

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF
ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE
AUSTRALIAN COMPETITION POLICY REVIEW ISSUES PAPER**

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Competition Policy Review Panel (the “Panel”). The Sections appreciate the opportunity to present our experience and views with respect to several subjects raised in the Panel’s Issues Paper. The Sections’ comments reflect their expertise and experience with competition law in the United States as well as in numerous other jurisdictions worldwide.

The Issues Paper seeks input on a wide range of competition-related topics. The Sections’ comments focus on the following specific issues:

- I. International price discrimination
- II. Misuse of Market Power
- III. Price Signaling
- IV. Resale Price Maintenance

I. International Price Discrimination

Sections 2.6 and 2.7 of the Issues Paper ask whether there is a case to regulate international price discrimination and, if so, how this could be done effectively. It is the Sections' view that introducing legislation to "regulate international price discrimination" as suggested in the Issues Paper could hamper competition and economic efficiency.

As a general principle, flexibility in pricing is crucial to competition in a market-based economy. This principle was recognized by previous panels in Australia that reviewed domestic price discrimination legislation, which was repealed in 1995. Differential pricing does not necessarily reflect a lack of competition or anticompetitive conduct. To the contrary, it can be an indication of robust competition. Indeed, it may be "the very presence of competition, rather than monopoly power, that often is responsible for the prevalence of discriminatory prices."¹ Past reviews of Australian price discrimination legislation have similarly concluded that price differentiation generally enhances economic efficiency.²

In particular, price discrimination based on geography is often beneficial for competition and consumers. It is widely accepted under competition law principles that distinct supply and demand conditions may result in the existence of distinct geographic markets, in which different prices are to be expected. Differing prices may be a response not only to different costs (e.g., shipping, raw materials and other inputs), but also to other market conditions such as differing supply and/or demand levels, consumer demographics, culture, local competition, regulatory risk or requirements, distribution structures, and other factors. Allowing companies to set different

¹ William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L.J. no. 3, 663 (2003). This may be particularly evident in the airline, healthcare and software industries. *See id.* at 661–685.

² *See, e.g.*, REPORT BY THE INDEPENDENT COMMITTEE OF INQUIRY, NATIONAL COMPETITION POLICY, (AGPS, Aug. 1993), 74–79, *available at*

prices taking into account such conditions in different countries or geographic markets is generally procompetitive.³ Under certain circumstances, “price discrimination based on consumer location intensifies competition between... firms, causing prices to fall for all consumers and profits to fall for all firms.”⁴

Any proposed legislation of differential pricing, particularly based on geography, should be carefully evaluated. In the Sections’ view, the potential harm of regulating international price differences is likely to outweigh any potential benefits.

Regulation of international price differences is a risky endeavor. Even if regulation is limited to prices “not based on the different costs of doing business in each country” or to “unjustified” price discrimination, identifying such cases is extremely difficult given the complexity of the factors influencing pricing decisions in a given country, as described above.

The attendant uncertainty and risk for companies is likely to have a chilling effect on justifiable and procompetitive price differences. This could lead to higher prices in some countries (or everywhere). It could also create incentives for foreign suppliers to abandon or choose not to enter the Australian market, resulting in less choice for consumers and less interbrand competition in Australia. Likewise, Australian companies might opt out of overseas markets, or be constrained in their ability to compete in certain countries. As one U.S. study put it, deterrence of price differentiation based on customer location “unambiguously harms consumers.”⁵

<http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>.

³ See C.D. Howe Institute Competition Policy Council, CROSS-BORDER PRICE REGULATION: ANTI-COMPETITION POLICY? 3 (2014) (“When distributors or retailers set prices to reflect local demand or cost conditions, or to keep posted prices steady in the face of exchange rate movements, that is consistent with competition.”).

⁴ James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327, 341 (2005).

