Submission to the Competition Policy Review Committee

Competition Policy Review

Issues Paper

Submission by:

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and

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Introduction

This submission addresses the release of the Issues Paper on *Competition Policy Review in Australia* (14 April 2014). The aim of this submission is to provide an informed debate on four of the issues raised by the Issues Paper. Some of the suggestions that have been provided are of a policy nature and observe the need to broaden the focus of competition law to take into account the broader interests, and not just the economic interest, of consumers and small businesses.

If any of the responses require further explanations, please contact Dr Marina Nehme at the UNSW Australia, Law Faculty at m.nehme@unsw.edu.au.

General Observations:

The observations made in this submission can be summarised in the following manner:

- the aim of competition law in Australia should not be solely focused on the economic welfare of consumers but should also recognise the need to promote fair competition, enabling efficient businesses large and small, to compete effectively and drive growth in productivity and living.
- the terms of s 46(1) of the *Competition and Consumer Act 2010* (Cth) (*CCA*) should be broadened to include an 'effects test' alongside the current 'purpose test', thus lowering the hurdle the ACCC must face in enforcing s 46. The 'effects test' may deter a rational actor from breaching the law because of the greater likelihood that the ACCC may initiate legal action against him or her.
- a review of the sanctions regime may be required as the current system is unlikely to deter rational actors from breaching the law. Amendments to the pecuniary penalties for corporations under s 76(1A)(b) and for individuals under s 76(1B)(b) are suggested, as is a strengthening of the court's powers to make disqualification orders against individuals under s 86E.
- statistical analysis shows it is very difficult to take action and enforce rights in relation to competition issues because the regulatory system is ineffective and hampers enforcement efforts.

Question 11 – What should be the priorities for a competition policy reform agenda to ensure that efficient business, large and small, can compete effectively and drive grwoth in productivity and living?

It is important for Australia to remain economically competitive with the rest of the world. However, the aim of competition policy should not be solely focused on the economic welfare of consumers but should also recognise the need to promote 'fair competition', including a right to take necessary steps to avoid the danger that supply squeeze[1] may cause to competition.

The *CCA* is designed to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection', as stated in s 2 of the Act. Harm to consumers is deemed to equate to harm to competition.[2]

However, the concept of 'fair competition' would recognise that the aim of competition policy can be conceived in a broader sense than it is currently interpreted. The objectives can include supporting fair conduct, promoting the competitive process, controlling wealth transfers, limiting the accumulation of private economic power, and supporting business freedom.[3] Competition policy in Australia can have broader social and economic motivations

[1] This is characterised as an exclusionary practice used by a retailer with substantial market power to squeeze the margins of its suppliers in order to sell products at a cheaper price to consumers. The difficulties that may be found in suing in this area can be represented in *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Limited (No 2)* [2003] FCAFC 163.

[2] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 13.

[3] See Kaysen C and Turner D, Antitrust Policy: An Economic and Legal Analysis (Harvard University Press, 1965) pp 11-18; Sullivan L, 'Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?' (1977) 125 U. Pa. L. Rev. 1214; Fox E, "The Politics of Law and Economics in Judicial

than economic welfare alone. There should be unity between the economic goals of competition policy and its social and political foundations; that is, the spirit behind its enactment in the *CCA*.[4] The authors of this submission believe that the economic goals of competition policy, correctly defined, may also generally advance the social and political objectives of the law. This will ultimately protect consumers' interests and not just their economic welfare. Such a protection will further deal the problematic nature of the current legislation which can be illustrated in the context of the Australian grocery sector where a duopoly exists with Woolworths Ltd (Woolworths) and Wesfarmers Ltd (Coles) controlling 80% of the market share.[5]

These two companies operate on both a wholesale and retail level, with the consequence that these two organisations have the ability to control every step of the grocery supply chain from primary production all the way to how much shelf space a product receives.[6] Vertical integration – which, according to the Chicago School, does not require any regulation – in such instances may cause problems, since vertical restraints between suppliers and retailers may be harmful to either of the parties. In the case of Coles and Woolworths, both organisations have admitted they are minimising their transaction costs by rationalising the number of suppliers they deal with.[7] For example, Wesfarmers Chief Executive, Mr Richard Goyder, said 'we have pushed back on a number of suppliers to get better prices by asking them to be more efficient and perform better. We had to let some suppliers go.'[8]

This approach and attitude, while not illegal under the current competition policy, has had a negative effect on the bottom line of both big and small suppliers. Coca Cola Amatil, Unilever and Nestlé have all seen their profits collapse as a result of the continuous price war between Coles and Woolworths.[9] Chief Financial Officer and Executive Vice-President of HJ Heinz, Mr Arthur Winkleblack, acknowledged that the behaviour of the two supermarkets was 'very difficult' and fostered an 'inhospitable environment.'[10] If multinational organisations are suffering as a result of the restraints imposed by Coles and Woolworths, small suppliers may be even more vulnerable to vertical restraints. Yet this conduct may not be perceived as a contravention of current Part IV of the *CCA* because it is all about allocative efficiency and consumer welfare. It does not recognise or acknowledge the

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Decision Making: Antitrust as a Window" (1986) 61 NYULR 554; Fox E, "Antitrust, Competitiveness and the World Arena: Efficiencies and Failing Firms in Perspective" (1996) 64 Antitrust L J 725; Lande R, 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' (1989-1990) 58 Antitrust L J. 631.

