

21 November 2014

Professor Ian Harper
Chair, Competition Policy Review Panel
Competition Policy Review
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper,

Thank you for the opportunity to make a submission in response to the Competition Review's (the Review) Draft Report, and for providing MasterCard with the opportunity to engage throughout this process.

MasterCard is a technology company in the global payments industry which connects consumers, financial institutions, merchants, governments and businesses worldwide, enabling them to use electronic forms of payment instead of cash and cheques. As the operator of the world's fastest payments network, we facilitate the processing of payment transactions, including authorisation, clearing and settlement and deliver related products and services. We make payments easier and more efficient by creating a wide range of payment solutions and services using our range of well-known brands, including MasterCard®, Maestro® and Cirrus®. We also provide value added offerings such as information services and consulting. Our network is designed to ensure safety and security across the global payment system.

MasterCard operates in more than 210 countries and territories around the world. Some of the jurisdictions in which we operate, including the United States and Europe, have competition laws which have some similarities to those being proposed in Australia as part of the Review. However, those laws also have some differences from those proposed in Australia, and we are pleased to have the opportunity in this submission to point out some of those differences.

The Payments industry has long been at the forefront of innovation, and has constantly been changing to ensure consumer and merchant experiences are optimised. Recent innovation within the payments industry has included the widespread adoption of contactless payments, the entry of new payment providers from the technology sector and the emerging use of biometric authentication.

We welcome many of the recommendations in the Draft Report, including:

- the proposed simplification and amendments set out in Draft Recommendation 22;
- the removal of the separate prohibition against exclusionary provisions in Draft Recommendation 23;
- the proposed removal of the per se prohibition on third line forcing such that it will only be prohibited if it has the purpose or has the effect, or likely effect, of substantially lessening competition in a market in Draft Recommendation 27; and
- the proposed simplification of the prohibition against exclusive dealing in Draft Recommendation 28.

MasterCard believes these changes will clarify and simplify the operation of Australia's competition laws.

In relation to Draft Recommendation 25 to amend section 46, MasterCard does not consider that the prohibition in section 46(1) of the Act necessarily requires amendment. It does not automatically follow that because the prohibition and, in particular, the 'taking advantage' requirement can be difficult to satisfy, the prohibition in its current terms is inadequate and should be amended. The effectiveness of section 46 cannot be assessed in isolation and needs to be considered in light of the complete suite of prohibitions against anti-competitive conduct in Part IV. In relation to this, there are a number of examples where conduct was found not to contravene section 46 but was found to contravene other prohibitions such as those in section 45 and 47 (for example, *Rural Press Ltd v ACCC* [2003] HCA 73 and *ACCC v Cement Australia Pty Ltd* [2013] FCA 909). The fact that the conduct in those cases did not also breach section 46 does not necessarily establish a failing with Australia's competition laws.

If however the Panel considers that section 46 should be amended, then we would offer the following comments on the proposed amendments:

- If the prohibition is to be amended then MasterCard believes that Australia should follow similar principles on this issue to those followed in other regions in the world, such as in Europe and in the United States, where an effects-based approach is used. Relevantly, in such countries, it is generally accepted that the appropriate approach is an effects-based analysis and not a purpose or effects analysis as currently proposed in Draft Recommendation 25.
- In relation to this issue, MasterCard refers the Panel to the 2009 Communication from the European Commission (EC) entitled "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", in which the EC set out (in a "soft law" approach) its preferred effects-based approach to analyses of alleged abuses of dominance.

- In places such as Europe and the United States where an effects test is adopted it is also recognised that the prohibition should not overreach and prohibit legitimate commercial conduct. Accordingly, if an effects test is to be adopted then MasterCard considers that it is important that there is an appropriate defence to ensure that such legitimate commercial conduct is not prohibited. Further, the defence should be in terms that will provide an appropriate degree of certainty for organisations which may seek to rely upon it.
- While the Panel recognises the importance of having an appropriate defence, MasterCard is concerned that the defence proposed in the Draft Report does not adequately protect legitimate commercial conduct and does not provide sufficient certainty in its application.
- In relation to the first element of the defence, that the conduct "would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market", if this is simply intended to ensure that the firm had a legitimate commercial rationale or objective for engaging in the conduct then we would encourage that element to be clearly expressed in the competition laws.
- The second element of the defence, which requires an organisation to prove that the "effect or likely effect of the conduct is to benefit the long-term interests of consumers", is likely to create significant uncertainty and has the potential to exclude legitimate conduct. In particular, questions have been raised as to whether this would mean that only conduct that is likely to promote economic efficiency in the long-term would satisfy the defence and that conduct engaged in for other reasons (such as to address security or similar issues) would not.¹
- The proposed defence also raises the question of whether it would operate in a similar manner to the 'net public benefit' test used in the authorisation process and result in a balancing of what aspects of the conduct are in the long-term interests of consumers and what aspects are not. As well as increasing uncertainty, such an approach would impose a significant burden on any organisation seeking to rely upon the defence.
- In MasterCard's view a better approach would be to require an organization to establish that it had a legitimate commercial rationale or objective for the conduct. The issue would then be whether the conduct in question was appropriate, having regard to that objective and the means used to achieve it in light of the impact on competition. This is similar in approach to that adopted in the United States under the 'rule of reason' analysis where the final step is for the plaintiff to show that any legitimate objectives can be achieved in a substantially less restrictive manner².

¹ See for instance, Philip Williams, 'Notes on the proposed new s 46', October 2014.

² See for instance *O'Bannon v. National Collegiate Athletic Association*, 7 F. Supp. 3d 955, 985 (N.D. Ca. 2014) where the court outlined the steps in the rule of reason analysis and described the final step as being (assuming the defendant had provided evidence of the relevant conduct's pro-competitive effects) for the plaintiff to show that any legitimate objectives can be achieved in a substantially less restrictive manner.

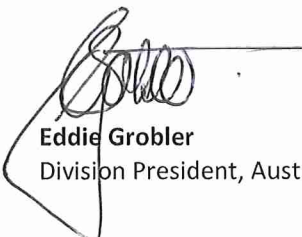
- It is also important under any new prohibition against misuse of market power that the burden of proof is appropriately allocated between the parties so as not to impose an unwarranted burden on organisations that may be subject to this prohibition. In this, MasterCard refers the Panel to the approach adopted in the United States under the 'rule of reason' analysis. This approach was described in the Microsoft case as follows:³

[T]he plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . . [I]f a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a procompetitive justification for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. . . . [I]f the monopolist's procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.

- Competition law should encourage, not stifle innovation. The payments industry is very innovative, particularly with developments to combat fraud and other risks that evolve over time, as well as developments in response to technological change. Any defence to a revised prohibition against misuse of market power, such as that proposed by the Panel, must ensure that this innovation is not stifled. The way the proposed defence is currently framed, with the difficulties and uncertainties discussed above, does not ensure that such innovation will be safeguarded from the prohibition and accordingly not at risk of being stifled.

We once again thank you and the Panel for this opportunity to respond, and would welcome any further questions or other engagement with the Review Panel or Secretariat.

Yours Sincerely



Eddie Grobler
Division President, Australasia

³ *U.S. v. Microsoft Corp.*, 253 F.3d 34, 58-59 (D.C. Cir. 2001) (internal citations and quotation marks omitted)