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Briefing note 31 March 2015

Competition Policy Review Panel final report on the review of Australia's competition laws released

On 31 March 2015, the Australian Government released the Competition Policy Review Panel's Final Report for the so called "Root and Branch" review of Australia's competition legislation, the *Competition and Consumer Act 2010* (Cth) (CCA).

In this briefing, we look at several of the key issues covered by the 539 page Report, and potential areas of interest for business.

Key issues

- Misuse of market power - the panel recommends reform of the existing unilateral conduct laws to become an effects test.
- Mergers - the merger test should be retained and the ACCC should once again be the agency first reviewing formal merger and authorisation applications.
- Cartels - the cartel laws should be simplified and the concept of "concerted practices" introduced as in Europe, but it should not be a per se offence. The currently complex laws relating to legitimate JVs should be simplified.
- The Final Report can be viewed here.

Merger approval processes: Informal merger clearance process to stay the same, ACCC to be decision maker in first instance for formal merger clearance and authorisation process

- **No material change to the ACCC informal clearance process.** The Panel acknowledged that the flexibility and cost effectiveness of the informal process might be comprised if it were amended to address certain issues that were raised in respect of transparency and timeliness. It was acknowledged that, as the most commonly used of the merger clearance options, the informal process delivers benefits in terms of the lack of complexity in information requirements and the relatively low cost of its use. It was recommended that any issues in relation to timeframes would be more appropriately addressed by way of business representatives consulting with the ACCC on the matter.

- **Changes recommended to the formal merger process and the authorisation process.** The Panel acknowledged that the formal clearance process has not been used since its introduction in 2007, however it considered that with certain changes in place, both the formal process and the authorisation process present important alternatives to the informal process. The most significant recommendation in this respect is the removal of the ability to apply directly to the Australian Competition Tribunal (**Tribunal**) for authorisation. The Panel's preference is for the ACCC to be the decision maker in the first instance with appeal rights to the Tribunal. It raises a question whether the current ability of merger parties to go directly to the Tribunal is a significant retrograde step in complex mergers, as being required to go first to the ACCC may increase timeframes by over 3 months and when coupled with the time taken in any appeal to the Tribunal, this may compromise the merger review period being sufficiently timely in M&A.
- **Impact on commercial timeframes in M&A.** The current three month statutory timeline is a commercially appealing restriction for time critical transactions, particularly where parties consider that the proposed acquisition will be opposed by the ACCC. Applicants under the proposed process would be compelled to first be subject to the lengthier timeframe under the ACCC process (currently 40 business days for formal clearance) and then a further period for any merits review. With all decisions being made by the ACCC in first instance, the role of the Tribunal will be confined to a review body. This has important implications for the information and material that may be considered by the Tribunal.
- **Confidentiality and procedural concerns.** The Tribunal being restricted to being a review body may create practical challenges for the ACCC and merger parties. The ACCC merger processes often involve the provision of commercially sensitive information by stakeholders (including competitors or customers). This creates confidentiality concerns as well as a lack of transparency as to information that the ACCC has relied upon in reaching its decision. It is unclear how a limited review process based only on information available to the ACCC will address these information asymmetries. Further, the removal of a right to seek direct consideration by the Tribunal might be more sensibly balanced with affording parties the due process of a rehearing where parties have a right to adduce further evidence and information.

Misuse of market power-substantial reforms proposed to section 46

- **Addressing concerns with the current test.** The Panel acknowledges that the current language of section 46 struggles to frame an effective prohibition that captures anticompetitive conduct that also does not risk constraining vigorous competitive activities by businesses that may otherwise have a "substantial degree of market power". The Panel considers that such a failure can (and has) led to outcomes that are inconsistent with good competition policy. The Panel's view of section 46's current effectiveness appears to stem from both what it considers to be the interpretational difficulties associated with the "taking advantage limb", and the focus on harm to individual competitors (as opposed to competition) of the current "purpose" test.
- **Reform to a proposed effects test.** The Panel has recommended that section 46 be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the conduct has the "purpose, or would be likely to have the effect, of substantially lessening competition in that or any other market." Such a proposal would therefore result in the removal of the "take advantage" limb from the prohibition (and its associated interpretive issues) as well as altering the "purpose" test to the standard test currently used in section 45, 47 and 50 of the CCA, namely whether the conduct in question has the purpose, effect, or likely effect of substantially lessening competition in the relevant market. This recommendation also redirects focus toward the market rather than individual competitors, consistent with the overall focus of the CCA.

