

Dear Sir

COMPETITION POLICY REVIEW FINAL REPORT 2015

Please excuse the terrible formatting of this submission. I am currently in the UK working on an unfamiliar computer whose email function is not allowing me to attach my document in word or pdf. Hence, I have included it in the body of the email.

Thankyou for the opportunity to comment on the final report. I am an academic. My specialty areas are franchising law and insolvency law. Prior to becoming an academic I spent 19 years as a commercial lawyer in private practice.

3.8 UNCONSCIONABLE CONDUCT

The Panel notes the recent [2015] Federal Court declarations in two proceedings instituted by the ACCC that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. These cases indicate that the current unconscionable conduct provisions are working as intended to meet their policy goals. (Harper, p 62).

I disagree for the following reasons:

- Very few businesses other than the ones the size of Coles could sustain an action that ran for 4+ years - from 2011 to 2015. If this conduct had been perpetrated by a franchisor/ for example, the franchise term would likely have expired before the matter had been heard in court.
- This legislation has been in place since 1998, 17 years. There have only been a handful of cases successfully prosecuted. This suggests not that the business community is extremely well-behaved but that the legislation misses its mark or is not being interpreted by the courts as parliament intended.

The Panel notes that, in December 2014, the Federal Court by consent made declarations that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. The Court also ordered Coles to pay combined pecuniary penalties of \$10 million, and Coles agreed to enter a court enforceable undertaking with the ACCC to provide redress to more than 200 of its suppliers referred to in the proceedings. (Harper, p 356) I disagree here too. While court enforceable undertakings are a very good way to avoid the risk of protracted litigation and the expenditure of vast time and money, they are not an admission of having breached the legislation and they do not provide robust guidance that the bodies making submission sought. Only a fully articulated court decision can provide this guidance.

RECOMMENDATION 39 — BLOCK EXEMPTION POWER

A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA. This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38).

Block exemptions granted to franchisors can disempower franchisees who, in other parts of the legislation are business consumers, but would not fit the category of 'members of the public'. The franchisees are disempowered because they lose the ability to highlight and protest onerous or over reaching requirements that a franchisors can otherwise impose. For example, in a Bakers Delight franchisor's notification N92536 - found here -

<http://registers.accc.gov.au/content/index.phtml/itemId/750777/fromItemId/729985>, the franchisor wanted to require franchisees to buy non-essential as well as essential supplies at potentially uncompetitive prices through the franchisor. It was only through providing the

opportunity for franchisees to object that this came to light. As a result a more restricted consent was provided by the ACCC.

I recommend that arrangements crafted within franchise arrangements should be excluded from any block exemption.

25.6 MARKET STUDIES

If these are to be conducted it would be useful if a summary could be published and accessible via a website. This would help companies and advisers improve their own awareness of how to determine the identify of a 'market' for the purposes of the legislation.

The Report includes acknowledgment that markets are now global. The difference between the ability of an Australian manufacturer to compete on price may come down to whether and how externalities are factored into the comparative price. Beyond the obvious externalities like cost of transport from manufacturer to market, there are additional important externalities like – how much water was required to make the product compared to how much was available in the country (think rice production in drought ridden Australia compared with rice production in countries with ample rainfall), and the relative cost of labour. Externalities, especially those concerning water use and air pollution, should be required to be factored into any economic evaluation of a 'market'.

RECOMMENDATION 51 — ACCC GOVERNANCE

Competition and Consumer Act 2010 (Cth) s 7 Constitution of Commission

(1) The Commission shall consist of a Chairperson and such number of other members as are from time to time appointed in accordance with this Act.

(2) The members of the Commission shall be appointed by the Governor General and shall be so appointed as full time members.

(3) Before the Governor General appoints a person as a member of the Commission or as Chairperson, the Minister must:

(a) be satisfied that the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection; and

(b) consider whether the person has knowledge of, or experience in, small business matters; and

(c) if there is at least one fully participating jurisdiction—be satisfied that a majority of such jurisdictions support the appointment.

(4) At least one of the members of the Commission must be a person who has knowledge of, or experience in, consumer protection.

The panel proposes that:

Half of the ACCC Commissioners should be appointed on a part-time basis. ... The Chair could be appointed on either a full-time or a part-time basis, and the positions of Deputy Chair should be abolished.

In my opinion, cohesion is essential within such an important body so I strongly support the Chair retaining a full time role.

The Chair needs to be able to delegate confidently and at short notice to a deputy so Deputy roles need to remain in existence and to be full time.

The Panel [also] believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision-making.

Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

I disagree with the panel's assertion that paras 7(3)(a) and 7(3)(b) are sufficient. It is clear the types of experience listed in 7(3)(a) are worded in the alternative. As for 7(3)(b), the Minister is only required to consider whether the proposed appointee has ... in small business matters in order to fulfil the criteria.

The Australian public needs to have confidence that the ACCC (and ASIC and other regulators) do not represent only the 'big end of town'. Looking at the current composition of the ACCC and ASIC's Commissioners it is fair to say that almost all are drawn from large organisations, including multinational law firms. This origin provides valuable experience to inform the perspective of the large enterprise. It does not guarantee a voice for small businesses and consumers, the very stakeholders who lack funding and time to lobby effectively as individuals.

Small business and consumers constitute the majority of the economy, numerically. The government currently has only limited power to tinker with the configuration of the ACCC Commissioners' skills bases currently because of the existence of CCA (paragraphs 7(3)(a) and 7(3)(b)). I believe the public confidence in the ACCC commissioners is essential and can best be maintained through retaining Commissioners with the specific sets of experience mandated in the CCA. Whether their appointments are full time or part time is possibly an issue for budgetary considerations.

5.1 ACCESS TO REMEDIES

The report observes that: "public price disclosure can help consumers make informed choices" (Harper final report, p 68).

Small business needs, as noted, useable access to remedies. Access to remedies not only helps those that have a need for the remedy, it also helps future consumers make informed choices about which businesses they want to deal with, and helps their advisers provide informed advice. This is important for consumers at all stages of their interactions with suppliers.

Thus it is also very important for purchasers of franchised businesses to be able to understand the dispute profile of their potential franchisor. But, ADR, be it conciliation or mediation is confidential in all aspects. This means that intending franchisees cannot discover from any source whether the franchisor is an habitual fighter who is frequently in disputes with franchisees, or whether the franchise system is harmonious and there are few disputes within it. In my opinion this is a fundamental flaw with ADR. There should be a single public register, possibly maintained by the ACCC or ASIC, where the existence of all mediated franchise disputes is recorded by party names, franchise system name, dispute subject, and a brief summary of the outcome – resolved, not resolved.

Thankyou for considering my input.

Yours faithfully

Jenny Buchan