RETAIL GUILD OF AUSTRALIA
SUBMISSION TO FINAL HARPER REPORT

The Harper Report acknowledges that there is a fundamental problem with Australia's competition regime in respect of a lack of access to justice.

This submission is singularly focussed on the problem of access to justice. The Retail Guild will not address Harper's comments on sections 50 and 46 of the competition laws in this submission, having already made comprehensive suggestions to remedy the problems that exist in those areas of the law in its submission to that review.

The Harper Report reaffirms the long held view of earlier reviews of the competition laws, that they were primarily intended to be enforced by private parties, not exclusively by the ACCC.

But over the last decade or so, private litigation has dropped off considerably. This problem has been made worse by the fact that the ACCC itself is bring very few competition cases (approximately one case per year), and has taken virtually no action in the supermarket space notwithstanding persistent complaints about the conduct of the two majors over many years.

An absence of cases is creating considerable uncertainty as to the interpretation of the law by the Courts (as demonstrated by the widely differing views as to how an effects test is likely to work if incorporated into section 46). This in turn exacerbates the risk of litigation and – by way of a vicious cycle – thereby further discourages future cases.

In addition to the growing uncertainty as to a Court's likely interpretation of the law, the main impediments to private parties litigating competition laws are:

i) The risk of an adverse costs order should an applicant lose;

ii) The length of the process; and

iii) The lack of suitable remedies.

The focus of this paper is to explore practical solutions to these problems (particularly the first).

Relief from Costs Orders

Relief from costs orders is already a common feature in many jurisdictions in Australia, including town planning jurisdictions, where large investments are at stake.

In the United States, costs orders do not form part of the legal process. Even with this, however, there is a view that in a limited number of special matters – including competition (antitrust) law – the public interest in private litigation occurring is so great that positive measures should be taken to actively encourage it. Consequently, a private party which successfully proves an antitrust claim is entitled to "treble damages" (or three times the proven loss caused by the conduct).

In the European Union, the Commission has called on all jurisdictions in which costs "follow the event" (as in Australia) to carefully review the appropriateness of this approach in competition cases, as again there is considered to be significant benefit to the public when private matters are pursued through the Courts.

Specifically in the United Kingdom, the Competition Appeals Tribunal has been established, and has been granted the discretion to make any order it sees fit in relation to costs, as opposed to the usual rule that costs follow the event.

The Retail Guild submits that private litigants bringing actions under Part IV should be able to apply to the Court at an early stage seeking relief from costs regardless of the outcome of the case. The Retail Guild is aware of concerns that such an approach may result in frivolous or vexatious litigation. In the same manner that these concerns have been addressed overseas, the Guild suggests that they are readily overcome in Australia. For example, an application for relief from costs:

i) should involve a preliminary hearing whereby a judge (or registrar) could assess the basic merits of the claim (in a similar manner to any prima facie assessment of a matter). If the judge (registrar) were satisfied that there was a sound basis for bringing the case and that there would be public benefit in it proceeding (whether due to the potential cessation of anti-competitive conduct and/or because an important aspect of the law was in issue), then s/he could make an appropriate order relieving the applicant of costs, regardless of the outcome of the case; and

ii) could be subject to a substantial filing fee (over and above the standard filing fee for such actions), which could act as a form of "bond". Such a bond, perhaps in the order of $25,000 (the current merger authorisation filing fee), would discourage frivolous use of the process. If the judge considered the applicant's case had not been conducted appropriately, the bond could be forfeited to the respondent; and

iii) could also be subject to the judge (register) determining that the applicant is a party that, in the absence of relief from costs, could not otherwise pursue this claim which (as per the first criterion) has been established to be in the public interest.

Australian Competition Tribunal

To provide an expeditious forum for competition matters, an expansion of the jurisdiction of the Australian Competition Tribunal (**ACT**) to include competition claims under Part IV should also be considered. This may require review of the appropriate remedies which the Tribunal could impose (and may mean enforcement matters, subject to pecuniary penalty, would still be pursued by the ACCC through the Courts). Once such jurisdiction was expanded, the ACT should conduct such matters in its ordinary course (ie not subject to costs orders).

Tribunal processes are far cheaper and quicker than conventional Court litigation processes. Notwithstanding its specific expertise in competition matters, the ACT currently has a very limited jurisdiction, providing no solution to the access to justice issues identified in the Harper Report. Below are key changes to the ACT's structure and jurisdiction which would enable small business to access a quick process to determine breaches of the competition laws:

i) The ACT's jurisdiction should be expanded to include Part IV matters.

ii) The rules of the ACT should be changed so matters can be initiated by affected third parties (those third parties would have to demonstrate an appropriate interest);

iii) For Part IV matters, the issues would need to be considered de novo (in contrast to many of the ACT's current processes, for which the ACT is limited to material previously provided to the ACCC).

iv) The remedies available to private parties should be carefully considered, to ensure the ACT's powers remain within the terms of the constitution.

Whilst a Tribunal process for Part IV matters is an inherently quicker and more cost effective dispute resolution process, it is highly likely those decisions will be appealed where large corporations are involved. This is why relief from costs orders remains a critical issue even if a Tribunal process is adopted.

Federal Court Rules for case management

The Retail Guild endorses the Harper Review's recommendation to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice. This is an existing well understood technique which could be applied immediately by changing the Federal Court procedures.

Submitted by the Retail Guild of Australia Inc
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