

EXCLUSIVE DEALING

Competition Policy Review (Harper Review) Draft Report

Current position

Substantive law

- Section 47(1) prohibits exclusive dealing, defined as the forms of exclusive dealing in s 47(2)-(9). The provisions are complex and convoluted, attempting to define many common forms of vertical trade restrictions (but not covering all such restrictions).
- Third line forcing conduct is prohibited per se and other forms of exclusive dealing are prohibited only where it has the purpose, effect or likely effect of substantially lessening competition.

Notification

- In addition to authorisation parties may *notify* the ACCC of proposed conduct and (if not opposed) can engage in the notified conduct without contravening the Act. Different fees, processes and tests apply to third line forcing and other forms of exclusive dealing.

Harper Panel draft proposal (rec's 27 and 28, chapter 17.3)

Substantive law

- Remove per se ban on third line forcing (recommendation 27)
- Reduce complexity by prohibiting two categories of vertical restriction concerning supply of goods and services (recommendation 28):
 - 'supplying goods or services to a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and
 - refusing to supply goods or services to a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.'

Reciprocal provisions to apply in relation to the acquisition of goods and services

(Rationale: s 47 is difficult for a business person to read and understand and it does not address every form of vertical restriction)

Notification

- Simplify: see separate information sheet on exemptions

[summary prepared 11 October 2014]