



Australian Government
Department of Communications

Drew Clarke

Secretary

Professor Ian Harper
Chair, Competition Policy Review Panel
c/o Competition Policy Review Secretariat
The Treasury
Langton Crescent
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Dear Professor Harper

Thank you for the opportunity to comment on the Competition Policy Review Draft Report (the Draft Report) released on 22 September 2014.

The Department of Communications (the Department) recognises the fundamental importance of competition in driving productive, allocative and dynamic efficiency in the economy, and supports the work undertaken by the Review Panel (the Panel) as timely and important in building on the original National Competition Policy (NCP) agenda.

The Department welcomes the Panel's recognition that in the 20 years since the NCP, new digital technologies, applications and innovations are dramatically 'digitally disrupting' the way markets operate, and fundamentally changing the way that consumers, businesses and markets interact. Furthermore, these disruptions are resulting in greater contestability in the supply and use of products and services in many areas of the economy. This is often occurring through reduced barriers to market entry, which can generate greater scope for game-changing innovations. This represents a major force that is affecting the Australian economy and will influence whether our competition policies, laws and institutions continue to be fit for purpose.

While the Draft Report identifies the capacity of technology to lift Australia's living standards, the importance of this should not be understated:

- Deloitte Access Economics (Deloitte) estimates that Australia's Internet economy is forecast to grow at twice the rate of GDP to \$70 billion by 2016.¹
- McKinsey Global Institute has calculated that around a fifth of GDP growth in advanced economies over the past five years has arisen from the Internet and associated technologies – with 75 per cent of this growth occurring in sectors not traditionally seen as 'technology' industries, testament to the broad applicability of these technologies.²

The Final Report would benefit from a stronger focus on the impact of digital disruption and new technologies in offering the potential to identify new competitive opportunities for industries across the economy, and opening up many existing markets to greater competition. As the Draft Report indicates, Governments need to respond to the challenges of adapting regulation to address emerging services and new business models for supplying established services. The Department encourages a stronger focus by the Panel on reviewing what are proving to be restrictive competitive arrangements in today's highly digitised world. This would enable greater opportunities for contestability generated by new technologies across many sectors of the economy, particularly service industries.

The transformative effects of ubiquitous high-speed broadband across the business and household economy will become particularly evident with the progressive rollout of the National Broadband Network (NBN). However, it is widely recognised that the Government's investment in the NBN also has implications for competition in the supply of such infrastructure. In recognition of this issue, the Government sought the advice on a range of policy and regulatory issues from a panel headed by Dr Michael Vertigan, AC, including competition and regulatory governance matters. The Vertigan panel has now reported to the Government and its advice is being considered.

The Department offers the following observations in relation to digital disruption and enablement in respect of a number of the Draft Report recommendations.

Digital disruption and enablement

The Panel's concern for the impact of new technologies, and the consequential 'digital disruption' to traditional business models, is closely aligned with the Government's policy agenda across the Communications portfolio. The Department recognises that the pervasive use and integration of digital technologies can disrupt existing markets and how they operate, as well as how consumers engage with those markets.

The Panel's Draft Report notes that the challenge for policymakers and regulators is to capture the benefits of digital disruption by ensuring that competition policies, laws and institutions do not unduly obstruct its impact yet still preserve traditional safeguards for consumers. The Department acknowledges that this can be challenging in formulating effective policies, not only

¹ Deloitte Access Economics, 'The Connected Continent', August 2011, p 2, 41.

² McKinsey, 'Internet Matters: The Net's Sweeping impact on Growth, Jobs & prosperity', McKinsey Global Institute. May 2011. See http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters

due to the need to continue to protect consumers' safety and well-being, but also because those businesses most vulnerable to disruption are often large, established and major employers.

It is important that the benefits of digital disruption and innovative technologies are not obstructed by unduly burdensome regulation and information requirements — regulation and red tape should not stifle innovation and invention. Rather, innovation should be actively encouraged, and while it is not possible to legislate for inventiveness, it is important to create an environment where businesses can operate innovatively and entrepreneurship is stimulated throughout the economy.

In terms of the Panel's second principle under Draft Recommendation 1, that Governments should promote and enable informed choices by consumers, new technologies have a positive role to play. Digital tools, for example search engines and online marketplaces, continue to expand opportunities for consumer choice by increasing the availability and timeliness of products and services. Stimulating these digital enablers will boost consumer welfare by reducing information asymmetry and promoting choice in decision making. Often these consumer benefits are hard to quantify, including balancing these benefits against the impact on more traditional industries.

Digital disruption in service industries

The Department considers that digital disruption will be most acute in Australia's service industries.

