



Submission to the Competition Policy Review

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LAWYERS

Executive Summary

The Competition Policy Review offers an important opportunity for the Australian Government to resuscitate productivity growth in Australia through micro economic reform, attending to the "unfinished business" of the Hilmer Review in 1993.

Minter Ellison's Australasian Competition Group has been assisting clients and various professional associations in preparing their submissions to the Review. We appreciate the opportunity to make this submission, which identifies some additional issues which we believe warrant further consideration by the Review, based on our experience of competition issues in particular situations and particular sectors.

We recommend consideration be given to the following matters:

- the desirability of a clearer conceptual approach to competition laws:
 - avoiding convoluted codification
 - trusting our judicial institutions to apply standards as opposed to codes and avoiding kneejerk legislative responses to judicial decisions
 - stripping away the curiosities and inconsistencies that have crept into Australia's competition laws
- applying that clearer conceptual approach to rules about misuse of market power (section 46) and resale price maintenance (section 48)
- addressing international pricing differentials by removing remaining parallel import restrictions rather than attempting to prohibit price discrimination by international suppliers
- updating and extending the allowance made under competition law for activities occurring within corporate groups to apply to analogous 'economic systems', such as franchise networks, to allow benign and pro-competitive activity to occur unimpeded.

Minter Ellison is one of Australia's leading commercial law firms and recognised as a leader in competition law and practice. We would welcome the opportunity to expand on any of our submissions and to make further submissions on these or any other issues during the course of the Review. Please contact the following if you have any questions relating to our submission.

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1. A clearer conceptual approach to competition laws

Minter Ellison recommendation to the Review: Address the complexity and inconsistency that has taken root in parts of the CCA. The law can be made much clearer if it sets down clear rules that are capable of general application in Australian commerce. This would leave courts to discharge their responsibility for interpreting and applying those laws in specific cases.

Part IV of the CCA has been criticised for being overly prescriptive, particularly in comparison to competition laws in other jurisdictions. This view has a superficial appeal but is not entirely justified as in most jurisdictions, including the US and the EU, core competition prohibitions are supplemented by other legislative instruments and guidelines.

On a closer analysis, we believe there are three principal issues that need to be addressed in the drafting of Part IV of the CCA:

1. First, the drafting has become overly convoluted in places. This is most evident in Division 1 of Part IV (cartel conduct). For example, the provisions directed towards 'bid rigging' (the third limb of the 'purpose' condition found in section 44ZZRD(3)(c)), are contrasted with the corresponding provision that was proposed in New Zealand's draft cartel legislation (Commerce (Cartels and Other Matters) Amendment Bill, clause 7, proposed section 30A) below.

Australia	New Zealand
<p>(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a <i>cartel provision</i> if:</p> <p>(a) either of the following conditions is satisfied in relation to the provision:</p> <p style="margin-left: 20px;">(i) the purpose/effect condition set out in subsection (2);</p> <p style="margin-left: 20px;">(ii) the purpose condition set out in subsection (3); and</p> <p>(b) the competition condition set out in subsection (4) is satisfied in relation to the provision.</p> <p>...</p> <p>(3) The purpose condition is satisfied if the provision has the purpose of directly or indirectly:</p> <p>...</p> <p>(c) ensuring that in the event of a request for bids in relation to the supply or acquisition of goods or services:</p> <p style="margin-left: 20px;">(i) one or more parties to the contract, arrangement or understanding bid, but one or more other parties do not; or</p> <p style="margin-left: 20px;">(ii) 2 or more parties to the contract, arrangement or understanding bid, but at least 2 of them do so on the basis that one of those bids is more likely to be successful than the others; or</p> <p style="margin-left: 20px;">(iii) 2 or more parties to the contract, arrangement or understanding bid, but not all of those parties proceed with their bids until the suspension or finalisation of the request for bids process; or</p> <p style="margin-left: 20px;">(iv) 2 or more parties to the contract, arrangement or understanding bid</p>	<p>(5) In this Act, bid rigging means restraining 1 or more parties to a contract, arrangement, or understanding from making a bid, or requiring a bid to be in accordance with a contract, arrangement, or understanding, where—</p> <p style="margin-left: 20px;">(a) the parties to the contract, arrangement, or understanding are in competition with each other for the supply or acquisition of the goods or services that are the subject of the bid; and</p> <p style="margin-left: 20px;">(b) the essential features of the contract, arrangement, or understanding are not disclosed to the person running the bid before the bid is lodged.</p> <p>(6) For the purpose of subsection (5), bid includes—</p> <p style="margin-left: 20px;">(a) a tender; and</p> <p style="margin-left: 20px;">(b) any step preliminary to making a bid, such as giving an expression of interest.</p>

