



AUSTRALIAN
**FOOD &
GROCERY**
COUNCIL

AFGC SUBMISSION

COMPETITION POLICY REVIEW
DRAFT REPORT

Sustaining Australia

SUMMARY

The Australian Food and Grocery Council (AFGC) welcomes the Draft Report of the Competition Policy Review and commends the Review Panel for undertaking a 'root and branch' review that addresses the broad and ambitious terms of reference. The AFGC has some specific comments and concerns in relation to a limited number of issues (eg misuse of market power, parallel importation and the role of competition law in addressing "double agent" issues in vertical integration), but expresses its support or conditional support for a large majority of the Draft Report recommendations.

BACKGROUND

This submission is made by the Australian Food and Grocery Council (AFGC) in response to the 22 September 2014 release for comment of the draft report ("Draft Report") of the Competition Policy Review (the "Review").

The AFGC has previously made submissions to the Review in response to the 14 April 2014 Issues Paper. The purpose of this submission is not to repeat the earlier submissions, but to respond to the Draft Report and its detailed recommendations.

The AFGC acknowledges the breadth of the Draft Report in analysing and considering reforms based on the Review's wide-ranging terms of reference. In the Draft Report, the Review Panel has fulfilled the promise of a 'root and branch' review of competition policy, institutions and law. While there has been significant focus on reform to competition law in the area of abuse of market power, the AFGC sees in the Draft Report a much wider platform for a 21st Century approach to competition policy and regulation that has much to commend it.

This submission –

- makes comment in relation to the broad principles and drivers for competition policy discussed in the Draft Report;
- discusses a number of specific competition law issues where the AFGC considers that refinement of the Draft Report is needed or would be of benefit; and
- provides a summary table of the AFGC's response to the Draft Report's 52 recommendations.

COMPETITION POLICY

The AFGC agrees with, and endorses, the identification of “*making markets work in the long term interest of consumers*” as the policy goal of competition law. This important concept is deserving of more attention in the Review’s final report, with the opportunity to clearly identify what the phrase entails, especially in areas beyond mere price. For example, consideration could involve the three classic pillars of economic efficiency: allocative efficiency promoting the free flow of investment; productive efficiency promoting the efficient manufacture, supply and retailing of goods to consumers; and dynamic efficiency involving the entry of new players and innovative products to promote consumer choice. The Draft Report recommendations regarding competition policy and laws align well with such considerations, but the policy narrative would benefit from a more explicit statement and connection of this principle through to the reform proposals.

The identification of a policy goal could also be expressly stated in competition laws as a guiding principle for both enforcement and compliance agencies and the courts, for example by amending the object of the *Competition and Consumer Act 2010* (CCA) to refer to “the proper functioning of markets for the long-term interests of consumers”, rather than to consumer welfare. There may also be benefit in the Competition Policy Review recommending that the ACCC and relevant state based jurisdictional enforcement agencies developing a consistent, more detailed statement of guiding principles based on the policy goal.

The AFGC strongly supports the Draft Report’s statement that competition laws need to be “clear, predictable and reliable”. These three touchstones of regulatory best practice are vital for market efficiency and, at least to a degree, underlie the need for a ‘root and branch’ review of existing laws which do not deliver the degree of clarity or predictability that they might. This is a point to which this submission will return in its discussions of some particular issues.

The AFGC further endorses the Draft Report’s identification of the importance of competition policy, and competition law reform, as a driver of economic growth and prosperity. The need for efficient investment in, and use of, infrastructure and national resources serves as one example, as does the need to complete the unfinished agenda from the National Competition Policy Reforms (the Hilmer Review), with a relentless pursuit of deregulation

and contestability paramount. In particular, market structure and policy settings in the gas market are, in the AFGC's view, preventing the market from responding efficiently to the domestic pressures brought about by significant exports. More detailed discussion of gas market issues and recommended reforms are contained in the joint submission to the Energy Green Paper from an alliance of industry associations, calling for a new gas reform agenda needs to be developed through the Council of Australian Governments (COAG).

The draft Report focusses on three drivers for the reform of competition policy: regional trade opportunities, the aging population, and the disruptive impact of technology. Whilst the second is of less direct impact to the food and grocery sectors, the AFGC concurs that these are all indeed significant factors.

