COMPETITION POLICY REVIEW

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I. Introduction

The *Competition and Consumer Act 2010* (Cth) (CCA) and competition policy involve a number of issues in relation to questions raised in the Issues Paper (14 April 2014). This submission will focus on three issues arising from the current provisions of the CCA that are within the areas of the author's research expertise:

- Vertical restrictions: RPM (resale price maintenance) and exclusive dealings;
- Proving collusion under the cartel regime and section 45;
- Objective of competition law.

These issues will be explained briefly and recommendations will be provided in connection with the underpinning objective of the review: the effectiveness of the Australian economy. The discussed topics will primarily reflect issues arising from Chapter 5 and Chapter 1 of the Issues Paper.

II. Vertical Restrictions: RPM and Exclusive Dealings

This part discusses the provisions dealing with vertical restrictions, in particular s48 and related Part VIII of the CCA 'Resale price maintenance' and s47 'Exclusive dealing'. These provisions should be re-evaluated in connection with the following concepts:

- Firstly, these anticompetitive practices should be prohibited.
- Secondly, they should be allowed – exempted from general prohibition – on the grounds of public benefits, as the substantial lessening of competition is not an appropriate test for these vertical restraints.
- Thirdly, the party or parties who introduce and enforce RPM and/or exclusive dealing should be liable for such conduct.

1) Prohibition

Vertical restrictions in the form of RPM and exclusive dealings should be prohibited because they restrict competition. Although individual RPM or exclusive-dealing conduct usually and primarily restricts intrabrand competition (except for a few forms, such as tying), which is not as anticompetitive as individual cartel conduct restricting interbrand competition, the legalisation of vertical restrictions would lead to a lessening of competition and would be to the detriment of the

Australian economy and general consumer welfare (by increasing prices and decreasing choice for consumers).

From an economic point of view, there are three very basic, outlining, scenarios.[1] Firstly, if the upstream (supplier's) market is monopolistic, competition will probably be restricted substantially because of the power of the supplier. Some forms of vertical restrictions would also be captured by s46 of the CCA. Secondly, if the upstream market is concentrated, some forms of vertical restrictions could infringe s46 but only if the corporation (supplier) in question has 'a substantial degree of power in a market' and other requirements are satisfied. Whether a vertical restriction would substantially lessen competition in this situation is questionable.

The final situation is based on the existence of a competitive market. (This can also, to some extent, apply to concentrated markets.) A vertical restriction within one brand will have the least anticompetitive effect in a competitive market. It will primarily lessen intrabrand competition; however, it could also have a negative impact on interbrand competition. For instance, the fact that one producer imposes RPM on its retailers, which restricts intrabrand price competition, can influence the price-decisions of its competitors and/or retailers who determine the final price of competing products. Indeed, restriction of intrabrand competition can have an impact on interbrand competition. If vertical restrictions are not prohibited but are instead legalised, this could lead to a situation where a particular vertical restriction (or restrictions) becomes a standard in that industry, notwithstanding whether the market is competitive or concentrated. For instance, in the United States of America ('US'), the introduction of the rule of reason in vertical territorial restrictions in 1977[2] led to tolerating such restrictions in practice.[3] Indeed, vertical territorial restrictions have become a common standard in some industries.[4]

Although an individual vertical restriction will not lead to a substantial lessening of competition in many cases in practice, its cumulated effect with vertical restrictions of other competitors will. Therefore, 'legalisation' of vertical restrictions would lead to negative impacts on the Australian economy, consumer welfare and the detriment of efficient but small and/or medium sized entities (this is further explained in point 3).

2) Public Benefits Exemption

Substantial lessening of competition is not an appropriate test for vertical restrictions.[5] The restriction of intrabrand competition, common for vertical individual restrictions, is seen as less restrictive and hence less anticompetitive than the restrictions of interbrand competition so typical for cartel conduct. Unless the market is monopolistic or highly concentrated, an intrabrand (vertical) restriction usually (but not always) will not lead to a substantial lessening of competition.

Furthermore, an argument that such behaviour could start a 'domino effect', where other competitors are influenced by that restriction and/or will implement the same restriction, would be

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1 This is only a very simplified version. These situations should be considered from both downstream and upstream markets and divided into sub-situations, such as monopoly-monopsony, oligopoly-monopsony, competitive market-monopsony, monopoly-oligopsony and so on.

2 *Continental T.V. v. GTE-Sylvania*, 433 U.S. 36 (1977).

3 The last cases occurred in the 1970s and 1980s. All of them were unsuccessful and the vertical restrictions in question were found to be reasonable. Since then, there have not been any cases on vertical territorial restrictions under section 1 of the *Sherman Antitrust Act 1890*.

4 For instance, vertical territorial restrictions were common between producers and wholesalers of soft beverages in the US. See, *First Beverages, Inc. of Las Vegas and Will Norton v. Royal Crown Cola Co. and H & M Sales Co.*, 612 F. 2d 1164 (1980), at 1166; See In re *Coca Cola Co.*, No. 8855 (F.T.C. April 25, 1978), Trade Reg.Rep. (CCH) Supp. No. 330; In re *PepsiCo, Inc.*, No. 8856 (F.T.C. April, 1978).

