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Submission on final Harper Panel Report

These comments are based on the Report's recommendations. I do not intend to get into a drafting commentary on the draft Bill. That is for others.

My comments are based on a small business perspective. Issues relating to ACCC governance as based on my time as a CEO of the ACCC.

At the outset I should say that an overall message in the Report is that law should focus on damage to competition and not simply competitors – not a good message to small business and a very hard position for small business to understand. This critical distinction is not explained by the Panel.

My comments on the Panel recommendations (where I feel that I can make a meaningful comment) follow.

SUPPORT

- **All levels of Government commercial operations to be covered by competition law.** R 24
- **Procurement policies** to be reviewed for anti-competitive elements. R18-
- **Competitive neutrality** rules to be strengthened and better enforcement. R15-17

- **Collective bargaining** rules to be improved. R54

This will depend on the legislation as the initial intention when the collective bargaining notification regime was introduced in 2006 was largely negated by the detail of the legislation.

- **Competition, consumer and small business issues** to stay with ACCC. R49

- ACCC to give better **focus on small business issues**. R 53

Agree but not sure what that means. Does not sit well with recommendation that the Small Business Deputy Commissioner to be scrapped.

- **Parliamentary Committee** to oversight ACCC R 51.

- **Secondary boycott** law to be strengthened and more enforcement.R36

The Government might even consider that in some cases it take action if the ACCC will not. This has been done in the past.

- **Anti-competitive elements in industrial agreements** to be unlawful R 37

- **Authorisation processes** to be simplified.R38

- **Block exemptions** R39

Such block exemptions need to be for a set time and then reviewed. Such exemptions have impact on third parties.

- **Act** generally to be **simplified** R23

- **Private action for damages** as a result of anti-competitive conduct regime improved.R41

What is proposed is mainly relevant to coat tails action following ACCC action. It does not attack the overall problem of taking private action such as costs orders.

CONCERNS

- **Section 46(misuse of market power)** an “effects” test to be added but the conduct to be prohibited must substantially lessen competition. “Taking advantage” to be deleted. Prohibition on predatory pricing to go, conduct aimed at competitors to be deleted.R30.

In my view this is of limited assistance to small business Predatory conduct directly aimed at small business will in most cases not substantially lessen competition in a market.

Having said that I see some benefit to some changes to section 46. I would be happier and more accepting of the proposed section 46 if the UCT proposals were improved. A suggested revamp of section 46 is **attached**. It is my view that where “effects” is added some detail of the conduct targeted needs to be in the legislation.

- **A new form national competition policy be re-introduced R8/43**

Last time that happened (Hilmer) small business was a loser. Any COAG action needs to factor in small business detriment, e.g. Taxis, retail trading hours, pharmacies, liquor retailing. The new oversight body should have small business representation and hence more than 5 members.

- **Joint ventures R27-**

Agree with the exemption for some joint ventures but the draft that was part of the Report seems to go further than is warranted, especially in relation to joint marketing arrangements.

- **Split ACCC R50**

I have some sympathy for that recommendation but needs to be well thought out. Much of what is seen as regulatory is really CCA adjudication. Also there is a need for cross membership between ACCC and any new agency.

OPPOSE

- **Resale price maintenance** is currently per se unlawful, proposal is to weaken the prohibition and allow resale price maintenance in some situations.R34

This will bring back RPM from the bad old days and will be imposed more on small business than large

- **Third line forcing-** is now unlawful, proposal is to weaken the prohibition.R32

Same comments to those on RPM.

- **Exclusive dealing-** law to be either abolished or weakened substantially. It is said that it is no longer necessary. R28/33

We have heard that before in relation to section 49(Price discrimination) and prefer to leave the law as is until it is very clear that it is redundant. Small business is often the victim of exclusive dealing conduct.

- **Dispute resolution-** little in the report to assist small business- a major weakness of the Report.R53

It seems that the main idea is for the ACCC to be a referral agency. Then what? There needs to be a holistic approach to this issue. See **attached** for a suggested framework for small business disputes'

- **No prohibition on price discrimination-R31**

Said to be covered by section 46. We have heard that before.R31

- **ACCC Governance** .ACCC Deputy positions, including small business to be abolished.R51

Seems odd if ACCC to focus more on small business. The targeted roles of some Commissioners helps those areas getting some priority. The Commissioners do not represent small business or consumers as such but help bring in relevant issues into ACCC decisions.ACCC is so broad that not all Commissioners can be across everything. In any case the ACCC needs a Deputy, failure to have one in the past was a problem if Chair was absent.

- Half of the ACCC Commissioners to be part time.

ACCC needs to have a good mix of full time and associate members (not part time) There should be up to 5 full time and a panel of associates to bring in wider community input. Such a panel should be representative of various regions of Australia The roles and function of the ACCC do not facilitate part time members. There is too much scope for conflict and the Commissioner jobs are full time. There is a part time regime in NZ but that has had its problems where members with real skills in some areas are conflicted on particular matters, As a former CEO of the ACCC I have other views on ACCC governance but the suggestions by the Panel simply do not make sense..R51

- **Retail trading hours** to be liberalised-R12

Will hurt small business. The theory is all very well but not the reality.

- **Town planning** rules to be liberalised- same comments as above.R9

Hank Spier

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