

18 February 2007

Sir,

Your Issues Paper asks whether the current consumer framework is fundamentally sound and what broad changes to the framework could be made. It seems to me that competition law and policy is a fundamental part of the current consumer framework. A corollary to competition is consumer choice. By fostering competitive markets, competition law and policy enhances consumer choice and promotes the ability of consumers, by the choices they make, to communicate their preferences to producers in a relatively efficient manner.

I invite the Commission to consider whether the consumer framework in Australia would benefit from having a "Market Investigation Reference" process as set out in the UK Enterprise Act. (See the attached OFT document on Market Investigation References.) I understand that the Office of Fair Trading can make Market Investigation References to the Competition Commission, and I wonder whether the ACCC could perhaps be allowed to make Market Investigation References to, perhaps, the Productivity Commission.

It seems to me that ex-post enforcement of competition laws, while having a place, is not necessarily the best tool for addressing the underlying (structural) problems of market failure. A Market Investigation might be a good way to identify the root causes of market failure, and working out the most effective remedy going forward. This might include remedies that are subject to a sunset clause or if appropriate further review. The remedy might include a voluntary or enforceable undertaking offered by a corporation in lieu of more direct regulatory measures.

I wonder whether the current consumer framework relies too heavily on enforcement of the Trade Practices Act to deal with market failure. For example, I wonder whether consumer groups sometimes have unrealistic expectations of the ACCC being able to address perceived "price fixing" conduct in the retail supply of petrol. This consumer pressure can arguably lead to unwarranted high profile enforcement action that might be motivated, in part, at appeasing consumers. A power to make Market Investigation references might give the ACCC greater scope to address the underlying causes of consumer grievances in a more effective manner.

A significant issue with ex post enforcement, I think, is that it unreasonably forces firms to work out in advance what conduct is or is not legitimate. An ex ante approach seems fairer - any remedy for market failure is only implemented going forward, without having to find that there has been a contravention of the Trade Practices Act. In this regard, firms might be more willing to acknowledge that there are legitimate issues that need to be addressed going forward, without concerns that this would involve acknowledgement of any wrong doing or contravention of the Trade Practices Act.

Another benefit of a Market Investigation is that it gives consumer, business, and other community groups an opportunity to participate in the Market Investigation, and to work out a remedy that addresses market failure. In contrast, ACCC enforcement action is generally confined to a judge, the ACCC and the defendant, with little opportunity for the wider public to have any say at all. For example, this could give consumer groups a say in debating calls for protection from competition that one sometimes hear.

In a 2005 speech (attached), the Chairman of the UK Competition Commission (Paul Geroski) outlines three reasons for holding market investigations as opposed to competition law enforcement action:

(a) Market inquiries focus on the level of the market rather than at the level of the individual firm. For this reason, market inquiries are better able to identify systemic problems and develop solutions that most directly address the underlying causes of market failure.

(b) There are often many reasons why a market may not be working well, that have little to do with technical breaches of competition law prohibitions.

(c) The goal of market inquiries is to ensure that markets which are not very competitive will be more so in the future than they have been in the past. In contrast, competition law enforcement only seeks, at most, to eliminate certain anti-competitive practices or agreements.

A list of Market Investigation References undertaken by the Competition Commission is available at http://www.competition-commission.org.uk/inquiries/reference_type/market.htm. They illustrate the types of consumer issues that can be more effectively addressed through a Market Investigation, and the range of remedial measures that could be developed to address the underlying causes of market failure. It is interesting to see how the Competition Commission has been able seek industry and public input on proposed measures to address market failure, and refine those measures with the benefit of those input. Such an approach would simply not be possible in a law enforcement framework.

I urge that Productivity Commission to seek public comment on whether the consumer framework could benefit from Market Investigation References.

Kind regards,

K Choong