Regional Trade Opportunities

The growth in regional markets does present opportunities for Australian industry to deliver products to meet growing Asian demand. However, there are other competing factors at play, including high domestic production costs, a concentrated domestic retail sector and the vigorous competition faced by Australian exporters in these same markets (all are documented in the AFGC's previous submission). The ability of Australian exporters to respond to regional demand is not certain and will need to be earned in the marketplace – in other words, the mere existence of regional demand alone will not deliver export sales, or maintain Australian standards of living.

The AFGC therefore suggests that a broader, global (rather than regional) perspective is more appropriate as the lens through which reform to Australia's competition policy, laws and structures must be viewed. It is global engagement and global competitiveness that, in the AFGC's view, is the driver of competition policy. Understanding, for example, the imperatives of investment in Australia by multi-national corporations, the impact of technology in global supply chains, or the core advantages and disadvantages that accompany the tag "Australian" in export markets, cannot be achieved with anything less.

Technology

The AFGC is particularly heartened to see that the impact of technology has been recognised as a key driver of modern competition policy. Within the food and grocery sector, the AFGC and its members have a number of projects underway to capitalise on the opportunities for efficiency presented by new technology, and remain keen for regulators to grasp such possibilities as well

The Draft Report is perhaps less clear in linking the developments in food and information technology to its specific recommendations, leaving a gap in the narrative of reform. To address this point, the Draft Report might give some specific illustrations, for example as to how the disruptive effects of technology represent a shift in the balance of power in favour of consumers (through the ability to customise data to individual taste) and away from prescription by regulators or brand owners. Competition laws should therefore encourage, rather than impede, such developments. Conversely, big data can assist retailers and brand owners to be more responsive to consumer needs but at a potential costs to privacy. Competition laws should promote a proper balance in this regard. Such illustrations serve to draw out the connecting narrative between the policy driver and the Draft Report's recommendations.

SPECIFIC ISSUES

MISUSE OF MARKET POWER

The AFGC is conscious that it is the misuse of market power, rather than its existence, that is the key concern of competition law. It is therefore important to have a clear concept of what is meant by 'misuse', and of the scope of any provision directed against misuse. The AFGC notes that there are instances where the 'misuse' of market power either offends other provisions in the CCA (the recent action instituted by the ACCC against Coles supermarkets, for example, is cast in terms of unconscionable conduct rather than misuse of market power) or can be addressed through other means (for example, the Food and Grocery Code of Conduct proposed as a voluntary prescribed Code under the CCA).

If there is to be reform in relation to the legislative proscription against misuse of market power, the AFGC considers that the application of a "purpose or effect of substantially lessening competition" test would improve consistency with related provisions in the CCA. Further, the AFGC supports the proposal to allow consideration of the impact of market power conduct on "any other market"; which will improve the relevance of the provision to markets with 'double agent' vertically integrated participants (ie where the participant is both competitor and customer of its suppliers).

The introduction of a defence for normal business activity is also supported and should be more effective in targeting misuse of market power than the 'take advantage' test currently in the CCA.

However, any change to the statutory provisions will require thorough consideration to ensure that it will deliver outcomes that promote markets operating in the long term interests of consumers and minimise costs and perverse outcomes. In particular, the benefits of reform must demonstrably outweigh the additional compliance burden on normal business activity, and deliver a competition law that is clear, predictable and reliable.

The potential for an increased compliance burden lies at the forefront of the AFGC's concerns. Corporations that hold a significant market share might for that reason alone incur increased compliance costs through the necessity to ensure that any business decision does not constitute an exercise of market power that has an effect of substantially lessening competition or, if it arguably does so, that the proposed defence applies to the conduct. At the heart of this concern is the Draft Report's

statement that competition laws must be clear, predictable and reliable. The 'substantial lessening of competition' test is not always predictable at the granular level of decision making, and may prove costly to analyse (albeit most have an intuitive grasp of its scope). Similarly, the defence of "long term benefit of consumers" and normal business practice, while understandable, may be costly to quantify and analyse. These potential costs may serve as an anchor against innovative, competitive business conduct that needs to be encouraged rather than encumbered.

The AFGC is also concerned as to how the proposed law might address the cumulative effect of conduct on a market. The proposed test could, potentially, allow an abuse of market power targeting competitors provided there is no substantial lessening of competition from any individual conduct, and yet the combined effect of such conduct could substantially lessen competition over time. Such 'creeping targeting', derived through sequential conduct raises concerns analogous to creeping acquisitions, and should similarly be addressed in the legislation. For example, consideration could be given to a provision similar to the telecommunications misuse of market power provision (s151AJ(2), Part XIB) which refers to "...conduct on one or more occasions with the combined effect...". Such an extension could perhaps be more generally included in the other 'substantial lessening of competition' provisions in competition law.

