Queensland Government Submission to the (Dawson) Review of the Competition Provisions of the Trade Practices Act 1974

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Context

Effective competition laws contribute to the productivity, efficiency and growth of an open, integrated economy. The *Trade Practices Act 1974* (TPA) provides the foundation for the Australian economic regulatory regime. Ongoing scrutiny of how well it is facilitating favourable economic outcomes is a critical element of regulatory reform.

The Queensland Government is committed to the continuation of strong economic growth in both traditional and emerging knowledge-intensive industries. The State's Economic Strategy is consistent with the Organisation for Economic Cooperation and Development's (OECD) position on the required policy setting to support economic growth in the "new economy". Key policy elements include:

- promoting competitive and efficient markets;
- continuing liberalisation of trade and investment;
- ensuring the regulatory framework for investment and entrepreneurial activity is appropriate;
- supporting diffusion of ideas and technology; and
- systematically evaluating and improving the effectiveness of policies.

In particular, a high level of domestic competition is one of the most critical economic factors that support innovation. Competitive pressures provide the incentive to seek out new solutions, generate new products and processes and invest in more efficient infrastructure.

The need for sound economic argument

The Queensland Government is largely satisfied with the operation of the existing TPA and the current range and level of powers available to the ACCC, within the existing accountability mechanisms.

The ACCC is an active, well resourced and visible regulator with effective power to advance its agenda. These are desirable attributes.

Deregulation and microeconomic reforms generally, over the last decade, have been accompanied by a very significant growth in the number of regulators and volume of regulatory activity through which business must navigate. Over-regulation runs the risk of dampening economic reforms by compromising legitimate competitive business activity and investment, and through the imposition of high compliance costs on business.

The economic arguments used in regulatory assessments are subject to change, as is the economic environment by virtue of its dynamic nature. It is not possible for law makers or regulators to be infallible. Given the risks of over regulation, some conservatism in implementing regulatory reform is desirable.

Given that any form of regulatory intervention in the market has the potential to create negative distortions, any changes will need to be based on sound economic argument and a clear demonstration that the current provisions are inadequate.

Queensland looks forward to the Dawson Committee's analysis as an opportunity for a valuable contribution to be made to the national debate in terms of:

1) providing greater depth and quality of economic argument, specific to the Australian economy, in relation to the competition provisions of the TPA; and

2) advice about the improving the administration of the Act in terms of:
    - particular functions (eg. consideration of mergers and their authorisation); and
    - the focus of ACCC activities (eg. educational role relative to litigation).

Initial policy position

Some of the matters raised in submissions to the Dawson Review are controversial. Queensland is mindful of suggested amendments put forward by the Australian Competition and Consumer Commission (ACCC) notably:

- criminal sanctions for major collusive activity;
- higher civil sanctions;
- application of an effects test to determine whether there has been misuse of market power; and
- the power to issue cease and desist orders to be granted to the ACCC.

Queensland offers the following comment on the ACCC proposals and other issues relating to the effectiveness of the TPA.

Introduction of an "effects test" to augment the "proscribed purposes test" into Section 46 (misuse of market power)

The proposal to introduce an effects test is regarded as the most significant of those promoted by the ACCC to the Dawson Review. Its implementation could be expected to have a distortionary influence on the competitive behaviour of firms in the market place. For this reason, extreme caution is requested in considering an effects test, especially if the test is being considered in conjunction with cease and desist powers.

The combination of an effects test and cease and desist powers effectively reverses the onus of proof. The reversal of the onus of proof would require businesses to prove themselves innocent to the satisfaction of the ACCC (or a tribunal) if their behaviour was questioned by the ACCC. Having to prove that one acted honestly is very difficult.

It is noted an effects test has been considered by five separate reviews of the TPA since 1989[1].

An effects test reduces clarity for business as to where competitive activity becomes anti-competitive (eg. where discount pricing becomes predatory pricing). Other options may be more effective including, for example, improving the effectiveness of the purpose test by increasing the probability of identifying conduct in breach of the purpose test. The recent release by the ACCC of a discussion paper entitled "Leniency policy and cartel conduct" appears to be aimed at achieving this objective.

It is acknowledged that an effects test is employed in overseas jurisdictions, however, this fact, of itself, is not a sufficient argument to adopt the test. The applicability of the test to the Australian context cannot be considered in isolation of the other regulatory considerations and market features of those jurisdictions.

Queensland is supportive of the principle that the TPA should enable effective protection to firms and the economy from abuse of market power. This should be achieved without compromise of the principle of natural justice, procedural fairness or excessive regulatory burden.

The Queensland Government recommends against the introduction of an effects test without further extensive and robust economic debate about the comparative costs and benefits of alternative approaches to achieving the policy objective.

Greater ability of the ACCC to intervene quickly through "cease and desist powers" to prevent damage to firms or markets from anti-competitive behaviour

For reasons similar to those above in relation to the effects test, the introduction of the power for the ACCC to issue cease and desist orders is not supported without a clear understanding of the potential impacts on competitive activity. It is also suggested the Committee consider whether a commensurate increase in accountability is necessary to reassure the public about the application of enhanced powers.

[1] *Competing Interests: Is there Balance*. Review of the ACCC Annual Report 1999-2000. Standing Committee on Economics, Finance and Public Administration.

