MinterEllison's comments on Exposure Draft – Competition and Consumer Amendment (Competition Policy Review) Bill 2016

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MinterEllison

MinterEllison welcomes the opportunity to provide comments to the Commonwealth Treasury in response to the Exposure Draft of the Competition & Consumer Amendment (Competition Policy Review) Bill 2016 (the **CPR Bill**).

Introduction

1. The release of the CPR Bill following from the Final Report of the Competition Policy Review (the **Harper Report**) is an important step towards improving Australia's competition law framework, a step which will in turn support microeconomic reform to resuscitate productivity growth in Australia.

2. MinterEllison appreciates the opportunity to make this submission. We have assessed the CPR Bill through the lens of our Australasian Competition Group's broad experience of competition issues and we wish to provide comments on three aspects.

Summary

3. These three key aspects are:

    a. *Merger authorisation process:* MinterEllison endorses collapsing the existing separate processes for formal merger clearance (by the ACCC) and merger authorisations (by the Australian Competition Tribunal) into a single process. MinterEllison is concerned, however, that the proposed limitations on merits review by the Tribunal of ACCC decisions risk undermining the utility of the proposed new authorisation process. Accordingly:

        i. proposed section 101(2) should make clear that a review of a merger authorisation decision is, like review of other authorisation decisions, a full rehearing of the merits of the merger authorisation application; and

        ii. proposed section 102(8) which sets out limitations to Tribunal reviews should not be implemented.

    b. *Misuse of market power:* MinterEllison suggests an approach for consideration which would better allow businesses to be confident that they can readily distinguish lawful from unlawful unilateral conduct. The second guidance factor in proposed section 46(2)(b) - conduct "*preventing, restricting or deterring the potential for competitive conduct in a market or new entry into that market*" – could be elevated from being a guidance factor of uncertain weight to part of the prohibition itself in s46(1). This change preserves the essence of the proposed drafting but would mean the section targeted firms:

        i. with substantial market power;
        ii. from engaging in 'anti-competitive conduct' (where that term is defined to mean conduct "*which prevents, restricts or deters the potential for competitive conduct in a market or new entry into a market*");
        iii. with the effect or likely effect of substantially lessening competition.

    c. *Admissions of fact:* Proposed changes to section 83 of the CCA extending its operation in relation to admissions of fact should be abandoned to avoid discouraging settlement of enforcement proceedings. Failing that, the proposed drafting potentially over-captures things which on any view ought not to be included as admissions for the purposes of s83 by applying generally if the admission is made in proceedings. That should be clarified.

Merger Authorisation process

4. Separate existing processes for formal merger clearance (by the ACCC) and merger authorisations (by the Australian Competition Tribunal) are proposed by the CPR Bill to be collapsed into a single process and included with the ACCC's existing general power under s88 to authorise conduct which may breach the anti-competitive conduct prohibitions in Part IV of the CCA. MinterEllison endorses that approach.

5. MinterEllison is concerned, however, that the proposed limitations on review by the Tribunal of ACCC decisions risk undermining the utility of the proposed new authorisation process.

6. The CPR Bill would limit Tribunal review of ACCC merger authorisation decisions as follows:

    a. Tribunal reviews of merger authorisations are not a full re-hearing of the matter on the merits;

    b. on review, the Tribunal may have regard only to:

        i. material produced or evidence given to the ACCC in connection with its determination;

        ii. matters that were referred to in the ACCC's reasons for making the relevant determination; and

        iii. any information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting with such persons as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence given to it by the ACCC; and

    c. Tribunal review must be completed within a strict 90 day timeframe.

7. The main problems which we see with that approach are that:

    a. first, as a 'base design' the CPR Bill adopts the current (unused) formal merger clearance review evidential process (which is largely limited to 'the papers' before the ACCC); and

    b. second, the CPR Bill limits the Tribunal's scope to seek clarifying information or evidence.

8. As an experienced merger advisor, MinterEllison believes that the current formal clearance process has remained unused, in significant part, because the 'on the papers' review process is uncertain and untested, creating a real disincentive to use the process. Adopting the approach proposed in the CPR Bill to limit merits review risks the new process also being 'still born'.