PARALLEL IMPORTATION

The Draft Report's discussion of parallel importation issues, in the AFGC's view, fails to grasp both the anti-competitive aspects of transfer of risk and the more fundamental issue regarding the long term interests of consumers.

The genesis of parallel importation, at least in a policy and regulatory sense, lay in the price differential paid by Australian consumers for books and CDs in the 1980's. While the draft Report acknowledges technology disruption as a major driver for competition policy reform, the analysis of parallel importation issues in the Draft Report remains rooted in the belief that Australian consumers are paying "over the odds" for products compared to consumers in other countries.

The fact remains that parallel importation permissions remain a 1990's solution to a 1980's problem, one that has marginal impact or influence to consumers in the 2010's and beyond. The growth and changing technology paradigms, *especially* for books and music, have left the question of parallel importation well behind.

The legacy of “last century” solutions, however, remains embedded in the national psyche. The problem is that parallel importation permission is, and is analysed in the Draft Report as, a ‘one size fits all solution’ when a food product is not a book, nor a cosmetic a CD.

Food and grocery products are subjected to intense regulation in Australia, and compliance comes at a cost. If Australian consumers are paying more for the food and groceries compared to overseas markets, the first port of call should be a careful review of existing regulation (Australia, for example, has 16 requirements that apply to net weight or volume markings alone) and the costs involved in compliance.

The AFGC accepts that many of its concerns around parallel importation, especially in relation to the transfer of compliance and enforcement risks, arise due to a lack of enforcement rather than policy or regulatory failure. However, brand owners are faced with the reality that parallel imports do not seem to be, nor have any prospect of being, an enforcement priority, and to lay the industry’s concern solely at feet of enforcement failure fails to deal with the market reality.

That aside, the AFGC takes issue with the suggestion in the Draft Report that consumers purchasing parallel imports are effectively choosing to self-insure against product risks, when this is clearly not the case. There are two reasons why:

- consumers do not choose to self-insure because products are not identified as being parallel imports nor are the differences always obvious to a casual purchaser (in fact it is in the interests of the importer and/or vendor to minimise differences); and
- even if they are aware a product is a parallel import, consumers can take advantage of the brand protection risks to gain what is in effect a free warranty from the Australian brand owner.

For example, chewing gum and confectionery products from global brands that have been parallel imported require very close label scrutiny to identify that the product is not that of the Australian brand owner, and yet it is the Australian brand owner that must carry the costs of call centre contacts and product replacement (with Australian brand product) to protect brand reputation. There is also little practical recourse to global funding arrangements to recompense these costs because the exporting brand owner is often either unaware or not the direct seller of the parallel imported product. The coffee example cited in the Draft Report similarly fails to identify the costs incurred by the Australian brand owner as a result of the parallel importation.

The AFGC therefore repeats its earlier submissions that parallel import regulatory permissions have limited utility in the modern consumer world of ready internet purchasing, and are serving only to provide parallel importers with a market advantage due to their ability to transfer reputation and compliance risks to brand owners. The Draft Report does not explain how the continuance of these structures serve any long term consumer interest other than price, at the potential loss of investment in Australian manufacturing.

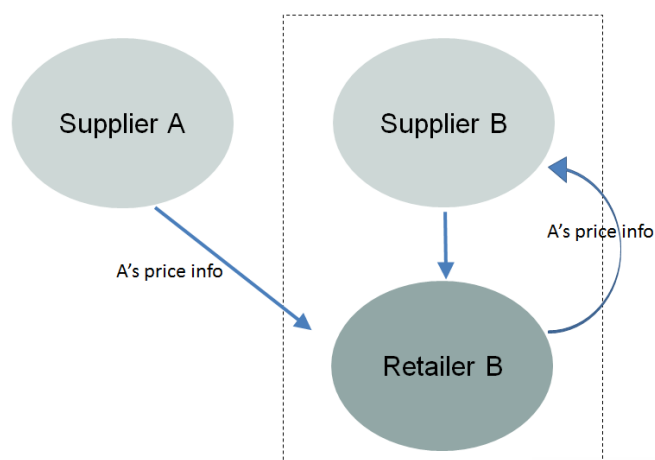
MARKET DEFINITION AND VERTICAL INTEGRATION

In section 6.2 of the Draft Report, the Panel discusses vertical integration and use of home brands by supermarkets, and makes the following statement -

"There have been a number of structural changes in the operation of supermarkets, such as greater vertical integration and use of 'home brands', an increase in the range and categories of goods sold within supermarkets, and greater participation by supermarket operators in other sectors. Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of other parties... While the Panel is sensitive to these concerns, they do not of themselves raise issues for competition policy or law."

