SUBMISSION TO THE AUSTRALIAN GOVERNMENT COMPETITION POLICY REVIEW BY THE ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION

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1. INTRODUCTION AND PURPOSE OF SUBMISSION

1.1 Introduction

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at http://ibanet.org.

1.2 Purpose of Submission

This Submission to the Australian Government Competition Policy Review ("**Review**"), is intended to focus on only certain areas raised by the Review in its Issues Paper released on 14 April 2014 ("**Issues Paper**"). In particular, this Submission seeks to bring international comparisons and experience where appropriate to assist the Review. The Working Group members identified in the cover letter to this Submission are available to discuss issues with the secretariat and Review Panel where the Review Panel would find it helpful and constructive.

2. BACKGROUND

2.1 The Review

The Working Group commends the Australian Government for a thoughtful and wide ranging review of competition law in Australia intended to promote competition across the Australian economy and a review which builds upon the internationally acclaimed National Competition Policy Review (the Report by the Independent Committee of Inquiry 1993, National Competition Policy – sometimes known as the "Hilmer Review"). The Working Group also commends the Australian Government for establishing an independent panel to conduct such an important review and the public and transparent manner in which it is being conducted.

2.2 The Working Group objectives in this Submission

The Working Group is comprised of international antitrust practitioners from multiple jurisdictions around the world as well as practitioners from Australia. The Working

Group is conscious of the multitude of issues raised in the Issues Paper and wishes to address only certain issues based on the Working Group's international and Australian experience in a manner that the Review will hopefully find constructive and helpful. Consistent with the aims of the IBA, the Working Group will seek to provide in this Submission comparative international competition analysis to assist the Review Panel.

3. EXECUTIVE SUMMARY

This Submission makes the following key comments and suggestions to the Review for its consideration, based on the structure of the Chapters in the Issues Paper:

***Chapter 1 - Competition Policy Principles*:** Apart from commending the Government's focus on competition policy, the Working Group does not address this Chapter, other than its observations as to competition policy principles raised in relation to Chapter 5 (Competition Laws).

Chapter 2 - Regulatory Impediments to Competition: The Working Group believes it is important to consider Australian competition laws in a global context. Australia's laws should be similar in nature to those of its major trading partners and also be broadly consistent with those in the Asia-Pacific. Australia is a large country from a geographic perspective, but relatively small from a population perspective and therefore its competition and intellectual property laws should take into account these factors. In these circumstances in order to facilitate trade and limit transaction costs Australia's competition laws should be, as far as appropriate, consistent with its trading partners. This will facilitate business from an economic perspective as well as compliance with competition laws for companies involved in such international trade and commerce. Any changes regarding international price discrimination or intellectual property laws should only be made in that international context. This Submission addresses those issues in some detail.

Chapter 5 - Competition Laws: The Working Group notes that Australia has a highly codified competition law and extremely detailed provisions in certain areas, particularly those relating to per se contraventions of Australian competition laws. These per se provisions and the exemptions processes relating to those provisions warrant consideration as to whether they are overly prescriptive and do not allow sufficient consideration of efficiency and productivity improvements unless they are "exempted" by the competition agency or other applicable body such as the Australian Competition Tribunal ("**Tribunal**"). Consideration should be given to whether business confidence and understanding of competition laws in Australia has sufficiently matured such that if the per se prohibitions were removed, it would no longer be necessary to have so many notification processes exempting various types of conduct in order to provide "business certainty" and that such market conduct could be assessed under a so called "rule of reason" or competition test.

The working group in relation to Chapter 5 issues and questions has sought to provide international comparisons of Australia's competition laws. These comparisons have informed the following comments (where "**Sections**" refers to Sections of this Submission):

Section 5 – Competition Laws: The Working Group notes that Australia's laws relating to conduct between big business and small business and developments as to

unconscionable conduct and unfair terms are similar to those in other jurisdictions such as Japan – they raise similar issues and the Working Group believes they do not warrant additional legislative intervention at this time.

In relation to ***misuse of market power,*** the Working Group believes that if the Review was minded to change the Australian misuse of market power test to an "effects" test, then there needs to be clarity as to the nature of what such a test would actually involve in an Australian context and great care would need to be taken not to stultify pro-competitive conduct. The Working Group has provided quite detailed international perspectives to address these points.

Section 6 – Anti-competitive arrangements (cartels and joint ventures): The Working Group in this section puts forward reasons why the current Australian legislation dealing with cartels is overly complex and misconceived in its treatment of joint ventures as it does not sufficiently recognise their important role in commerce. International comparisons are provided in order to provide alternative perspectives. The Working Group also sees little merit in the so called "price signalling laws" in their current form and if they are to be retained suggests they should be reformulated to be more consistent with international laws on facilitating practices.

Section 7 – Market Investigations / Market Studies: The Working Group is cautious on market investigations / studies as competition policy reform tools given their actual competitive impact based on international experience and believes that the existing Productivity Commission process is likely to be an adequate investigative tool with more appropriate independent resources.

Section 8 – Mergers: The Working Group commends the Australian merger control process for its flexibility. In relation to the contentious 5-10% of mergers, the Australian Competition Tribunal appears to be providing a very timely and efficient process for contested merger reviews based on the recent AGL/Macquarie Generation matter[1]. The Working Group would be mindful of and interested in the views of the Tribunal as to how it is functioning as a forum for hearing contested mergers.

Chapter 6 - Administration of Competition Policy: The Working Group addresses certain major issues raised in the Issues Paper and will not provide any comments on the Administration of Australia's Competition Policy by the Australian Competition & Consumer Commission ("**ACCC**"), except as to the following high level comment. The ACCC is a widely respected competition regulator internationally and its contribution to the International Competition Network ("**ICN**") and in relation to its engagement in the Asia Pacific region concerning mergers and cartels is not sufficiently recognised. Compared to many competition agencies it is extremely transparent and timely in its decisions. However, as a leading regulator in the Asia Pacific region it should be mindful of issues that are being raised internationally as to the continuing need for increased emphasis on due process, transparency in analysis and decision making and accountability for decisions. It is also important to ensure timely and appropriate appeal mechanisms to appropriate forums to challenge

[1] Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1

interpretations of the law and to have best practice and oversight in appropriate internal and external forums by specialist and well trained competition bodies.

Further, while there is solid praise for the ACCC internationally, in Australia the ACCC covers very large areas of the economy across a broad range of sections that agencies in Europe or the United States do not seek to cover within one organisation. This breadth of coverage may give rise to risks in decision making processes and timeliness. Sound competition laws address one aspect of good competition policy, but equally independent competition agencies should strive for administering those laws consistent with best practice in their regulatory processes.

4. REGULATORY IMPEDIMENTS TO COMPETITION

4.1 International Price Discrimination

Paragraphs 2.6 and 2.7 of the Issues Paper (in relation to Regulatory Restrictions in Goods Markets) provide as follows:

> "*A further issue in relation to imports is international price discrimination. International price discrimination occurs when sellers charge different prices in different countries and those prices are not based on the different costs of doing business in each country. A recent parliamentary inquiry*[2] *found that Australian consumers and businesses must often pay much more for their IT products than their counterparts in comparable economies, in some cases paying 50 to 100 per cent more for the same product.*
>
> *Australian competition laws do not specifically prohibit price discrimination, though anti-competitive conduct relating to price discrimination may be prohibited by the other provisions of the Competition and Consumer Act 2010 (**CCA**). The Canadian Government has recently announced that it plans to introduce legislation to address country specific price discrimination against Canadian consumers.*"

Questions:

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

4.2 The Canadian example is not considered to be good competition policy

A prohibition on international price discrimination is in the Working Group's view not the appropriate policy response to perceived high prices in Australia. Producers' freedom to determine the prices they charge for their products is a fundamental characteristic of a market economy. Both the Swanson[3] and Dawson Committee[4]

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2 Parliament of Australia, House Standing Committee on Infrastructure and Communications 2013, Inquiry into IT Pricing.

3 Trade Practices Act Review Committee Report August 1976

4 Review of the Competition Provisions of the Trade Practices Act 2003

reviews observed in 1976 and 2003, that it is price flexibility which is at the heart of competitive behaviour and a general prohibition against price discrimination would substantially limit price flexibility. In the Working Group's view, price discrimination regulation could also lead to significant intervention in the economy. For example, it may be impractical or unfair to regulate the prices of one producer and not its competitors as an inquiry into perceptions of unfair pricing of one producer may result in sweeping industry-wide regulation. It could also result in an uneven application of the rules, if some producers are regulated and not others. Such distortions are to be avoided.