<p>and proceed with their bids, but at least 2 of them proceed with their bids on the basis that one of those bids is more likely to be successful than the others; or</p> <p>(v) 2 or more parties to the contract, arrangement or understanding bid, but a material component of at least one of those bids is worked out in accordance with the contract, arrangement or understanding.</p> <p>...</p> <p>(4) The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:</p> <p>(a) are or are likely to be; or</p> <p>(b) but for any contract, arrangement or understanding, would be or would be likely to be;</p> <p>in competition with each other in relation to:</p> <p>...</p> <p>(i) if paragraph (3)(c) applies in relation to a supply of goods or services--the supply of those goods or services; or</p> <p>(j) if paragraph (3)(c) applies in relation to an acquisition of goods or services--the acquisition of those goods or services.</p>	
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The Australian legislation does not do anything that the proposed New Zealand legislation does not, but the New Zealand version is more easily understood and followed. In an enforcement context, lawyers in New Zealand might conceivably have a debate on the meaning of 'restraining', but we believe a business executive would be able to read and understand the essence of their legal obligations under the draft New Zealand legislation without regular recourse to their lawyers. In Australian law, this is unlikely to be the case.

There are two possible explanations for the convoluted approach taken in the Australian legislation:

- (a) rather than creating norms of conduct that are capable of general application and enforcement, it is possible that the drafters of this legislation have sought to anticipate and expressly deal with each specific mischief that could arise under the heading of 'cartel conduct';
- (b) there is perhaps a lack of trust in the courts, or at least doubt as to whether the courts will give effect to the legislation in a manner satisfactory to the government or the regulator.

We do not believe either concern would warrant the convoluted approach taken to the Australian cartel laws. Attempting to anticipate and address each mischief in legislation is a futile exercise. The greater risk in this course of action is that something will be missed, raising the question of whether it was intended to be prohibited at all.

2. Australian tribunals and courts (especially at the appellate level) have repeatedly demonstrated a sophisticated understanding of the principles that underpin our competition law and the legislation that seeks to give effect to those principles. Courts are certainly capable of error, but appeal courts exist to correct those errors. The mere fact that a regulator fails to prove a case in court does not necessarily mean the legislation is flawed. Sometimes the defendant is simply not guilty.

This need to respond to adverse decisions underpins the second concern we see with the drafting of Part IV of the CCA. Amending this legislation in response to specific judicial decisions is a practice that goes back to its earliest days. However in recent years some of the amendments that have been made to 'respond' to judgments have, at best, done little to clarify the law and, at worst, have the potential to cause confusion or produce unintended consequences.

Notable examples of this can be seen in section 46 of the Act (which is discussed in more detail in the following section):

- (a) section 46(1AAA) appears only to re-state concepts articulated by the High Court in *Boral v ACCC* [2003] HCA 5 at [130], [191];

- (b) section 46(4A) states that, in deciding whether a person has contravened section 46(1) the court may have regard to supplying goods below relevant cost for a sustained period, and the reasons for that conduct. Why it is thought necessary to tell a court it can consider such conduct (however it is ultimately defined) without indicating whether or why it might be illegal, is unclear;
- (c) section 46(6A) appears to assemble disparate formulations of 'taking advantage' of market power and, again for reasons that are unclear, added a catch all limb of 'otherwise related to' the firm's market power.