[4] Brodley J, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress" (1987) 62 NYULR 1020 at 1021.

[5] Mableson T and Stewart J, Supermarket Shootout: Will the Independents Survive?, Ferrier Hodgson (April 2011), http://www.ferrierhodgson.com/en/Publications/Newsletters/Ferriers%20Focus/2011%2004%20-%20April.aspx.

[6] Parliament Submission to House of Representatives Standing Committee on Industry, Science and Resources, *Finding a Balance: Towards Fair Trading in Australia* (May 1997) pp 121-136. The concern has also been that "products are withheld from independent distributors or else supplied at a cost that does not permit the independent distributors to be competitive in the market".

[7] Smith R, "Australian Grocery Industry: A Competition Perspective" (2006) 50 Aust J Agric Resour Econ 33 at 39.

[8] Ferguson A, "The All-Consuming Market for Markets", The Age (28 July 2012).

[9] Greenblat E, "Supermarket Price Wars Cost Coca Cola", The Sydney Morning Herald (21 August 2013) p 26.

[10] Kruger C and Greenblat E, "Suppliers Count the Cost as Woolies and Coles Shoot It Out Over Prices", The Sydney Morning
Herald (21 April 2012).

disorder that may be caused to the market[11] or the fact that while such conduct may benefit consumers in the short term it may negatively affect consumer choice in the long term: certain suppliers may be kicked out from the market and high barrier of entry may be introduced as a result of the strategy of Coles and Woolworths.

For instance, while consumers have benefited from the $1 per litre milk policy adopted by Coles, this benefit is only short term because the policy has created a competitive imbalance in the industry which may be harmful to consumers in the long term. The Senate Economics References Committee's Final Report on The Impacts of Supermarket Price Decisions on the Dairy Industry noted that 'the committee is concerned about the long-term future of these smaller retailers [and suppliers], and the effect that any weakening of this sector of the grocery market will have on competition in the long-run.'[12] As a consequence, Queensland put forward in 2013 the Milk Pricing (Fair Milk Mark) Bill 2013 (Qld) to protect the declining milk industry against the growing power of Coles and Woolworths.

While this submission does not support or defend the outdated 'big is bad, small is good' school of thought on antitrust,[13] they do support recognition of the fact that competition has both positive and negative connotations, and propose that the aim of competition law policy should not be solely focused on the economic welfare of consumers but should also recognise the need to promote fair competition, including a right to take necessary steps to avoid the excesses of competition.

This reality is that competition can drive prices below cost, benefiting consumers in the short term. However, it may also lead to a failure of competitors with the rise of one victor who may take control of the market, making competing businesses the victims of competition. Once the market is in the control of the sole victor, consumers may be left worse off in the long term.[14]

The authors of this submission believe that the economic goals of the provision, correctly defined, may also generally advance the social and political objectives of the law. This will ultimately protect consumers' interests and not just their economic welfare.

Question 29 – Given structural changes in the economy over time, how should misuse of market power be dealt with under CCA?

A Change is needed to ensure the effectiveness of the misuse of market power provision in the legislation. As it stands, the ACCC and its predecessor, the Trade Practices Commission (TPC), have only initiated 18 civil actions for possible breaches of s 46 in the past 37 years. This low number of civil actions, especially in view of the number of complaints the ACCC[15]

[11] Sullivan L, "Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?" (1977) 125 UPL Rev 1214 at 1225.

[12] Senate Economics References Committee, *The Impacts of Supermarket Price Decisions on the Dairy Industry*, Final Report (November 2011) (Dairy Report) at [4.52]. See also Zumbo F, "Promoting A More Diverse and Competitive Australian Supermarket Sector" (2012) 20 AJCCL 25 at 25, 36.

[13] Klein J, "Antitrust Enforcement in the Twenty-First Century" (1999-2000) 32 Conn L Rev 1066 at 1068.

[14] Walker S, "Market Talk: Competition Policy in America" (1997) 22(2) *Law and Social Inquiry* 435 at 439. However, it is important to note that when the victor raises its prices, other competitors may enter the market. This may be difficult when anti-competitive conduct is targeted toward producers and manufacturers. In such instances, competition is harder to strive after it has been destroyed as entry into the market may be difficult.