Deloitte recently reported that almost one-third of the Australian economy faces imminent major disruption due to the transformative power of the digital economy. The sectors identified as most likely to be affected include some of Australia's biggest employers, such as retail and professional services.³

As the Panel is aware, services play a significant role in our international exports. According to the Department of Foreign Affairs and Trade, in 2012–13 services accounted for 17.4 per cent of Australia's total exports.⁴

Many examples exist of innovative digital business models that are challenging traditional service industries:

- booking and sharing technologies are disrupting the accommodation and hotel industry, with online booking and comparison services increasing competition among providers, as well as providing consumers with even greater choice through sharing services such as Airbnb, that allow subscribers to rent out their own properties directly to another user;

³ Deloitte Access Economics, 'Harnessing the 'bang'. Stories from the digital frontline', 2014, p 4.

⁴ Department of Foreign Affairs and Trade, Trade in services Australia, 2012-13. See <http://www.dfat.gov.au/publications/stats-pubs/trade-in-services.html>

- Coursera is an education platform that partners with top universities and organisations worldwide to offer free online courses
- Freelancer allows consumers to post projects and receive crowd-sourced bids from freelance service providers. Freelancer notes it connects over 13 million employers and freelancers globally from over 247 countries, regions and territories; and
- Kickstarter supports crowd-sourced funding of a range of projects. Since its launch in 2009, 7.5 million people have pledged \$1 billion, funding 74,000 creative projects. This service is an example of how digital innovation can facilitate the establishment of new initiatives and support increased market entry.

In the transport sector, the Panel notes that mobile technologies are emerging that compete with traditional taxi booking services (Draft Recommendation 6) and that it is important to balance the accessibility and potential price benefits of these technologies with consumer safety.

The Final Report would benefit from a broader consideration of the impact of digital disruption across a range of service industries, consistent with the Draft Report's assessment of the taxi industry.

Foreign operators supplying digital services to Australian markets raise additional regulatory complexities, notably regarding the jurisdictional application of competition policy. While international firms with widespread impact across the internet are playing an important role in shaping the opportunities for domestic digital services industries, the Department notes instances where a company has been deemed to be engaging anti-competitive behaviour in a jurisdiction outside of the company's operational origin. Some global high-tech companies are being challenged by competition authorities and courts, particularly in the European Union and the United States but also in other jurisdictions such as Japan, South Korea, India and Brazil.

Notwithstanding that the *Competition and Consumer Act 2010* (CCA) prohibits certain anti-competitive conduct in Australia such as cartel conduct, misuse of market power or exclusive dealing arrangements, the Final Report would benefit from further exploring how digital integration and disruption by overseas providers with significant market power may affect Australian markets. The Final Report should also consider whether current competition law provides sufficient protection against possible anti-competitive practices by these operators.

Specific recommendations for consideration

Road transport is benefiting from the introduction of new technologies, including intelligent transport systems which can reduce congestion and the costs of managing road networks. In addition, teleworking and remote delivery of services can further reduce the demand on road use (Draft Recommendation 3).

Online retailing has given rise to a 24 hour global market place, with ready price comparisons and ease of availability providing increased choice to consumers. The Department notes that this is causing considerable competitive disruption to traditional 'bricks and mortar' retailing, and should be considered in relation to restrictions on retail trading hours (Draft Recommendation 51).

Some of the largest disruptions are occurring in the media industry, where timely access to content is drawing consumers, driving advertising revenues and competitively challenging established distribution models and operators. The media and content industries are also being affected by the ease with which consumers can access content, including content access that infringes copyright. The Department notes the recent Australian Law Reform Commission copyright review, in particular, which considers competition policy issues in intellectual property (IP) arising from new developments in technology and markets. The Department is also working with the Attorney-General's Department on online copyright infringement and copyright issues in trade negotiations (Draft Recommendation 7).

The Parliamentary *IT Pricing Inquiry* report proposed repeal of section 51(3) of the *Competition and Consumer Act 2010* so that IP licences are no longer exempt from some parts of competition law (Draft Recommendation 8). The report also considered the issue of parallel import restrictions and their effect on IT products and services for consumers. The Government response to the Inquiry is being considered.

Deregulation in the Communications portfolio

Implicit in many of the Panel's recommendations for competition reform is the notion of deregulation, removing unnecessary and inefficient regulation and information requirements, thereby allowing competition forces to operate more incisively. The Department is actively engaged in supporting the Government's deregulation agenda, which is focussed on reducing the cost to business of superseded and cumbersome regulation.