We respectfully submit these provisions add nothing to the clarity or substantive content of the law and should be repealed.

3. Finally, there are provisions in the statute that are simply inconsistent (or have become inconsistent as the legislation has been amended). For example:
 - (a) why does the Act contain two different joint venture exceptions (ie. sections 44ZZRO/44ZZRP and section 76C);
 - (b) why does the Act specify different standards in determining whether conduct substantially lessens competition (eg. section 45 is purpose or effect, section 45DA is purpose and effect, while section 50 is effect only)?

Another example is canvassed in more detail in section 3 below – the exemption from the rule in section 45 of maximum resale price maintenance conduct. It seems to us difficult to identify any explanation for that exemption to s45 other than as an unintended legacy of the 2009 amendments by which price fixing was removed from section 45 and put into the other sections dealing with cartel conduct referred to above.

Whether the panel believes it is in a position to rectify these issues, or whether it considers it more appropriate to refer these issues for further review, there is, in our submission, a pressing need to address the complexity and inconsistency that has taken root in parts of the legislation.

While we do not believe this is a law that can be made 'simple', the law can be made much clearer if is drafted so as to set down clear rules, that are capable of general application in Australian commerce, with the courts being left to discharge their responsibility for interpreting and applying those laws in specific cases.

2. Misuse of market power

The Issues Paper asks:

Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

The challenge for the Competition Policy Review in relation to the current 'misuse of market power' provision – s. 46 – is to consider how to re-shape it to operate in Australia's best interests. This requires more than simply opting for a 'purpose' or an 'effects' test. The shape this law should take in regards to Australia's long-term interest requires deeper consideration.

Professor Eleanor Fox of NYU said the universal challenge with misuse or monopolisation laws is *'to formulate a liability rule or standard that takes wise account of the tension between providing incentives to be the best, and preventing unjustified creation and abuses of monopoly power.'* That is precisely what successive Australian Governments have been trying to do, though with little success, according to business large and small.

Overseas jurisdictions such as the USA, EU, Singapore, Japan and Brazil, have a standard-based 'misuse of market power' law. Australia, Canada and South Africa have opted for a rules-based law - one that prescribes more precisely what is to be prohibited, with the illusion of greater apparent certainty and the disadvantage of form over objective. A standards-based law sets out a norm of conduct and leaves the courts greater room to decide how it applies on a case-by-case basis, consistent with current social values, drawing on broader experience. A good, and now uncontroversial, example of this standards-based approach is our 'misleading and deceptive conduct' provision.

One solution for the Review would be recommending a move to a standards-based 'misuse of market power' provision, but that, at least on its own, is unlikely to be realistic. However, it should not be dismissed lightly. The Review should not determine what is and is not unacceptable conduct by a corporation with market power by ticking off against a statutory provision. Courts are best placed to determine qualitatively what is and is not a misuse of power, as opposed to acceptable competitive behaviour. Statutory codification largely removes that qualitative assessment and at best produces the illusion of certainty. The approach taken with the 'unconscionable conduct' provision is an example of the standards-based approach. It contains a general prohibition on unconscionable conduct, but adds a provision to guide, but not constrain, courts in determining what conduct is acceptable and what is not. Singapore and Japan are examples of this approach, as are the USA and the EU, although in the latter two, guidance has been provided administratively.

The other alternative is to perpetuate the current rules-based provision, expanding its coverage where it is regarded as too limited in its scope. If the Review takes this approach, it should start at the level of principle - how to re-shape the law to operate in Australia's best interests, disregarding the sectoral interests that will inevitably seek to pull the Review in diametrically opposed directions.