The AFGC understands that vertical integration, of itself, is unlikely to raise issues for competition law provided that the effect of vertical integration is not one of lessening the proper competitive functioning of markets. However, in the case of supermarket introduction of 'home brand' products, there are potentially significant competition issues, in AFGC's opinion, due to the 'double agent' character of the retailer being both customer and competitor.

"Double Agent"



Source: Trends in Retail Competition: Private label, brands and competition policy, Report on the 10th annual symposium, Oxford Institute of European and Comparative Law / Centre for Competition Law and Policy



This 'double agent' issue presents two particular concerns –

- The retailer, as customer, gains market insights into pricing, product development and innovation from its suppliers that it may then provide to a contract manufacturer in relation to its competing in-house products; and
- The retailer controls access of shelf space and positioning and is in a position to competitively favour its own products, even to the extent of restricting consumer choice by discontinuing stocking of branded items.

The Draft Report notes that the anti-competitive conduct provisions of the CCA are relevant for assessing such conduct. The AFGC further notes that the Food and Grocery Code of Conduct requires transparency in shelf allocation and delisting decisions for branded products, and restricts the use of non-public information from suppliers to the purpose for which it is provided. It may well be that these provisions, combined with the proposed Code of Conduct, are sufficient to address the issue within the food and grocery retail space, but even so the AFGC is of the view that the 'double agent' concern is of relevance to the Review and should be analysed against the goal of market operation that promotes the long term interests of consumers, rather than being dismissed under a general statement that vertical integration does not raise competition concerns.

SECONDARY BOYCOTTS

It is important to distinguish public advocacy (which should be permitted) from secondary boycott behaviour (which should be prohibited). The Draft Report makes no recommendations in relation to the current consumer or environmental concern exemption for boycott behaviour that would otherwise be illegal.

The AFGC is aware of anecdotal reports regarding secondary boycott behaviour, most recently involving social media campaigns against products with halal certification. The efficacy of such "consumer" boycotts is dramatically enhanced by modern technology, and although this is identified as a key policy driver in the Draft Report, its impact in the area of secondary boycotts is not acknowledged or addressed.

The AFGC reiterates its view that criminal behaviour remains criminal irrespective the belief system underlying that behaviour, and allowing environment and consumer beliefs to engage in what is otherwise criminal behaviour begs many

questions about the nature of criminal law and why those two belief systems, as distinct from others, are condoned.

INFRASTRUCTURE MARKETS

The AFGC notes with concern the unfinished business from the National Competition Policy Reforms, particularly in the gas and electricity markets, and supports the Draft Report's recommendation for a renewed commitment to complete the reform agenda, underpinned by competition payments.

In particular, the AFGC is concerned that the market structure and policy settings in the gas market are preventing the market from responding efficiently to the pressures brought about by significant liquid natural gas exports. Given the urgency and importance of this issue, the AFGC considers that a new gas reform agenda needs to be developed by COAG, and supports the Draft Report's call for a detailed review of competition in the gas market. A more detailed discussion of gas market issues and recommended reforms are contained in the joint submission to the Energy Green Paper from an alliance of industry associations.

The AFGC supports the introduction cost reflective pricing in roads and the principle of linking revenues to road investments that reflect the needs of road users. However, there needs to be a mechanism to ensure that those contributing through charges are also able to contribute to national priority setting. For example, road investments need to deliver efficiencies to Australia's freight task if freight companies are a major contributor to funding.

COMMENT ON RECOMMENDATIONS

The following table sets out the AFGC's response to the specific recommendations made in the Draft Report. Please contact the AFGC should you consider a more detailed comment on any point would be useful.