⁵ *Id.* at 332

The U.S. experience with the Robinson-Patman Act (“RPA”), which prohibits certain forms of price discrimination (but not price discrimination between customers in different geographic markets), has shown that regulation of price discrimination “has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would.”⁶ The Antitrust Modernization Commission, which ultimately recommended repeal of the RPA, further asserted that it “inhibit[s] entry” and “requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.”⁷

As a practical matter, implementation of international price discrimination legislation is likely to be burdensome and require intensive factual and economic analysis.⁸ The government would have to consider complex threshold issues such as which countries Australian pricing should be compared against, how to compare pricing given different currencies and fluctuating exchange rates, and what international trade agreements might be implicated. Substantial resources and expertise would be required for enforcement.

On the other hand, it is highly uncertain whether any such legislation would adequately address the concerns that prompted this panel’s inquiry, namely, seemingly high prices in Australia.⁹ As noted above, it may in reality have the unintended consequence of higher prices. Furthermore, high prices in themselves do not necessarily indicate the existence of

⁶ ANTITRUST MODERNIZATION COMMISSION REPORT AND RECOMMENDATIONS (2007), 311, *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁷ *Id.* at 320.

⁸ The panel has noted that the Canadian Government has announced plans to introduce legislation to address country-specific price discrimination, focused, as we understand on price differences between Canada and the United States. No legislation has been introduced yet and no detail has been provided on the circumstances in which price differences may be considered unjustified. As such, we do not believe Canada can provide an effective guide for this panel in determining whether to regulate international price differences.

⁹ The Australian Parliament has concluded such legislation is not recommended. Standing Committee on Infrastructure and Communications, AT WHAT COST? IT PRICING AND THE AUSTRALIA TAX (2013), *available at*

uncompetitive market conditions or anticompetitive conduct. If high prices are the result of anticompetitive conduct, existing provisions in the Australian Competition & Consumer Law should suffice to address such conduct.

It is the Sections' view that in many cases differential pricing between countries and between different geographic markets in fact increases competition and efficiency. Conversely, broadly restricting such pricing flexibility is likely to have a negative effect on competition and consumers.

II. Misuse of Market Power

Paragraph 5.9 of the Issues Paper asks whether Section 46 of the CCA should be amended to include an effects test for anticompetitive conduct, in addition to the existing purposive test. The Sections respectfully submit that broad changes to Section 46 appear to be unnecessary: the requirement of purpose has not proven to be an obstacle to enforcement of the Act, and there is no evidence that the current Section 46 significantly under-deters anticompetitive unilateral conduct.

Although Section 46's apparent focus on "purpose" appears at odds with international norms that increasingly focus on competitive effects, the Australian courts have developed and applied Section 46 using sound economic principles and a careful consideration of competitive effects and potential harm to consumers. As such, although Section 46 could be amended to bring the statutory language more into line with judicial interpretation, inserting a separate effects test into Section 46 has the potential to raise significant uncertainty as to how such a test ought to be applied by the Australian courts.

http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm.

a. *Overview*

Section 46 of the CCA prohibits firms with a substantial degree of market power from taking advantage of that market power for any of three defined anticompetitive purposes.¹⁰ For the most part, Section 46 contains broad language rather than prescriptive provisions.¹¹ Over the last forty years, the Australian courts have developed a considerable body of law interpreting and clarifying Section 46.¹²

The U.S. experience regarding unilateral conduct holds particular relevance for Australian policymakers. Similar to Section 46, Section 2 of the Sherman Act contains broad language prohibiting attempted monopolization, conspiracies to monopolize and monopolization. Congress drafted the Act broadly and “expected the courts to give shape to the statute’s broad mandate by drawing on the common-law tradition.”¹³

The U.S. courts and antitrust agencies have, over the last one hundred and twenty-four years, interpreted and applied Section 2 in numerous contexts, sometimes controversially and not always successfully. Several inquiries have examined whether Section 2 ought to be amended.¹⁴ There has been vigorous academic debate over the optimal regime to police unilateral conduct, including the formulation of several different tests for distinguishing exclusionary unilateral conduct from legitimate competition. Nevertheless, Section 2 has survived without legislative

¹⁰ Competition and Consumer Act § 46. The proscribed purposes are: “(a) eliminating or substantially damaging a competitor of the corporation . . . ; (b) preventing the entry of a person into that or any other market;” and “(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.” *Id.*

¹¹ The so-called “Birdsville” amendment relating to predatory pricing is a recent exception from this general philosophy. *See id.* at § 46(1AA)

¹² *See, e.g.,* Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1987) 167 CLR 177; Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1; Rural Press Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 53; Boral Besser Masonry Ltd v. ACCC (2003) 215 CLR 374 at 479; Eastern Express Pty Ltd v General Newspapers Pty Ltd (1992) 35 FCR 43.