Harsher penalties - Introduction of criminal sanctions

There is apparent support from many entities and individuals for the introduction of criminal sanctions for serious economic crimes and for harsher civil pecuniary penalties. Queensland supports the view that major cartel activity to collude to fix prices, rig bids, and make market sharing arrangements and so on, are serious economic crimes that warrant criminal penalties.

The Queensland Government perceives there are a number of issues to be considered in relation to the ACCC proposals for harsher criminal penalties. A better understanding of these issues is a vital prerequisite to supporting the introduction of such penalties. These issues include:

- there appears to be the need for significant levels of restructuring of the legal framework in relation to the onus of proof, collection of evidence, and requirements for warrants to search premises. The requirements for these matters should be as stringent as they are in other areas of criminal law.

- the rationale underlying criminal sanctions for big business only, as opposed to firms of any size, needs to be further developed. Legal precedent suggests stealing, for example, is a crime irrespective of the wealth of the perpetrator. It is not clear why an arbitrary distinction, based on turnover, capitalisation or number of employees, should mean the difference between criminal or non-criminal behaviour. An international precedent for this distinction is not known.

Harsher civil penalties

The Queensland Government's main focus in assessing any proposal for the introduction of harsher penalties under section 76 of the TPA would be ensuring a reasonable balance between:

- clarity as to the application of the anti-competitive provisions by the courts and ACCC;
- the capacity of Australian firms to understand and comply with the TPA and the costs of doing so;
- the ability of the ACCC to litigate or threaten litigation from a position of greater influence, resources and perhaps favourable information asymmetry; and
- preventing significant economic costs to the community as a result of a breach of the TPA.

The Courts commonly do not impose the maximum pecuniary penalties (which are $500,000 for an individual and $10 million for a corporation, per offence). The largest fine to date is $15

million, imposed in 2001 on Roche Vitamins Pty Ltd for multiple offences. There appears to be scope for the courts to impose significant penalties already.

Recovering losses - time limit to bring an action and difficulty in loss assessment

A related matter to addressing the effects of anti competitive conduct is the ability of a party which has suffered loss through that conduct to assess the extent of their losses and seek compensation.

Queensland has suffered loss or damages more than once as a result of conduct which breaches the TPA, particularly involving collusion. The State has coordinated major litigation against companies following offence proceedings against those companies by the ACCC. For some of these companies it was a repeat offence.

The experience of the State in these matters suggests:

- for some companies which were successfully prosecuted by the ACCC the State has had difficulty quantifying the loss arising from their failure to deliver contracted services; and

- it may be possible for a person to avoid liability simply because their breach was not known within 6 years after the offending behaviour.

It is recommended an amendment of section 82(2) be made to enable an action to be commenced within 6 years of the relevant event becoming known to the victim of the conduct suffering the loss.

Effectiveness of the mergers and acquisitions provisions and processes for merger review

There is an argument that if Australian firms were given greater freedoms to merge into larger more dominant domestic entities, they would be more internationally competitive.

Queensland believes the basis for the international competitiveness of Australian firms is their success in a vigorously competitive domestic market.

A lack of fair competition in the domestic market runs the risk of Australian consumers, customers and input suppliers of merged entities subsidising foreign consumers or shareholders. A reduced competitive discipline brought about by a weakening of the mergers provisions of the Act may stifle innovation and productivity.

A significant area of criticism from business of the current mergers provisions relates to the administrative processes of the ACCC, particularly in relation to authorisation of mergers. Specific complaints include a lack of commercial timeframes and the opaque nature of some ACCC decisions when dealing with merger applications.

The Queensland Government is supportive of reducing the regulatory burden where possible, but wary of attempts to limit the ACCC's powers or effectiveness in this area. There may be a case for a greater number of technically qualified staff to support this ACCC function.

Authorisation of anti-competitive activities (other than mergers)

Specific matters of interest to the State are:

- use of ACCC power to grant authorisations (section 88) based on experience of this with primary industry bodies; and
- the State providing legislative exemptions in specifically authorised legislation (section 51) as an effective part of the NCP framework.

Queensland is satisfied with the effectiveness of these activities and supports the continued effective operation these provisions.

Accountability of the ACCC

Some firms and industry bodies have been critical of the ACCC's aggressive pursuit of its agenda in the media, its recourse to threat of, or actual, legal action and its use of its information gathering powers. Some have argued the regulator should itself be subject to regulation or some form of oversight.

The Queensland Government considers the existing lines of accountability within which the ACCC must operate, together with the remedies available under administrative law, are generally adequate. As noted earlier in the submission, an active and well resourced regulator is desirable. Any proposal for an additional level of oversight will need to demonstrate it can produce significantly better outcomes than under the current framework.

Request to review specific TPA reform recommendations

The Queensland Government notes changes to the TPA and its administration have considerable ramifications for the State's businesses and its citizens as consumers. Penalties for breaches, the powers of the ACCC, regulatory principles and accountability processes also have potential flow-on consequences for consumer protection agencies in the States and Territories.

The Queensland Government would like to see strong and detailed arguments and have sufficient time to evaluate any specific proposals for TPA reform prior to any significant amendment being undertaken on the basis of recommendations developed by the Dawson Committee. The Ministerial Council for Consumer Affairs and Heads of Treasuries forums should be given an opportunity to respond to the Dawson Committee's draft recommendations.

Given the significance of the Review recommendations, Queensland encourages the Dawson Committee and the Commonwealth Government to allow a reasonable period of public consultation on the review findings.