Such an intrusive regulation of pricing would be unusual for a developed market economy such as Australia and should be undertaken cautiously and only if it could be implemented effectively to the clear benefit of the economy as a whole. In our respectful view, this cannot be done. Regulation of international price discrimination by prohibition and enforcement would be controversial, impractical and ineffective for numerous reasons as follows:

First, it is not clear that price discrimination is undesirable. When producers are able to segment consumers based on their ability or willingness to pay, they may be able to sell more products and serve more customers than if required to set a single price[5]. European Union competition policy has recently made large strides in embracing the benefits of price discrimination in many areas of the economy. It has also been noted that banning price discrimination can have an inflationary effect[6]. The growing appreciation of the positive welfare-enhancing aspects of price discrimination needs to be taken into account in formulating policy responses to concerns about perceived high-prices.

Second, as a recent Canadian study observed, price regulation could inhibit imports and exports[7]. If implemented in Australia, foreign producers could decline to sell in Australia out of concern that government regulation could undermine their pricing and sales strategies. Conversely, Australian producers may be hesitant to export products to low cost jurisdictions if low-cost sales in that other country could form the basis for a price discrimination investigation in Australia.

Third, the law would be difficult to enforce. The reasons for international differentials in pricing can be complex and unclear. They can include import tariffs, operating costs, product safety standards and competition conditions in local markets, as well as manufacturers engaging in country specific pricing strategies[8]. Day-to-day fluctuations in exchange rates and other conditions of sale would also account for differences and would make "apples to apples" comparisons difficult. There are

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5 See: At what cost? IT pricing and the Australia tax (Standing Committee on Infrastructure and Communications) 29 July 2013 and Cross-Border Price Regulation: Anti-Competition Policy? (Report of the CD Howe Institute Competition Policy Council) 8 May 2014.

6 At what cost? IT pricing and the Australia tax (Standing Committee on Infrastructure and Communications) 29 July 2013 at 4.111.

7 Cross-Border Price Regulation: Anti-Competition Policy? (Report of the CD Howe Institute Competition Policy Council) 8 May 2014.

8 See: The Canada-US Price Gap (The Standing Senate Committee on National Finance) February 2013 and At what cost? IT pricing and the Australia tax (Standing Committee on Infrastructure and Communications) 29 July 2013.

numerous other reasons for international price differentials. For example, in order to boost sales or launch a product, a high consumption tax may lead a supplier to lower pre-tax sales prices to compensate customers for this extra tax burden. This may not occur in a country that does not have these taxes. For end customers in various jurisdictions, the pre-tax sales price could be different, even though the post-tax prices may be similar. Similarly, the prices of pharmaceutical products in jurisdictions with national health services may be lower as a result of large purchases than those in countries with private health care providers. Assessing in a particular case whether a price differential is due to higher costs as opposed to an "unfair" or anticompetitive country pricing strategy would require an in-depth factual and economic analysis and possibly subjective decision-making.

Fourth, because of their complexity, reviews would be time-consuming and resolutions of individual cases could require ongoing supervision or regular re-evaluation. The length of investigations would also create a risk that the circumstances underlying a particular case will have changed before an investigation is complete. Further, should a producer subject to regulation subsequently want to make a price increase due to an exchange rate fluctuation or higher production costs, a new analysis would be required.

Fifth, price regulation, even if justified, is not a role for which the ACCC or other similar enforcement body is likely to be well-equipped, at least not without a large and ongoing investment in resources and such a role may also undermine the competition agency's credentials and approach to allowing market dynamics to set prices. Although price regulation may occur in some industries in some jurisdictions, an economy-wide mandate to regulate prices is a significant undertaking. It could also divert limited resources from other enforcement activity, such as the detection and prosecution of price-fixing cartels. Administering both a price setting role and also a free market role in pursuing cartels and other price fixing arrangements will have the potential to create a "competition" agency with conflicting regulatory principles if it was required to deal with regulatory intervention in setting prices which goes beyond price regulation roles in relation to clear monopolies.

It is also noteworthy that Australia does not have a domestic prohibition on price discrimination. The consistent application of competition policy should seek to avoid different internal and external price discrimination regimes.

Although the Canadian government has indeed signalled plans to introduce legislation to address country specific price discrimination, the proposal is controversial and it has not yet been introduced in the Canadian parliament. In our view, Canada therefore does not provide an example of a working or effective scheme for the regulation of international price discrimination.

4.3 Conclusion on International Price Discrimination

In the Working Group's view, the issue of international price discrimination needs to be viewed in tandem with other policies such as restrictions on parallel imports and domestic sales taxes. Any approach to addressing concerns about price differentials ought to take into account neighbouring policy developments.

We also note that the Standing Committee on Infrastructure and Communications' report on its inquiry into IT pricing declined to recommend regulating price discrimination through prohibition and enforcement[9]. Instead, it recommended other steps be taken to ameliorate the impact of international price discrimination, such as the removal of certain restrictions on parallel importation.

However in our view, the optimal policy to achieve competitive prices is to foster inter-brand competition at manufacturer and retail level. Lively competition from other suppliers still appears to be the most effective way of ensuring that customers obtain the deal that is best for them - in terms of prices, innovation quality, technology and ancillary services.

The promotion of parallel trade as a means of promoting price competition has never been far from the minds of Australian policymakers. At the same time, it is important to balance such an approach with ensuring protection of IP rights. The treatment of parallel trade issues in Australia has in large measure turned on the way the respective ways in which Section 44 of the *Copyright Act 1968*[10] and Section 123 of the *Trade Marks Act 1995* have been interpreted. The future of Section 44 of the Copyright Act is directly linked to the specific question posed in the Issues Paper at paragraph 2.9 with respect to the regime that applies to the importation of books. In addition, the impact of Section 123 of the *Trade Marks Act* on the free flow of trade marked goods needs to be understood in terms of the case-law which has developed over the years since the enactment of that provision, and its possible effect on consumer welfare.

4.4 Intellectual Property

The Issues Paper at paragraph 2.18 raises the broad topic of Intellectual property rights and states as follows:

> "*2.18 The underlying rationale for governments to grant intellectual property (IP) rights (such as patents, trade marks and copyrights) is that creations and ideas, once known, may otherwise be copied at little cost, leading to under investment in intellectual goods and services. However, providing too much protection for IP can deter competition and limit choice for consumers.*"

Questions:

Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of the IP laws be achieved in a manner more conducive to competition?

We now turn to copyright and trade mark issues.

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9 *At what cost? IT pricing and the Australia tax* (Standing Committee on Infrastructure and Communications) 29 July 2013.

10 For a general discussion of the legal context of Section 44 within the overall scheme of the Copyright Act 1968, refer to Lahore, Lindgren and Rothnie, "*Copyright & Designs*" [34,620]ff.

4.5 **Copyright**

In addition to legal rights in relation to foreign-origin (i.e. Hollywood) films, the legal regime that applies to the importation of books is now one of the very few areas left to domestic copyright owners to stem the flow of parallel imports. Australia is an English-speaking country which sources much of its fiction and non-fiction material from other jurisdictions (especially the UK). The regime established under Section 44A of the Copyright Act is, if nothing else, convoluted, whereby:

- If the book is first published after 22 December 1991 and not first published in Australia (including simultaneous publication, namely, within 30 days of its first publication made overseas), the copyright owner cannot block parallel import.

- Even where a power to block parallel imports generally exists, parallel imports of books are permissible:

  (i) where a person has placed an order for one or more copies with the local copyright owner (or their representative) and the local copyright owner has not -- (a) said within 7 days that they will accept the order; and (b) actually supplied the books ordered within 90 days;

  (ii) where a bookseller needs to do so to satisfy an order (including a verifiable telephone order) by a customer for his or her own use; and

  (iii) two or more copies are needed to fulfill an order from a non-profit library for the library's own "shelves".

It is widely acknowledged that the main impact for Australian consumers generated by Section 44A has been that paperback editions have been available in local bookshops much faster than was previously the case; prior to these reforms being enacted, it was commonplace for a period in excess of 12 months to pass before the paperback version was released in Australia, and there is a discernible rise in the diversity available to consumers, both in terms of subject-matter and in the form of different available publications (e.g., paperback, hardback, quality paperback, trade paperbacks and the mass-market paperbacks).