¹³ Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978).

¹⁴ *See* Report of Antitrust Modernization Commission, *supra* note 7.

amendment and has proved elastic enough to apply to numerous types of business conduct and in many different industries despite the enormous changes in the American economy since 1890.

b. Is the Apparent Focus on Purpose in Section 46 in Need of Amendment?

The Sections understand that in previous inquiries, such as the *Dawson* inquiry, the ACCC has argued that its enforcement of Section 46 has been hampered by the need to prove purpose, and that an effects test would be easier to establish and thus facilitate more effective policing of unilateral conduct by the ACCC.¹⁵

The requirement to prove intent has not proved to be a particular obstacle in U.S. enforcement in an otherwise sound case of exclusionary anticompetitive conduct with clear consumer harm. Modern U.S. decisions hold that it is not subjective intent but objective intent that is relevant, and that intent can be inferred from conduct and effect.¹⁶ The focus of the U.S. courts is on evidence of monopoly power and proof of exclusionary conduct.¹⁷

Similarly, in Australia it appears that “purpose” is considered broadly under an objective—not a subjective—standard.¹⁸ Section 46(7) of the Act makes the objective standard explicit by providing that that a proscribed purpose may be “ascertainable only by inference from

¹⁵ Trade Practices Act Review Committee, REVIEW OF THE COMPETITION PROVISIONS OF THE TRADE PRACTICES ACT (2003) (“Dawson Report”), available at <http://tpareview.treasury.gov.au/content/report.asp>; *Australian Competition & Consumer Commission*, SUBMISSION TO THE TRADE PRACTICES ACT REVIEW (2002), available at http://tpareview.treasury.gov.au/content/subs/056_Submission_ACCC_P1.pdf.

¹⁶ The Supreme Court accepted in *Griffith* that intent could be inferred from effect: “it is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or a monopoly results as the consequence of the defendant’s conduct or business arrangements.” *United States v. Griffith*, 334 U.S. 100, 105 (1948). *See also* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1972); *United States v. United Shoe Mach. Corp.*, 247 U.S. 32 (1918) (Evidence of actual exclusion may substitute for intent).

¹⁷ “To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 879 (2004) (emphasis in original).

¹⁸ In *Melway Publishing*, the High Court held that purpose in connection with Section 46 was objective and merely “involves intention to achieve a result.” *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) 205 CLR 1. In *Rural Press v. ACCC*, the concurring opinion stated that “The purpose of conduct is the end sought to be accomplished by the conduct”. *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 82 (citing *News Ltd v. South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 653). As such, there appears to be little difference between US law and Australian law on this point.

the conduct of the corporation or of any other person or from other relevant circumstances.”

Section 4F of the Act also provides that the anticompetitive purpose need not be the only purpose or dominant purpose, as long as it is a substantial one. As such, it seems clear that Australian courts can and do consider the totality of the circumstances in determining whether a corporation possesses the requisite anticompetitive purpose, including analyzing the nature of the conduct and its likely effect.