- **How to deal with legitimate business conduct?** Whilst the Panel's recommendations as to the amendment of section 46 were widely anticipated and the subject of extensive submissions at both the initial and Draft Report stages, it is nonetheless controversial. The Panel noted the risk of "inadvertently capturing pro-competitive conduct" inherent with its recommended amendments. To address this concern, the Draft Report proposed introducing a defence to the revised section 46. However the Panel, noting the absence of support for the proposed defence in the submissions on the Draft Report, moved away from a defence in favour of legislative guidance with respect of the section's intended operation. The proposed section 46(2) provides two mandatory but non-exhaustive factors which courts must have regard to when considering whether there has been a substantial lessening of competition in respect of section 46, namely:

  (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and

  (b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

- **Proposed new provisions may create uncertainty for business.** While arguably an improvement on the proposed defence (and the consequential issues with onus of proof), these factors are nonetheless problematic and will create uncertainty in application. Firstly, these factors should be considerations which courts already have regard to when considering whether there has been a substantial lessening of competition in a market. Further, the proposed section 46 does not provide any guidance as to how the factors in the proposed section 46(2) are to be balanced against each other or as against other non-mandatory relevant considerations. Thirdly, the inclusion of such legislative guidance is also inconsistent with the treatment of substantial lessening of competition in sections 45, 47 and 50. One of the reasons the Panel found against the inclusion of a defence to section 46 was the inconsistency of such a defence with the approach to substantial lessening of competition in other sections of the CCA and the attended risk of confusing the established meaning of the "substantial lessening of competition". It is unclear why the Panel did not consider the same arguments to apply in respect of the proposed legislative guidance.
- **Grocery industry issues.** The Panel in its consideration of section 46 found that while section 46 issues were mostly raised in the context of the grocery industry, these competition issues were of equal application across various industry sectors. Other than its recommendations on planning restrictions being removed, given the introduction of a Grocery Code, the Panel chose not to make any express recommendations relating to this sector.

Access to infrastructure: A focus on the public interest before requiring access

- **Reform of Part IIIA.** The Panel has substantially endorsed the Productivity Commission's recommended changes to the declaration criteria in Part IIIA of the CCA to ensure that the access regime is limited to exceptional cases where the pro-competitive effects of access outweigh the economic distortions and unnecessary costs which can be involved in regulated third-party access.
- **Changes to the access provisions.** The Panel proposed amending subsections 44H(a),(b) and (f) to respectively, require the Minister to be satisfied that access on reasonable terms and conditions (rather than access per se) would result in a substantial increase in competition in a dependent market of national significance, clarifying that the duplication of the facility by an existing service provider is not a relevant consideration, and requiring that the access

promote the public interest rather than the currently lower threshold of being not contrary to the public interest. These amendments may make obtaining access declarations under Part IIIA more difficult.

Concerted practices: The introduction of a European law concept to the unique Australian context

- **Price Signalling.** To date no actions have been brought in relation to the price signalling conduct provisions, which currently only apply to the banking sector. In recommending their repeal, the Panel has acknowledged that competition laws should apply across the economy rather than to specific sectors. In what is considered to be one of the most significant recommendations, the Panel has recommended that concerted practices should be illegal.
- **Concerted practices – what are they?** This is an important extension of the current law that requires evidence of some sense of mutual commitment before parties may be said to be engaging in anti-competitive behaviour. Concerted practices are currently prohibited in European antitrust law and describe looser arrangements where there is deliberate information exchange between competitors. The Panel has provided some insight on its understanding of what is intended by 'concerted practices':

  The word 'concerted' means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression 'concerted practice with one or more other persons' conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price).