While it is also no surprise that booksellers have long railed against these provisions and have sought their modification or removal[11], it is arguable that the net effect of these provisions in practice has been that copyright owners have not been adversely impacted in their control of book prices (the impact has been more noticeable in terms of availability). Moreover, the realities of online e-book distribution channels provided by Amazon and other market participants such as iBooks, while the astronomic growth of direct sales channels such as Amazon and, more recently, Book Depository, might mean that much of what is currently found in Section 44A becomes increasingly of less practical relevance to the average Australian consumer. The dramatic demise of "bricks and mortar" bookshops in Australia over the past few years pays testimony to

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[11] See *e.g.,* Australia Publishers Association's Submission of 6 July 2012, to the House of Representatives Committee's Inquiry into IT Pricing, Submission 066, at page 3.

this change. Accordingly, it would not be unreasonable to take the position that there is really no need to open up the book selling market further and that, if anything, Section 44A should be removed. From the consumer's perspective, one suspects that a book is now available both faster and cheaper from a supplier such as Book Depository than it would if a consumer placed its order with the local bookseller. That paradigm is probably only disturbed where mass market "top seller" books are involved, allowing supermarkets to use their purchasing power to provide certain titles at very significant discounts which are even more competitive than the e-book or mailed route.

Moreover, the Working Group is mindful of the fact that any policy on parallel trade should be conscious of the broader "cultural" and "arts" policy implications of actions designed to increase competitiveness. While the Working Group is not in a position to take a position on this range of issues with respect to any given jurisdiction, the fact remains that such policies will always be relevant in such situations, regardless of the overriding policy orientation of promoting competition.[12]

4.6 Trade Marks

The legal regime for the treatment of parallel traded goods into Australia and bearing a legitimate trade mark is reflected in the terms of Section 123(1) of the *Trade Marks Act 1995*, according to which:

"... a person who uses a registered trade mark in relation to goods that are similar to goods in respect of which the trade mark is registered does not infringe the trade mark if the mark has been applied to, or in relation to, the goods by, or with the consent of, the registered owner of the trade mark."

That provision is the statutory embodiment of the long-standing case precedent found in the Champagne Heidsieck Case dating back to 1930[13]. Consistent with the traditional understanding of the international "exhaustion" principle, the principle enshrined in Section 123(1) should extend to the situation where the trade marked goods have been introduced on to a foreign market by a legitimate licensee of the trade market owner[14].

However, the legal standing of parallel imported goods has become problematic in the recent past. Thus, on one view, it is not unreasonable to take the view that the recent Full Federal Court precedents in the respective *Sporte Leisure*[15] *and Lonsdale*[16] Cases have effectively read the defence found in the plain words of Section 123 out of the *Trade Marks Act*. It has done so not only because it has raised a variety of complications as to whether the goods have been introduced on the original market

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12 There is every possibility that such non-competition policy issues are likely to lead to calls for the increased funding of local authors. See Warwick A Rothnie, "*Parallel Imports*", (Sweet & Maxwell, 1993) at pp. 551 - 561 and 590 – 597.

13 *Champagne Heidsieck et Cie Monopole Société Anonyme v. Buxton* [1930] 1 Ch 330 at 339.

14 See *Transport Tyres Pty Ltd v. Montana Tyres Rims and Tubes Pty Ltd* [1999] FCA 329. See also Rothnie, "Parallel Imports", supra, at pp.2-8.

15 *Paul's Retail Pty ltd v. Sporte Leisure Pty Ltd* (2012) 202 FCR 28.

16 *Paul's Retail Pty Ltd v. Lonsdale Australia Ltd* (2012) 294 ALR 72.

with the true "consent" of the trade mark owner, but primarily because it imposes a very significant burden on a prospective parallel trader to prove that the scope of the licence conferred upon the original trade mark licensee confers full rights upon that licensee (i.e., the goods are in fact genuine trademarked goods).

On the basis that "hard cases make bad law", perhaps the more benign view would be to distinguish the Sporte Leisure and Lonsdale Cases from the clear principle set forth in Section 123, by clarifying that those cases are not "true" parallel import cases insofar as they involved pirated goods rather than genuine trademarked goods; the pirate was in fact a licensee in some parts of the world. However, if the "worst case" scenario applies to the interpretation of Section 123, the situation becomes more complicated when one considers that the defence in Section 123 was widely understood to apply only to trademarked goods which were of the same quality and unaltered in appearance. This was in fact the explicit position included in the previous legislation prior to the 1995 Act coming into force, but was not accompanied by a counterpart provision in the 1995 amendments.

Another problematic issue which arises in practice revolves around the common practice of some trade mark owners (especially in cosmetics-related fields) assigning their trade marks to a local distributor/subsidiary in order to facilitate the prevention of parallel trade. As a practical matter, this is a risky commercial strategy as the trade mark may be considered to be "deceptive" because the international brand reputation of the product may spill over into the Australian market[17]. Although this concern has as yet not materialised into any official court challenges, it nevertheless remains a distinct possibility in a world of increasingly globalised branding.

4.7 Conclusion on Intellectual Property

What is clear is that the treatment of parallel trade is very much a key issue in any re-thinking about the form which Australian competition policy should take in generating greater competitiveness. The dramatic changes to Australian consumers' retail shopping practices over the past few years, especially through their on-line purchases, has called into question, among other things, existing parallel trade policies, both with respect to copyright and trade mark legal regimes. While we have sought to identify above some of the legal issues that should be taken into account in formulating new policies in this regard, the fact remains that any policy either supporting or preventing parallel trade needs to take due account of the industrial policy dynamics of an expansive "exhaustion" doctrine when seen in light of the need, on the one hand, to respect brand owners' rights while, on the other, ensuring that the Australian consumer is not faced with an economy that is structured in such a way as to deliver consistent high pricing.

5. COMPETITION LAWS

5.1 Introduction – Legal Framework

Section 5 of the Issues Paper raises some of the most important competition law issues in term of competition laws, but also raises issues as to policy settings and the

[17] See, for example, Section 88(2)(c) of the Trade Marks Act 1995.

approach in Australia to competition law more generally. Particularly in countries with concentrated industries there is a focus by Governments and competition agencies on misuse of market power laws (or abuse of dominance as it is viewed in Europe) as well as unfair (or unconscionable) conduct laws in terms of the approach of large companies to small businesses.

Australia is no exception to this focus and indeed the recent proposals of extending unfair contract terms from business to consumer contracts to business to small business contracts is consistent with these developments. However, care needs to be taken to understand the overall competition policy setting and associated compromises that this creates and in particular how these laws are understood to operate in the overall community. An illustration of the confusion and complexity as to what the Working Group believes is a sound focus on the competitive process compared to the risks of stifling positive pro-competitive behaviour by focussing on the impact of rivalrous conduct on competitors, is provided by the following paragraphs from an article in the Weekend Australian on 21-22 June 2014: (Page 16)

> "*A new 'effects test' would let the ACCC prosecute companies over the misuse of market power that has the effect of damaging a rival, without needing to prove that the damage was deliberate... Sims insisted that size is not the problem, 'Of course big is not bad' he says but if you're using your position to exclude others from the market, that's when you cross the line. We're not out to penalise big companies but the bigger you get, the more you have to ensure you don't engage in exclusionary conduct."*

Immediate questions arise from such a quotation as to whether such a test can be easily explained and in particular explaining that it should focus on the competitive process and not competitors as well as how such a test will be applied in practice by the ACCC.

The next few subsections consider the above issues in more detail in relation to unconscionable conduct and misuse of market power.

5.2 Unfair and unconscionable conduct in business transactions

The issues Paper at paragraph 5.14 raises the following questions.

Questions:

Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?

Are there other measures that would support small and medium sized business participation in markets?

It is the Working Group's submission that, in determining the level of support appropriate to afford small and medium sized businesses it is necessary to consider the provisions of the CCA, including the Australian Consumer Law (**ACL**) as well as other laws designed to address any imbalance between large and small business. The ACCC is well equipped to investigate and enforce these provisions for the benefit of

vulnerable businesses. It is also relevant to acknowledge the Australian Government's agenda for reform and support for small business and to take into account legislative change that the Australian Government has committed to introduce.

The Working Group's view is that any legislative changes regarding the unfair or unconscionable conduct provisions of the CCA should only be made following a demonstrated need for further regulation. Overseas examples considered in this Section 5 do not provide any alternative regimes and indeed only highlight the difficult balance and transparency in enforcement processes that is required of competition agencies administering such laws.

5.3 Existing laws provide appropriate support for small and medium sized businesses

The Working Group considers that the existing framework of laws in Australia, alone and in combination, provide an effective level of protection and support for small and medium sized business participation in markets.