9. In our view:

    a. the case for the proposed limited form of merits review for merger authorisation is very weak and it greatly dilutes the existing rights of merger parties to put all relevant lay and expert evidence before the Tribunal, to cross-examine witnesses, to seek subpoenas for third party documents and so forth which are currently available under the existing merger authorisation process;

    b. the proposed drafting is inconsistent with the underlying intent of the Harper Report recommendations. The main argument for reforming the clearance system so as to have the ACCC as the decision maker of first instance for mergers was because the initial evidence gathering undoubtedly sits better with the ACCC than it does with the Tribunal. However, the argument for reform has never been that the Tribunal is not an appropriate body or that its processes are faulty –

indeed, the broad consensus is that the Tribunal is an excellent review body for specialist competition law matters. That is certainly MinterEllison's experience;

c. very limited merits review as proposed will stymie the benefits of the reforms. If merger parties are uncertain (or are clearly unable to) put all relevant lay and expert evidence, to cross- examine witnesses called by the ACCC, and to make oral submissions, they will not use the new formal authorisation process. It is plain to those practitioners – including those at MinterEllison - that have run contested merger cases that have come before the Federal Court and the Tribunal in recent years that rigorous testing of the evidence has led to outcomes that are at odds with the cases advanced by the ACCC. Without the ability to test those cases fully on merits review merger parties will have a strong incentive to continue to use the informal clearance process with an effective right of 'full merits review' in the Federal Court (albeit that the Federal Court is a less specialist review body than the Tribunal);

d. the discipline of having a third party expert appeal body such as the Tribunal being able to review the lay and expert evidence in a full and unfettered manner (subject always to its broad discretion to run hearings as its sees fit) is critical to the advancement of sound economic decision making in merger cases in Australia. It will impose a real and immediate discipline on the ACCC and merger parties; and

e. there is no compelling reason to depart from the approach to review in all other cases involving authorisation of conduct which risks breaching Part IV prohibitions, for which full merits review is specified.

10. The Administrative Review Council has recommended that, as a matter of principle, decisions that are likely to affect a person's interests should be subject to merits review.[1] Where 'limited' merits review is proposed, it is typically to address concerns about the cost and delay involved in frequent and lengthy appeals. Neither of these considerations are applicable in relation to merger authorisation decisions. It is noteworthy that:

a. applications to the Tribunal for merger authorisation (and in authorisation cases more broadly) are relatively rare, reflecting that commercial considerations will often deter firms from pursuing appeals;

b. the Tribunal has ably and efficiently determined merger authorisations as the decision maker of first instance (ie. without limitations on evidence) within the 3 month statutory timeframe currently allowed; and

c. the need for speed is almost always a commercial problem for the merger parties, rather than the ACCC, so it is in the merger parties' interests to move things as quickly as possible and certainly within the 3 month proposed statutory timeframe.

11. Accordingly, MinterEllison submits that:

a. proposed section 101(2) should make clear that a review of a merger authorisation decision is, like review of other authorisation decisions, "*a rehearing of the matter*"; and

b. proposed section 102(8) which sets out limitations to Tribunal reviews should not be implemented.

[1] Administrative Review Council, *What decisions should be subject to merit review?*, 1999, paragraph 2.1.

Misuse of market power

12. MinterEllison suggests an approach for consideration which would better allow businesses to be confident that they can distinguish between lawful and unlawful unilateral conduct. Adopting something like the Canadian law approach by identifying an adjectival qualification such as "exclusionary" conduct or "anti-competitive" conduct would establish a genus of bad conduct to better guide business as to what s46 is directed to prohibiting. Section 46 is directed to prohibiting conduct which makes it more difficult for competitors to compete, rather than conduct which forces competitors to be more effective.

13. We think the second guidance factor in proposed section 46(2)(b) could be repositioned to achieve this aim. The subsection refers to conduct "*preventing, restricting or deterring the potential for competitive conduct in a market or new entry into that market*". Elevating that fundamental concept from being a guidance factor of uncertain weight (as it is in proposed s46(2)(b)) to part of the core prohibition itself in s46(1) would mean s46 targeted firms:

    a. with substantial market power;
    b. from engaging in 'anti-competitive conduct' (where that term is defined to mean conduct "*which prevents, restricts or deters the potential for competitive conduct in a market or new entry into a market*");
    c. with the effect or likely effect of substantially lessening competition.