  Such practices will breach the CCA if they have the purpose, effect or likely effect of substantially lessening competition, but will not be per se offences.
- **Future issues.** The amendment may encourage ACCC action in respect of its concerns expressed in relation to petrol pricing and mobile phone carrier subsidies. If accepted the amendment may have wide reaching implications for many businesses who often disclose information to industry counterparts as an ordinary course of business.

Competition institutions: A paradigm shift

- **Substantial changes to competition institutions.** The Panel has proposed an Access and Pricing Regulator ("APR") be established to perform the regulatory access and pricing functions of the ACCC, Australian Energy Regulator and the National Competition Council (**NCC**). The Panel notes the synergies of the ACCC performing regulatory and access functions but concluded that the "culture and analytical approach" of a regulator differed to those of a law enforcement agency. A single agency for all Australian Government price regulation functions may, the Panel suggests, "sharpen focus and strengthen analytical capacity in this important area of regulation". The Panel proposed an ambitious timeframe for implementation of this recommendation, submitting that the Australian Government should create the APR within 12 months of accepting the Panel's recommendations.
- **The dissolution of the NCC.** The Panel has also recommended the NCC be dissolved and a new independent national competition body, the Australian Council for Competition Policy (**ACCP**) be established. The ACCP would absorb the functions of the NCC which are not performed by APR and provide leadership and drive implementation of the evolving competition policy agenda. The Panel proposes to give the ACCP a broad remit, including advocacy, education and promotion of collaboration in competition policy, ex-post evaluation of some merger decisions, identifying potential areas of competition reform and conducting market studies. This recommendation raises

questions about the suitability of an independent body vis-a-vis a government department exercising explicit policy functions and the efficient use of scarce government resources.

- **Market studies.** The market studies function which the Panel proposes to give the ACCP, is similar to that exercised by the Competition & Markets Authority in the UK. The Panel considers market studies to provide a means by which policymakers can better understand the competitive landscape and determine whether policy changes are needed. The Panel notes that in many jurisdictions the market studies function resides with the competition regulator, but considers this approach may lead to conflicts of interest between policy and regulation/enforcement functions and as such, considers the proposed ACCP as the best body to conduct this function. The Panel also proposes the ACCP have mandatory information gathering powers and that market studies can be initiated by any market participant, including small businesses and regulators. The time, cost and tangible benefits of such studies is something the Government should give careful consideration to when considering the Report.

Section 155 notices: Reducing the compliance burden in a digital age

- **Existing powers.** The ACCC has broad information gathering powers under which it often requires companies to provide a vast amount of information. The Panel acknowledged that compliance with some section 155 notices may entail significant costs, particularly in a digital age where businesses retain thousands of records online.
- **Regulatory burden and non-compliance.** In recognising the regulatory burden, the Panel has recommended a defence to compliance with a section 155 notice if it can be demonstrated that a reasonable search was undertaken. It has also encouraged the ACCC to review its guidelines on section 155 notices in view of the perceived regulatory burden. However, the Panel has suggested that the penalty for non-compliance to be increased to $85,000, to be in line with similar notice based evidence gathering powers in the *Australian Securities and Investment Commission Act 2001* (Cth).

The long road ahead: Treasury to consult

- The final report is wide ranging and contains recommendations which are likely to have a significant impact on Australian competition law if adopted. Given the scope and depth of the report it should be borne in mind that it is likely to take several years before any recommended laws are enacted.
- The Government will need to carefully consider the implications of the Panel's 56 recommendations. Parties have by 26 May to lodge submissions on the report to the Assistant Treasurer.

Clifford Chance will be hosting a Pre-ICN Function on 27 April 2015 in Sydney at which ACCC Chairman, Rod Sims will be speaking. For further event information please contact Trish Miller (trish.miller@cliffordchance.com).

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