In particular, the Working Group refers to:

(a) Existing unconscionable conduct provisions which apply to businesses other than listed public companies;

(b) Consumer guarantees and misleading and deceptive conduct provisions, to the extent that they are relevant and applicable in small business transactions;

(c) Misuse of market power laws prohibiting a corporation with a substantial degree of market power from taking advantage of that power for a proscribed anti-competitive purpose (see discussion in this Section 5 on amendments to that provision);

(d) The notification mechanism in the CCA to authorise businesses to engage in collective bargaining[18];

(e) The Franchising Code of Conduct which regulates the conduct of the participants in the franchise relationship and provides franchisees with a range of protections aimed at addressing any imbalance in knowledge and bargaining position.

(f) Industry specific measures such as the Telecommunications Consumer Protection Code which give protection to small business with a telecommunications spend below a specified amount;

(g) State legislation which regulates retail lease arrangements and provides protection to small business entering retail tenancies such as a minimum lease

[18] In its 2013 Report, the ACCC reported that the majority of collective bargaining arrangements that they assessed involved small businesses including primary producers and professions. (see Australian Competition and Consumer Commission and the Australian Energy Regulator, 'Annual Report 2012-13' (Report, Australian Competition and Consumer Commission, 29 October 2013) < www.accc.gov.au/annualreports>).

term, imposing obligations for landlords and prohibiting unconscionable conduct[19];

(h) State based regimes establishing a small business commissioner to resolve disputes relating to unfair market practices or commercial dealings to protect small business[20]; and

(i) The Australian Securities and Investment Commission Act 2001 (Cth) which has equivalent unconscionable conduct and unfair terms provisions that apply to supply and acquisition of financial services and which is enforced by the Australian Securities and Investment Commission (**ASIC**).

It is the Working Group's submission that these laws provide appropriate protection, support and recourse for small and medium sized business and address concerns of unequal bargaining power and lack of knowledge and resources.

The Working Group also notes the Australian Government's commitment to extend to the small business sector the existing unfair contract term provisions in the ACL which apply to consumers. As a result, the Australian Department of Treasury is engaging in a separate consultation process on behalf of Consumer Affairs Australia and New Zealand (CAANZ) from 23 May 2014 until 1 August 2014[21].

It is the Working Group's submission that the Review should have regard to the responses generated by this consultation process and any Regulation Impact Statement that is presented to Consumer Affairs Ministers.

These points are now considered in more detail

5.4 The unconscionable conduct provisions of the CCA are available and are being effectively enforced

There has been some uncertainty regarding the meaning that should be given to statutory unconscionable conduct[22] however this has not dissuaded the ACCC and ASIC from using the provisions in enforcement actions.

The ACCC has brought a number of cases for breaches of the unconscionable conduct provisions involving business-to-business arrangements, particularly in the context of franchise arrangements and retail tenants.

Examples of franchisor conduct pursued by the ACCC include the franchisor demanding increased franchisee fees not provided for in the franchisee agreement[23] and pressuring franchisees who did not meet performance criteria to sell, transfer or

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19 For example the Retail Leases Act 1994 (NSW).

20 For example the Small Business Development Corporation Act 1983 (WA).

21 Consumer Affairs Australia and New Zealand, 'Extending Unfair Contract Term Protections to Small Business Consultation Paper', May 2014.

22 For example whether it involves an element of 'moral taint' and the relevance of the notions of fairness, vulnerability and advantage. See *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

23 See *ACCC v Seal-A-Fridge* [2010] FCA 525.

terminate their franchise by withholding stock or halting income[24]. In relation to tenants, conduct held to be unconscionable has included seeking unreasonable rent for renewal of a shop lease and making misleading statements in English to a tenant who could not speak or read English well[25].

Unconscionable conduct by franchisors and retail landlords is also addressed by industry specific regulations. This industry specific approach complements the existing regime in the ACL and assists in dealing with those business arrangements where the imbalance in participants' bargaining position may be acute.

Furthermore, the ACCC has recently issued high-profile proceedings against a major supermarket in Australia for alleged unconscionable conduct arising from the implementation of a rebate program affecting a large number of its suppliers. The ACCC is alleging that the relevant supermarket chain used undue pressure and unfair tactics in negotiating with suppliers, provided misleading information and took advantage of its superior bargaining power so that its overall conduct was in all the circumstances unconscionable[26].

It is therefore clear that unconscionable conduct remains an enforcement priority for the regulators and in the case of the ACCC, this is particularly so when it involves large national companies or traders and impacts on consumers and small businesses[27].

Accordingly, the Working Group considers that the existing laws provide adequate and appropriate protection for conduct of this nature and the regulators are well placed to actions for penalties, injunctions and to seek redress for affected small business through representative action[28].

5.5 Consistency with the level of regulation in other jurisdictions is important

It is also relevant to assess the nature and extent of regulation in Australia compared to other relevant jurisdictions. The Working Group considers that existing laws give similar or greater protection to Australian businesses compared to the applicable laws in other jurisdictions that regulate business practices.

For example in Japan there are no equivalent specific laws, rather that jurisdiction relies on 'Abuse of Superior Bargaining Power' laws in its *Anti-Monopoly Act*. These protections are more akin to the Australian misuse of market power prohibition in section 46 of the CCA.

Similarly in the United States the broad provision in the Federal Trade Commission Act prohibit 'unfair methods of competition' which has been found to include 'unfair

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24 See *ACCC v Allphones Retail Pty Ltd (No 2)* [2009] FCA 17.

25 See *ACCC v Dukemaster Pty Ltd* [2009] FCA 682.

26 ACCC, 'ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers' (ACCC Media Release, NR 102/14, 5 May 2014).

27 ACCC, *Compliance and Enforcement Policy*, 2014, Australian Competition and Consumer Commission <www.accc.gov.au>.

28 See section 238 of the ACL.

practices in a standard setting' and attempted collusion as well as "traditional" antitrust claims, such as those that would be covered by the Sherman Act, which polices unilateral and concerted actions that unreasonably restrain trade or limit competition.

In the United Kingdom, the unfair contract terms laws are only applicable to consumer contracts[29].

Given that the Australian laws already address many of the concerns relating to the protection of small and medium sized businesses and provide comparable or greater protection to that many jurisdictions, the Working Group submits that further regulation is not necessary and may lead to inconsistencies in application with large trading countries of Australia.

5.6 Prohibition on "Abuse of Superior Bargaining Position" – Comparisons with the Japanese Anti-Monopoly Act

Paragraphs 5.11 to 5.14 of the Issues Paper contain a discussion of the effectiveness of regulation on "unfair and unconscionable conduct in business transactions," with a focus on appropriate regulation on the disparity in bargaining power. Japanese competition law has dealt extensively with the disparity in bargaining power between contractual parties through its regulations on Abuse of Superior Bargaining Power (**ASBP**) under the Japanese Anti-Monopoly Act ("**AMA**"). This section of the submission briefly summarizes the background, current regulations, and enforcement status of ASBP regulations, as well as any suggestions for Australian policy based on the experiences in Japan.

5.7 Background of Japanese regulations

In order to revitalize the Japanese economy, the Japanese Government considered it important to cultivate a competitive environment where small-and-medium enterprises ("**SMEs**") can freely engage in business activities, as SMEs account for more than 99% of the total number of companies in Japan. Historically, it has been considered that it is not uncommon for some large companies in Japan to use their superior bargaining power to take advantage of SMEs by imposing unreasonable contract terms or unreasonably requesting economic benefits (for example, many large companies require SMEs to pay a certain amount of support money without any legitimate economic reason). The ASBP provisions have taken (and are still taking) a significant role in eliminating this type of unfair conduct in order to ensure that SMEs and large companies are on a level playing field and that there is considered to be fair competition in the market irrespective of company size.

5.8 Overview of regulation under the AMA

The rules regulating ASBP under the AMA focus on two main elements: "superior bargaining position" and "abusive conduct." The element of "superior bargaining position" can be found to exist if the bargaining power of one party is "relatively" superior to the counterparty; there does not need to be absolute "market dominance"

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[29] *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083

by one party. The types of "abusive conducts" are enumerated in the regulations, and include (i) forcing a counterparty to purchase a commodity or service, and (ii) forcing a counterparty to provide economic benefits. In 2010, the Japanese Government reinforced the sanctions against ASBP practices by introducing monetary sanctions through so-called "surcharge payment orders." Based on the revised AMA, a contravener is subject to a monetary sanction equal to 1% of total relevant sales to the counterparty(ies).

5.9 **Regulatory impact**

Eliminating ASBP practices has been one of the top priorities of the JFTC's competition policy, and the JFTC has recently strengthened enforcement against ASBP. For example, in November 2009, the JFTC established a task force inside the Investigation Bureau of the JFTC that specializes in the enforcement of ASBP regulations. There have been four cases where companies have been charged with committing ASBP violations since the surcharge payment was introduced in 2010, and the total amount of monetary sanctions in ASBP cases amounted to around JPY 5.3 billion.