There are a few basic lessons from which the Review might draw guidance:

- (a) Australia is by no means alone in struggling to find the right balance with its misuse of market power law. Everyone has the same problem. As the US Supreme Court has observed: *'Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern; the means of illicit exclusion, like the means of legitimate competition, are myriad.'*
- (c) Internationally two types of abusive behaviour are generally addressed - exclusionary behaviour reducing or impeding effective competition, and unfair or unreasonable treatment of customers or suppliers who are dependant on the powerful firm. In Europe and the USA, for example, cases have involved conditional discounts, tying and bundling, predatory pricing, margin squeezing and other conduct regarded as exploitative conduct. An Australian review might ask whether our current law is sufficient to apply, in appropriate circumstances, to each of those types of conduct and if not, should it?
- (d) The test for determining appropriate circumstances for intervention remains a vexing issue internationally. Intervention that is too intrusive produces a chilling effect on investment and innovation; while a test that is too *laissez faire* reduces competition and harms consumers and the economy generally. In Australia the test has focussed on the powerful firm's purpose, but that is not a universally accepted criterion for liability. If not 'purpose', by what principle might we decide what conduct is, or is not, to be prohibited? Other measures suggested in economic literature since our law was enacted include an 'equally efficient competitor' test, a 'furthering monopoly power' test, a 'profit sacrifice' test, a 'no economic sense' test and a 'consumer harm' test. In Europe the 'consumer harm' test is now preferred, whereas in the US the Justice Department has, in recent times, promoted the 'no economic sense' test.

Because a particular approach commends itself in Europe or the US does not make it necessarily suitable for Australia. The Review should consider the lessons learned elsewhere and assess the relevance to Australia.

3. Resale price maintenance

Minter Ellison recommendations to the Review: The operation of the prohibition on resale price maintenance conduct is no longer consistent with the objectives of the CCA, and sections 48 and 96 – 100 be deleted from the CCA. The exemption from section 45 of so-called 'maximum resale price maintenance' conduct is over-broad and removes potentially anticompetitive from consideration under the CCA. Section 45(5)(c)(iii) should be deleted from the CCA.

The Issues Paper asks:

Do the provisions of the CCA on resale price maintenance operate effectively, and do they work to further the objectives of the CCA?

As well as asking specifically about resale price maintenance, the Issues Paper also asks:

Do the statutory exemptions, exceptions and defences, including liner shipping, operate effectively, and do they work to further the objectives of the CCA?

Two points are relevant regarding resale price maintenance. First, the operation of the prohibition on resale price maintenance conduct is no longer consistent with the objectives of the CCA. Second, the exemption from section 45 of so-called 'maximum resale price maintenance' conduct is over-broad and removes potentially anticompetitive from consideration under the CCA.

1. The resale price maintenance (RPM) prohibition is no longer necessary

The theoretical basis for prohibiting RPM is twofold. First, RPM impedes competition by allowing manufacturers and suppliers to mandate the price at which their products are to be resold. Banning the practice assists in ensuring that prices are competitive. Secondly, RPM facilitates collusion between manufacturers and between retailers.

Arrangements between competitors – whether manufacturers, distributors or retailers – amount to illegal price-fixing cartel conduct. Australia does not need prohibition on unilateral RPM to stamp out that conduct. More broadly, even if the current RPM prohibition were removed, there is little doubt that arrangements between groups of manufacturers, distributors or retailers (whether through trade associations or more directly) to fix resale prices would amount to a cartel, with a serious risk of criminal sanctions.

The arguments in favour of permitting RPM, except where it is likely to have an adverse effect on competition, include that efficient distribution can be enhanced by allowing manufacturers and suppliers to determine the basis on which their products are sold, including price. Manufacturers and suppliers may have many reasons for wanting to manage distribution of their products, and those reasons can be pro-competitive, or at least are not presumptively anticompetitive.

