Submission to the Independent Review of the Food and Grocery Code of Conduct.

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RECOMMENDATIONS ON BETTER GOVERNMENT POLICY INTEGRATION AND ON BETTER ACCC REVIEW OF INDIVIDUAL MARKETS AS COMPLEMENTARY CONDITIONS FOR EFFECTIVE CODE OF CONDUCT OPERATION

1. POLICY INTEGRATION

This submission suggests to the independent Review that it interpret its brief to allow for wider more generic recommendations or conclusions that significantly impact upon competition in the food and grocery industry, as well as other highly concentrated areas of the economy.

To address wider recommendations is very important for this Inquiry and for wider advance in policy reform, since the current Government is appropriately establishing many reviews and inquiries in many individual areas. But it lacks a proper mechanism devoted to adding up and integrating the results. Normal bureaucratic processes, especially after the weakening of the Australian Public Service over the past decade, do not do this or do not do it well.

An integrative body such as an enhanced Productivity Commission or an Economic Planning Advisory Council would assist here. This Review could also stretch to discussion, conclusion or even recommendation on such related matters of policy integration. For instance, how will the recommendations of specific industry inquiries such as this Independent Review of Food and Grocery, the ACCC Supermarket Sector Inquiry 2024-2025 and many others, and even wider matters such as those being currently considered by entities such as the Treasury Competition Review and the House Economics Committee Inquiry into Promoting Economic Dynamism, Competition and Business Formation, be integrated? And, especially, will the policy integration too be conducted in a considered and open and balanced way with input from major stakeholders and the wider community on that integration of policy?

At present the answer remains no, and this needs to be recommended for change. If this is accepted and done, a genuine, coherent and informed vision for the future of the country can better emerge. Prime Minister Paul Keating had intended to transform the then Economic Planning Advisory Commission into focussing precisely on policy integration and not only the conduct of particular inquiries. Perhaps this Code of Conduct Review could revive this Keating vision, at least for wider investigation and consideration, so that individual industry reviews can be more meaningful and matters of complementarity and conditionality addressed.

2. ACCC REVIEW OF INDIVIDUAL MARKETS

In relation to specific proposals that could enhance better competition in the food and grocery industry, this submission suggests that the Independent Review of Food and Grocery Code of Conduct recommend that for the Code to operate effectively, it needs appropriate complementary conditions in place from ACCC responsibilities. In particular, the Code of Conduct review could accordingly support the amendment of the Competition and Consumer Act 2010 as follows:

- Require explicit examination of the definition of the relevant market for any deliberations and determinations. This should cover both product market and geographic market.
- Introduce into the legislation allowance for joint (or collective) dominance, so that where two or more legally independent entities act together in a particular market as a collective entity, this can be examined and addressed.

These two recommendations are elaborated in a separate submission by the authors to the current House Standing Committee on Economics Inquiry into Promoting Economic Dynamism, Competition and Business Formation, provided here as an attachment to this present submission.

However, one further point needs to be made. The Code of Conduct Inquiry head Mr Emerson has commented publicly on one of these issues, as follows:

“In May 2010, I introduced a bill into parliament clarifying that the prohibition of creeping acquisitions that substantially lessened competition in a market applied not just to the national and state markets but also to local markets. My amendment – possibly the shortest in Australian parliamentary history – changed “a” market to “any” market, ensuring the prohibition on creeping acquisitions covered local markets. " (Australian Financial Review, 22 January 2024)

This was indeed a major improvement and recognised the point regarding market definition. We would argue that this amendment could today be further strengthened to not only ensure that creeping acquisitions apply to local as well as national markets and allow the ACCC to examine that, but to oblige the ACCC to explicitly review the appropriate geographic market coverage in any investigation?

One of the reasons why geographic markets are often ignored in merger cases is that there is a limited time to investigate mergers - but if it is a creeping merger then the ACCC should already have been considering the smallest markets that the potentially acquired firm operates in.

Or, when there is a merger between two major supermarkets or breweries or chains of hotels etc - where many geographic markets have to be considered - the ACCC can consider the most likely anti-competitive market and stop the merger on this basis to make the merger conditional on making the acquirer sell to other competitors.

3. CONCLUSIONS

- We recommend further strengthening of the commendable 2010 initiative on market definition to go forward as a recommendation of what is needed to complement the Food and Grocery Code of Conduct, to ensure it can be effective.
- This would also be proposed in parallel with a second recommendation to introduce into the Competition and Consumer Act 2010, allowance for joint (or collective) dominance.
- Consideration of a new separate integrative Planning Commission or a reformed Productivity Commission with a wider added integrative mandate, is a third consideration that this Review might also want to place on the table, so that recommendations by the Review and others can be rendered more coherent in their total effectiveness.