The Department's Policy Background Paper No. 1, *Deregulation in the Communications Portfolio* (November 2013, p3) notes:

'The communications sectors—broadcasting, telecommunications, and radiocommunications—are subject to substantial levels of regulation. This regulation goes well beyond market design and technical regulation. It reflects a complex balance of public policy objectives including access and social inclusion, competition and choice, consumer protection, public safety, privacy and reliability.

The Government considers that there is substantial opportunity for reducing the regulatory costs of business in the communications sector, while maintaining important and enduring outcomes for the Australian community.'

In support of this agenda, the Minister for Communications has actively pursued deregulation, including via the recent introduction to Parliament of three portfolio deregulation bills. Many of the deregulatory initiatives that have been implemented across the portfolio during 2014 are expected to provide significant benefits across the economy. In giving effect to the deregulation agenda, the Department seeks to achieve a complex balance between competing interests, including competition issues.

Regulatory impact is an important matter to be taken into consideration in putting forward competition law reforms. Whether regulation is fit for purpose, when considered in the context of its regulatory impact, should be a guiding principle for the Panel. We recommend the Panel consider how the design, implementation and administration of competition policy reforms can best be aligned with the deregulation agenda in order to achieve the Government's policy objectives in the most effective manner.

Consistent with the Government's deregulation objectives to reduce the regulatory burden on business and the community, the Department supports an Australian Competition and Consumer Commission (ACCC) review of its guidelines on Section 155 notices (Draft Recommendation 36) in order to reduce any burden imposed by notices in the digital age. This review will also identify opportunities for efficiencies available through the use of search and other digital tools. The digitisation of records not only increases the absolute number of documents kept but also enables firms to use increasingly sophisticated search tools that are commonplace in office software.

ACCC governance and structural arrangements

Given the Government's deregulatory agenda and the work of the Independent Cost-Benefit Analysis of Broadband and Review of Regulation chaired by Dr. Michael Vertigan (the Vertigan panel) the Department offers further views on the governance and role of the ACCC.

The Department notes the recommendation of the Vertigan panel that the telecommunications-specific functions of the ACCC, with the exception of Part XIB of the *Competition and Consumer Act 2010*, should be transferred to a 'networks regulator'.⁵

The Vertigan panel's considerations which led to this recommendation deserve careful attention, as they involve judgements about the long term regulation of telecommunications and the need to reform current arrangements.

The ACCC has been responsible for the economic regulation of telecommunications since 1997. The allocation of this role to the ACCC was consistent with the Hilmer reforms, which sought a uniform approach to industry regulation and treatment of investment. In the late 1990s it was widely anticipated that over time, industry-specific regulation such as Part XIB and Part XIC of the then *Trade Practices Act 1974* would become less relevant and eventually fall away, at which point regulated sectors such as telecommunications would be regulated under the general competition laws such as Part III.⁶

This has not come to pass, however, and the Vertigan panel expresses the view, shared by the Department, that "the need for industry-specific regulation will not diminish, at least in the near to medium term".⁷

⁵ Independent Cost-Benefit Analysis of Broadband and Review of Regulation – *Volume I: National Broadband Network Market and Regulatory Report* – August 2014, Recommendation 19, p.143.

⁶ In most economies, in contrast, the ACCC's telecommunications functions (including access regulation) reside with an ICT or communications regulator – many of which also have 'converged' responsibilities spanning adjacent sectors such as broadcasting. This is the case in the US, UK, France, Italy, Canada, Sweden, Finland, Norway, Spain, Japan, Singapore and Korea, among others. Germany has a network regulator for telecom, railways and electricity. Denmark and the Netherlands have recently joined New Zealand in vesting telecoms within a general economic regulator. Blackman & Srivastava – *Telecommunications Regulation Handbook* – World Bank, 2011, pp.14-21. Telecom regulatory institutions in eleven large OECD markets are described in: Berkman Center at Harvard University/ F.C.C. – *Next Generation Connectivity* – Feb 2010, pp.240-325.

⁷ Independent Cost-Benefit Analysis of Broadband and Review of Regulation – *Volume I: National Broadband Network Market and Regulatory Report* – August 2014, p.141.

In this context the panel argues for a more focused approach: "...The sheer scale of the regulatory tasks that lie ahead and the high costs of regulatory error suggest a need for those tasks to be undertaken by an entity whose leadership is focused on regulatory functions (particularly network access regulation) and whose performance is primarily and transparently assessed on the basis of its efficiency and efficacy in the discharge of those functions."⁸

A key issue in the oversight of telecommunications is balancing regulation to prevent misuse of market power by owners of monopoly infrastructure and provide open access on terms which encourage competition, and regulation that provides incentives for efficient investment in long-lived networks. Of course other network industries face similar trade-offs.

