

23 April 2014

Practice Group:

*Antitrust,
Competition & Trade
Regulation*

Your Opportunity to Improve the Competitive Framework of Your Industry

By Murray Deakin, Sylvia Ng and Joni Jacobs

Have Your Say on the Issues Paper on Australia's Competition Policy Review before 10 June 2014

The Competition Policy Review Panel (Review Panel) has released its much anticipated [Issues Paper](#) on the 'root and branch' review of Australian competition laws and policy.

It is a wide ranging review which is intended to address regulatory impediments to competition, competitive neutrality in respect of government provided goods and services, potential regulatory reform of industry specific sectors, Australia's competition laws and the institutional framework for competition policy.

The review provides a real opportunity to advocate for reform of any regulatory restrictions which adversely affect competition. This Legal Insight will provide you with more information on the issues to be examined within the following industries:

- Property development
- Education, health and disability care and support services
- Pharmaceuticals
- Offshore exporters of goods to Australia
- Utilities
- Maritime
- Agriculture and aquaculture.

The Review Panel has promised to undertake extensive consultation on the Issues Paper, including:

- public forums to be held in May 2014
- written submissions and feedback from interested parties, due 10 June 2014.

Consumers, businesses of all sizes and governments at all levels are encouraged to get involved.

If your business would like to provide input on any issue that affects the competitive process in the Australian economy, whether this be broad competition issues or specific sector based issues, we encourage you to partake in the consultation process.

Background to Competition Policy Review

The 'root and branch' review is the first comprehensive review of Australia's competition laws and policy in over 20 years.

The Prime Minister and the Minister for Small Business announced a review of competition policy on [4 December 2013](#). On 27 March 2014, the Minister for Small

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Business announced the Review Panel and released the final [Terms of Reference](#) following consultation with the States and Territories.

The [Review Panel](#) will be led by Professor Ian Harper (Deloitte Access Economics partner) with Su McCluskey (Chief Executive Officer of the Regional Australia Institute), Michael O'Bryan (senior barrister at the Victorian Bar) and Peter Anderson (former Chief Executive of the Australian Chamber of Commerce and Industry) as panel members.

The Issues Paper was released on 14 April 2014. The deadline for submissions in response to the Issues Paper is Tuesday, 10 June 2014. A further consultation process will be undertaken following the release of a draft report (expected around September 2014) and a final report is expected to be provided to the Australian Government within 12 months (in early 2015).

The Competition Policy Review will examine the broader competition framework to ensure that it continues to play a role as a significant driver of productivity improvements, and to ensure current laws are operating as intended and are effective for all businesses, big and small.

The broad Terms of Reference mean that the Review Panel can make wide ranging recommendations to promote competition across the Australian economy and to ensure that the framework is responsive to today's economy and resilient to any changes that may emerge.

Sectors Affected by the Competition Policy Review

Property Development

The Review Panel has identified that the property industry may be adversely affected by restrictions on the sale and use of land. Land use restrictions may take many forms, including planning restrictions, zoning laws and development assessment procedures. Various policy rationales are offered to justify why unfettered development of land is not permitted. These include environmental considerations and the need to coordinate community services and facilities.

However, inflexible restrictions on land use or complex and costly approvals procedures may create significant barriers to business entry or expansion, and may result in land not being allocated to its highest valued use. In addition, some policy rationales may be anti-competitive in essence. For example, rejecting a planning application because it may have an adverse impact on existing businesses.

The Issues Paper raises the following questions to allow those in this industry to have their say:

- *Are there planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?*
- *Are there unwarranted regulatory impediments to competition in this sector that should be removed or altered?*

The Issues Paper also questions whether trading hour restrictions may be unduly hampering competition.

Health, Education and Disability Care and Support Services

Over recent years, governments have examined reforms in human services such as health, education and disability care and support. Human services include education and

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training, health care, aged care, child care and public housing. Together, these services are a large and growing part of the Australian economy.

The importance of these social welfare sectors goes beyond their size. Better human services enable healthier, safer and better educated citizens who can aspire to higher welfare and living standards.

However, it has been noted that a number of regulatory restrictions through licensing, geography and the provision of certain services themselves may have an undue impact on competition.

Accordingly, there is an intention to carry out an extensive review of this industry, having regard to the following questions raised in the Issues Paper:

- *Can more competitive outcomes in the human services sector enhance both Australia's productivity and the quality of human services delivered to Australian citizens?*
- *Will more competition among providers serve the interests of consumers of health, education and other services?*
- *What issues arise when government agencies, private businesses and not for profit organisations simultaneously seek to provide human services?*

Pharmaceuticals

The pharmaceutical industry is already a heavily regulated industry. The Issues Paper raises the following issue for those in this industry:

- *Are there occupational based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?*

Offshore Exporters of Goods to Australia

A particular objective of the Review Panel is to consider ways to ensure Australians can access goods and services at internationally competitive prices. The following question raised in the Issues Paper is relevant to those who export consumer goods to Australia:

- *Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?*

International price discrimination occurs when sellers charge different prices in different countries and those prices are not based on the different costs of doing business in each country. Australian consumers and businesses may be paying more for their products than their counterparts in comparable countries.

