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Professor Ian Harper
Chairperson
Competition Policy Review
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper

Release of the Panel's Issues Paper

We write to congratulate you on your appointment as Chair of the Australian Government's Competition Policy Review and to encourage the Panel to examine an issue that is of significant importance under your terms of reference but which appears to have been largely over-looked in the commentary concerning this inquiry.

Amongst other things, you are asked to consider:

> "whether competition regulations, enforcement arrangements and appeal mechanisms are in line with international best practice" (TOR 3.4).

We consider ourselves well placed to identify relevant issues of international best practice in competition related enforcements and appeals. Our firm, Jones Day, is the eighth largest law firm in the World by revenue. As well as offices in Sydney and Perth, our firm undertakes legal work in 21 other countries. We have competition law specialists in the majority of these countries and, between us, the signatories to this letter are admitted to practice in three jurisdictions internationally.

Our Sydney based competition law team frequently advises local Australian business people on their legal obligations domestically and, as part of our global team of advisors, we are often asked to advise companies who trade globally and their foreign domiciled executives.

Arising from that experience, we would like to encourage you to inquire into why it is that Australia takes an idiosyncratic approach to investigating the conduct of individual business people and of imposing civil penalties on those people without according those individuals with the safeguard protections that are afforded in all other of the countries that are members of the OECD.

Since the 1970's when Australia's legal system started imposing personal sanctions upon individuals, the stakes for corporate and individual defendants has continually increased. Meanwhile, the Australian system has progressively fallen further and further behind on the counter-balancing principles of protection and due process for individual defendants.

In our view, the disparity between heavy penalties and weak process protections has reached the point where for some clients Australia is a business un-friendly country in which to avoid investing. For other clients, Australia is a location in which very high levels of (arguably excessive) compliance expenditure is required in order to safely conduct business and this must

be reflected in higher costs and therefore prices. This is one factor that contributes to fewer businesses participating in the Australian economy and consequently a perverse result in that there is a higher level of concentration in many industries and *lower* levels of competition.

Three specific questions illustrate the more general point we would like to make about the lack of process protections in the Australian competition law system:

- Should accused persons have a right to decline to answer ACCC questions that tend to be self-incriminatory?
- What should be the standard of proof that applies when persons are accused of competition law violations?
- Should penalties be payable by corporations or individuals in the case of unilateral conduct violations?

We encourage you to consider these specific points and more generally the issue of whether it remains appropriate to impose very significant sanctions on corporations and individuals for both cartel contraventions and contraventions involving substantive economic assessments without the protections available in all other developed countries around the world.

Kind regards

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