Canberra
13 February 2024.

Attachment. Submission to House Standing Committee on Economics Inquiry into Promoting Economic Dynamism, Competition and Business Formation, Ian McEwin and Glenn Withers, 22 November 2023.

Brief for the House of Representatives Standing Committee on Economics' inquiry into promoting economic dynamism, competition and business formation

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RECOMMENDATIONS

To enhance workable and productive competition in Australia, along with other measures, the following two policy initiatives would assist in addressing issues associated with market concentration. These involve the amendment of the Competition and Consumer Act 2010 as follows:

1. Require explicit examination of the **definition of the relevant market** for any deliberations and determinations. This should cover both product market and geographic market.
2. Introduce into the legislation **allowance for joint (or collective) dominance** , so that where two or more legally independent entities act together in a particular market as a collective entity, this can be examined and addressed.

EXPLANATION

These recommendations have emerged from close examination of the Australian beer market and its duopolistic nature as regards on-premises beer consumption sales, and the implications of this for small beer producers in local markets, and the realisation that the joint dominance phenomenon here is also found also in a range of other important industries in Australia.

However, current legislation does not fully encourage or permit effective workable competition review for these industries, so that revision of legislation is necessary. This revision will include ensuring that sub-national markets must be considered, and joint dominance is made actionable for enhancing competition.

These recommendations have major political economy salience in that they would oblige more attention to local and not just national markets, a fact very important to electoral

[1] The opinions expressed in this brief are those of the authors. They do not purport to reflect the opinions or views of the Australian National University. Comments from Philip Withers are gratefully acknowledged, but the views expressed are those of the authors.

constituents. And, the ability to address collective dominance could have major benefit for cost-of living issues, such as even reducing increases in the price of beer.

BACKGROUND

1. **Defining the Relevant Market**

Defining the relevant market is important in determining the extent of competition between competitors and also the boundaries of economic likely effects of anti-competitive conduct (such as tying). The relevant market identifies the competitive constraints a firm faces and so permits an assessment of the existence, creation or strengthening of market power – definable as the ability of a firm to raise price above the long-run competitive level. Market definition involves both a product market dimension and a geographic market dimension. And while the latter can be seen as less important in many countries, the geographic market must not be forgotten in the Australian context given the large land mass and low population.

The most commonly used tool in market definition is called the hypothetical monopolist test (HMT)[2]. This test defines the geographic market as the smallest area or region in which a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price (SSNIP) above the competitive price level. So, for example, the geographic market for groceries in a remote area would consist of the narrowest region in which a single supermarket could profitably impose a 5-10% price increase above the competitive level because of (i) the inability (or unwillingness) of its customers to travel to other stores outside the region and (ii) the inability of supermarkets outside the region to supply customers within it.

Of course, the price used is the competitive price which is likely to differ by region according to differences in transport costs etc. Assuming a national market subsumes regional differences in costs within a national cost and price. Applying the HMT solely at a national level may suggest negligible anti-competitive effects from a tie (say between beer producers and beer taps in hotels) but, at the same time, impose insurmountable barriers to new entry at local levels (say by craft beer producers).

There is a tendency in competition law to focus on the constraints faced by the firm complained about (and investigated). For example, if there is a proposed merger between two national firms then the focus is on the national market for the products under investigation. So regional markets tend to be ignored in the investigation. If new entry can occur at local levels, then ignoring the impact on regional markets will ignore different impacts in regions from the alleged anti-competitive practice.

As a result, potential new competition and innovation at the local level may be prevented. For example, two national beer producers may each impose exclusivity arrangements on pubs and other retail outlets nationally, and also price nationally despite local cost and competition differences. These exclusivity arrangements may make entry more difficult for

[2] OECD Roundtable on Market Definition, 25 May 2012: https://one.oecd.org/document/DAF/COMP(2012)13/En/pdf

new, large international beer producers who wish to compete at the national level, but not impose a barrier. But at the same time these national exclusivity arrangements may make it practically impossible for small new producers (such as craft beer producers) to enter local markets to gain a foothold perhaps with new innovative beers and production methods.