In Canada, the Government recently announced that it plans to introduce legislation to address country specific price discrimination against Canadian consumers. Australian competition laws do not specifically prohibit price discrimination, though anti-competitive conduct relating to price discrimination may be prohibited by other provisions of the *Competition and Consumer Act 2010* (Cth) (CCA).

The Review Panel has also identified the following related issue:

- *Should any current restrictions on parallel importation be removed or altered in order to increase competition?*

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A parallel import is a non-counterfeit product imported from another country without the permission of the intellectual property owner. The above issue is likely to be of particular relevance to the computer software, information technology, music and book industries. Consumers and business may try to find ways around international price discrimination, including by parallel importation. The Issues Paper also identifies an opportunity for exporters to seek the repeal or reform of regulations which restrict imports into Australia:

- *Are there import restrictions, bans, tariffs or similar measure that, on balance, are adversely affecting Australians?*

The supply of goods into the Australian market may be limited by import restrictions. There have been import restrictions imposed to protect local producers through the use of tariffs on, for example, imported clothing.

Utilities

The energy and infrastructure sectors have been the subject of a number of competition related reforms notwithstanding heavy government involvement in the past. Since the National Competition Policy reforms, competition has increased in industries such as electricity, gas and water through industry reforms and the privatisation of government assets.

However, it has been recognised that there may be scope for further reform or the finalising of reforms in some of these sectors. The following issues have been raised in the Issues Paper:

- *Is there a need for further competition related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?*
- *What is the experience of businesses in dealing with state and territory regulators?*

Maritime

Part X of the CCA provides a degree of immunity from competition laws for liner shipping services. This exemption for registered agreements (which may otherwise amount to cartel behavior, such as price fixing) was put in place due to concerns regarding cost, capacity and scheduling.

In December 2013, a joint study by the Australian and New Zealand Productivity Commissions recommended that "[t]he Australian and New Zealand Governments should remove — preferably on a coordinated basis — the exemption for international shipping ratemaking agreements from legislation governing restrictive trade practices", resulting in increased competition and potentially lower costs for businesses. A Bill is currently before the New Zealand Parliament that proposes to remove similar exemptions in New Zealand.

In view of these developments, the Review Panel has posed the follow questions:

- *Are there occupational based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?*
- *Do the statutory exemptions, exceptions and defences, including liner shipping, operate effectively, and do they work to further the objectives of the CCA?*

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If the Part X exemption is removed, these liner shipping arrangements would be subject to the general competition laws in Part IV of the CCA. As is the case for other sectors currently, authorisation from the Australian Competition and Consumer Commission would remain available if the public benefits of such arrangements were found to outweigh their costs.

Agriculture and Aquaculture

Over the years, there has been a review and removal of certain regulatory restrictions that adversely affected competition in areas of statutory marketing of agricultural products, fishing and forestry.

Policy decisions have been made that impose import restrictions due to public health concerns (eg bans on agricultural imports due to quarantine reasons) and the protection of local producers. Some regulatory restrictions have also been imposed on some produce on the basis of ecological sustainability.

Additionally, there are restrictions in some export markets affecting the advertising and marketing of certain goods (eg rice exports) in an attempt to maximise prices received by Australian producers.

While the National Competition Policy has contributed significantly to improving competition, the following questions raised in the Issues Paper may be relevant to those involved in this sector:

- *Are there unwarranted regulatory impediments to competition in this sector that should be removed or altered?*
- *Are there import restrictions, bans, tariffs or similar measures that, on balance, are adversely affecting Australians?*
- *Are there any restrictions on the export of goods from Australia which should be removed or altered in order to increase competition for exporters and producers, and choice for consumers?*
- *Are there regulations governing the sale of goods for health and safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition?*

Have Your Say

This is the first opportunity in more than 20 years for businesses to have their say on competition policy issues. Submissions are not limited to the current competition laws and institutions, but extend to include any law, regulation or practice that can affect competition.

Businesses should consider the Issues Paper and what submissions they would like to make, which may include:

- direct responses to all or some of the questions raised in the Issues Paper
- submissions on the impact of the current regulatory framework on competition within your industry, and why changes might or might not be required
- submissions on the regulatory burdens that impact on competition and what reform might be required to improve the competitive environment.

Businesses can either:

- make formal written submissions

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- 'Have your say' which allows businesses to respond to all or some of the eight high-level key questions listed in the Issues Paper without the need for a detailed written submission.

Submissions may be made until Tuesday, 10 June 2014 and can be lodged electronically or by mail.

If your business would like to have your say on any issue that affects the competitive process in the Australian economy, we encourage you to partake in the consultation process.

How We Can Help

Our team has a breadth of experience in assisting clients with drafting submissions to the Government and lobbying for legislative and policy change. Please contact us if you have any questions or would like assistance with drafting submissions.

Authors:

Murray Deakin

murray.deakin@klgates.com
+61.2.9513.2335

Sylvia Ng

sylvia.ng@klgates.com
+61.2.9513.2303

Joni Jacobs

joni.jacobs@klgates.com
+61.2.9513.2463

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