The Sections note that the ACCC has been defeated in several recent section 46 cases.¹⁹ However, the Sections understand that these cases were decided on grounds other than purpose. Recent defeats occurred because the ACCC failed to establish that the defendant possessed a substantial degree of market power or that the defendant had “taken advantage” of its market power.²⁰ The Sections caution against claims by agencies that litigation defeats justify substantive competition law amendments. Such claims should generally be viewed skeptically: losses may be the result of evidence unique to the particular case, litigation tactics and case selection, rather than evidence that the law is obviously deficient.

c. Proof of Competitive Effects and Potential Consumer Harm are Limiting Principles Already Applied by Australian Courts

Under the current law in Australia, although there is no explicit mention of competitive effects in the statutory language of Section 46 itself, the Courts (appropriately in the Sections’ view) appear to have read into Section 46 a threshold requirement that the conduct harms or has

¹⁹ *Rural Press*, (2003) 216 CLR 53; *Boral Besser Masonry Ltd v. ACCC* (2003) 215 CLR 374; *Universal Music Australia Pty. Ltd v. ACCC*, [2003] FCAFC 193.

²⁰ R. Trindale, A. Merrett and R. Smith, “The grass is always greener? The effects vs purpose debate resumes”, 14 *State of Competition* 6 (Nov. 2013) at 5.

the potential to harm consumers.²¹ As such, the Australian courts already take into account competitive effects, both in considering the overall purpose of the conduct and whether it is exclusionary, and in applying a threshold test of whether the conduct plausibly threatens any consumer harm. These are important limiting principles and appear to have moved Section 46 away from any perceived narrow focus on purpose or intent to harm competitors.

To the extent Section 46 requires clarification, it could be amended to emphasize what the courts have already held – that consumer welfare, anticompetitive effects and economic principles must be at the heart of Section 46.²² This is also consistent with the law in the United States.²³

d. Questions Raised by an Effects Test for Misuse of Market Power

The Issues Paper does not indicate how an effects test would be incorporated into Section 46. One suggestion has been to adopt the existing telecoms-specific effects test found in Section 151AJ into Section 46. If Section 151AJ were adopted as a model for Section 46 reform, a firm with a substantial degree of power in a market would be prohibited “from taking advantage of that power in that or any other market with the effect, or likely effect, of substantially

²¹ See, e.g., *Boral Besser Masonry Ltd v. ACCC* (2003) 215 CLR 374 at 479 (“Competition policy suggests that it is only when consumers will suffer as a result of the practices of a business firm that s 46 is likely to require courts to intervene and deal with the conduct of that firm.”).

²² Section 2 of the CCA provides that the objective of the legislation is to “[E]nhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” *Competition and Consumer Act 2010* (Cth) § 2 (Austl.). See also *Queensland Wire Industries*, (1987) 167 CLR 177 at 191 “[T]he object of s. 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.” (per Mason CJ and Wilson J); *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR at 13; *Boral Besser Masonry Ltd v. ACCC* (2003) 215 CLR 374 at 411 (“The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations.”). See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.”). More recently, the D.C. Circuit held that anticompetitive conduct must “harm the *competitive process* and thereby harm consumers.... In contrast, harm to one or more *competitors* will not suffice.” *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis in original).

²³ See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.”). More recently, the D.C. Circuit held that anticompetitive conduct must “harm the *competitive process* and thereby harm

lessening competition in that or any other market.”²⁴ This formulation would appear to leave it with the Australian courts to develop the standards by which effects are determined, as U.S. courts have done with respect to Section 2 of the Sherman Act. The Sections recommend that those standards be left for development by the courts, as opposed to trying to legislate a specific effects test standard or standards.

e. Unilateral conduct provisions should provide clear guidance for corporations with market power

It is of critical importance that corporations that might be found to have market power understand clearly their obligations and liabilities.²⁵ Uncertainty itself poses risks of deterring legitimate procompetitive conduct. Given that any change to Section 46 might result in significant uncertainty and call into question the coherent body of law that the Australian courts have built around Section 46, the Sections believe that broad changes to Section 46 may be undesirable.

To the extent any amendments are made to Section 46, the Sections recommend that any such amendments seek to codify the existing focus of the Australian courts in unilateral conduct cases, namely proof of market power and conduct (i.e., whether there is an anticompetitive use of market power to achieve anticompetitive results).

consumers.... In contrast, harm to one or more *competitors* will not suffice.” *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis in original).

