QBE submission to the Competition Policy Review's Final Report

May 2015

Introduction

QBE welcomes the opportunity to respond to the recommendations in the Competition Policy Review Panel's final report (***Report***) of 31 March 2015.

QBE has previously provided two submissions in response to the Issues Paper released by the Panel on 14 April 2014 and the Panel's draft report released in November 2014 (***QBE Submissions***).

QBE supports the Panel's view that the aims of competition policy should be to:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

QBE also supports the Panel's view that competition policy should be aimed at improving the economic welfare of Australians.

As outlined in more detail in this submission, QBE however considers:

- a national regulation review of the operation of our non-catastrophic personal injury schemes should be considered a priority in the reinvigorated National Competition Policy agenda;
- Governments providing insurance should be subject to the same prudential and other regulatory requirements that apply to the provision of insurance in Australia; and
- the proposed amendments to section 46 of the Competition and Consumer Act 2010, including the proposed introduction of an "effects test", will almost certainly have a detrimental impact on productivity and should not be supported.

Regulatory restrictions (recommendation 8)

QBE is **very supportive** of the Panel's recommendation 8 which relates to regulation review by all Australian governments aimed at ensuring that unnecessary restrictions on competition are removed. Similarly, QBE **supports** the Panel's recommendation that the review process should be overseen by the proposed Australian Council for Competition Policy (recommendation 43) with a focus on outcomes achieved rather than processes undertaken.

As noted in QBE's previous submissions[1], overlapping, duplicative and inconsistent regulation between the states, territories and Commonwealth on the same activity creates significant inefficiencies and, in some instances, inequities and adds considerably to the cost of doing business in Australia, which in turn impacts and creates barriers to competition.

Over-regulation at the federal, state and territory levels, including regulatory overlap, is a major contributor to our comparatively high domestic cost structures. Differing levels and structures of federal and state government regulation also add unnecessarily to the costs and complexity of providing affordable insurance services. The layers of regulatory responsibility and overlapping regulatory requirements and objectives between the various state regulators and the federal prudential regulator, APRA, creates complexity, rework, inconsistencies and additional costs and operational issues for insurance companies. These additional cost burdens often have a direct negative impact on productivity and impede competition, without any significant benefit to consumers.

[1] QBE Submissions, both on page 2.

It is clear that following the introduction of the National Competition Policy (***NCP***) there has been considerable progress in reducing the amount of anti-competitive regulation. It is also clear however, as identified by the Panel in the Report, that the regulation review process that began under the NCP regime has flagged, and needs to be reinvigorated on a national level.

QBE **strongly submits** that a national regulation review of the operation of our non-catastrophic personal injury schemes should be considered a priority in the reinvigorated NCP agenda. Indeed, the Productivity Commission's 2005 report on National Competition Policy Reforms specifically identified the frameworks for workers' compensation insurance and compulsory third party insurance as requiring a further review of restrictions on competition and efficiency[2].

QBE notes that the operation of our personal injury schemes has not been flagged by the Panel as a priority area for review. QBE **strongly submits** that this requires reconsideration, particularly in the context of the complexities involved with the proposed introduction and interface of the NIIS and NDIS with these myriad schemes.

Such a review should also consider the broader benefits to the economy and consumers of opening up the non-catastrophic personal injury schemes to competitive underwriting and operation. Governments at both state and federal level have significant exposure and fiscal liability for personal injury schemes. Additionally, unlike APRA prudentially regulated insurers, government monopoly schemes are not subject to consistent prudential or pricing oversight and can be subject to and influenced by conflicting social and political pressures.

QBE believes it is timely to consider whether it is appropriate or necessary for governments to continue to underwrite non-catastrophic personal injury compensation schemes, such as workers compensation and CTP.

Competitive neutrality (recommendations 15-17)

QBE strongly **supports** the Panel's view that "the principle of competitive neutrality is an important mechanism for strengthening competition in sectors where government is a major provider of services"[3] and thanks the Panel for recognising that "[t]he case for extending the principle of competitive neutrality is strongest when:

- there are different arrangements for government providers operating in the same market as alternative providers; and
- the differential treatment is not justified on net public benefit grounds."[4]

As previously noted in QBE's Submissions, QBE wishes to reiterate that governments providing insurance should be subject to the same prudential and other regulatory requirements that apply to the provision of insurance in Australia.

Misuse of market power (recommendation 30)

QBE continues to have significant concerns and **does not support** the Panel's final recommendation in relation to section 46 of the Competition and Consumer Act 2010 (***CCA***) and the proposed introduction of an "effects test".

The Panel has recommended that the primary prohibition be re-framed, to prohibit:

"…a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market."

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[2] Productivity Commission, *Review of National Competition Policy Reform, Inquiry Report No 33, February 2005,* page XVI
[3] Report, page 267.
[4] Report, page 267.

Section 46 of the CCA currently prohibits corporations that have a substantial degree of power in a market from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor of the corporation;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct.

The Panel's recommendation removes the 'take advantage' element, replaces the 'purpose' test with an 'effects' test and also replaces the specific categories of exclusionary conduct with a 'lessening competition' standard.

The changes to section 46 are significant. QBE's previous submission on the Panel's draft report outlined our serious concerns with the proposed introduction of an "effects test" and the undoubted capture of pro-competitive conduct that will fall within its ambit (as recognised by the Panel). QBE considers the introduction of the test will almost certainly have a detrimental impact on productivity. This is counterproductive at a time when, as a country, we are looking at what we can do to increase our productivity.

The potential impact for business is extremely unclear. QBE is concerned that businesses wishing, for example, to take innovative steps in order to improve their productivity or increase their market share may ultimately be reluctant to do so in light of the proposed changes. This concern remains, despite the Panel's attempt to mitigate such concerns, by recommending that:

"…the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- *the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and*
- *the extent to which the conduct has the purpose, effect or likely 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."*

Despite the suggested directions to the courts, the difficulties of determining between conduct that is permitted, and conduct which is not permitted, cannot be underestimated. This is particularly so given the subjective nature of the judgements that will be required. Determining the meaning of "would likely to have the effect of" through court interpretation will result in many years of uncertainty while this meaning is settled by the courts. This is contrary to one of the aims of competition policy which is to "establish competition laws and regulators that are clear predictable and reliable".

The Final Report also recommends that the ACCC issue guidelines regarding its approach to enforcing section 46. Any such guidelines, however, would not necessarily provide any clarity long term (in order for corporations to undertake appropriate business planning) as the ACCC could interpret any such guidelines differently over time or could amend them at any time. They would also not bind a court in its interpretation of the relevant provisions.

The Panel does not provide any compelling evidence to support the introduction of an effects test, nor any examples of the misuse of market power which the proposed amendments would seek to rectify. Nor is there an adequate assessment of the potential cost impact of the proposed change that will be incurred by business (and ultimately consumers).

The Panel does, however, refer to the large number of independent reviews and parliamentary inquiries that have previously debated the sole 'purpose' vs 'effect's test (see Box 16.2 on page 207), which QBE notes overwhelmingly did ***not*** recommend an effects test.

Given the potential cost and reputational implications for corporations, the benefits of the proposed effects test should be clearly stated and analysed thoroughly against the cost implications and impact on productivity.

Conclusion

QBE welcomes the opportunity to provide this submission in response to the Australian Government's final report on the Competition Policy Review. If there is any further detail or information which QBE could provide, please do not hesitate to contact Kate O'Loughlin, Head of Government Relations & Industry Affairs (kate.oloughlin@qbe.com).