Recommendation	Issue	Comment
1	Competition Principles	Supported. Recommend that the object of the CCA and relevant jurisdictional legislation replace "consumer welfare" with the "the long term interests of consumers"; and that this definition be explained in terms of productive, allocative and dynamic efficiency.
2	Human Services	No comment
3	Road Transport	Supported, provided revenues truly reflect needs of users , and are applied to infrastructure development
4	Liner shipping and repeal of CCA PartX	Supported
5	Cabotage in coastal shipping	Supported
6	Taxis	No comment
7	IP Policy Review and FTA implications	IP is a reward for innovation that needs to be balanced against competition principles. The Draft Report's questioning as to whether the balance is right is legitimate but not, in the AFGC's view, sufficiently analysed to justify reform.
8	Repeal of CCA s.51(3)	See 7 above. The competition policy rationale is appreciated, but the proposed reform raises potential for conflict between

		CCA and IP laws, which may have dampening effect on innovation.
9	Parallel importation	These recommendations are NOT supported. They fail to consider the anti-competitive effects of PI and do not address the role of technology and globalisation.
10	Planning and zoning	Supported, but reform will require government commitment at all three tiers of Commonwealth, State/Territory and local government.
11	Regulation Review	Supported, but suggest the process might be better overseen by existing best practice agencies rather than ACCP to avoid duplication and an over-emphasis on competition policy compared with other government policy agendas.
12	Standards Review	Supported as per 11 above
13 - 15	Competitive Neutrality	Supported.
16	Electricity, Gas & Water	Supported, though reform agenda should be much broader, encompassing other incomplete recommendations from previous reviews. The recommendation should also include the Panel's call for a broad review into competition in the gas sector, discussed in the Draft Report text.
17	Competition Law Concepts	Supported.
18	Competition Law Simplification	Supported. A reform even as simple as sequential clause numbering would assist.

19	Application to the Crown	Supported
20	Definition of Market	The proposed extension to the definition of 'competition' largely addresses the AFGC concern that 'market' is being interpreted by the ACCC and the courts in a narrower sense than is conceived by the parties acting within it. The definition of 'market' could refer to a market "in or including Australia' as a further clarification (rather than just 'in Australia').
21	Extra-territorial Reach	No comment other than to note that the practicalities of enforcement will limit extraterritorial operation.
22	Cartel Conduct	Supported subject to further analysis, especially regarding the impact on the work of industry associations. Alignment with recent NZ reform proposals in cartel legislation would be desirable.
23	Exclusionary Provisions	Supported
24	Price Signalling	Supported
25	Misuse of market power	Requires further analysis. See comments in main text.
26	No provision on price discrimination	Supported
27	Third line forcing	Supported on the basis that such arrangements will remain illegal where they significantly lessen competition in the third party's market.
28	Exclusive dealing	Supported.

29	Resale Price Maintenance	Supported
30	Mergers	Supported in principle, but concern that strict regulatory decision timeframes may encourage conservative decision-making. The reforms should also include greater procedural and policy transparency in relation to ACCC considerations and re-instate the opportunity to seek a direct hearing before the Competition Tribunal.
31	Secondary Boycotts - employment	No comment
32	Secondary Boycotts – jurisdiction	No comment
33	Fair Work Act	No comment
34 - 35	Authorisations and Notification	Supported
36	s.155 Notices	Supported. An alternative reform might be to allow external administrative review of s.155 notice scope and timeframe for response to ensure process is not oppressive.
37	Admissions and private actions	Opposed. Admissions may be made as a means of bringing closure to ACCC proceedings that may not be forthcoming if civil liability and damages were an added consequence.
38	National Access Regimes	No comment
39-43	New ACCP	AFGC supports the need for competition studies of a particular market or competition issues. The AFGC is cautious

		about establishing a new agency where there are existing government or non-government providers for such functions. The AFGC does not oppose the proposed ACCP provided the Review explains why existing bodies could not properly undertake the tasks involved.
44	Competition Payments	Supported
45-47	Splitting ACCC, New Board	No comment.
48	ACCC Media Code of Conduct	Supported
49	Small Business Access	Supported. However, there are market power imbalances that prevent SME taking on large customers so this may provide to be of limited utility. Reforms might appropriately await the outcome of current court proceedings and consider Industry Code solutions.
50	Collective bargaining	Supported, but caution against perverse outcomes where collective bargaining serves to protect the less efficient within a collective. Explicit reference to the long term interests of consumers might be a safeguard in this regard.
51	Retail trading hours	Supported, but need to also consider the flow-on impact on the flexible labour needs of manufacturers to meet 24/7 demand
52	Pharmacy location and ownership	No comment

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