²⁴ *See* Competition and Consumer Act § 151(AJ). The Sections note that although the ACCC has issued competition notices, Section 151AJ has not been used to establish substantive liability. As such, the utility of the Section 151AJ approach may be doubted as the ACCC has not succeeded in proving an effects-based case since the provision was introduced in 1997.

²⁵ In *Melway*, the High Court cited approvingly Privy Counsel’s observation that provisions such as Section 46 should be “construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful.” 205 CLR 1 at 10–11 (quoting *Telecom Corporation of New Zealand v. Clear Communication Ltd*, [1995] NZLR 385 at 403).

III. Price Signaling

Section 5.22 of the Issues Paper asks whether the price signaling provisions of the CCA should be retained, repealed, amended, or extended to cover sectors other than the banking services industry. The Sections believe that the inclusion of specific provisions outlawing one type of potentially harmful conduct has the potential to overreach, as well as the potential to miss conduct of concern. A preferable approach, in line with U.S. and European practice, may be to extend the application of existing provisions in the CCA to concerted conduct having clearly anticompetitive impact that may not rise to the level of a “contract, arrangement or understanding” under Section 45.

While forward public announcements of prices and outputs are common in many industries, the economic effect of such announcements on competition is ambiguous. Businesses communicate to the public and their stakeholders for a variety of reasons, such as to inform customers, improve brand awareness, and to fulfill regulatory obligations. Public price announcements may benefit customers by helping them to choose the offering which best corresponds to their needs, while at the same time lowering their search costs. Conversely, such announcements may also serve as a focal point for coordination and result in artificially high prices.

Traditionally, U.S., European and other antitrust authorities have challenged information exchanges and price signaling under anticompetitive agreement prohibitions, such as Section 1 of the Sherman Act and Article 101 of the *Treaty on the Functioning of the European Union* (TFEU). Proof of a combination or conspiracy is a critical element of these provisions, but U.S. courts and other authorities have inferred agreement or concerted action from the circumstances surrounding the information exchange, and there have been several successful challenges on this

basis.²⁶ The European Commission’s 2010 reform of its rules for the assessment of cooperation agreements between competitors strengthened the European approach to information exchanges under Article 101 where they amount to a “concerted practice,”²⁷ and the Commission has demonstrated its intent to be aggressive in prosecuting companies for price signaling conduct.²⁸ In the U.S., invitations to collude also have been prosecuted as acts of attempted monopolization under Section 2 of the Sherman Act²⁹ or as “unfair methods of competition” under Section 5 of the Federal Trade Commission Act.³⁰

A common feature of U.S. and international approaches to the potentially economically harmful impact from a variety of conduct is the adaptation and extension of existing laws prohibiting anticompetitive conduct. The Sections suggest that the Panel consider the extent to which minor changes to existing competition legislation—along the lines of the European Commission’s “concerted practice” doctrine to address information exchanges—rather than a standalone legislative solution—could address the competitive problems posed by information exchanges and price signaling.

The Sections understand that specific laws governing price signaling were introduced into Australian competition law in 2011, partly in response to several adverse court decisions in

²⁶ See, e.g., *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969); *In re Petroleum Prods. Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990); *United States v. Airline Tariff Publishing Co.*, 1994-2 Trade Cas. (CCH) 70,687 (D.D.C. Aug. 10, 1994). See also, *Roundtable on Information Exchanges Between Competitors Under Competition Law—Note by the Delegation of the United States*, OECD, 21 October, 2010 (“US OECD Submission”).

²⁷ This reform led to the publication of the Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements [2011] OJ C 11/1 (the “Horizontal Guidelines”).

²⁸ In November 2013, the Commission announced the opening of antitrust proceedings against a number of container shipping lines. European Commission, *Antitrust: Commission opens proceedings against container liner shipping companies*, IP/13/1144, 22 November 2013, available at http://europa.eu/rapid/press-release_IP-13-1144_en.htm.

²⁹ *United States v. Am. Airlines*, 743 F.2d 1114 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985).