[15] The number of complaints is referred to later on in this submission.

has received in the past regarding potential breaches of s 46, is the result of the fact that the ACCC has found it challenging to prove the elements of this provision.[16] A rational actor may infer from this that a breach of s 46 is unlikely to lead to any civil action against an alleged offender. If the likelihood of any repercussions occurring as a result of such a breach is low, the misuse of one's substantial market power may appear yet more profitable. This belief may be compounded by the fact that the ACCC has publicly admitted the difficulties it has had in the past in proving that a breach of s 46 has occurred.[17] Commentators and concerned industry players alike have made similar public statements:

> Section 46 has failed in its objective of dealing with abuses of market power. There were High Court decisions that basically undermined the effectiveness of s 46.[18]

> The lack of prosecutions under s 46 despite ongoing concerns in industry suggest that it may not contain the powers necessary to overcome problems within industries such as the dairy industry.[19]

Even the High Court has noted that proving the elements of s 46 is a 'notoriously difficult task'.[20]

The end result is that the public is left with very little protection in this area. It is important, therefore, to amend s 46 so as to lower the hurdle that the ACCC faces when seeking to enforce the provision. Changes have already been made to the element 'taking advantage of its market power'.[21] The authors of this submission propose that there should also be an amendment to the 'purpose test'.

a *Introduction of an Effects Test*

Under the current regime, it is only when the corporation uses its market power for one of the three proscribed purposes listed in s 46(1) that it breaches the misuse of market power provision in the *CCA*. The purpose of the corporation's conduct may be established by direct evidence or inference. This has led to claims that the purpose test does not impose an onerous burden on the ACCC.[22] However, the low enforcement record of the ACCC itself highlights the existence of a problem in this area. This is one of the reasons why the ACCC has tried to lobby for an amendment of the test to include an 'effects test'.[23]

Further, one of the problems of the 'purpose test' is that irrespective of whether actual harm to a competitor or to competition may have occurred, the conduct of a corporation will not lead to a breach of s 46 unless the purpose of the conduct was prohibited. Accordingly, even

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[16] Sims R, 'Australasian Convenience and Petroleum Marketers Association conference' (Paper presented at Annual Conference Breakfast Melbourne, 12 September 2012) at 3.

[17] Sims, n 16 at 3; ACCC, 'Qantas Airlines Matter Discontinued' (MR 245/03, 21 November 2003).

[18] Associate Professor Zumbo F, *Committee Hansard*, 9 March 2011, 48 as cited in Senate Economics References Committee, n 12 p 106.

[19] NSW Farmers' Association, Submission 124 at 11 as cited in Senate Economics References Committee, n 12 p 106.

[20] *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, at [85].

[21] While these amendments have been made, they remain untested. It is therefore crucial for the ACCC to initiate more civil actions in respect of potential breaches of s 46 so that whether the changes made have dealt with the issues that have been raised in the past when proving the element 'taking advantage of' may be assessed.

[22] Trade Practices Act Review Committee, n 31 p 77.

[23] Trade Practices Act Review Committee, n 31 p 77.

if the result of the corporation's conduct was to substantially lessen competition, use of its market power will not be viewed as unlawful or prohibited if the conduct was not for one of the proscribed purposes.[24]

The authors argue that such a scenario should not be acceptable in this day and age, as it is harmful to competition and, as such, does not fit within the aim of s 46. Further, it can cause damage to competitors which in the long run may negatively impact upon consumers. It does not even fit within perfect competition theory since, as Stigler noted when writing in support of market deregulation, the following two features of competition are necessary:[25]

- feature 1: each economic unit must be small enough as not to exert an influence on the price; and
- feature 2: neither government nor private entities can create barriers to the movement of resources into and out of a particular industry.

In a duopoly such as the current Australian grocery market, for example, the first feature is not there as two main actors (Woolworths and Coles) are setting the pricing. Additionally, the second feature is missing as private entities are allowed to be involved in conduct that may create barriers to entry into the market as long as they did not *purposely* intend to do so. This is one of the reasons why the ACCC has found it hard to prove that Woolworths and Coles actually have been engaged in breaching the market misconduct provision.[26]

The authors recommend that s 46(1) be amended to take into account not only the test of the purpose of a corporation's conduct but also the anti-competitive effects of that conduct. This will provide better protection to consumers in the long term as well as in the short term. Thus, in the wording of the legislation, a corporation with a substantial degree of power in a market would contravene s 46(1) if it takes advantage of that power in that or any other market for the purpose, '*or with the effect, or likely effect*' of eliminating or substantially damaging a competitor, preventing the entry of a person into the market, or deterring or preventing a person from engaging in competitive conduct.[27]

Although an 'effects test' has been rejected by review committees in the past, a recurring consideration in the deliberations of those committees was the notion that in the future case law would shed light on the interpretation of s 46.[28] Almost four decades after the introduction of s 46, however, only 18 civil actions have been initiated by the ACCC and the looked-for illuminating case law has not yet developed. Further, the report of the Senate Economics References Committee on *The Impacts of Supermarket Price Decisions on the*

[24] Blunt G and Neale G, 'The Development of Section 46 in Australia – *Melway* and its Likely Impact on Business' in Hanks F and Williams P (eds), *Trade Practices Act: A Twenty-Five Year Stocktake* (Federation Press, Sydney, 2001) p 207.

[25] Stigler G, *The Theory of Price* (Macmillan, New York, 1987) p 13.

[26] Australian Competition and Consumer Commission, 'ACCC: Coles discounting of house brand milk is not predatory pricing' (*Media release*, NR 129/11, 22 July 2011).

