

Competition Policy Review Panel releases issues paper on review of Australia's competition laws

On 14 April 2014, the Competition Policy Review Panel released its Issues Paper for the so called "Root and Branch" review of Australia's competition laws.

The Issues Paper has been structured to seek feedback on a wide range of issues that affect the level of competition in the Australian economy. The Paper casts a wide net, looking not only at existing laws and institutions but also to market practices that can affect competition in Australia.

In this briefing, we look at the main areas covered by the Issues Paper, and suggest areas of interest for specific industries.

Structure of Issues Paper

The Issues Paper does largely focus on competition issues that it was anticipated would be raised, given Australia's concentrated industries (few participants and large market shares) arising from the country's relatively small population compared to its size

It has been structured to permit businesses, if they wish to do so, to focus only on those aspects of competition that impact that business in their response to the Review Panel. Alternatively, a business may comment on the broad principles of competition or the institutions that

set or enforce competition policies or laws in Australia.

Submissions in response to the Issues Paper are being sought by **10 June 2014**.

The Issues Paper is structured as follows:

- **Chapter 1 – Competition Policy Principles** – What should these policies be and their priorities for the Australian economy?
- **Chapter 2 – Regulatory Impediments to Competition** - Rules or regulations that impede competition in Australia, such as intellectual property rights,

Key issues

- The Paper focuses on key industry sectors in Australia such as grocery and fuel
- There are also some slightly unexpected areas of focus such as international differential pricing and intellectual property rights
- Submissions are due by 10 June 2014
- A link to the Paper can be found here: http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf

parallel import restrictions and international price discrimination, as well as more local Australian issues such as planning and development laws or occupational licences that restrict competition.

- **Chapter 3 – Government Produced Goods and Services and Competitive Neutrality** – whether the previous Federal and State Government reforms have left a distorted playing field in some industry sectors

between Government and the private sector?

- **Chapter 4 – Potential Reforms in Other Sectors** – Reforms in areas where Government operates extensively, for example, education, health and aged care – are there competition impediments in these sectors?
- **Chapter 5 – Competition laws** – The operation of Australia's competition laws and regulation. This chapter covers infrastructure access and the level of competition in key markets such as "groceries, petrol and utilities". Interestingly the Paper raises the question of market studies such as those carried out in the UK and whether those types of sectoral studies and the solutions recommended by those studies would have relevance in Australia.
- **Chapter 6 – Administration of Competition Policy** – this deals with the effectiveness of the ACCC and other competition regulators in Australia and the institutional structures that support them.

Technology and differential pricing

The usual suspects of groceries and petrol, together with utilities, receive substantial attention in the Paper as sectors for close scrutiny and reform, but perhaps one of the most interesting areas of focus is the chapter dealing with "Regulatory Impediments to Competition" and the discussion of whether intellectual property laws and/or international price discrimination affects competition.

At paragraph 2.6 the Paper refers to a recent Parliamentary Inquiry that came to the view that Australian consumers and businesses quite often pay more for their IT products than consumers in comparable countries and that Australia does not prohibit price discrimination.

The question was put: *"Is there a case to regulate international price discrimination? If so, how would it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?"*

The Paper mentioned the Canadian Government's proposal to introduce country-specific price discrimination laws. This proposal has been widely criticized as not being the best example of sound competition policy.

The February 2013 Report of the Canadian Standing Senate Committee on National Finance on the Canada-USA Price Gap found a differential of up to 10% between pricing in Canada and the US for some types of goods.

However, that differential was affected by currency differences, product safety and other compliance cost differences as well as differences in the relevant markets in Canada from those in the United States.

The Canadian Government's response - or so it would appear - is to give the Canadian Competition Bureau a power to address "price discrimination that is not justified by higher operating costs in Canada".

This is a slippery slope toward price control and is likely to lead to confusion as to what is justified and what is not. Difficulties will inevitably arise through "rent seekers" trying to

influence the Competition Bureau to take action.

To take a similar approach in Australia would seem to be an anathema to a Coalition Government publicly focussed on a free market and deregulation. It is also likely to raise false expectations for consumers in Australia that may be difficult to justify, given the smaller population, different cost bases and different compliance and other laws in Australia.

Intellectual property rights

Quite disturbingly the Paper also raises the question: *"Are there restrictions arising from intellectual property laws that have an unduly adverse impact on competition? Can the objectives of intellectual property laws be achieved in a manner more conducive to competition?"*

While the Issues Paper refers to the Productivity Commission's Trade and Assistance Review 2011-12, it provides little practical guidance on this issue, other than acknowledging that there are various international treaties on intellectual property rights, and that it is important that governments grant intellectual property rights to protect innovation.

If there is not appropriate recognition of intellectual property, ideas may be copied at little cost, leading to underinvestment in intellectual property related to the provision of goods and services. Alternatively, overzealous protection of intellectual property rights may itself stifle competition and consumer choice, as noted by the Productivity Commission.

One of the big issues of any review of this kind from a business perspective is not only the impact of regulation in an economy, but also

the ability to invest with certainty as to the ongoing regulatory environment.

Constant revisions or changes to basic concepts of important laws - such as those relating to intellectual property rights - to address perceived competition law issues, without a clear and substantiated need, is likely to be viewed as a retrograde step - at least, from the perspective of the business community.

Grocery and fuel

As anticipated, grocery and fuel are important and key sectors for the Paper. A whole page is devoted to grocery and petrol - (see page 42 of the Paper) asking "*Are there issues in key markets that raise competition concerns not addressed by existing anti-competitive conduct laws? If so, in which ways might they be addressed through competition related policies?*" The Paper seems to be striving for an answer associated with sectoral reviews based on the UK experience. That is quite a different regulatory and constitutional environment to Australia and may cause concern as to the uncertainty such reviews could create for business investment.

A more straightforward answer from a regulatory perspective to the perception of over concentration in the grocery industry in Australia, is to make market entry easier by addressing planning and other environmental laws - though this is a vexed area politically.

Corporates and financial services

From the perspective of large corporates and financial institutions, the Paper asks whether the current misuse of market power provisions

should, in addition to a purpose test, include an effects test (at paragraph 5.9) and also whether the price signalling laws should be repealed or amended, or whether they should be extended beyond banking (at paragraph 5.22).

Mining, energy and resources

From an energy and resources sector perspective, the Paper questions whether the outcome of the Productivity Commission's recommendations from the Part 111A and national access regime review should be adopted or should other changes to the access regime be made (paragraph 5.19).

Unsurprisingly, given the extent of interest in the Queensland Competition Authority's regulation of rail access of the coal networks in Queensland, the Paper expressly asks for views on the dealings of business with such State and Territory regulators (at paragraph 6.12) as well as more generally with the ACCC (at paragraph 6.11).

Conclusion

The Paper is a very wide-ranging document and gives companies an opportunity to make focussed submissions.

Given the breadth of the Review, focussed submissions, containing concrete examples of issues and areas of reform that would assist in increasing productivity, are likely to lead to the most constructive outcome.

Please contact those listed below if you wish to discuss the Paper or require assistance in making a submission.

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