³⁰ *Matter of U-Haul Int’l and AMERCO*, FTC File No. 081 0157 (Jul. 20, 2010); *Matter of Valassis Commc’ns*, FTC File No. 051 0008 (Apr. 19, 2006);.

attempted prosecutions of such conduct under Section 45.³¹ The Sections understand that the issue in each of these decisions was the strict approach taken by the courts to proof of “contract, arrangement or understanding,” setting a high bar for the level of commitment or obligation that must be shown to exist to prove a violation.

Under the Australian price signaling provisions,³² corporations are prohibited from:

- Making private disclosures to competitors of information relating to prices, discounts, allowances, rebates or credits with respect to goods or services supplied or acquired by the corporation that are outside the ordinary course of business (a *per se* offense);³³ and
- Making disclosures regarding prices, capacity or commercial strategy for the purpose of substantially lessening competition in a market.³⁴

Although clearly designed to address specific concerns as to the interpretation and applicability of Australian competition law to potentially harmful conduct, the price signaling provisions suffer from several deficiencies.

a Unilateral communications

The price signaling prohibitions apply only to unilateral communications concerning price. In doing so, they permit prosecution of attempts to reach an anticompetitive agreement, providing broader scope for intervention than under Section 1 of the Sherman Act or Article 101 of the TEFU. The prohibitions also do not require proof of additional factors such as market power, as would be required to found liability under Section 2 of the Sherman Act. Although

³¹ TPC v Email Ltd & Ors [1980] FCA 86; ATPR 40-172; Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161; ACCC v Leahy Petroleum [2007] FCA 794.

³² CCA, Division 1A.

³³ CCA, Section 44ZZW.

Section 5 of the *Federal Trade Commission Act* (which provides no private right of action) has been used by the FTC to challenge unilateral “invitations to collude,” those prosecutions have focused on blatant attempts to derail the competitive process that also are likely to result in competitive harm.³⁵

A further consequence of opening up liability for purely unilateral communications is potentially to stifle legitimate (and potentially procompetitive) business communications. Although an exception for communications made “in the ordinary course of business” was included in the Section 4EE of the CCA, there does not appear to be any Australian judicial interpretation of this phrase, raising additional ambiguity and uncertainty.³⁶

b. Price information

The *per se* price signaling provision prohibits the private communication of “information relating to prices, discounts, allowances, rebates or credits” without further detailed description of the types of information that would attract *per se* liability. This prevents Australian courts from focusing on different types of information that would be most likely to harm competition, while ignoring information exchange that is largely benign. For example, it is well understood that information relating to *current or future* prices, discounts, allowances, rebates or credits, as distinct from historical information, has the ability or potential to result in coordination on prices

³⁴ CCA, Section 44ZZX.

³⁵ For example, in *Valassis Comm's* the Commission stated: “the public statements made by Valassis went far beyond a legitimate business disclosure and presented substantial danger of competitive harm. The Commission’s complaint alleges that Valassis made a strategic decision to use and did use its analyst call to communicate to News America information that was essential for News America to understand how Valassis proposed to divide up the market and how it proposed to transition from competition to coordination.” *Matter of Valassis Comm's, Analysis to Aid Public Comment*, March 14, 2006, available at <http://www.ftc.gov/sites/default/files/documents/cases/2006/03/060314ana0510008.pdf>

³⁶ Brent Fisse and Caron Beaton-Wells, “Private disclosures of price-related information to a competitor ‘in the ordinary course of business’: A new slippery dip in the political playground of Australian Competition Law” (2011) 39 *Australian Business Law Review* 367-379.

charged going forward.³⁷ Conversely, by limiting the prohibition to price information, the CCA misses potentially anticompetitive exchanges of other information, such as input costs, plant downtime or investments and other sensitive information that ultimately could impact competition.

IV. Resale Price Maintenance

Section 5.26 of the Issues Paper asks whether the resale price maintenance (RPM) provisions of the CCA operate effectively. In the Sections' view, a move to a competitive-effects based analysis of RPM conduct, rather than the current *per se* rule, would be more in keeping with international developments in this area.

