

A new competition law and policy for Australia?

Today, the Australian Government announced the Competition Review Panel for its pre-election commitment for a "root and branch" review of competition law and policy in Australia, with the release of the terms of reference for commencement of a 12-month inquiry set to take place in 2014.

The most important task in the short term for businesses is to review the terms of reference and consider the possible impact on their operations, any submissions they would like to make and how best to be prepared for any changes that may affect their operations in Australia.

Root and branch review

A "root and branch" review of competition law and policy has been a Coalition policy since 2010 aimed at preventing anti-competitive conduct and aligning with national economic policy objectives.

The last comprehensive review was carried out in 1993 by Professor Hilmer (the Hilmer Review). The Hilmer Review is estimated to have added 2.5% to Australia's gross domestic product. Since this time, the Australian economy has grown and changed substantially in response to globalization, social change and technological advancements such as e-commerce. The review is a timely examination to ensure competition policy in Australia is "fit for purpose".

An effective competition policy framework benefits consumers by facilitating innovation, productivity and

competitiveness consistently across all sectors of the economy. Key markets highlighted as a focus for the review include groceries, electricity and petrol.

It is also hoped that the review will spark positive changes to advance investment, promote Australian business, improve productivity and enhance living standards.

Terms of reference

The review is intended to assess the effectiveness and the responsiveness of the current competition legal framework, including but not limited to the provisions of the *Competition and Consumer Act 2010* (Cth)(CCA). The terms of reference are extremely broad, and include consideration of:

- the misuse of market power (dominance in European terminology) provisions;

Key issues

- The Australian Government has announced a "root and branch" review of competition law and policy in Australia, including of the provisions of the *Competition and Consumer Act 2010* (Cth).
- On 27 March 2014, the Australian Government released the terms of reference setting out the economic and legislative scope of the review. Interested parties will have an opportunity to make written submissions, with a final report expected within 12 months.
- the operation of merger clearances;
- provisions that are currently uncertain or rarely used - for example collective bargaining by small businesses;
- anti-competitive conduct not currently captured by the CCA;
- the unfair and unconscionable conduct provisions;
- existing exemptions from competition law (such as the authorization or notification

processes as well as immunities for providers of liner shipping services);

- industry specific regimes;
- government dominated-sectors and the privatization of government services;
- the interplay between Federal, State and Territory based regimes;
- the adequacy of the National Access Regime (taking into account the Productivity Commission's recent inquiry);
- the operations and processes of regulatory agencies;
- enforcement arrangements and avenues of appeal; and
- mechanisms of redress, penalties and remedies.

Importantly, the review will consider whether competition law and policy in Australia can be simplified in line with global best practice.

Review panel membership

The Review Panel will be chaired by Professor Ian Harper, a partner at Deloitte Access Economics. Professor Harper served on the Wallis committee review of the financial system 17 years ago.

He will head a panel comprised of Su McCluskey, CEO of the Regional Australia Institute, Michael O'Bryan SC, a barrister at the Victorian Bar, and Peter Anderson, who recently stepped down as the Chief Executive of the Australian Chamber of Commerce and Industry.

The panel has been encouraged to draw on (but should not duplicate or re-visit) the work of other recent or current reviews including the work of Treasurer Joe Hockey's Commission of Audit and the Cost-Benefit Analysis and Regulatory Review for the National Broadband Network (NBN).

However, it would otherwise appear that the provisions of the CCA are all open to review.

Key implications in the terms of references

There are several key issues embedded in the bureaucratic speak of the terms of reference and one can imagine the many authors at work here. Some of the more interesting are:

Paragraph 3.3.2:

"considering whether the misuse of market power provisions effectively prohibit anti-competitive conduct and are sufficient to: address the breadth of matters expected of them; capture all behaviours of concern; and support the growth of efficient business regardless of their size".

This looks to be a review of Australia's misuse of market power provisions to see whether the Government should move to a purpose and effects test for misuse of market power. If this occurs, businesses may need to assess and potentially recalibrate various business activities and strategies.

Paragraph 3.3.6:

"considering whether the National Access Regime contained in Part IIIA of the CCA (taking into account the Productivity Commission's recent inquiry) is adequate".

This paragraph, unlike the reference to not revisiting the review of the NBN, may allow consideration of whether the state based access regimes in relation to rail infrastructure are operating effectively (notwithstanding previous National Competition Council Certification) given the focus of the review on productivity improvements.

Paragraph 3.4.1:

"foster a productive and cost-minimising interface between the Australian Competition and Consumer Commission (ACCC) and industry (for instance, through applications for immunity or merger clearances) that is simple, effective and well designed".

This paragraph is perhaps focused on the balance of per se contraventions in Australian competition legislation which prompt Australian companies to lodge various exemption applications. The review may perhaps consider whether there should be a more "rule of reason" type approach and consideration of efficiencies. This may therefore do away with the process of seeking (non merger) authorisations as well as exclusive dealing and third line forcing notifications.

Paragraph 4.2:

"examine whether key markets – including, but not limited to, groceries, utilities and automotive fuel – are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains".

This paragraph appears to be focused on existing laws relating to misuse of market power, petrol retailing, and perhaps the Informed Sources ACCC investigation on information sharing as well as claims of unconscionable conduct in the grocery sector in relation to dealings with suppliers. Businesses operating in the retailing and grocery sector will need to consider this focus of the review.

Paragraph 4.4:

"consider the impact of concentration and vertical integration in key Australian markets on the welfare of Australians ensuring that any

changes to the coverage and nature of competition policy is consistent with national economic policy objectives".

This paragraph seems to be considering the impact of vertical integration, as to whether the current laws are sufficient to deal with vertically integrated businesses and issues as to the need for structural separation in infrastructure and other industries.

Paragraph 4.3:

"consider alternative means for addressing anti-competitive market structure, composition and behavior currently outside the scope of the CCA".

This paragraph is rather curious and it is unclear whether the particularly broad drafting of the terms of reference is suggestive of giving

powers akin to the sectoral inquiries which occur in the UK. It would be of particular relevance to Australian business if it led to structural changes in Australian industries.

Conclusion

The Government has gone to some lengths throughout the terms of reference of emphasizing the review should focus on "productivity boosting microeconomic reform", while at the same time the "need to be mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation".

This is a sensible approach although it remains to be seen how the Review Panel will deal with improving the competitive process without stifling business with over regulation

Next steps

The Review Panel is to ensure thorough engagement with all interested parties. The Review Panel will publish an issues paper, hold public hearings and receive written submissions. A final report is to be provided within 12 months of the establishment of the Review Panel.

Further details on the process for the review will be released shortly.

If you have any questions on the terms of reference or the review, please contact the people below.

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