5 This currently applies to s47 of the CCA.

difficult to win based on the substantial lessening of competition requirement using, for instance, the counterfactual test. Firstly, because it is the conduct of the defendant being evaluated and not its competitors' behaviour; and secondly, the 'future with or without' test is based on assumptions which could lead to different conclusions.

The general understanding of the impacts of vertical restrictions on competition is that vertical restrictions mostly restrict intrabrand competition and could have legitimate, public-benefit, business reasons. These reasons are, for instance, economies of scale, increase of post- and pre-sale services, protection from free riding and quality certification. Therefore, vertical restrictions include two elements: first, they restrict competition (intrabrand competition at least), second, they can lead to procompetitive benefits and even enhance competition. To what extent they do so is arguable. Nevertheless, taking into consideration facts from relevant US, EU and Australian cases, procompetitive reasons for vertical restrictions, which would genuinely enhance competition (for instance, in the form of pre- or post-sale services), are very rare.

Therefore, a sound-based approach should be based on two principles which should be embodied in competition-law legislation provisions. These principles are almost authentic to the correctly-formulated principles in National Competition Policy for competition-law legislation. They are summarised in the Issues Paper on page 11:

> 2. Legislation[6] should not restrict competition unless it can be demonstrated that:
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> a. the benefits of the restriction to the community as a whole outweigh the costs, and
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> b. the objectives of the legislation can only be achieved by restricting competition.

Similarly, RPM and exclusive dealings should be prohibited (because they restrict competition; although, primarily intrabrand competition) unless it can be demonstrated that:

a. particular RPM or exclusive dealing conduct includes public benefit(s) – procompetitive benefit(s) – which outweigh the detriments arising from restricting competition; and
b. such public benefit(s) cannot be achieved (to the same effective extent) without restricting competition in the form of RPM or exclusive dealings.

3) Liability

The situations that arise from a number of US, EU and Australian cases are as follows: an entity with bargaining power (either the supplier, its buyer, a group of buyers or, very rarely, all involved entities) introduces and forces RPM or other forms of vertical restrictions. Usually a small entity(s), but always the party with less bargaining power, is the one forced to apply vertical-restriction policy; however, it is usually not in its interest to do so. It does so because it does not want to lose/hinder the relationship with the entity, which is interested in and forces vertical-restriction policy.[7]

The relevant provisions should reflect this. The entity that forces others to maintain price or comply with exclusive dealing, either a supplier, or a buyer or a group or buyers with bargaining power or

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[6] 'Legislation' includes Acts, enactments, ordinances or regulations.

[7] For example, in the case of *ACCC v High Adventure Pty Ltd* [2005] FCAFC 247, a distributor with a bargaining power that arose from the fact that it was initially the only Australian distributor of a foreign corporation's products, disliked another distributor's price competition and "persuaded" the producer to impose RPM.

occasionally both parties (both parties having a genuine interest in applying the vertical restriction in question), should be liable for such conduct.

The current approach stands on an assumption that suppliers and not buyers introduce and force RPM and exclusive dealing. This does not fully reflect the reality or the fact that bargaining power plays a significant role in enforcing vertical restrictions. Prosecuting entities that initiated RPM or exclusive dealing, and which generally have the stronger bargaining power, will lead to justice and the protection of usually smaller but efficient businesses. A wrongly set approach can have a negative impact, for instance, on markets where there are only a few major distributors with significant bargaining power who, in situations when their profit is threatened, could easily force their suppliers, including importers, to maintain vertical restrictions such as RPM and territorial restrictions. In Australian concentrated markets, many smaller importers rely on well-established, local distributors. The form of vertical-restriction 'abuse' of their bargaining power would have a negative impact on Australian consumers and the economy as it will increase prices and decrease choice for consumers. This is even more profound in the recent and future developments as Australia faces and will continue to face growing global competition.

III. Proving Tacit Collusion

The narrow interpretation of 'arriving at and/or giving effect to an understanding' under s45 and Part IV, Division 1 of the CCA and its application by the courts have a negative impact on the deterrence of collusive, cartel behaviour. The fact that many Australian industries are highly concentrated means that such an application and interpretation are very detrimental for the Australian economy and consumers. The current application of the term 'understanding' by the courts does not capture situations where there is no direct evidence of an agreement, or collusion in the form of cooperative oligopolies, which are bilateral/multilateral actions, in contrast to natural oligopolies, which are uniformed, unilateral actions and thus should remain legal.

Although the Federal Court stated in *Leahy*[8] that the existence of circumstantial evidence and collusion in the form of a tacit agreement extending beyond pure parallel behaviour could establish the existence of an understanding, it simultaneously made it all but impossible to prove any such thing. It held that the understanding is not established if a mutual commitment is not proven, which requires evidence of express communication on the existence of an agreement and the commitment to act illegally to be put before the court. Such an approach will not necessarily capture cooperative oligopolies since collusion may take forms that do not include verbal or written communication and a mutual commitment.