International competition practice is developing to catch up with economic theory in the area of RPM. There is a strong economic basis for concluding that RPM practices are in many circumstances procompetitive. Adopting a RPM policy may be a rational and procompetitive act by a supplier where demand for a product is driven by factors other than price, such as service levels both before and after purchase. For such products, a supplier may adopt a RPM policy in order to encourage competition among retailers on non-price dimensions, such as service, marketing and inventory levels. In these circumstances, RPM can correct “free-riding” among retailers, whereby retailers who invest in service levels such as staff training lose the business customers who visit their stores to learn about products but make their purchases from retailers who can offer low prices because they have not made similar investments in service.

RPM also can be procompetitive even absent free-riding by aligning promotional incentives between manufacturers and distributors. Maintaining resale prices and thereby

³⁷ US OECD Submission, n.31 *supra*, at 4; United States v. Airline Tariff Publishing Co., 1994-2 Trade Cas. (CCH)

offering the retailer a guaranteed margin will have the effect of “inducing the retailer’s performance and allowing it to use its own initiative and experience in providing valuable services.”³⁸ This effect can be achieved more efficiently with the incremental profit margin offered through RPM than through alternative payment mechanisms, such as slotting fees or separate fees for promotional services.³⁹ By increasing the retail margin, RPM also has the effect of supporting a larger distribution network.⁴⁰

There also is a well-established body of thinking on the limited circumstances in which price maintenance policies may be anticompetitive. A number of competition authorities have recognized four potential theories of competitive harm to assist in developing their own enforcement approach and providing guidance to businesses and practitioners:

- Inhibiting competition between suppliers: Price maintenance conduct may be used by suppliers to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement among them;
- Inhibiting competition between retailers: One or more retailers may compel a supplier to adopt price maintenance conduct to facilitate less-vigorous price competition among them, or to help police a price-fixing arrangement among them;
- Supplier exclusion: A dominant supplier may use price maintenance conduct to guarantee margins for retailers as an incentive not to carry the products of a rival or new entrant supplier; and

¶70,687 (D.D.C. Aug. 10, 1994).

³⁸ *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, ___ (2007) (“*Leegin*”).

³⁹ Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanisms*, 31 J. L. & Econ. 265 (1988).

⁴⁰ *Id.* See also Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, Presentation to FTC Hearings on Resale Price Maintenance, February 17, 2009, available at

- Retailer exclusion: A retailer may compel a supplier to adopt price maintenance conduct with the objective of excluding competition to that retailer(s) from discount or more efficient retailers.⁴¹

The U.S. law on RPM is in a state of flux. In 2007, the Supreme Court overturned a 90-year old precedent and held that under the federal antitrust laws, RPM should be judged under the rule of reason rather than viewed as *per se* unlawful, allowing the economic impact of the practices to be taken into account in assessing whether the conduct violates Section 1 of the Sherman Act.⁴² In spite of this, several state attorneys general still believe that RPM should be viewed in the same manner as horizontal price-fixing, and have been looking for opportunities to challenge RPM practices under state antitrust laws.⁴³ This has created an uncertain environment for business, particularly given that in today's world many businesses operate in multiple states, in which treatment of RPM practices may differ.

In Europe, the EU and member state authorities have generally taken a strict approach to RPM. Price floors have traditionally been viewed as a hardcore violation of EU competition law. The European Commission's 2010 guidance on vertical arrangements suggested a softening of this approach, acknowledging the potential for efficiency justifications, and reflecting the general

http://www.ftc.gov/sites/default/files/documents/publicevents/resale_price_maintenance_under_sherman_act_and_federal_trade_commission_act/bkleinppt0217.pdf

⁴¹ See Christine A. Varney, *A Post-Leegin Approach to Resale Price Maintenance Using a Structured Rule of Reason*, ANTITRUST, Fall 2009, 22-26. See also Competition Bureau (Canada), *Price Maintenance (Section 76 of the Competition Act): Enforcement Guidelines*, Draft for Public Consultation Issued March 20, 2014 ("Draft Canadian Competition Bureau RPM Guidelines").

⁴² *Supra*, note 45.