[27] This perspective is also supported by the non-government senators of the Senate Economics References Committee: Senate Economics References Committee, n 12 p 139.

[28] Trade Practices Consultative Committee, Parliament of Australia, *Small Business and the Trade Practices Act* (1979); House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (1989); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Mergers, Monopolies and Acquisitions* (1991); Independent Committee of Inquiry, Parliament of Australia, *National Competition Policy* (1993); Joint Select Committee on the Retailing, Parliament of Australia, *Fair Market or Market Failure? A Review of Australia's Retailing Sector* (1999).

Dairy Industry has highlighted that the lack of an 'effects test' has made it harder for the ACCC to determine whether a breach of s 46 has occurred.[29] Lastly, an 'effects test' may be beneficial to small businesses as it may aid protection of the process of competition more effectively, keeping them in the market.[30]

The proposed introduction of an 'effects test' would essentially achieve three main goals, each of which is in line with the overall aims of the competition law provisions in Australia:

- such amendment would overcome enforcement difficulties associated with proving purpose in s 46 cases generally, and supply squeeze in particular;
- such amendment would achieve uniformity of s 46 with the rest of Pt IV of the *CCA*, which is generally directed against conduct that has the purpose *or effect* of damaging competition; and
- in posing the question 'what will the long term effect of this conduct be', such amendment would more effectively protect the process of competition as it would better facilitate a long term perspective on promoting competition and fair trading in accordance with the objects of the Act.

Because the introduction of an 'effects test' may lower the hurdle that the ACCC faces when determining whether it should take action for alleged breaches of s 46, rational actors may think twice before breaching s 46, as the likelihood of their being sued and found in breach of the provision will be greater than is currently the case.

b *Introduction of a Defence*

The *Review of the Competition Provisions of the Trade Practices Act* (2003) ('*Dawson Report*') noted that the introduction of an 'effects test' may make the distinction between legal (that is, pro-competitive) and illegal (anti-competitive) activities difficult. The risk is that the 'effects test' may lead to normal competitive behaviour that may injure competitors becoming unlawful. If this occurred, an 'effects test' could discourage competition.[31] To deal with this concern, a 'public interest' defence might be introduced. Thus, if conduct that would otherwise fall under s 46 is in the best interests of consumers in the short term as well as the long term, the conduct will be allowed even if some harm may be caused to competitors as it is in the public interest to permit it.

The introduction of such a defence in the legislation may provide protection for businesses while maximising competition in the market. Further, the defence may ensure that the 'effects test' does not penalise legitimate business decisions that will benefit consumers in the long term.

[29] Senate Economics References Committee, n 12 p 102.

[30] See for example, Master Grocers Association of Victoria Ltd, Submission No 63 to Trade Practices Review Committee, '*Review of the Competition Provisions of the Trade Practices Act*', April 2003 p 4.

[31] Trade Practices Act Review Committee, Trade Practices Act Review Committee, Commonwealth of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('*Dawson Report*') pp 80-81.

Question 41 – Are the enforcement power, penalties and remedies, including for private enforcement effective in furthering the objectives of the CCA? The panel is interested in whether there are other remedies or powers (for example in overseas jursidctions) that should be considered in the Austrlaian context?

The focus of this submission will only be on enforcement by the ACCC as it is crucial that the ACCC has penalties at its disposal to regulate anti-competitive conduct. Without such sanctions, the public interest purpose of the legislation would be lost. Private enforcement by itself, no matter how good it is, is not enough to protect the interest of consumers.

Pursuant to the rational actor theory, a rational person cannot be expected to comply with the law in the absence of strong sanctions for non-compliance if they would profit from unlawful conduct.[32] In order to achieve deterrence, the sanctions imposed for non-compliance have to be high enough that the estimated benefits of violating the law do not outweigh the estimated costs of engaging in the unlawful conduct.[33] In the context of a rational actor deciding whether or not to breach the *CCA* provisions, to be effective a sanction would have to take away the prospect of the actor profiting from the anti-competitive conduct. Under the current regime, a range of sanctions may apply in circumstances where a breach of anti-competitive provision has been found to have been breached,[34] however, this submission will particularly focus on pecuniary penalties and disqualification orders.

a *Sanctions Against Corporations: Pecuniary Penalties*

A breach of the provisions in Part IV may result in the imposition of pecuniary penalties on the offending corporation under s 76 of the *CCA*, the aim of which provision is to achieve deterrence, both specific and general.[35] For example, French J noted that:[36]

> The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.

This fits within the prevailing international view that the object of monetary sanctions against corporations is deterrence.[37]

However, a review of the penalties applied over the years highlights that the penalties imposed have failed to have sufficient deterrent effect as they were not high enough to counter the profit generated from a breach of Part IV. For example, over the years, successful

[32] Yeung K, *The Public Enforcement of Australian Competition Law* (ACCC Publishing Unit, Dickson, 2001) p 23.

[33] Bentham J, 'The Principles of Penal Law' in Bowring J (ed), *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1838-1843) Volume 1, p 396; Cooter R and Ulen T, *Law and Economics* (2nd ed, Scott Foresman, Glenview, 1997) pp 389-394.