5.10 **Issues to be considered**

Japanese regulators appear to have found the recent focus on ASBP regulations has been quite successful. However, many private practitioners have criticized the regulations mainly from the following two perspectives. We believe that these two perspectives are quite useful when considering desirable policy in Australia.

(a) **Transparency issue**

One of the most serious issues regarding the regulation of ASBP, the Working Group believes, is the transparency of enforcement. The existence of a violation of ASBP regulations has not always seen as being clearcut, because there can be uncertainty as to whether one party has a "superior bargaining position" vis-a-vis the other party, or whether particular contract terms should be deemed "abusive." In response to this criticism, the JFTC issued detailed guidelines regarding ASBP in 2010 accompanied with the introduction of the monetary sanction regime. However, the definition of "superior bargaining position" and the various types of abusive conduct is still seen as being somewhat ambiguous, and judicial interpretation of the regulations needs to be accumulated. In this regard, additional guidance is likely to be forthcoming, as decisions are expected to be released shortly from the administrative proceedings for the four cases in which ASBP sanctions have been sought.

(b) **Sanction mechanism**

A second area of concern has been the design of the sanction mechanism. As mentioned above, the primary sanction against ASBP in Japan is currently the surcharge payment, which results in a penalty being paid to the Government. However, in ASBP cases where SMEs have been exploited by larger companies, it is perhaps more important that the damages incurred by the victims be recovered rather than the Government collecting monetary fines.

5.11 **Conclusion on Comparison with Japan**

The Japanese experience in this area does not suggest there is an easy panacea to this issue beyond the provisions in the Australian competition legislation. Further the same issues of transparency as to differences in bargaining power and consistency of enforcement as to types of abusive conduct as well as remedies will arise with any new regulation. In these circumstances, the Working Group does not see large changes required in this area of Australia's competition laws as they will take time to develop and settle.

5.12 **Misuse of Market Power – Adoption of effects based test?**

The Working Group considers that prohibitions on misuse of market power should focus on conduct with a material anti-competitive effect, which does or would adversely affect competition and the competitive process, rather than simply on the purpose/aim or form of such conduct. In principle, conduct should only be prohibited if it is actually and objectively capable of appreciably affecting competition (in an Australian context substantially lessening competition) and thus consumer welfare.

However, the Working Group appreciates that in the context of the Australian legislation, greater difficulties with the identification of unlawful conduct are posed by a test which focuses on effects, rather than purpose. Uncertainty about the scope of the prohibition is exacerbated by the lower market power test currently adopted in the Australian legislation (a substantial degree of market power) rather than the market dominance requirement present in EU law. Care would need to be taken to ensure pro competitive conduct was not inadvertently stifled by a new test.

5.13 **The EU Experience**

As the Review Panel will be aware, there has been significant debate within the EU as to how the EU law prohibition on unilateral misuse of market power - the prohibition on abuse of dominance contained within Article 102 of the Treaty of the Functioning of the European Union ("**Article 102 TFEU**") - should be dealt with.

Historically, the approach of the EU Commission and European courts had been criticised for applying Article 102 TFEU in an overly formalistic manner (for example in relation to the issue of rebates), lacking the focus on economics and effects which has characterised other areas of EU competition law. There was a concern that such a formalistic approach could end up protecting particular (possibly inefficient) competitors rather than the competitive process.

However, in recent years the approach of both the EU Commission and the European courts (together with many Member State authorities) to Article 102 TFEU has moved towards an approach which focuses more on whether the conduct of dominant businesses has (or would have) adverse effects on competition (in particular focussing in principle, on exclusionary conduct which forecloses equally efficient competitors).

This approach is reflected in the publication by the EU Commission of its guidance on Article 102 TFEU (Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings

(2009/C 45/02)) ("Guidance") and the review which preceded this. When publishing the Guidance the EU Commission made it clear that its intention was to adopt "an economic and effects-based approach to exclusionary conduct under Article 102 TFEU, that it is "protecting competition and consumer welfare, not (individual) competitors who do not deliver to consumers" and that "dominant companies should be free to compete aggressively as long as this competition is ultimately for the benefit of consumers".

The European courts have, over time, also started to adopt a similar approach to that outlined in the Guidance, with a focus on the effect of the conduct in question and whether it produces any actual or likely exclusionary effect. We emphasise this movement of Court decisions over time. This is particularly the case when it comes to price-based exclusionary abuses such as predatory or discriminatory pricing.[30]

The potential downside of an effects-based approach is of course that this can reduce certainty for businesses (in self-assessing their own conduct, or seeking to challenge that of rivals or suppliers/counterparties with market power).

However, the merits of an appropriate consumer focused effects-based approach include the following: it targets conduct which is most likely to cause greatest harm to consumer welfare ; allows anti¬competitive and pro-competitive conduct (or competition on the merits) to be distinguished on the basis of the specific facts underlying the conduct in question; and reduces the risk of chilling pro-competitive behaviour. It also removes the inherent difficulties in assessing subjective intent or purpose (including conduct with multiple aims), in particular where certain strategies may be commercially rational absent any exclusionary intention.

It is submitted that a similar approach in Australia may be preferable, if it is possible to overcome the concerns about uncertainty with the scope of an effects-based prohibition.

Indeed the overall objective of an effects based analysis of protecting competition and economic welfare, as opposed to individual competitors, already has some judicial support in Australia as the courts have interpreted the current test in s46 by reference to the objective of protecting competition, not individual competitors.[31] Nonetheless, moving towards an effects based test, if practicable, would help align Australian law with the EU approach and would further promote the objective of protecting competition and economic welfare.[32] It is still important to note that this area is still developing in the EU in terms of case law. Given there are some differences between the EU and the United States, the United States position is now considered.

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30 See for example the judgment of the Court of Justice in Case C-209/10 Post Danmark. The EU Courts have not endorsed fully the EU Commission's suggested effects-based approach as set out in the Guidance Paper. Indeed, in some areas of the law such an exclusivity clauses or exclusivity rebates the EU Courts appear to have remained more "traditional" and to apply a more form-based approach. See for example the recent judgment of the EU General Court in Intel (Case T-286/09) and the judgment of the Courts of Justice in Tomra (Case C-549/10P)

31 cf. Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177 at [23] - [24]; Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1 at [17]; Boral Besser Masonry Limited v ACCC (2003) 215 CLR 374 at [87], [260], [261], [280])

32 See footnote 29 above

5.14 United States Experience on Monopolisation

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Under current law both offences require proof that the monopolist's acts had an anticompetitive effect sufficient either to obtain or maintain monopoly power.

Unlawful Monopolisation

It is well established under U.S. law that proof of monopoly power is not by itself sufficient to establish unlawful monopolization. The United States Supreme Court identified the elements of unlawful monopolization in U.S. v Grinnell:

> *The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident*[33].

Although a number of early cases interpreted the second prong (sometimes referred to as the "willfulness element") to require only anticompetitive intent[34], more recent decisions focus on intent only as bearing on probable effect.

In Aspen Skiing Co. v. Aspen Highland Skiing Corp., the United States Supreme Court noted that "evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . or predatory.'"[35] Significantly, however, a number of cases have held that general intent to harm one's competitors and obtain a dominant position is not sufficient to satisfy the willfulness element absent predatory or anticompetitive conduct[36].

Where the defendant has a legitimate business purpose, even one that disadvantages its rivals, willfulness cannot be established. For example, if the defendant merely desires to increase profits or market share, such motives are considered legitimate business purposes. Where, however, the defendant is willing to absorb losses to drive its competitors from the market, the defendant's conduct is more likely to satisfy the willfulness requirement.

Most noteworthy is the court's decision in U.S. v. Microsoft Corp.,[37] where it set out a framework to analyse a monopolist's conduct. Noting first that it is difficult to distinguish between conduct that is merely vigorous competition and illicit exclusion,

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33 384 U.S. 563, 570-71 (1966).

34 U.S. v. Aluminum Co. of Am., 148 F.2d 416, 432(1945)("the monopolist must have both the power to monopolize and the intent to monopolize"); Times Picayune Publishing Co. v. U.S. 594, 626 (1953) ("the offense of monopolization . . . demands only a general intent to do the act.").

35 472 U.S. 585, 602 (1985).

36 See e.g., Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113 (1st Cir. 1989)("the desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws"); Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)("if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant").

37 253 F.3d 34 (D.C. Cir. 2001).

the court identified the following principles "based upon a century of case law on monopolization":

> *First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. . . .*
>
> *Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . .*
>
> *Third, if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.*
>
> *Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.*
>
> *Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct. (citations omitted)(emphasis supplied)*[38].