⁴³ See, e.g., In the Matter of Nine West Group, Inc., No. C-3937 (Apr. 11, 2000) (Attorneys general of New York and twenty-six other states argued in favor of continued prohibitions on RPM in a submission to the Federal Trade Commission); *People v. Bioelements Inc.*, File No. 10011659 (Cal. Super. Ct. Riverside County, filed Dec. 30, 2010) (California Attorney General obtained a consent decree against a company that had RPM agreements with independent resellers); *People v. Tempur-Pedic International, Inc.*, 400837/10 (N.Y. Sup. Ct. N.Y. County filed Jan. 14, 2011) (New York Attorney General failed in an attempt to enjoin Tempur-Pedic's RPM program).

consensus in economic theory that RPM is not always “bad.”⁴⁴ The guidance acknowledges that fixed or minimum resale prices may lead to efficiencies in three narrowly construed situations. First, RPM may help suppliers launch a new product by incentivizing distributors to invest in creating a market for a new product in the launch phase. Second, set resale prices may be necessary to effectively run short-term price-based promotions in franchise-based distribution networks. Third, RPM may help address free-riding on presales services (particularly relevant for complex products). Again, however, member states have taken a different line, with several recent high-profile RPM prosecutions in the UK, Italy and others.⁴⁵

Canadian law on RPM also has been in a state of development. For decades RPM was a *per se* criminal offence in Canada. In early 2009, following the U.S. Supreme Court’s *Leegin* decision, the Canadian federal government introduced legislation that resulted in significant changes to the Canadian Competition Act, including the decriminalization of RPM and the introduction of a new civil provision with a competitive effects test and limited remedies of an injunctive nature.⁴⁶ Overall, the experience in Canada with the decriminalization of RPM has been positive. The Canadian Competition Bureau has recently issued draft guidelines which are generally a welcome development and make clear the Bureau’s view that RPM is a common and in many cases pro-competitive market practice.⁴⁷ The most serious anti-competitive motives for

⁴⁴ European Commission, GUIDELINES ON VERTICAL RESTRAINTS, 2010/C 130/01, OJ 2010 C 130/1, paragraphs 52 to 54.

⁴⁵ See, e.g., UK Office of Fair Trading, *Press Release 64/13: OFT issues Statement of Objections to sports bra supplier and three UK department stores*, September 20, 2013; UK Office of Fair Trading, *Press Release 66/13: OFT issues statement of objections in mobility scooters sector*, September 24, 2013; Italian Competition Authority, *Case I766 Inverter solari ed Eolici, decision to launch an investigation*, October 22, 2013; Italian Competition Authority, *Case I718 Enervit, decision to launch an investigation*, November 20, 2013.

⁴⁶ *Budget Implementation Act, 2009*, S.C. 2009, c. 2. See Competition Bureau (Canada), *A Guide to Amendments to the Competition Act*, April 22, 2009.

⁴⁷ Draft Canadian Competition Bureau RPM Guidelines, *supra* note 42.

RPM continue to be addressed by competition provisions dealing with cartels and abuse of dominance, which provide for significant penalties.⁴⁸

The Sections recommend that the Panel consider the need for specific *per se* prohibition on resale price maintenance (RPM) in light of economic analysis and developing international practice in this regard. Further, to the extent that RPM is a symptom of broader anticompetitive concerns, for example misuse of market power, other provisions of the Australian competition laws may be sufficient to address them. Overall, given the current state of knowledge, the Sections would not endorse adoption of a *per se* prohibition against RPM.

Conclusion

The Sections very much appreciate the opportunity to comment on the Issues Paper and hope that the Panel finds these comments useful. We would be pleased to respond to any questions that the Panel may have and to provide any further assistance that may be appropriate.

Respectfully submitted,

**Section of Antitrust Law
Section of International Law
American Bar Association**

⁴⁸ *Id.*; see also *Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law (The Sections) On the Canadian Competition Bureau's Draft Enforcement Guidelines for Price Maintenance (Section 76 of the Competition Act)*, June 2, 2014, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_201406_rpm.authcheckdam.pdf.