14. The need to elaborate in this way arises from the removal of the 'take advantage' element in the proposed drafting of s46. Under the existing form of s 46, a company with substantial market power is prohibited from engaging in conduct which makes sense for it only because of the market power it holds – that is "taking advantage" of market power required by s 46. In other words, a company with market power is not prevented from conducting itself (even aggressively) in the same way as any firm without market power would.

15. While MinterEllison understands the intent of the amendment, removing the 'take advantage' element as is proposed risks undermining some of the confidence with which businesses holding substantial market power can approach competitive strategy. The lack of any qualification to the broad noun "conduct" in the proposed drafting leaves to the competition test all the work required to sort between good and bad conduct by firms with substantial market power.

16. Will such companies know what they can or cannot do while not chilling 'good' conduct? There is a risk that a business may not act competitively because it fears the competition test may apply to normal aggressive competitive conduct which may happen to have the consequence of making the resultant structure of the market less competitive for a time, for example by improving a product or reducing price to take share from a competitor which can then no longer survive in the market. That is not a risk that should be lightly taken.

17. Accordingly, MinterEllison sees benefit in qualifying the word "conduct" in proposed s46(1). It would be helpful to express generically what type of conduct the CCA is aiming to catch – not just in an ACCC guideline or explanatory materials - but in the statute itself. Including some adjectival qualification such as "exclusionary" conduct or "anti-competitive" conduct for example would increase certainty and reduce chilling risks, giving some comfort to businesses that 'normal' competitive conduct is not intended to be caught by the competition test.

18. Canadian law[2] illustrates such an approach – it applies to a so-called "practice of anti-competitive acts" by a dominant firm with the effect or likely effect of substantially preventing or lessening competition. There is a non-exhaustive list of types of conduct which are deemed to be anti-competitive acts, such as

[2] Section 79 *Competition Act* RSC 1985, C-34 (as amended)

margin squeezing, pre-emption of scarce facilities, incompatible product specification, predatory pricing and so forth[3]. It is not a closed list but it establishes a genus of bad conduct as guidance to what the statute is directed at prohibiting – namely, conduct which makes it more difficult for competitors to compete rather than conduct which forces competitors to be more effective.

19. In our view, explicitly delimiting the central "conduct" concept in this manner would workably mitigate much of the risk of chilling pro-competitive conduct.

Admissions of fact

20. Section 83 of the CCA enables findings of fact made against a corporation in one proceeding (typically brought by the regulator) to be prima facie evidence against the corporation in another proceeding (typically brought by a private litigant). The proposed amendment to section 83 in the CPR Bill would extend the section to allow similar use of admissions of fact in other proceedings. MinterEllison has real concerns that the changes would over-capture some admissions and perversely deter efficient and genuine efforts to settle proceedings.

21. Many ACCC proceedings are resolved by the corporate defendant making admissions of fact that establish the contravention. If those admissions will also constitute prima facie evidence against the corporation in another proceeding in accordance with the proposed amendment to s83, then this will:

    a. operate as a potentially significant disincentive to the efficient and appropriate settlement by private parties of ACCC enforcement proceedings; and

    b. mean that litigants in public enforcement proceedings who do wish to settle will be encouraged to agree facts calculated to minimise potential liability for damages in follow-on private actions rather than facts properly reflecting the core conduct at the heart of the ACCC's concerns.

22. There would be a real risk that settlement of proceedings will either be discouraged altogether or discouraged from occurring in a way which reflects the essence of the wrongful conduct. This latter point raises an important issue for public confidence in the administration of justice. The amendment risks creating an incentive for parties to manufacture 'facts' to settle a proceeding which may then be disproved if a subsequent follow on damages suit emerges. On that basis, MinterEllison recommends against the proposed amendment.

23. If, contrary to our recommendation, the reform to s83 proceeds, MinterEllison notes that the proposed drafting potentially over captures things not necessarily intended to be an admission in the relevant sense by applying generally "if the … admission is made in proceedings". For such an admission "made in proceedings" proof can occur under proposed subsection 83(2)(b) by production of "a document in which the admission was made". In our view, this drafting gives rise to uncertainty as to whether, for instance, an admission in correspondence (such as a without prejudice offer to settle) could be "an admission … made in proceedings". We do not think such an admission is intended to be caught or should be caught under section 83. For that reason, we suggest that s83(2)(b) be clarified.