A competition agency by wrongly assuming a relevant market as national is likely to ignore the impact of the national anti-competitive practice on potential small new regional entry, even when entry by a craft brewer is highly profitable. Because of time constraints imposed on competition regulators by their legislation, there may not be time or resources to properly examine differential impacts of alleged anti-competitive practices.

The Committee should therefore address this issue by looking at the history of market definition in Australia and whether both product and geographic market definitions have been appropriate over time and whether the national definition subsumes important regional differences that, if acknowledged, could advance competition.

2. **Should Competition Legislation be amended to allow for Joint (or collective) Dominance?**

Collective Dominance is a term that has been developed by the European Union Courts. The term has its origin in the wording of Article 102 of the Treaty on the Functioning of the European Union (TFEU), which states that: "Any abuse of one or more undertakings of a dominant position within the internal market […] shall be prohibited[…]". It is clear that this wording suggests the possibility of an abuse by two or more undertakings.

Collective dominance under Article 102 (TFEU) was first accepted by the European Union General Court in Italian Flat Glass (1992). Then in the Compagnie Maritime Belge (2000, paragraph 45), the EU Court of Justice stated that collective dominance is a position: "held by two or more economic entities legally independent of each other, which from an economic point of view, present themselves of act together on a particular market as a collective entity."

In Airtours (2002, paragraph 62), the EU General Court actually established a three-prong test for a finding of collective dominance as follows:

- Each operator must have the ability to monitor the behaviour of the others as to whether they are adopting a common policy.
- This tacit collusion must be sustainable over time.
- The reaction of actual or potential competitors and consumers must not impact the benefits of joint action.

The EU Court of Justice confirmed the Airtours test in Impala II (2008, paragraph 251) and held that the three Airtours criteria can also be established indirectly.

Australia does not have such joint dominance (or collective dominance) in its competition legislation. Normally, for Australia, tying and bundling and exclusive dealing are dealt with

under s 47 of the Competition and Consumer Act 2010 (Cth.). In 2022, Gilbert &Tobin[3] noted the following:

> "Currently, there is no separate concept of collective dominance in Australia. However, more than one corporation may have a substantial degree of power in a market (section 46(7)). In determining whether a corporation has a substantial degree of market power, a court may: combine the market power of the corporation and its related entities (section 46(3)); and take into account any market power derived from contracts or arrangements with others (section 46(4)(b))."

Further analysis is necessary to determine the overlap between sections 46 and 47 and whether they adequately deal with the prevalence of duopolies in Australia. The effects test in s 46 came into operation in 2017 following the Harper Review. The House Committee could assess whether this change would cover (or influences) the kinds of practices used in the brewing and various other important duopolies in Australia, but a direct enunciation of the concept and test, as for Europe, would make this clear and explicit and powerful.

3. Application: The Beer Industry Case

The problems for competition in the beer industry are well covered in the opinion from Professor Rhonda Smith[4] and in the media by Adele Ferguson[5], and, on an international basis in the PHD thesis of Erin McPherson[6] which examines beer (and petrol) across the UK, US, Belgium and Australia. More detail on the beer industry case, as an illustration of this problem, can be provided to the House Committee upon request, including duopolistic use of tying during Covid in local markets to entrench concentration and prevent lower price craft beer competition.

In ACCC decisions that did not oppose major acquisitions in the beer industry, a conventional almost subconscious bias that saw the market only as national (and which merged retail and on-premises beer as one market) is evident. The most recent such decision to not intervene was November 2021, and the limits to market definition and the absence of analytic instruments to deal adequately with collective dominance seem quite evident [7]. Should the changes to legislation proposed above here be accepted, the ACCC should revisit these decisions, as well as being empowered to examine more effectively, for the purposes of workable competition,other important markets where there may be joint dominance,

Canberra
20 November 2023

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[3] https://www.gtlaw.com.au/knowledge/dominance-australia-2022

[4]Arrangements in the Australian Beer Industry, Submission to ACCC - Rhonda L Smith Nov 2013

[5] Adele Ferguson, "Craft brewing industry says ACCC's crackdown has gone flat", Australian Financial Review, July 18. https://www.afr.com/opinion/craft-brewing-industry-says-acccs-beer-crackdown-has-gone-flat-20160717-gq7khk

[6] Erin McPherson, (2015) An examination of the competitiveness of the methods by which beer has been distributed in the UK focusing on the beer tie agreement. PhD thesis, University of Glasgow, https://theses.gla.ac.uk/6678/

[7] https://www.accc.gov.au/media-release/accc-will-not-oppose-lions-proposed-acquisition-of-fermentum