Other provisions of the competition law could effectively deal with aspects of behaviour the RPM provision prohibits if it were removed. RPM provisions in supply arrangements between manufacturers or distributors and retailers, or attempts to make such arrangements, would risk infringement under the s45 prohibition on anticompetitive contracts, arrangements and understandings, if in fact there is a likely adverse effect on competition. Even refusals to supply a retailer because the retailer had not agreed not to discount the product could amount to an attempt to make an anticompetitive arrangement, if an adverse effect on competition is established.

In the absence of evidence of consumer harm, it is in the public interest to allow manufacturers to set the price at which their products are on-sold. They should be entitled to choose the most efficient, effective and competitive way to do so.

2. The exemption of maximum resale price maintenance from s45 is too broad

The exemption from s45 prohibitions for conduct constituting what might be termed 'maximum resale price maintenance' is too broad and in our view, operates inconsistently with the objective of the CCA. It does this by removing altogether maximum resale price agreements from the operation of the s45 prohibition on agreements which substantially lessen competition. Such conduct should not be immunised from the operation of the fundamental rule against agreements lessening competition under s45.

By mis-calibrating the proper scope of the prohibition, the current operation of the exemption for maximum resale price maintenance undermines the effectiveness of the fundamental rule in section 45. This is a problem which is capable of a simple fix.

While this is not a well understood area of the CCA, in our experience it has had some significant practical ramifications. For example, the CCA simply doesn't work where a 'most favoured nation' (MFN) clause operates to set a maximum resale price for a reseller by reference to the price that reseller charges for a rival manufacturer's product. The potential anti competitive purpose or effects of such an MFN are not able to be considered. MFNs of that type are quite common.

A summary of the legislative position is as follows:

- (a) Along with recommended prices and loss leader selling, maximum resale price maintenance is excluded from the per se prohibition of resale price maintenance under sections 48 and 96 of the CCA.
- (e) The exemption in relation to maximum resale price maintenance, however, goes further and specifically excludes that conduct even from the general prohibition on arrangements which have the purpose or effect of substantially lessening competition under section 45, regardless of whether it could be shown to substantially lessen competition.
- (f) Section 45(5)(c)(iii) provides that *'this section does not apply to or in relation to'* a provision of a contract arrangement or understanding 'in so far as the provision relates to' ...
'conduct that would contravene section 48 if this Act defined the Acts constituting a practice of resale price maintenance by reference to the maximum price at which goods or services are to be sold or supplied or are to be advertised, displayed or offered for sale or display'.
- (g) The practice of resale price maintenance is defined to be that referred to in Part VIII of the CCA.

In particular, this means that a vertical agreement (ie between manufacturer and retailer) by which the manufacturer sets a maximum resale price for the retailer cannot be considered under the general prohibition in section 45 of agreements which have the purpose, effect or likely effect of substantially lessening competition.

This issue highlights the concerns expressed in section 1: needless complexity can lead to unpredictability and inconsistency. In short, the drafting works in this area by saying that the prohibition in s45 doesn't apply to certain conduct if that conduct would contravene another section, if that section said something different to what it actually says. This is not simple to understand, nor to apply. The CCA must be capable of being understood and consistently and predictably applied. Minter Ellison endorses calls for a program of legislative simplification. By targeting specific areas identified in the Review as inconsistent or unnecessarily complex the CCA's objectives will better be met. The complete exemption of maximum resale price maintenance from the operation of section 45 of the CCA is most likely an unintended consequence of byzantine legislative drafting which can readily be fixed.

4. International Price Discrimination should not be regulated

Minter Ellison recommendation to the Review: International pricing differentials should be addressed, if at all, only by removing remaining parallel import restrictions rather than attempting somehow to prohibit price discrimination by international suppliers.

The Issues Paper asks:

Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?

Minter Ellison submits that international pricing differentials should be addressed, if at all, only by removing remaining parallel import restrictions rather than attempting somehow to prohibit price discrimination by international suppliers.