Here, the Vertigan panel expresses the view that in the post-1997 period, "the access regime proved ineffective in promoting innovation and investment..."⁹

The Government has signalled that it hopes to attract significant private capital into the fixed line telecommunications market (and other regulated infrastructure markets) in the future, and so whatever institutional arrangements are ultimately recommended and put in place for the regulation of these sectors, a key objective must be a stable and predictable environment conducive to private investment.

The complexity of regulating telecommunications and other network industries, the potential advantages of narrower focus and greater accountability, and the desirability of uniform economic regulation across sectors where this is practical all lend support to the concept of a networks regulator. But as the Vertigan panel's report highlights, achieving such an institutional outcomes entails significant complexity in implementation.

The Department also takes the view that implementing Draft Recommendation 46 may involve additional complexity, particularly given jurisdictional differences between the sectors proposed to be brought under such an entity. This argues for consideration of other approaches capable of delivering the outcomes sought that avoid an increase in regulatory weight and complexity.

This raises the question of the efficacy of an industry-specific communications regulator in Australia. The Department notes that a number of comparable countries have either long had such institutions or have developed and refined them since the 1990s. In the United Kingdom, for instance, this has seen Oftel (a telecommunications-focused industry regulatory) evolve into Ofcom, which brings together competition regulation and compliance issues relating to all forms of media and communications to address on-going convergence trends across media, broadcasting and telecommunications.

In an Australian context, the Constitution prescribes communication services as a Commonwealth responsibility (section 51(v)). An industry-specific communications sector regulator would avoid potential governance issues arising from combining telecommunications with other network

⁸ Ibid.

⁹ Ibid., p.152.

industries where responsibility is shared or resides with the states and territories. It would also avoid the potential for a regime where three regulators address the communications sector.

Finally, in regard to Draft Recommendation 47, the Department supports in principle the need to ensure regulators remain informed, engaged and transparent in carrying out their enforcement functions. We suggest, however, that the Panel consider carefully whether the proposal put forward regarding the governance of the ACCC will achieve this outcome.

Competition principles and the public interest

Regarding the competition principles set out in Draft Recommendation 1, and noting the public interest test that it also proposes, there are a number of observations that the Department can offer regarding the interplay between the competitive principles and the public interest.

The Department has played a role over the past 30 years in facilitating competition and private sector investment into markets that were once the strong preserve of Government monopolies. As such, the Department does not oppose the idea that the default position in relation to industry structure should be one that emphasises competition and private sector investment over Government ownership and regulation. However, as Draft Recommendation 1 also recognises, there may be instances where these principles do not always deliver the outcomes expected by consumers individually and the community as a whole, nor necessarily the wider considerations of Governments.

The Panel recommends that the competition principles (outlined in Draft Recommendation 1) should have precedence such that the constituent principles should apply unless their costs outweigh the benefit. The Department supports this approach in assessing policy options, noting that in applying cost-benefit analysis for this purpose it can be difficult to quantify the benefits of some Government interventions, particularly where subjective community values are involved. This includes matters such as the ability of all Australians to communicate at an affordable price regardless of location, the wish to be informed, the ability to participate in wider social and political debate, or the need to foster social cohesion.

In short, the Panel's recommendation that Governments should apply the competition principles when implementing competition policy, on the condition that they are subject to a public interest test, is a sound principle. However the Department suggests that the Panel consider additional or alternative means of describing the public interest test to take greater account of wider public policy objectives and existing regulatory assessment frameworks.

Competitive Neutrality

In respect of the Panel's recommendation that all Australian Governments review their competitive neutrality policies (Draft Recommendation 13), the Department offers the following observation.

Convergence between communications platforms means they can deliver multiple services. For example, broadband infrastructure can support the delivery of a vast range of services including email, telephony, print, televisual content, and other products not necessarily supported by

Government intervention. This has the potential to significantly complicate assessments about the competitive neutrality of Government interventions. In many instances the case for Government intervention in one layer (e.g. the network) may be clear; however, it can have flow on consequences for contestability in other layers.

Finally, on a technical point, the Department encourages the Panel to clarify in its Final Report whether its recommendation to amend the *Competition and Consumer Act 2010* so that the competition law provisions also apply to Government activities (Draft Recommendation 19) is intended to apply to Commonwealth procurement only or more broadly apply to all trade and commerce activities.

We would welcome further engagement on the progress of the Final Report. Dr Paul Paterson, Chief Economist and Head of the newly-established Bureau of Communications Research can be contacted at paul.paterson@communications.gov.au and on 02 6271 5958.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D. Clarke', with a stylized flourish at the end.

Drew Clarke

5 December 2014