The requirement of mutual commitment in the case of undertaking is harsh and does not reflect the approaches of other regimes. For instance, the general position in the US is that the analysis of establishing conspiracies rests on the existence of 'plus-factors', which even includes situations where the information flow is a unilateral one; however, the other party (parties) acts upon that.

Justice Logan in *Woollam & Son*[9] seems to have a more lenient and a different, broader understanding of the term 'understanding'. He stated that to establish 'an understanding', commitments could be individual and moral and could be accompanied by expectations.[10] Justice Logan's approach to understandings captures tacit collusions, in other words, cooperative

8 *ACCC v Leahy Petroleum Pty Ltd*, [2007] FCA 794.

9 *ACCC v TF Woollam & Son Pty Ltd* [2011] FCA 973.

10 Ibid [55], [141]; also see *Norcast S.ár.L v Bradken Limited (No 2)*, [2013] FCA 235 [263]; referring to *ACCC v TF Woollam & Son Pty Ltd* [2011] FCA 973 [141].

oligopolies. Indeed, circumstantial evidence which leads to the conclusion of the existence of cooperation among participants should be satisfactory to establish 'arriving at an understanding'. However, if the circumstantial evidence leads to the conclusion that the uniformity of actions are rather the result of the structure of the oligopolistic market, then such conduct should be found legal.

A provision reflecting the above explanation would be highly beneficial, as it would provide certainty that all forms, including tacit forms, of collusive conduct would be captured by the legislation. This would lead to increased competitiveness for the benefit of the economy and efficient and competitive businesses and consumers. The ability to punish and deter all forms of collusive behaviour is becoming even more urgent for a well-functioning competition law and economy as cartel participants seeking to avoid punishment (and compensation claims) are and will be encouraged to 'achieve consensus through more subtle techniques that fall short of an express exchange of assurances in a covert meeting'. [11]

It would be advisable for legislation to include a simple provision on the definition of 'arriving at an understanding' (rather than the current provisions on price signalling which also capture unilateral conduct). This provision should define the understanding according to Justice Logan's interpretation of collusive conduct, which may include individual and/or moral commitments and expectations. Furthermore, for the purpose of clarity and certainty, legislation could state that 'arriving at an understanding' can be proved based on circumstantial evidence that leads to the conclusion of a collusive action. This would not include conduct that results purely from a natural oligopoly. This provision should be simple, transparent and to the point. Furthermore, it would be beneficial from the points of transparency and clarity, if the provisions of the new cartel regime, in Part IV, Division 1, were simplified and shortened. A number of parts of the CCA raise the same concern. On the other hand, the CCA includes a few simple and well-functioning provisions, for instance, s46(1), which indicates that legislation dealing with competition law does not have to be over-descriptive and over-technical (and even occasionally unsystematic).

IV. Objective of Competition Law and Policy

To ensure that legislation, currently the *Competition and Consumer Act 2010* (Cth), drives 'efficient, competitive and durable outcomes',[12] it is absolutely essential for the Act to provide the right objective of competition law. The objective is an underpinning principle, which should guide the decisions of the courts in all areas of competition law. The CCA states the objective of the Act in section 2. However, this legislation should ideally have two separate provisions, one for the objective of competition law and one for consumer law, as their objectives differ.[13] Having these two distinct objectives will provide clarity.

The Hilmer report correctly established that the objective of Australian competition law should be economic efficiency as being consistent with some social goals, most notably the 'empowerment of consumers', and competition policy should primarily facilitate effective competition.[14] This is in

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11 William E Kovacic, et al, 'Plus factors and agreement in antitrust law', (2011 – 2012) 110 *Michigan Law Review* 393 at 396.

12 Issues Paper (14 April 2014), p.50.

13 For further discussion on the objectives of competition law and consumer law, see Barbora Jedlickova, "One Among Many or One Above All? The Role of Consumers and Their Welfare in Competition Law and Policy" (2012) 33(12) *European Competition Law Review* 568.

14 National Competition Policy, reported by the Independent Committee of Inquiry ('Hilmer Report'), Australian Government Publishing Service, Canberra, 1993, pp. 3-6.

agreement with the Issues Paper (14 April 2014), which provides that '[c]ompetition policy seeks to protect, enhance and extend competition'[15] and that 'more competitive markets lead to greater efficiencies in the use of scarce resources'.[16] This understanding of the role of competition law is, in general, reflected in the first part of s2 of the CCA, which provides that '[t]he object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading…' However, at the centre of the objective of competition law, as correctly explained in the Hilmer report, is economic efficiency and effective competition. Total welfare is key for both of these values. From this standpoint, the connotation of the 'welfare of Australians' is confusing and/or incomplete. It could be associated with the 'welfare of consumer'. If so, the term 'Australians' does not include all consumers whose rights are protected by Consumer Law in the CCA. Most importantly, it is all consumers and all businesses operating in Australia who create the total welfare of Australia. Therefore, rather than 'Australians' the Act should refer to 'welfare of Australia'.

15 P.1.

16 P.1.