Thus, unlawful monopolization cannot be established under current United States law without an analysis of both the effect on competition and the proposed justification for the conduct.

5.15 Attempted Monopolization

Under Section 2 of the Sherman Act attempted monopolization requires proof (1) that the defendant has engaged in predatory or anticompetitive conduct (2) with a specific intent to monopolize and (3) has a dangerous probability of success in achieving monopoly power[39].

The predatory or exclusionary conduct that is required for a claim of unlawful monopolization is also required to establish attempted monopolization[40]. As is the

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38 Id. at 58-59.

39 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

40 Transamerica Computer Co. v. IBM, 698 F.2d 1377, 1382 (9th Cir. 1983)(conduct that is not anticompetitive for purposes of a monopolization claim cannot be considered anticompetitive for purposes of an attempted monopolization claim).

case for establishing unlawful monopolization, the mere desire to increase market share or profits, even at the expense of one's competitors, is not sufficient to establish a specific intent to monopolize. Direct evidence may be used to prove a specific intent, or a specific intent to monopolize may be inferred from anticompetitive conduct[41]. In order to show a dangerous probability of success, there must be proof of the defendant's ability to lessen or destroy competition in a relevant market. The principal factor in making this determination is the defendant's market share[42].

As United States courts continue to decide monopolization cases arising in various factual settings, the law with respect to these offences has become clearer. Both monopolization and attempted monopolization currently require more than just a general intent to perform an act or a specific intent to monopolize. There must be proof that the defendant engaged in predatory or exclusionary conduct and that such conduct has had or will have an anticompetitive effect sufficient to either maintain or obtain monopoly power (for the offense of monopolization) or to establish a dangerous probability of achieving monopoly power (for the offense of attempted monopolization).

5.16 Conclusion on Misuse of Market Power

The impact of a move to an effects based test will depend on the precise nature of the test being advocated, its interpretation and any more specific guidance promulgated by the regulator. It is noted in that respect that unlike many other enforcement Agencies the ACCC has not provided guidance on section 46 misuse of market power.

It would be important to ensure that a new effects test did not have unintended consequences: for example (i) by permitting potentially anti-competitive conduct such as intended exclusionary strategies against new or potential competitors or minor competitors which may not be "as efficient" as the incumbent but whose exclusion may result in significant anti-competitive effects on consumers and welfare; or (ii) by prohibiting pro-competitive conduct by focussing on abstract possible effects (which may, however, not be likely to result in consumer harm) where there is no exclusionary intent and the strategy appears legitimate. It would be useful to be clear as to the kind of 'effects' test actually being advocated.

Given the resulting risk of uncertainty inherent in a move to a new effects based test, in order to allow individual firms to effectively self-assess their behaviour and to avoid deterring pro-competitive conduct, it would be helpful if the ACCC could issue guidance on different types of typical conduct that could be caught under an effects-based approach (including practical examples).This would need to be supported by a consistency of approach in enforcement. Such guidance does not detract from the imperative of clear and simple drafting of an effects based test so that it is comprehensible to business and their advisers, as any ACCC guidelines would not have the force of law. Moreover, there are views that despite comprehensive guidance in the EU in this area, that guidance is not always consistently applied. While having

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41 *See e.g.*, M&M Medical Supplies & Services v. Pleasant Valley Hospital, 981 F.2d 160, 166 (4th Cir. 1992).

42 *See e.g.*, Microsoft Corp., 253 F.3d at 81 (2d Cir.)(plaintiff's failure to identify a relevant market resulted in reversal of lower court decision); Pastore v. Bell Telephone Co., 24 F.3d 508, 513 (3d Cir. 1994)("Most significant, however, is the defendant's share of the relevant market.").

provided comments on the EU position, the Working Group wishes to emphasise that the practical application of Article 102 TFEU is subject to ongoing debate and refinement in the Courts.

The Working Group believes that consideration should perhaps be given to limiting the Australian prohibition to circumstances where a company is using a dominant position in the relevant market, with the effect or likely effect of substantially lessening competition, rather than lesser test of taking advantage of a substantial degree of market power. Inserting this requirement in the Australian provision might assist in reducing the uncertainty possibly associated with moving towards an effects test.

Another option that the Working Group warrants consideration is the adoption of a test which requires both purpose and effect to contravene the prohibition. While acknowledging that such a solution would represent a compromise which is not entirely consistent with the overall objective, it would serve to capture only that conduct which is likely to have a harmful effect, but still maintain some certainty for businesses that conduct which has commercially rational and legitimate motives is not prohibited. A provision covering an 'attempt' for this kind of conduct would also assist in capturing conduct that was targeted at nascent competitors.

In conclusion, the Working Group notes the Issues Paper's comments about the need for Australian competition laws to be "fit for purpose" and in these circumstances it is very important to reflect on the precise areas or the theories of harm that are seeking to be addressed by any change to the law in this area.

6. ANTI-COMPETITIVE AGREEMENTS

6.1 Agreements between competitors

This section of the Submission deals with the following broad questions raised at paragraph 5.21 of the Issues Paper.

Questions:

Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?

6.2 The cartel provisions are unnecessarily complex

The Working Group believes that the Australian cartel provisions are unnecessarily complex. The cartel provisions are not expressed in language that is clear, with the effect that businesses and their advisors find it difficult to understand the application of the provisions and jury trials are likely to be very problematic. At a high level:

- The purpose and effect condition, purpose condition and competition conditions are detailed and lengthy, making it difficult to understand the scope of the prohibitions.

- In some cases, the same conduct will amount to both cartel conduct and an exclusionary provision. This overlap appears convoluted and unnecessary. Businesses may find themselves in a position where they need to test legitimate joint venture arrangements against two separate provisions.

6.3 The cartel provisions are overly proscriptive

The cartel provisions are overly proscriptive and overreaching. The cartel provisions may capture conduct that is either benign or pro-competitive. At a high level:

- The cartel provisions capture conduct which has both a direct and indirect proscribed anti-competitive purpose or effect.

- The prohibition against price fixing may capture pricing arrangements in vertical supply arrangements between parties that are in other circumstances competitors (that are not subject to the exclusive dealing exceptions set out in section 44ZZRS of the CCA). Such arrangements, which are potentially harmless and pro-competitive, with the exception of exclusive dealing, are not covered by any exception.

- The prohibitions against output restrictions, market allocation and bid rigging only apply to conduct which has an anti-competitive purpose, not an anti-competitive effect or likely effect. Further, the proscribed anti-competitive purpose need only be the purpose of one or some of the parties which is anomalous.

- The prohibition on bid rigging is precisely prescribed, such that some conduct which may amount to bid rigging, does not strictly fall within the definition and is therefore not captured.

- The definition of the term "likely" is overreaching – referring to a "possibility that is not remote". Elsewhere in the CCA, "likely" is defined to mean a "real chance or possibility". There should be consistency in the scope of such terms.

6.4 Suggestions for change

- The cartel provisions should be simplified. Regard should be had to the approach that has been adopted in New Zealand, the United States, the European Union and Canada. This is discussed in this Section 6.

- The potential overreach of the provisions to vertical supply arrangements between competitors should be removed. Regard should be had to the approach that has been adopted in New Zealand, where an exemption has been proposed for such arrangements.

- To provide greater certainty and clarity, the prohibition against exclusionary provisions should be repealed (as is happening in New Zealand), and acquisition boycotts should be incorporated into the prohibitions against cartel conduct (as should the related joint venture defence in section 76D of the CCA) – referred to further below.

- Consideration should be given to whether all of the conduct that is currently defined as cartel conduct should be the subject of a per se approach. Adopting a rule of reason approach in relation to appropriate conduct –could lead to the removal of the unnecessary red tape burdens in filing notifications with the ACCC (as occurs in relation to a large number of exclusivity arrangements).

6.5 The "price signalling" provisions are misconceived

At paragraph 5.22 the Issues Paper raises the following question:

> **Questions:**
>
> Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?

- The price signalling provisions are misconceived. They refer to "disclosure", rather than "concerted practices". In this regard, the provisions are overreaching and are different to the approach adopted internationally (for example in the United States, the European Union and the United Kingdom). Contrary to what was previously stated by some in relation to these provisions in relation to international best practice, these provisions are not consistent with similar international provisions.

- The provisions also do not fully prohibit concerted practices, as only the disclosing party attracts liability. In this regard it is difficult to conceive how elements of the conduct may amount to a per se offence.