Past reviews of Australian price discrimination legislation, in particular the Hilmer Review in 1993, have consistently concluded that price differentiation generally enhances economic efficiency. In that context, an attempt to regulate international price differences would both be unlikely to succeed and also potentially undermine the objectives of the CCA.

At a practical level, implementation of an international price discrimination rule is likely to require almost impossibly detailed factual and economic analysis, involving complex issues such as which countries Australian pricing should be compared against and how to compare pricing in a world of fluctuating currency exchange rates. Even assuming that any rule or regulation is limited to controlling only certain price differentials (for example price differences not founded on country-specific costs), then identifying breaches will be enormously complex, trying to control for all of the manifold factors influencing pricing decisions at any given time and in any given place.

The inevitable uncertainty created by regulation for international companies risks a chilling effect in Australia's small, open economy. It could lead to higher prices in Australia, create barriers for overseas suppliers to participate in Australian markets, and potentially resulting in less competition and less choice and for consumers - contrary to the objectives of the CCA.

5. Exemptions for conduct within corporate groups don't go far enough to protect benign behaviour

Minter Ellison recommendations to the Review: Existing exemptions for related bodies corporate should be extended to cover and protect single economic entities or 'systems', even those falling short of the technical definition of related bodies corporate.

The current exemption for related bodies corporate is consistent with underlying economic principle (which should be focused on conduct by a single economic entity) and should remain.

Minter Ellison submits that the existing exemption should be extended to cover and protect single economic entities or 'systems', even those falling short of the technical definition of related bodies corporate such as franchises, from *per se* offences under the CCA. This 'recalibration' of the application of the *per se* offences provisions in the franchise context would avoid unnecessary limits on the pro-competitive development and operation of franchise systems, while ensuring that franchise arrangements would still remain illegal if they have the purpose or likely effect of substantially lessening competition.

The most obvious example of single economic 'systems' that are subject to 'excessive regulation' are franchised business groups. By definition, franchise groups involve one person (the franchisor) granting to another the right to carry on a business of supplying goods or services under a system or marketing plan determined by the franchisor and which is materially associated with a trade mark or commercial symbol owned or licensed by the franchisor. Franchise groups are a form of cooperative business activity which provide an alternative to traditional methods, such as ownership through a single corporate structure, by which the capital and individual labour of the franchisor and individual franchisees can be productively employed to achieve a common economic goal.

A franchise system is therefore typically characterised by a need, and legitimate desire, for vertical and horizontal collaboration within the system, rather than competition. The CCA, however, does not recognise this fundamental difference in character; the cartel provisions apply between any unrelated bodies corporate in a franchise group and the resale price maintenance provisions apply between franchisor and franchisee relationships.

Relaxing these current restrictions would enable franchise groups to collaborate more fully and enhance 'inter brand' competition with other corporate or franchised entities at the expense of a relatively minor reduction in 'intra brand' competition, and significantly reduce non-productive compliance costs currently incurred by franchise groups.

We consider that relaxation of the current restrictions to franchise groups could be introduced with relative ease and certainty of operation because franchise agreements are already forms of contract that are well defined and regulated under the Franchising Code of Conduct (Code). The starting point could be exempt conduct engaged in between franchisors–franchisees and/or franchisees–franchisees (as defined in the Code) under the same system or marketing plan from:

- the resale price maintenance provisions;
- the cartel provisions;
- section 4D.

Provisions in franchisee agreements should remain illegal, however, if they otherwise have the purpose or likely effect of substantially lessening competition for the purposes of s45. In other words, a 'rule of reason' approach assessing franchise arrangements replaces the *per se* prohibitions.

More generally, we consider that the Review should closely examine whether other cooperative business models falling short of legal exemption afforded through the related body corporate exemptions exist which also warrant more lenient treatment. In particular, both incorporate and unincorporated joint ventures are currently dealt with in an duplicative, inconsistent and likely deficient manner under the current Act.

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