[34] Some of these sanctions include injunctive orders, community service orders and adverse publicity orders: *Competition and Consumer Act 2010* (Cth), ss 80, 86C(2)(a), 86D respectively.

[35] *Trade Practices Commission v Stihl Chain Saws (Aust) Pty Ltd* (1978) ATPR ¶40–091, at [17896]. Pecuniary penalties may also be viewed as a quasi-criminal sanction: Yeung K, *Securing Compliance* (Hart Publishing, Oxford, 2004) p 100.

[36] *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41–076, at [52152].

[37] See for example, International Competition Network, Cartels Working Group, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties* (Report to the 4th ICN Conference, Bonn, June 2005) p 58; Organisation for Economic Co-operation and Development (OECD), *Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws* (2002) pp 3, 12.

prosecutions for breach of s 46 have led to the imposition of a range of pecuniary penalties as illustrated in Table 1.

Period	Number of Cases Leading to the Imposition of Pecuniary Penalties	Lowest Penalty	Average	Highest Penalty
1974-1992	2	$175,000	$197,000	$220,000
1993-2006	7	$0	$2.7 million	$8 million
2007-2011	2	$2.5 million	$8.25 million	$14 million

Table 1: Pecuniary penalties imposed on corporations for breach of s 46[38]

Not unexpectedly, the pecuniary penalties imposed on corporations for breaching s 46 were at their lowest between 1974-1992. The maximum penalty that might be imposed on corporations during this period was $250,000. A review of the use of s 76 during this period noted that judges 'demonstrated reluctance to assess penalties anywhere near the allowable limit' and that they appeared 'especially sympathetic to colluders who [had] sought to raise prices after prolonged price wars'.[39]

Concerns that the penalty levels were failing to achieve deterrence led to the legislation being amended in 1993 to increase the penalties to a maximum of $10 million. As a consequence, the size of penalty imposed after 1993 increased. While the average penalty imposed during the period 1993-2006 was $2.7 million, there were still instances where no pecuniary penalty was imposed on a corporation found to have breached s 46 and as such one may question the deterrent effect these judgments may have had. Further, not one judgment during this period imposed the maximum penalty. This may have indicated reluctance on the part of the judiciary to impose pecuniary penalties at a level equal to the new maximum.[40]

Individual judges have nevertheless on occasion expressed the opinion that penalties imposed in the past have failed to have sufficient deterrent effect and that future penalties should be set at a level that would eliminate the prospect of illegal gain.[41] The hurdle back then was that the regime did not permit the penalty imposed to take into account the profit that the offender might expect to accumulate as a result of their breach of the law. This was a weakness in the system because if the offender is able to keep the gain generated through breaching Part IV, a rational actor may not be deterred from committing the breach.[42]

For this reason, the ACCC lobbied to change the penalty regime for breaches of Part IV of the then *Trade Practices Act 1974* (Cth); the *Dawson Report* also supported changing the

[38] The data was collected by reviewing all the cases where the ACCC was successful in proving that a breach of s 46 had occurred. These cases are listed in n 86.

[39] Round D, Siegfried J and Bailie A, 'Collusive Markets in Australia: An Assessment of their Economics, Characteristics and Judicial Penalties' (1996) 24 ABLJ 292 at 299. These findings were not limited to s 46 but to all cartel provisions in the legislation that may result in the imposition of a penalty under s 76.

[40] Round D, 'An Empirical Analysis of Price Fixing Penalties in Australia from 1974 to 1999: Have Australia's Corporate Colluders Been Corralled?' (2000) 8(2) CCLJ 1 at 12.

[41] See for example: *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] ATPR ¶41–815, at [42938]; *Australian Competition and Consumer Commission v Leahy Petroleum [No 2]* (2005) 215 ALR 281, at 287, 299.

[42] OECD, n 37 at 3.

penalty regime to ensure that the sanctions imposed for breach of the competition provisions in the legislation could take into account any expected gains made from the breach.[43] The *Dawson Report* recommended adopting New Zealand's pecuniary penalty regime for breaches of the equivalent of Partt IV of the *Trade Practices Act 1974* (Cth), considering it to be 'a desirable provision' and 'in the interests of closer economic relations between the two countries ... that the Australian Act should be amended along the same lines'.[44] This occurred in 2006 when s 76 was amended by the *Trade Practices Legislation Amendment Act 2006* (Cth). The maximum pecuniary penalty for contraventions of anti-competitive behaviour is now whichever is the greatest of the following:[45]

- $10 million; or
- three times the gain from the illegal conduct; or
- if the gain cannot be calculated, 10% of the offender's annual turnover in the preceding 12 months.

In assessing the amount of the penalty to be imposed, a court will consider the following factors:[46]

- the nature and extent of the contravening conduct;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the Act as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the Act in relation to the contravention;
- whether there has been similar conduct by the company in the past;
- the effect of the conduct on the functioning of the market and other economic effects of the conduct;
- the financial position of the contravening company; and
- whether the conduct was systematic, deliberate or covert.