- Although it is understandable in context how the current drafting of the provisions came about, the fact that the provisions are subject to numerous exceptions, including an "ordinary course of business" exception, which while ameliorating the impact on legitimate conduct such as syndicated lending, raises questions as to their practicality and utility.

- The price signalling provisions currently only apply to the banking sector. In the event that the provisions are not repealed but appropriately amended by starting afresh, the provisions should apply generally across the economy and not be limited to any one sector as competition laws should be of universal application.

- There is no equivalent prohibition in New Zealand, so the price signalling provisions are not consistent with Closer Economic Relations ("**CER**") with New Zealand.

Suggestions for change

- The price signalling provisions should be repealed, or alternatively amended. Regard should be had to the approach for concerted practices that has been adopted in the United States, the European Union, the United Kingdom and Brazil.

- Consideration should be given to whether a rule of reason approach is preferred to a per se approach.

- If amendments are made to provide for appropriate provisions dealing with concerted practices, the provisions should apply generally.

6.6 Joint Venture Arrangements

At paragraph 5.23 of the Issues Paper, the following question is raised:

> **Questions:**
>
> Do the joint venture provisions of the CCA operate effectively, and do they work to further the objectives of the CCA?

The Working Group believes that the joint venture defence is too narrow in scope and may not extend to protect relevant forms of legitimate collaborative activity. For example:

- The interrelationship between the cartel and the joint venture exception should be reversed with joint venturers recognised as in the United States (and arguably previously in Australia), as an important means of developing projects and sharing risk, rather than being characterised as mere possible exceptions to cartel laws. Joint ventures are an important area of economic activity. The Working Group believes that, given the number and generally commercially and economically positive aspects of joint ventures, the Australian position should be consistent with international practice and look favourably upon joint ventures rather than relegating joint ventures to exceptions to cartel conduct .

- The efficiency aspects of joint ventures are not appropriately recognised at first instance in the CCA (except as part of an application for authorisation under the CCA), but rather the conduct is assessed to determine whether it amounts to cartel conduct and then consideration is given as to whether the joint venture exception applies.

- The joint venture exception has narrow application, and accordingly raises uncertainty for business. The exception appears to only apply to joint ventures relating to production and supply. There remains uncertainty about its application to joint acquisition or joint marketing arrangements.

Suggestions for change

- The joint venture exception should be amended to apply to a wider range of collaborative activities:

    - including activities such as joint ventures, strategic alliances, franchises and consortium bidding arrangements; and

- not just joint ventures for the production and/or supply of goods or services.

As stated above, regard should be had to the approach that has been adopted in New Zealand, where (a) an exemption has been proposed for collaborative arrangements that looks to the substantive commercial purpose of the collaboration (with the substantial lessening of competition rule of reason prohibition remaining as a test by way of backstop), and (b) a clearance regime has been proposed to provide business certainty and a body of precedent to assist self-assessment.

More specifically, the New Zealand test provides for a two part, principle-based test that;

- requires only that the collaborative activity not be for the dominant purpose of lessening competition between parties (that purpose to be determined objectively); and

- the cartel provision be reasonably necessary to achieve the legitimate purpose of the collaboration. This part of the test has the benefit of drawing on United States and Canadian jurisprudence.

We now turn to some recent developments in New Zealand by way of comparison.

6.7 The New Zealand Perspective on Joint Ventures and other Anti-competitive Agreement Provisions

This section of this Submission focuses upon:

(a) The CER objectives of consistency in competition laws across the New Zealand and Australian jurisdictions;

(b) Consistency with the competition laws of other jurisdictions with which Australia and New Zealand trade, such as the United States, Canada and Europe, and newer competition regimes that draw on those jurisdictions' competition laws, such as China.

Against that background, we focus on the proposed language of the Commerce (Cartels and Other Matters) Bill now ("**Cartels Bill**") and comment on the extent to which the proposed provisions will allow parties affected by the Commerce Act 1986 ("**Commerce Act**") to assess with reasonable certainty in advance of engaging in collaborations or vertical supply arrangements with competitors whether their conduct will breach the Commerce Act or not. This is an objective consistent with the New Zealand Minister of Commerce's stated intention of encouraging pro-competitive collaboration, and broadly in line with the objectives of the Review.

6.8 "Collaborative activities" exemption

A key objective for the New Zealand Government, through the Ministry of Business, Enterprise and Employment ("**MBIE**") in proposing reform of the Commerce Act's "joint venture" exemption for cartel conduct (at section 31 of the Commerce Act) was a desire to depart from the current rigid and technical application of the joint venture

exemption, which has proven to be uncertain in scope and application and makes it difficult for pro-competitive collaboration to occur.

The exemption provides:

> ***"31 Exemption for collaborative activity***
>
> *(1) Nothing in section 30 [prohibition of cartel conduct] applies to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding, if—*
>
> (a) *the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and*
>
> (b) *the cartel provision is reasonably necessary for the purpose of the collaborative activity.*
>
> *(2) In this Act, collaborative activity means an enterprise, venture, or other activity, in trade, that—*
>
> (a) *is carried on in co-operation by 2 or more persons; and*
>
> (b) *is not carried on for the dominant purpose of substantially lessening competition between any 2 or more of the parties.*
>
> *(3) The purpose referred to in subsection (2)(b) may be inferred from the conduct of any relevant person or from any other relevant circumstance.*

The exemption is therefore in two parts; first there is a requirement that a collaborative activity must not be "carried on for the dominant purpose of lessening competition between any 2 or more of the parties".

This represents MBIE's attempt to distinguish between genuine forms of collaboration and "sham" ventures designed to avoid the prohibition on cartel conduct.

The benefits of the test are that it captures arrangements that are broader than formal (or informal) joint ventures, and extends to any collaboration that has a legitimate purpose. MBIE did consider whether to require the dominant purpose of the arrangement to be pro-competitive, but was concerned that would set an unnecessarily high bar.

The test does have its risks. In particular, there is a risk that the analysis of whether a collaboration is legitimate will be reduced to an assessment between deemed or objectively determined purposes. Cartel conduct is, by its nature, deemed to be likely to lessen competition between the parties (and would objectively have that purpose). When at least one purpose of an arrangement is likely to be regarded as to lessen competition between the parties, the question whether the "dominant purpose" is a different purpose may be an intensely factual enquiry, potentially susceptible to different perspectives of the New Zealand Commerce Commission and judges on an ex post basis.

In respect of the second limb, the "reasonably necessary" threshold, this appears to usefully draw on United States, Canadian and EU law, on what the Courts will consider to be a restraint reasonably necessary for the purpose of a legitimate collaboration. The New Zealand Commerce Commission in its draft Guidelines have taken a similar approach to the Canadian Competition Bureau which expressly provides that when assessing whether a provision is "reasonably necessary", the parties do not need to show that it is the least restrictive provision capable of achieving the desired objective.

The addition of a positive "legitimate pro-competitive" requirement to the section 31(2)(b) should also assist the Commission and the Courts in applying a commercially practical overlay to the "reasonably necessary" limb.

6.9 Clearance regime for collaborative activities

The Cartels Bill also proposes a clearance regime for collaborative activities. This regime is likely to be beneficial to businesses by:

(a) providing a means to obtain certainty in respect of the legality of pro-competitive arrangements without going through the more costly and time consuming authorisation regime;

(b) developing a volume of "precedents" through the New Zealand Commerce Commission's public decision reports that will provide businesses with guidance in self-assessing proposed collaborative arrangements.

Unfortunately, the regime is limited in that it will not apply to existing arrangements. However, the new cartel prohibitions (including criminal sanctions) will apply to arrangements already entered into before the enactment of the Bill that parties continue to give effect to after the enactment of the Bill.

6.10 Exemption for vertical supply agreements

The Cartels Bill also includes an exemption for vertical supply contracts included in clause 7.

Restrictions in vertical supply agreements, such as maximum resale price clauses or allocations of territories for resale of products, are common place commercial practices and are often pro-competitive as such restrictions will be necessary in order for a supplier to be incentivised to sell products to its customer. As noted by MBIE, "[v]ertical supply agreements are commonplace and are generally considered to enhance consumer welfare." Such an exemption is also consistent with the policy approach of overseas competition authorities (see EU guidelines). For example:

(a) many successful franchise operations depend on the ability of the franchisor to allocate specific territories to particular franchisees;

(b) a wholesale supplier is more likely to offer discounted terms to retailers where it is able to impose maximum resale prices on those retailers to ensure discounts are passed on to consumers to drive higher volumes for its business.

Particularly in a small market with often few participants, such as New Zealand, where organisations often compete at multiple levels in the supply chain to achieve necessary scale, a franchisor or wholesaler that happens to be vertically integrated should not be prevented from entering into pro-competitive arrangements, particularly when all of its non-vertically integrated competitors can, simply because it happens to be vertically integrated. Vertical arrangements should only be subject to the section 27 rule of reason analysis.

