

5 June 2015

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Your ref

Our ref

Dear General Manager

Competition Policy Review Final Report

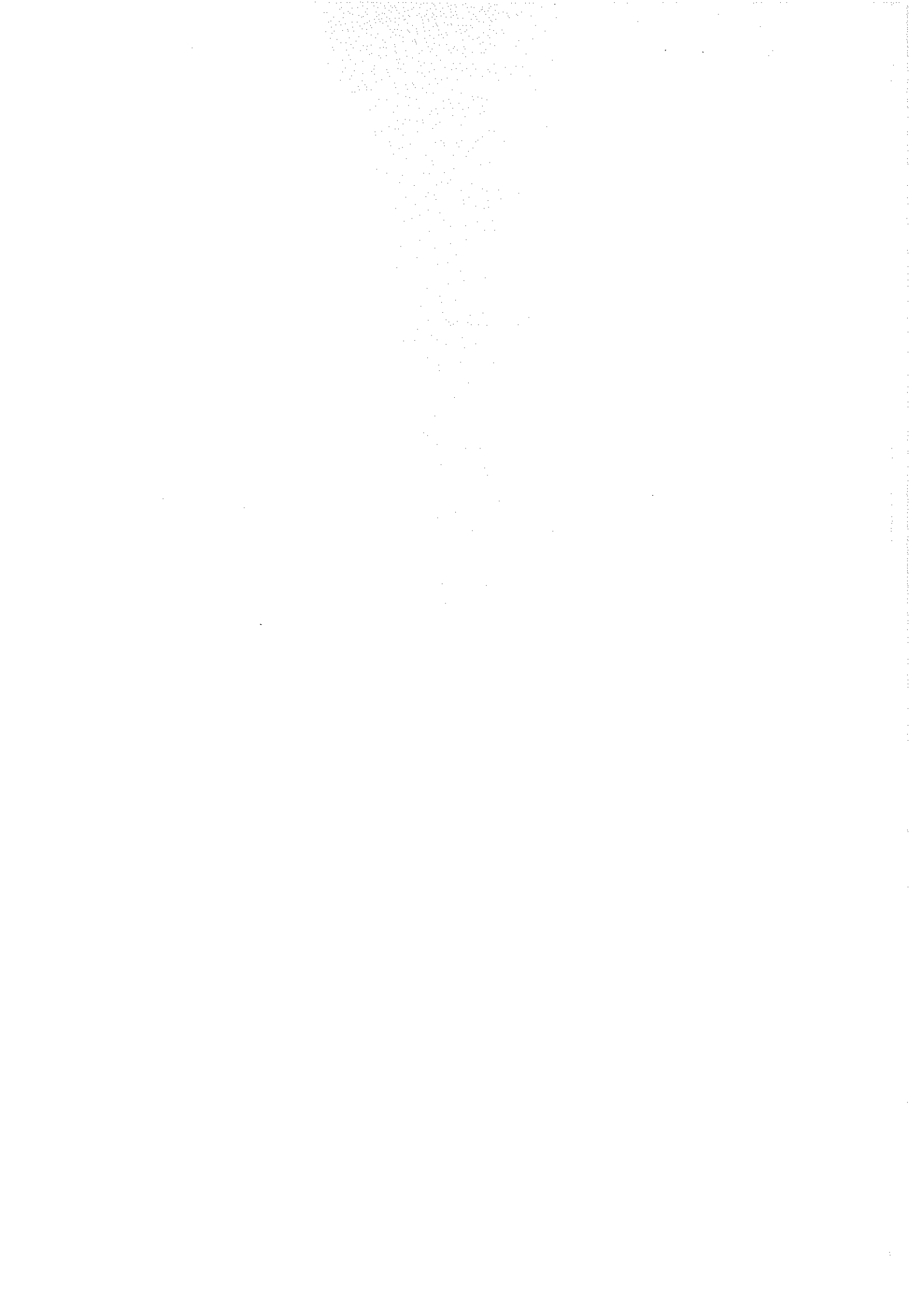
Please find attached the Queensland Law Society's submission in relation to the Harper Review Final Report. I note that the Society's submission is not confidential.