While the factors considered by the court in determining the amount of the penalty to be imposed have remained the same although the maximum penalty that may be imposed on a corporation has increased,[47] a review of the cases illustrates that there is no real consistency in the imposition of pecuniary penalties on corporations.

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[43] Trade Practices Act Review Committee, n 31 pp 160-161.
[44] Trade Practices Act Review Committee, n 31 p 161.
[45] *Competition and Consumer Act 2010* (Cth), s 76(1A)(b).
[46] These factors were identified in *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41–076, at [52152]–[52153] and expanded in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 and *J McPhee & Son (Aust) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532, at [157]-[158].
[165] These factors were approved and applied in *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489, at [23]-[24] and *Australian Competition and Consumer Commission v Cabcharge Australia Limited* [2010] FCA 1261, at [44].

Nevertheless, the changes in the penalty regime under s 76 noted above aid in strengthening the enforcement of Part IV, as the penalties are higher than before and take into account the gain from the illegal conduct or, if such an amount cannot be determined, 10% of the annual turnover of the corporation. Since it may be difficult to assess the gain from the illegal activity,[48] the default penalty may be the highest of $10 million or 10% of the offender's annual turnover. As seen in Table 1, in the case of penalties imposed for a breach of s 46, these changes have led to an increase in the average pecuniary penalty imposed on corporations in cases litigated by the ACCC under s 46 since 2007 to $8.25 million. This average is based on the outcome of only two cases, however, and in only one of these instances did the court apply the 10% of annual turnover test to determine the amount of the penalty that should apply. The pecuniary penalty in that instance was $14 million,[49] but this amount was the result of three contraventions of s 46. Consequently, the courts may still be reluctant to impose the highest penalty possible as they may be concerned that such a penalty will be oppressive.[50]

A broader review of the pecuniary penalties that have been imposed on corporations for breach of the competition provisions in the legislation highlights that Federal Court judges appear to have paid insufficient attention to the statutory maximum in setting penalties for such breaches.[51] Finkelstein J commented:[52]

> Penalties in Australia are still something of a light touch notwithstanding the new penalty regime that was introduced in 2006. If they are to be reviewed, perhaps the place to begin is not to lose sight of the maximum aggregate penalty that can be imposed in a particular case. Although only to be applied in the worst possible case, there must still be some relationship between the maximum penalty and the penalty that is imposed.

Accordingly, the deterrent effect of the current pecuniary penalties may be questionable and further review of the penalty regime may be required. After all, pecuniary penalties, especially low ones, may be viewed as a cost of running a business and as such will not have any deterrent effect.[53] The introduction of a base penalty may be needed to ensure that a breach of Part IV does not result in any lower penalty than the base monetary sanction. This would provide both the judiciary and the ACCC with a clear readily quantifiable point for calculation of the penalty and ensure a degree of consistency in fining practices.

The authors of this submission recommend that s 76(1A)(b) should be altered in the following manner:

> *(1A) The pecuniary penalty payable under subsection (1) by a body corporate for each act or omission to which this section applies that relates to any other*

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[48] An example of such difficulty can be found in: *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd* [2001] ATPR ¶41–809, at [42813], [42817]; Beaton-Wells C and Fisse B, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, Port Melbourne, 2011) p 427.

[49] *Australian Competition and Consumer Commission v Cabcharge Australia Limited* [2010] FCA 1261.

[50] *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489, at [29].

[51] Beaton-Wells and Fisse, n 48 p 431; Stevenson P, Stewart D and Floro A, 'A Dollar in the Hand: Assessing Penalties for Contraventions of Pt IV of the Trade Practices Act' (2008) 16 TPLJ 203 at 208.

[52] *Australian Competition and Consumer Commission v Bridgestone Corporation* (2010) 186 FCR 214, at [49].

[53] Bagaric M and Du Plessis J, 'Expanding Criminal Sanctions for Corporate Crimes—Deprivation of Right to Work and Cancellation of Education Qualifications' (2003) 21(7) C & SLJ 7 at 13-14.

*provision of Part IV, is not to be lower than 5% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the act or omission occurred; and is not to exceed—the greatest of the following:*

(i) if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit;
*(ii) if the Court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the act or omission occurred.*

Having a minimum base payment is not new and has been applied in other jurisdictions.[54] It would send a further message to the business community that breaches of Part IV will attract substantial penalties. It would also provide a transparent and structured approach to imposing pecuniary penalties on corporations without removing the court's discretion in respect of the amount of penalty to be imposed. Lastly, it will assist the ACCC in securing cooperation in the negotiation of any settlement that may arise as a result of a breach of Part IV.

b *Sanctions Against Individuals: Pecuniary Penalties*

A breach of Part IV may also result in pecuniary penalties being imposed on individuals; the current maximum penalty that may be imposed is $500,000.[55] However, this sanction is not regularly relied on. For instance, in the case of the enforcement of s 46, only in one instance has a breach of this provision resulted in the imposition of a pecuniary penalty on individuals, and the penalty imposed was $100,000 per individual.[56] As a result, in the context of misuse of market power, it may be said that pecuniary penalties have minimal deterrent effect for individuals.[57] As with corporations, the authors recommend that a base penalty is applied to individuals who contravene Part IV. This will result in more general and specific deterrence as the consequences of breaching Part IV are more serious. Accordingly, amendment to the legislation may need to take place to introduce such a base penalty.

