



Law Council
OF AUSTRALIA

Business Law Section

15 August 2014

Professor Ian Harper
c/- Competition Policy Review Secretariat
The Treasury
Email: contact@competitionpolicyreview.gov.au

Copy to:

Mr Rod Sims
Chairman
Australian Competition & Consumer Commission
Email: rod.sims@acc.gov.au

Dear Professor Harper,

Australian Competition Policy Review

We refer to the submission dated 2 July 2014 (**Submission**) made by the Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) in response to the Issues Paper (**Issues Paper**) dated 14 April 2014 released by the Competition Policy Review.

In light of the article in last Friday's Australian Financial Review that focussed on a number of issues purportedly raised as criticisms of the ACCC in the Submission, the SME Committee wishes to respond to the apparent interpretation of its Submission and further clarify some of the issues dealt with in the Submission given there are a number of places in the Submission where the language used has been interpreted as criticism of the ACCC. For example, with regard to difficulties for small businesses in being unable to claim products were Australian Made, the SME Committee recognises that the ACCC needed to cater for the positions of other stakeholder and regulatory organisations whose involvement may have caused an apparently inconsistent approach.

The SME Committee has for some time enjoyed a valuable and productive relationship with Dr Michael Schaper of the ACCC, the Deputy Chairperson responsible for the interests of small business. A number of the issues raised in the Submission were done so due to the opportunity provided by responding to the Issues Paper, whereas ordinarily these issues would have been raised through informal discussion with Dr Schaper who has regularly offered to consider concerns and suggestions of the SME Committee.

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This is particularly the case with the following aspects of the Submission, which are also clarified to temper perceived criticisms:

- The response to whether *'competition-related institutions are functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation.'*

The opinions proffered were drawn from experiences over some time by some members of the SME Committee and it is acknowledged that the ACCC may have since altered its approach. In particular, Dr Schaper explained earlier this year that the focus of the ACCC's Small Business Consultative Committee (**SBCC**) was shifting to liaising with businesses themselves, with the consequence that his separate liaising with the SME Committee was to be the primary interaction for legal input, rather than through representation on the SBCC.

- Under the responses to *'What are the experiences of small businesses to dealing with the ACCC?'*
 - o *'Small businesses as the subject of an ACCC investigation or litigation'*

The comment made that *'there is still a tendency for the ACCC to be somewhat heavy handed in its dealings with small business'* is also drawn from experiences by some members of the SME Committee, noted as having been the ACCC's previous approach. The SME Committee does note that this approach has changed significantly in recent years and with the introduction of alternative sanctions under the new Consumer Law it is anticipated that the ACCC will look to increasingly utilise appropriate available alternative sanctions for small businesses.

- o *'A consequence of being subject to a mandatory industry code'*
- o *'Small business as a complainant about the conduct of another trader'*

It has been the experience of SME Committee members that the ACCC often does not act or take steps to investigate and seek compliance with an industry code unless and until someone makes a formal written complaint, and that of more recent times the ACCC have not been advising complainants as to whether their complaint is being investigated.

The SME Committee acknowledges that given the large number of verbal and informal complaints and enquiries raised with the ACCC, from a practical perspective it can only be those that are formally raised that may be acted upon by the ACCC staff who deal with these matters and that it can be challenging to ensure complainants are made aware

of the instigation or not of an investigation or the progress of complaints. The SME Committee also acknowledges that the ACCC must prioritise its enforcement activities and regularly refers low value or appropriate matters to relevant consumer affairs bodies.

However, as raised in the Submission, keeping complainants informed represents good public administration practice. The ACCC does also need to be aware of situations where small businesses, particularly franchisees, refrain from making formal complaints for fear of retribution and are thereby vulnerable to unscrupulous operators and perhaps use its random audit power to focus enforcement action against those not complying with the law or a Code.

We request that the Submission be accepted having regard to the clarifications outlined above. The SME Committee welcomes the opportunity to provide input by way of Submission and looks forward to continuing its valuable liaison activities with the ACCC to support the interests of small business.

The SME Committee would be happy to discuss this further.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves

Chairman, Business Law Section