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Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted online at www.competitionpolicyreview.gov.au

SUBMISSION IN RESPONSE TO COMPETITION POLICY REVIEW DRAFT REPORT

Thank you for the opportunity to provide a further submission to the Competition Policy Review. This submission builds on the material provided to the Competition Policy Review Panel (**Panel**) by the Insurance Council of Australia (**ICA**) in our earlier submission of 10 June.

1. Overview of ICA position

- Statutory insurance schemes that are currently provided by Government monopolies should be opened up to competition.
- Government providers of statutory insurance should be subject to the same rigorous prudential regulation as general insurers, in accordance with the principle of competitive neutrality.
- General insurers are better placed than governments to underwrite statutory insurance schemes, to avoid financial risk to governments, volatility in financial performance, and political interference with the pricing of risk.

2. Regulatory restrictions

Draft Recommendation 11 states that all Australian governments should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

As the Panel's draft report outlines, this exercise was carried out in the late 1990s as a result of the National Competition Policy (NCP) reforms; however, the ICA is supportive of further work being done to address those areas where regulatory restrictions on competition continue to exist.

The draft report highlights in Box 8.2 a number of examples of regulations that restrict competition; one of which is "*compulsory workers' compensation insurance and third-party*

personal injury transport are only available from government monopoly providers in some States."[1]

The ICA provided detail about the benefits to consumers of competition in statutory insurance schemes, in both the initial submission to the Panel's issues paper, and in response to the Financial System Inquiry's specific request for further information:[2]

- Competition among insurers encourages innovation in risk management and claims management.
- Private sector insurers are subject to the detailed prudential requirements under the *Insurance Act 1973* (Cth), and prudential oversight by APRA, leading to risk pricing that fully funds longer tail liabilities. This provides consistent protection for policyholders and third party claimants.
- Competitive underwriting between private sector insurers enables governments to de-risk balance sheets, and to concentrate on the role of regulator of insurers licensed to operate in a scheme.
- Competitive underwriting between private sector insurers removes the pressure on governments to price premiums to meet political objectives. Political pricing of risk can lead to significant under- or over-pricing of risk by government, inefficient cross-subsidies between policyholders, and inter-generational inequities for policyholders.

It is the ICA's position that not only should statutory insurance schemes be opened up to competition, but that general insurers are better placed than governments to underwrite well-designed statutory insurance schemes.[3]

Shortly after the ICA provided its original submission to the Panel, the South Australian Government announced it would be opening up its Compulsory Third Party (CTP) personal injury motor accident insurance to the private sector.[4] South Australian Treasurer Tom Koutsantonis noted that the State Government should not be in the business of providing compulsory third party insurance, but could instead use the estimated $500m in initial surplus net assets that would be freed up by the privatisation to build and upgrade road infrastructure.[5]

The ICA supports the recommendation in the Panel's draft report that regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that (a) they are in the public interest; and (b) the objectives of the legislation or government policy can only be achieved by restricting competition.

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[1] The Australian Government *Competition Policy Review Draft Report* (September 2014) at page 76.
[2] Insurance Council of Australia *Submission to Financial System Inquiry Interim Report* (August 2014) at page 12.
[3] The ICA acknowledges the developing framework for the National Injury Insurance Scheme (**NIIS**). The website of the Treasury notes that "*The Australian Government is currently working with States and Territories to develop the NIIS as a federated model of separate, state-based no-fault schemes that provide lifetime care and support for people who have sustained a catastrophic injury*." In concert with the arrangements for the NSW Lifetime Care and Support Scheme for people who are catastrophically injured in NSW in a motor accident, NIIS arrangements in other jurisdictions may also be underwritten by the relevant government.
[4] Koutsantonis T (Treasurer, South Australia) *Private sector provision for CTP insurance*, media release, 19 June 2014.
[5] Ibid.

The ICA is of the view that applying a public benefit test to government monopoly statutory insurance schemes will likely reveal that there is no sustainable argument for restricting statutory insurance schemes to government providers.

The ICA is supportive of the process of reviewing government regulation being overseen by a proposed national competition policy body, as recommended by the Panel.

3. Competitive neutrality

The Panel notes in the draft report that government ownership can result in undue advantage if the government is exempted from regulatory constraints or costs, and recommends that Australian governments review their competitive neutrality policies.