Yours Faithfully,



Michael Fitzgerald

President



Recommendation	Status	Comments
1.	Supported	<p>The Society is supportive of:</p> <p><i>Government significant business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.</i></p>
2.	No comment	
3.	No comment	
4.	No comment	
5.	No comment	
6.	Referred to QLS Technical and Intellectual Property Law Committee (TIPS)	
7.	Referred to QLS Technical and Intellectual Property Law Committee (TIPS)	
8.	The Society supports this recommendation in principle.	Regulation is subject to State Constitutions. Certainly unnecessary restriction on competition should be removed.
9.	Referred to QLS Property Law Committee	
10.	Supported	

11.	Supported	
12.	Supported	
13.	Supported by this committee, but Referred to TIPS for further comment	
14.	No comment	
15.	Supported	
16.	Supported	
17.	No comment	
18.	Referred to QLS Government Lawyers Committee for noting	
19.	No comment	
20.	No comment	
21.	No comment	
22.	Supported and endorsed	
23.	Supported in principle	The redraft provision included in Appendix A are supported, subject to later comments in this submission.
24.	Supported	
25.	Supported and endorsed	

26.	Supported and endorsed	
27.	Supported in part	<p>The recommendation is broadly in line with the Society's original submission. Importantly, however, the drafting of the Joint Venture defence in Appendix A of the report does not reflect the entirety of the contents of the Report, as it covers joint ventures only. The joint venture defence should also apply to other legitimate forms of business collaboration, such as teaming agreements, coordination agreements, bidding agreements, alliance agreements and collaboration agreements. (See clause 3.5 fourth dot point of the Findings and Recommendations in the Harper Report.)</p>
28.	Supported	
29.	Supported -	<p>The concepts are supported.</p> <ul style="list-style-type: none"> • Concerted practices are not defined in the proposed drafting in Annexure A. The Society believes it is important to draft this new prohibition as clearly as possible. The Society submits that the concept of a "concerted practice" should be defined and should include that it between competitors or persons who, but for the conduct, would likely be competitors. • Concerted practices are proposed to be prohibited if they have an anti-competitive purpose and/or effect. Referring to purpose can lead to difficulties and inequities in multilateral situations, as parties may have different purposes (or a shared purpose may differ in its significance to the parties that share it). A party should not be found to have engaged in a

		<p>concerted practice based on the purpose of another party. The Society submits that a concerted practice should only be prohibited where the corporation alleged to have engaged in it has an anti-competitive purpose (or where the concerted practice has an anti-competitive effect).</p> <p>•</p>
30.	Opposed in part	<p>Although the Society does not oppose the authorisation approach, the defence to misuse of market power-which was in the draft report-has been removed. The committee holds the firm view that the defence should be retained. The reason for this is that, unlike the provisions of sections 45,47 to which "substantial lessening of competition" applies as the competition test, section 46 applies to unilateral conduct. The difficulties for seeing in advance whether the acts of an entity in pursuing a strategy will substantially lessen competition in a market are greater than when parties make contracts or arrangements whether vertical or horizontal. As a matter of fairness there should be a defence if the conduct in question would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in a market and the effect or likely effect on customers is to benefit the long term interests of customers. The onus of making out the defence should fall on the corporation engaging in the conduct.</p>
31.	Supported	
32	Supported and endorsed	
33.	Supported	The Society notes that the drafting comprehensively and succinctly

		covers the issues. The Society considers that exclusive dealing should remain an exception to cartel conduct.
34.	Supported	
35.	Supported in principle	<p>Partial support dependant on substance of guidelines.</p> <p>Adherence to strict timeframes for all stages of the process is critical.</p> <p>The guidelines should require the ACCC to provide full disclosure of information to lawyers for merger parties subject to appropriate confidentiality undertakings being given.</p> <p>We do not approve of the ACCP and therefore the recommendation as to its role in post -merger evaluations.</p>
36.	Supported	<p>The Society supports retention of the secondary boycott powers and the proposed reporting procedure. However, the Society notes that the enforcement power should extend to all parties participating in secondary boycotts whether competitors or not. Specifically they should extend to employer or employee representatives involved as parties to the offence.</p>
37.	Supported	<p>However, the Society notes that the enforcement power should extend to all parties participating in secondary boycotts whether competitors or not. Specifically, they should extend to employer or employee representatives involved as parties to the offence.</p>
38.	Supported and endorsed	
39.	Supported and endorsed	

