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CONSULT AUSTRALIA

Driving business success for consulting firms in the built and natural environment

10 June 2014

Professor Ian Harper
Chair
Competition Policy Review
C/O- Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper,

Thank you for the opportunity to comment on the Review of Competition Policy.

Consult Australia is the industry association representing the business interests of consulting firms operating in the built and natural environment. These services include design, engineering, architecture, technology, surveying, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments.

We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding $40 billion a year.

Approximately 40 percent of our industry's work is undertaken for public sector clients, and our member firms have played vital roles in the creation of some of Australia's iconic public infrastructure, including road, rail, hospital, airport, educational facilities, water and energy utilities, justice, aged care, sports stadia, and urban renewal projects. Their work varies from scoping studies to environment impact statements and other contributions to the planning phase of building and infrastructure projects, through to final design of built environment projects.

Competition policy is a vital component of the environment in which our industry operates. It plays a major role in determining whether they tender for work, and accordingly influences their ability to function as profitable businesses.

This submission will focus on a couple of specific challenges posed by Competition Law, as well as highlighting other factors in the marketplace that inhibit competition within our industry.

Joint Ventures and Cartel Conduct

These provisions are of particular interest to our industry. Consulting practices are seldom in a position to bid for work on major and certain other types of projects without forming a joint venture, generally with another consultant with specialist skills, given the size and complexity of many projects. Accordingly, teaming arrangements are common.

These arrangements are typically transparent to clients, and are often made at the behest of the clients themselves. No firms in our industry have substantive market power to dictate prices, and there are legitimate commercial factors driving the practice of teaming, which has not lessened competition through its previous use.

Existing Competition Law acknowledges the challenges posed by joint ventures to the prohibition against cartel conduct in Part IV of the *Competition and Consumer Act* 2010 (Cth). While cartel conduct is a serious offence, it explicitly excludes parties entering into a joint venture for the provision of goods or services, provided that:

- There is a contract, arrangement or understanding between the parties, and
- The parties reasonably believed that there was a contract and the joint venture is carried on jointly by the parties to the contract.

This joint venture exemption is essential to the workability of this provision, but still requires further clarification to provide business with the certainty required to continue to undertake joint ventures. Further clarification and protection is however required.

For example, the ability of potential joint venture partners to discuss pricing ahead of agreeing to work together needs to be explicitly protected. There is the risk that by discussing price signals and then deciding not to proceed with a joint venture, a business could be in breach of these provisions. In this instance there will not yet be a contract setting out the terms of a joint venture, as required by the exemption. Many businesses are concerned about understanding and fulfilling their obligations, which is not always easily practical in the context of establishing a joint venture between competitors.

There is also limited guidance available for businesses seeking to form joint ventures. While Australian Competition and Consumer Commission fact sheets acknowledge the exemption[1], they offer little guidance other than to set out the requirement that the joint venture be contained in the contract and to suggest firms seek legal advice. While Consult Australia acknowledges the importance of businesses obtaining that legal advice, we also submit that there should be more information freely and easily available to assist businesses looking for quick guidance as to how to ensure their activities are legal.

Misleading and Deceptive Conduct

Consult Australia appreciates that the focus of this review is on competition rather than consumer aspects of the law. However, the issue of misleading and deceptive conduct straddles both facets, and represents a significant challenge for our industry, as well as potentially other professional services providers.

Where a consultant undertakes work for a client, the contract typically sets out the standard of care to be upheld in their work. In professional consultancy contracts it is also typical for limits of liability to be negotiated which are a mechanism to balance the level of risk taken on by an advisor in carrying out a particular service, as there is often a considerable disparity between the fees being paid to a consultant versus the value of the project. These terms are then the

[1] http://www.accc.gov.au/system/files/Cartels%20What%20you%20need%20to%20know%20-%20a%20guide%20for%20business.pdf at p17.

basis of any legal action taken arising out of a dispute, or where a consultant's work is found to have been defective. This is particularly the case where a consultant undertakes a study to ascertain whether a construction project is viable, taking into account (for example) patronage forecasts.