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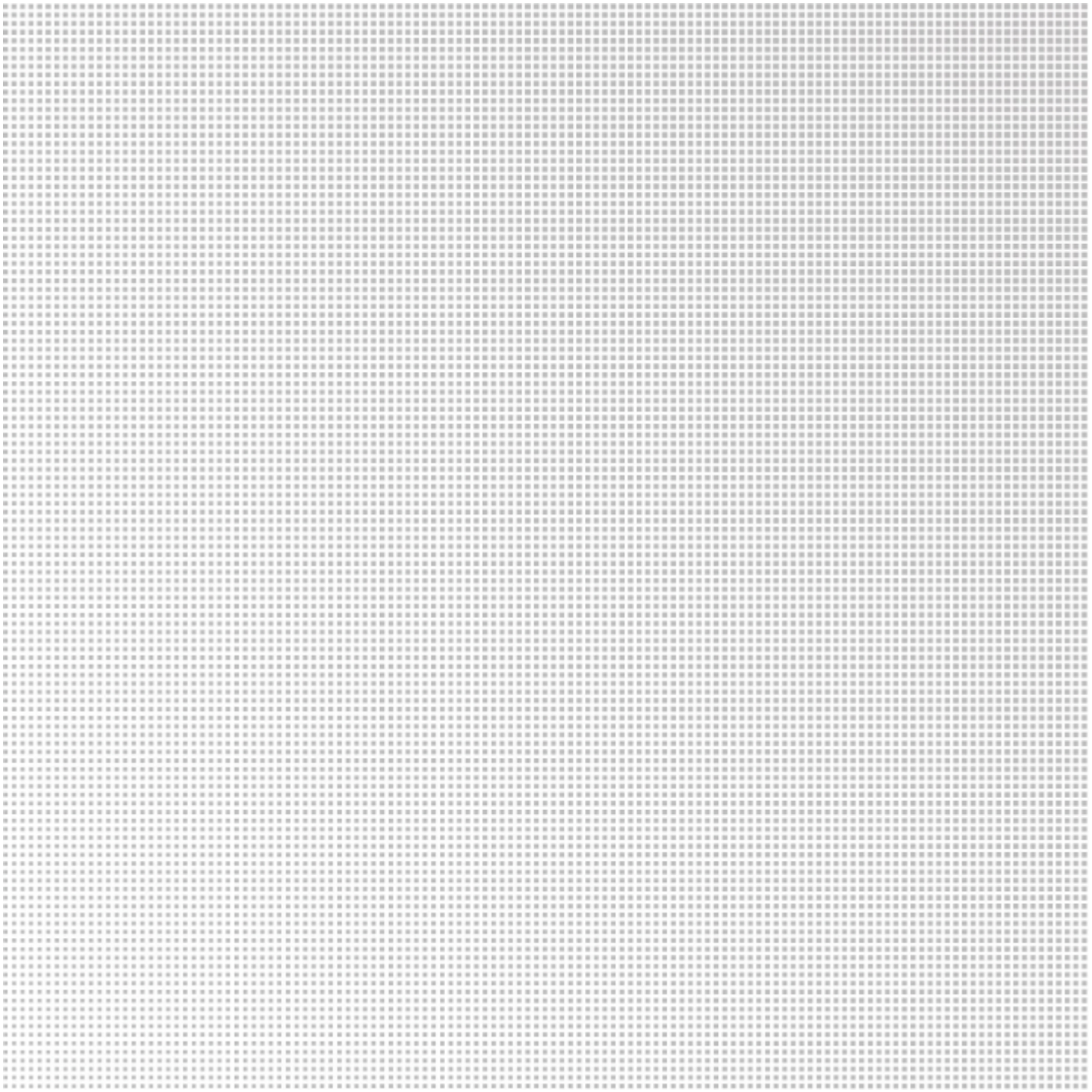
[3] Section 78 of the *Competition Act*



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