40.	Supported and endorsed	
41.	The Society does not endorse the Recommendation.	The Society recognises that its members have different views legitimately held. Whilst on the one hand there is the view that adopting this recommendation will prevent people from making admissions/concessions at any point in time, even when such admissions/concessions are sensible or given in the interests of resolving issues/ADR, on other hand members argue that plaintiffs in actions where such admissions are made outside of court findings will benefit from the ability to rely on such admissions to avoid the expense of having to prove that which is admitted.
42.	No comment	
43.	No comment	
44.	Opposed	The Society is of the view that the ACCC should cover all aspects of regulation.
45.	Opposed	The Society is of the view that another body will bring another set of rules and increase compliance costs for business by a significant amount. The Society is also of the view that mandatory information gathering powers are intrusive and will prompt resistance, and that the current incentives to comply with information requests (on a voluntary basis) are more effective.
46.	Opposed	The Society is of the view that the government already has sufficient power to direct the ACCC to undertake a study (we assume this would apply to the ACCP, if created), and that this power should not be extended to Local Governments; other parties can already request

		such studies. The Society notes that such studies would require significant funding and it is not clear where that funding would be sourced. It is the view of the Society that anyone should be able to request the ACCP to undertake studies, but only the government should have the power to direct the ACCP on this issue.
47.	Supported	The Society is of the view that the ACCC is most likely already undertaking such analysis.
48.	Supported in principle	
49.	Supported	
50.	Opposed	The Society is of the view that this is simply duplicating regulators, which will increase costs to both business and government. The duplication is likely to increase inefficiencies. If the recommendation is implemented, the ACCC and NCC should at the very least co-locate to mitigate the above issues.
51.	Opposed	The Society does not support the appointment of specific Commissioners for small business and fuel, and the Society opposes the idea of a part-time chair and part-time commissioners. If appointed, part-time officials will not be able to apply themselves fully to the roles, which will likely increase the time taken to issue decisions. Further, a part-time Chair and part-time Commissioners will no doubt hold other roles concurrently with their ACCC positions, and may well

		<p>find themselves in conflict. This has occurred in courts/tribunals which use sessional and part-time members, and the Society is of the view that this will compromise the efficiency of the ACCC.</p> <p>The Society recommends that the Chair and the Commissioners should be full-time, dedicated and non-conflicted.</p>
52.	Supported and endorsed	
53.	Supported in part	<p>The Society supports small businesses being referred to ADR schemes where appropriate. However, the requirement for the production of reasons for not pursuing, and ongoing updates when matters are pursued, is onerous and creates funding issues. The ACCC receives a significant volume of complaints each year such that responding in detail to all of them would constitute an enormous financial and resource burden.</p> <p>The Society is of the view that if the ACCC is unable to pursue a complaint for small business, it should simply direct the complainant to the other options available. Where a complaint is accepted, regular updates should not be mandated as the contact necessitated by the pursuit of the complaint should provide sufficient feedback to the complainant, and any regular regime would be too costly and cumbersome to implement. In addition, the information in updates and reasons for not pursuing would be open to abuse. No law enforcement agency comments on its investigations to members of the public. The ACCC should not act differently as it can result in prejudice to the agency enforcement or prejudice to an individual or both.</p>

		The Society supports resourcing the ACCC to test the law on a regular basis to ensure unlawful behaviour is being deterred.
54.	Supported	The Society supports the recommendation for the most part, but does not support the extension of the time for assessments of notifications from 14 to 60 days. The Society is of the view that 14 days is sufficient time for assessment, and that extending to 60 days is inconsistent with promoting competitive conduct.
55.	Supported	
56.	No comment	