c *Sanctions Against Individuals: Disqualification Orders*

Since 2007, a breach or attempted breach of Part IV by an individual may result in the disqualification of the person from managing a company.[58] A disqualification order will have a deterrent effect on individuals[59] as such an order may have very serious ramifications on the

[54] International Competition Network, Cartels Working Group, Subgroup 1 – General Framework, *Setting of Fines for Cartels in ICN Jurisdictions* (Report to 7th Annual Conference, Kyoto, April 2008) pp 15, 19; United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, 2R1.1(d)(1), Comment 3 (2012); European Commission, *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a)of Regulation No 1/2003* [2006] Official Journal C 210/2, at [12]-[13], [17]-[18].
[55] *Competition and Consumer Act 2010* (Cth), s 76(1B)(b).
[56] *Australian Competition and Consumer Commission v Eurong Beach Resort Ltd* (2006) ATPR ¶42–098.
[57] Anti-competitive actions other than misuse of market power have resulted in more fines being applied to individuals, however the amount of the fines remains low and as such deterrence may not be achieved: see the study conducted in Beaton-Wells and Fisse, n 48 p 462.
[58] *Competition and Consumer Act 2010* (Cth), s 86E.
[59] See for example Trade Practices Act Review Committee, n 31, Recommendation [10.2.2].

individual and his or her family.[60] This sanction will also send a message to the business community that for white collar crime 'the game is not worth the candle'.[61] It is important to remember that the main aim of a disqualification order is to ensure the protection of the public, but this fits in perfectly within the aim of Part IV.[62] The test that will apply to determine whether a disqualification order should be imposed is similar to the one that is applied under s 206C of the *Corporations Act 2001* (Cth).[63] However, the provision has rarely been applied in the context of Part IV and this makes it less effective, as few people will be aware of it and will not therefore factor it in when determining whether they should allow a breach of Part IV to occur.

Further, the sanction of disqualification order is prone to evasion. For example, under the current regime a person who is disqualified may still act as an independent consultant or adviser to a corporation,[64] and may even exert considerable influence or control over the management of the corporation without necessarily falling into the category of shadow director or de facto director.[65] If this occurs, the disqualification order has no effect in fact and may as well not have been issued in the first place.

To avoid this situation, the *Dawson Report* recommended that the courts should be empowered to exclude a person 'from being a director of a corporation or being involved in its management'.[66] This recommendation has been only partially adopted, as s 86E refers simply to court orders disqualifying a person 'from managing corporations'. The authors recommend that the original recommendation of the *Dawson Report* is adopted to enhance the deterrent effect of the provision and ensure the protection of the public.

Question 41 – What are the experiences of small businesses in dealing with the ACCC? Are there any factors that make it difficult for small businesses to enforce their rights or otherwise take action in relation to competition issues?

It is important for Australia to have a system that is effective to enable small businesses to take action and enforce rights in relation to contraventions of competition laws. However, an analysis of some of Australia's competition law provisions shows that it is very difficult to enforce small business' rights.

For example, section 46 is recognised as one of Australia's most important sections. The following data in Table 2 was collected by reviewing the ACCC's Annual Reports:

[60] *Nolan v Australian and Securities and Investments Commission* [2006] AATA 778 at [13]; *Nguyen v Australian Securities and Investments Commission* [2012] AATA 156 at [143]-[144].
[61] *Australian and Securities and Investments Commission v Vizard* (2005) 145 FCR 57, at 68.
[62] Nehme M, 'Latest Changes to the Banning Order Regime: Were the Amendments Really Needed?' (2013) 31(6) C&SLJ 341.
[63] *Australian Competition and Consumer Commission v Halkatia Pty Ltd (No 2)* [2012] FCA 535, at [112].
[64] However, such a claim may be scrutinised by the court: see *Australian and Securities and Investments Commission v Parkes* (2001) 38 ACSR 355.
[65] *Corporations Act 2001* (Cth), s 9; Simon H, *Administrative Behavior: A Study of Decision Making Processes in Administrative Organizations* (Free Press, New York, 1957) p 130.
[66] Trade Practices Act Review Committee, n 31, Recommendation [10.2.2].

Year	Complaints re potential breaches of s 46
2001-2002	830
2002-2003	830
2003-2004	553
2004-2005	484
2005-2006	451
2006-2007	364
2007-2008	325
2008-2009	246
2009-2010	544
2010-2011	550
2011-2012	471
TOTAL	**5648**

Table 2: Complaints received by the ACCC regarding potential breaches of s 46

On a number of occasions from 2001 to 2012, alleged misconduct relating to s 46 has been one of the top five reasons for lodging a complaint with the ACCC in any given year.[67] Despite this being the case, the ACCC/TPC has only initiated 18 proceedings for breaches of s 46(1). The data illustrated in Table 3 was collected by reviewing all proceedings initiated by the ACCC and the TPC under s 46 from 1974 to 2011.