Government statutory insurance providers are not subject to the same strict prudential requirements as general insurers in privately underwritten markets. Governments providing insurance, whether as monopolists or in competitive markets, should be subject to the same prudential and other regulatory requirements as general insurers, to ensure a level playing-field and protection for policyholders and third party claimants.

The ICA is supportive of the process of Australian governments reviewing their competitive neutrality policies being overseen by a proposed national competition policy body, as recommended by the Panel.

4. Misuse of market power – incorporating an "effects test"

The Panel recommends in its draft report that section 46 of the *Competition and Consumer Act 2010* (Cth) be extended to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, *or would have or be likely to have the effect*, of substantially lessening competition in that or any other market. The addition of the words emphasised above introduce an "effects test" into the existing purpose test.

The ICA strongly disagrees that the alleged difficulties in the application of section 46 to business conduct warrants the addition of an effects test to the unilateral conduct provisions. Rather than clarifying the boundary between anti-competitive and pro-competitive conduct, the proposed reframing of section 46 will create new uncertainly around the wider conduct of dominant firms. This uncertainty, along with other unintended consequences, could in fact lead to a significant lessening of competition, which is inconsistent with the objectives of the Review.

The ICA supports the findings of the Dawson Review (2003) that recommends no amendment should be made to section 46. We believe that the draft report provides no additional evidence to invalidate the findings of the Dawson Review. We have significant concerns that the Panel is recommending against the comprehensive analysis of the Dawson

Review. The recommendation also contradicts the aggregate findings from the 11 reviews outlined in Box 16.2 of the draft report, of which ten do not recommend the effects test. The ICA supports the Business Council of Australia's submission to the Competition Policy Review that further highlights flaws with the proposal.

The ICA's position is supported by the following points:

4.1 Reversing the burden of proof

We oppose reversing the evidentiary onus of proof to a corporation to demonstrate that the conduct would be a "rational business decision" by a hypothetical competitor. What is a rational business decision is highly subjective and a matter for commercial judgement that could be very costly to prove in a court. In a practical sense, a rational business decision will be shaped by a number of variables, which will vary significantly between different industries, firms, corporate structures and over time. The proposed parameters for a rational business decision are unclear, but in practice will likely involve creating assumptions on a range of issues concerning the hypothetical competitor, some of which are outlined below:

- What will the hypothetical competitor look like?
- What are the long-term strategic objectives of board members and shareholders?
- What financial resources are available?
- What is the risk appetite?
- Is the business entrepreneurial or mature?
- What market intelligence/insider sentiment/internal forecasts are decisions based on?

Hypotheticals are highly subjective and artificial constructs that should not be required to justify routine business decisions. Due to the nature of dominant firms, any business action (pro-competitive or anti-competitive) could potentially substantially lessen competition. The proposal may have a strong negative impact on competition as companies will seek to avoid lengthy/expensive litigation battles and repeated clearance/authorisation requests.

4.2 "Take advantage of market power"

The draft report includes discussion on the requirement "take advantage of market power".

Despite the draft report's criticism of the "take advantage of market power" test, current Australian case law provides more nuanced guidance to differentiate pro-competitive from anti-competitive competition, compared to the Panel's proposal. The introduction of the effects test, which includes a "rational business decision" defence, would need to be subject to extensive testing in the court system to gain practical certainty for business. Clarification through the courts could take another decade, which would only have a negative impact on the competitive process and add expense to all parties involved.

4.3 There is little evidence of a problem

There is little empirical evidence to suggest that section 46 is not currently adequately capturing anti-competitive conduct or that the section is too difficult to apply. We note that

that the ACCC regularly pursues section 46 cases and is often successful in proving a contravention of the provision.

4.4 Seeking consistency is flawed

Unilateral conduct prohibitions should not be harmonised with prohibitions relating to multi-party conduct (e.g. sections 45, 47 and 50). It would set a very high bar for any company decision by a firm that happens to be dominant in its market. Decisions made by a single firm include routine business matters and are far more common than decisions involving two or more parties (e.g. mergers and acquisitions, contracts, etc.). Expecting clearance/authorisation for all unilateral business decisions would be highly inefficient and ultimately harm the competitive process.

If you have any queries about the contents of this submission, please contact Vicki Mullen, General Manager, Consumer Directorate on (02) 9253 5120 or vmullen@insurancecouncil.com.au.

Yours faithfully

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