Some recent legal actions taken against consultants have filed claims alleging that certain consultants (subject to those claims) have been engaging in "misleading and deceptive conduct" where their forecasts have been inaccurate. For example, "Consultant A" was contracted to undertake a feasibility study into whether a particular piece of infrastructure would be profitable if constructed. Their study determined that the infrastructure would be profitable and their client proceeded on that basis. Following construction, much lower patronage numbers eventuated, and the infrastructure in question made a significant loss. In this instance, the client would ordinarily have an action in contract against the consultant having failed to meet the appropriate standard of care. That action in contract would be governed by the terms of the contract, including the limit of liability. In a business transaction there is no reason why such a limit of liability should not be binding on the parties and such terms are enforceable in court. However it is increasingly becoming practice for a claim to be made for engaging in "misleading and deceptive conduct". This claim is made in part in an effort to overcome the limit to liability, and to avoid having to establish negligence on the part of the professional.

This practice also impacts on whether a business's professional indemnity insurance policy covers them for a claim they make. Typically, misleading and deceptive conduct is only covered if an extension to their traditional policy is purchased. This is costly to the business and their client, and many businesses may not be aware that their policy might not cover them.

While the misleading and deceptive conduct prohibition was designed to protect consumers from being fraudulently induced to contract by an unscrupulous business, it is now being used as a legal tool against businesses to avoid the limit of liability that had otherwise been fairly negotiated to reflect the level of risk. This is not to suggest that the consultant in this case should not be held accountable for their error, nor that their client should not have a legal avenue to seek the appropriate remedy. However, it would appear that this particular term is being used for a wider application than was originally intended. This wider use is having a negative impact on the ability of professional services firms to operate and compete, particularly insofar as it undermines the certainty provided by limits of liability already negotiated with clients.

Accordingly, we recommend that the Government consider amending this particular section of the legislation to clarify that "misleading and deceptive conduct" refers to pre-contract behaviour only. It could also be argued that it should not apply to business to business transactions, as it is intended as a consumer protection, rather than an additional legal weapon to avoid limitations that otherwise apply to negligence and contract claims.

Other Inhibitors of Competition

The terms of reference to this inquiry broadly raise the issue of government regulations and other factors that may inhibit competition by deterring firms from competing for work.

In the case of our industry, two major factors are prime amongst the reasons firms decide not to bid for work (and hence, reducing competition). They are:

- The high cost of tendering; and
- Onerous terms and conditions in the contract, generally relating to the allocation of risk.

The high cost of tendering is the product of several driving forces, often related to the procurement process. They include the common requirement that tenderers test assumptions (eg. a geotechnical survey for which the client already has the data), and also the high cost of legal advice to review each contract. In this context, we note the possibility of reducing this cost through the increased use of standard contracts.

In terms of onerous terms and conditions, it is reasonably common practice for the party with the most bargaining power, usually the client, to offload all risks to the service provider they're engaging, regardless of who is better placed to manage that risk. It a common term of insurance policies that the policy will not respond to "assumed risk". That is, where the policy holder has contractually signed up to take on risk beyond what they would be responsible for at common law. Accordingly, onerous terms and conditions often lead to the creation of uninsured risks, which many businesses cannot afford to take on, and decide not to tender for work. While onerous terms and conditions drive a number of other undesirable outcomes, in this context they are an important factor in deterring businesses from tendering for work, and reducing competition in the process.

Procurement and onerous contractual risk are broad subjects on which Consult Australia has produced and is producing other thought leadership reports. While we would be pleased to further discuss these topics at length, we acknowledge that they are only tangentially linked to the terms of reference for this inquiry.

Conclusion

Thank you for the opportunity to comment on the discussion paper informing this Review. Consult Australia would be pleased to participate in further consultation associated with this Review, as it develops draft recommendations and further action. If you would like to discuss any aspect of this submission, please contact Robin Schuck, Senior Advisor, Policy & Government Relations on (02) 9922 4711 or robin@consultaustralia.com.au.

We look forward to working with you on this exciting project.

Yours sincerely,

Megan Motto
Chief Executive Officer