Causes of action under s 46	Number of cases
Predatory pricing	5
Refusal by supplier to deal with or supply	9
Threaten competitor	4
TOTAL	18

Table 3: Litigation initiated by the ACCC under s 46 of the CCA between 1974 and 2011

In addition to litigation, the ACCC accepted 13 enforceable undertakings relating to alleged breaches of s 46 between 1993[68] and 2011. The data in Table 4 was collected by reviewing all the enforceable undertakings accepted by the ACCC.

Enforceable undertakings under s 46: Alleged breach	Number of undertakings
Predatory pricing	0
Refusal by supplier to deal with or supply	12
Threaten competitor	1
TOTAL	**13**

Table 4: Enforceable undertakings relating to alleged breaches of s 46 between 1993 and 2011

[67] See, for example, ACCC, Annual Report 2000-2001, p 57; ACCC, Annual Report 2010-2002, p 66.

[68] This is the date when the Trade Practices Commission was first provided with the power to accept enforceable undertakings: Nehme M, "The Use of Enforceable Undertakings by the Australian Competition and Consumer Commission" (2008) 27(2) U Tasm L Rev 124.

As the tables illustrate, the total number of actions brought by the ACCC in respect of s 46 in 37 years represents only 0.5% of all the complaints received by the ACCC in this area from 2001 to 2012. This highlights that the regulatory system is ineffective and is hampering the ACCC's enforcement efforts in this area especially as the ACCC has recognised the importance of the misuse of market power provision and in fact monitors the compliance of different industries with the terms of the provision.

The above figures highlight that if the ACCC has difficulties in enforcing their rights and taking action in relation to competition issues, it is more likely that smaller businesses would have even more difficulty than the ACCC in enforcing their rights. This is especially the case as the ACCC itself has admitted that competition laws set a number of hurdles that have negatively influenced the ACCC's enforcement.[69] For example, it is a fact that, due to previous unsuccessful actions in the area of misuse of market power, the ACCC has stopped pursuing legal action against certain conduct that may be in breach of s 46.[70] As a consequence, further reforms may be required to improve the efficacy of the application of s 46 and other provisions in the Act.

Another example of small business having difficulty in enforcing its rights in relation to competition law is *ACCC v Australian Safeway Stores Pty Ltd*.[71] This can be characterised as an exclusionary practice used by Safeway with substantial market power to squeeze the margins of its bread suppliers. When the bread suppliers refused to sell bread to Safeway for the same cheap price that it did to some independent stores, Safeway removed the bread products from its shelf to punish the bread wholesalers. This was a clear contravention of the competition laws. However, in order to get a result, it took the ACCC more than nine years from the time of filing to the handing down of final penalties. This would dissipate any benefit for Safeway's victims.

Similarly, Coca Cola Amatil, Unilever and Nestlé have all publicly expressed their disdain with their experiences in dealing with competition issues with Coles and Woolworths.[72] Chief Financial Officer and Executive Vice-President of HJ Heinz, Mr Arthur Winkleblack, acknowledged that the behaviour of the two supermarkets was 'very difficult' and fostered an 'inhospitable environment'.[73] If multinational organisations are suffering as a result of the restraints imposed by Coles and Woolworths, small suppliers may be even more vulnerable to vertical restraints.

In the end, if these large corporations have trouble in enforcing their competition law rights, then, no doubt, it is possible that small businesses have even more trouble enforcing their rights.

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[69] Sims R, *Some Compliance and Enforcement Issues*, Law Institute of Victoria Breakfast Series (Melbourne, 25 October 2011) p 3, http://www.accc.gov.au/system/files/Some%20compliance%20and%20enforcement%20issues.pdf.

[70] See ACCC, *Annual Report 2002-2003*, p 4; Senate Economics Legislation Committee, *Estimates* (5 June 2003) p 616.

[71] *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2003] FCAFC 163.

[72] Greenblat E, "Supermarket Price Wars Cost Coca Cola", The Sydney Morning Herald (21 August 2013) p 26.

[73] Kruger C and Greenblat E, "Suppliers Count the Cost as Woolies and Coles Shoot It Out Over Prices", The Sydney Morning Herald (21 April 2012).

Conclusion

The Issues Paper provided by the Competition Policy Review Committee is an important starting point to identify competition-enhancing microeconomic reforms to improve productivity and growth. However, it is important to remember two considerations. Firstly, not every competition will lead to an improvement of the system. A number of strategies currently used by certain entities may lead to competition in the short term but not in the long term. As such, it is not enough to base our competition systems on theories such as workable competition, perfect competition or contestability theories. The focus should be more on fair competition which considers not solely the economic objectives but also the delivery of other benefits besides economic efficiency to society. Such an approach may allow for competition benefits to flow more easily to society. Secondly, a robust regulatory regime with strong sanctions is also essential to ensure the protection of consumers and to prevent rational actors from contravening the law. In the end, the strength of an efficient competition system would provide certain protection to small businesses and protect the interest of consumers.

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