For these reasons it was considered that an exemption from the per se prohibition for restrictions in vertical supply agreements is necessary, particularly given:

(a) the section can be interpreted to restrict vertically integrated companies from seeking to include normal commercial terms in their supply agreements with their downstream customers, that all of their competitors include in their supply agreements with customers; and

(b) the expanded definition of "in competition" included in the proposed section 30B that provides that if any of person A's interconnected bodies corporate compete with person B or any of person B's interconnected bodies corporate, person A is taken to be in competition with person B.

6.11 **Jurisdictional Reach**

Clause 5 of the Cartels Bill proposes to amend section 4 of the Commerce Act with the purpose of "clarifying the circumstances in which conduct is treated as having occurred in New Zealand".

The proposed new test draws on the New Zealand Crimes Act 1961 provisions relating to conspiracies formed overseas. However, it is unclear that the provisions will be able to be applied with sufficient certainty in the context of conduct that contravenes the Commerce Act. A view in New Zealand is that if there was perceived to be a need to amend the jurisdiction of the Commerce Act in relation to overseas conduct, it should be amended to adopt an "intended implementation" test, similar to that in section 2(3) of the UK's Competition Act 1998. Section 2(3) of the UK's Competition Act 1998 provides that the statute only has jurisdiction if:

> the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

It had been recommended by some to adopt a test along the same lines by introducing a new section 4(4) that provides as follows:

> (4) This Act extends to engaging in conduct outside New Zealand to the extent that the conduct is implemented, or is intended to be implemented, in a market in New Zealand.

The introduction of an implementation or intended implementation test has a number of benefits:

(a) It better achieves a balance between avoiding territorial overreach and the purposes of the Commerce Act. Foreign persons are considered to be put on notice by such a regime that they ought to consider whether their conduct complies with New Zealand's competition laws when they are targeting

conduct towards New Zealand's markets, but it should also prevent foreign persons being caught under the Commerce Act where sales to New Zealand were never contemplated by them.

(b) This test deals with the situation of implementation through innocent agents in New Zealand, providing jurisdiction over this category of indirect conduct that the judiciary have been troubled by for some time. It is an approach that we consider to be superior to introducing a separate jurisdiction with respect to deemed state of minds as provided for in proposed section 90(5)(b).

(c) It removes the requirement that the New Zealand Commerce Commission establish that the person carrying out the anticompetitive conduct was resident or carrying on business in New Zealand, which is a test that requires a degree of permanence of doing business that overseas companies implementing cartel arrangements in New Zealand do not often meet.

(d) It removes the need for defendants that have engaged in illegal conduct overseas, and wish to reach a settlement with the New Zealand Commerce Commission, to admit either explicitly or implicitly that their conduct was implemented or "affects" a market in New Zealand in order to fall within the Commerce Act's jurisdiction. Instead the defendant could settle on the basis that its overseas conduct was intended to be implemented in New Zealand. The existing requirement to admit an actual effect can be a real hindrance to prompt settlement because an admission that a particular conversation or arrangement actually had an affect can increase the likelihood of third party actions, particularly in the United States where treble damages apply.

6.12 Resale Price Maintenance per se illegality

The New Zealand Cartels Bill does not include any amendment to the per se prohibition on resale price maintenance ("**RPM**") despite the recognition by the US Supreme Court, in Leegin *Creative Leather Products, Inc. v PSKS, Inc*.,[43] that RPM can be pro-competitive.

In Leegin the US Supreme Court recognised that:

> **Minimum resale price maintenance can stimulate interbrand competition** among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand.
>
> ...
>
> **Resale price maintenance may also give consumers more options** to choose among low-price, low-service brands; high price, high service brands; and brands falling in between.
>
> ...
>
> Resale price maintenance can also increase interbrand competition by **facilitating market entry for new firms and brands**.

[43] *Leegin Creative Leather Products Inc v PSKS Inc*, 127 S. Ct. 2705 (2007).

A substantial amount of economic literature supports those benefits acknowledged by the United States Supreme Court[44].

The New Zealand Government has recently announced that that the question whether RPM should remain per se illegal in New Zealand will be revisited in the proposed review of section 36 (misuse of market power) provisions, that is presently being considered by MBIE.

6.13 Joint ventures: The United States Perspective

Joint Ventures Promote Competition.

United States antitrust enforcement agencies and federal courts recognize that joint venture agreements and other similar collaborations can promote efficiency and facilitate more robust competition. As the United States Supreme Court has stated, "joint ventures . . . hold the promise of increasing a firm's efficiency and enabling it to compete more effectively[45]." These arrangements allow firms with complementary strengths, abilities, and resources to combine, resulting in efficiency gains in such areas as research, development, production, and marketing[46]. When this happens, consumers may enjoy lower prices, higher quality, and quicker introduction of new products[47]. Because the antitrust laws aim to maximize consumer welfare[48], competition authorities must be careful not to unduly restrict the formation and operation of procompetitive joint ventures. United States antitrust law accommodates these collaborations in several ways as follows:

Relaxed Scrutiny is Appropriate for Joint Venture Agreements

In the United States, there are two fundamental modes of antitrust analysis: per se illegality, and the "rule of reason[49]." The former rule applies to practices for which "the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote[50]." This category of offenses includes horizontal price-fixing, supply restraints, bid-rigging, and market allocation. All other practices are subject to the rule of reason, a flexible inquiry that requires courts to weigh the

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44 For example, See Bhawana Gulatai "Minimum Resale Price Maintenance Agreements: Economic & Commercial Justifications" (2012) 9 *Manchester Journal of International Law*, 92.

45 *Cooperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 768 (1984).

46 FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 2.1 (April 2000)

47 *See id.* ("Consumers may benefit from these collaborations as the participants are able to lower prices, improve quality, or bring new products to market faster").

48 *See Reiter v. Sonotome Corp*., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription'").

49 *See In re Southeastern Milk Antitrust Litig*., 739 F.3d 262, 270 (6th Cir. 2014) ("Whether the restraint is 'unreasonable' is determined by one of two approaches—either the *per se* rule or the 'rule of reason'").

50 *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co*., 472 U.S. 284, 294 (1985).

practice's anticompetitive effects against its procompetitive benefits. The "true test of legality"[51] is "whether or not the challenged restraint enhances competition[52]."

Due to a joint ventures' capacity to produce competitive gains, joint venture arrangements are almost always analysed under the rule of reason[53]. According to the U.S. antitrust agencies' Antitrust Guidelines for Collaborations Among Competitors, this more lenient standard is ordinarily appropriate even if the collaboration "is of a type that might otherwise be considered per se illegal[54]." For example, where companies with complementary strengths combine to manufacture and sell a product that consumers demand, it would make no sense to prohibit them from setting prices[55]. So long as the restraint is "reasonably necessary to achieve [the] joint venture's efficiency-enhancing purposes," it will not be deemed per se unlawful[56].

The European Commission has adopted a similar approach to joint ventures. According to guidelines issued in 2011, "[h]orizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets[57]." The legal analysis for joint ventures closely resembles the rule of reason, asking whether the agreement "has an anticompetitive object or actual or potential restrictive effects on competition," and if so, whether the "pro-competitive effects outweigh the restrictive effects[58]." The European Commission further recognizes that while setting prices, limiting output, or allocating markets ordinarily "restrict competition by object," they may be necessary and efficiency-enhancing in the joint venture context[59].

Additionally, the United States Congress has created extra protections for certain types of collaborations. Under the National Cooperative Research and Production Act, qualifying joint venture arrangements can only be assessed under the rule of reason[60]. Moreover, if the joint venture agreement is disclosed to federal authorities, plaintiffs to any suit challenging the arrangement as anticompetitive are limited to recovery of actual (rather than treble) damages[61]. In 2004, Congress extended these same

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51 *See Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition").

52 *Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999) (quoting *NCAA v. Bd. of Regents of Univ. of Okla*., 468 U.S. 85, 104 (1984)).

53 *See Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998) ("Joint venture enterprises like OFC, unless they amount to complete shames . . . are rarely subject to per se treatment").

54 ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *supra note* 6, §3.2.

55 *See Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (it is not *per se* illegal "for a lawful, economically integrated joint venture to set the prices at which the joint venture sets its product").

56 *See Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318 (Fed. Cir. 2010); *Major League Baseball Props., Inc. v. Salvino, Inc*., 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring).

57 GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 TO THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS § 1.1 (2011).

58 Id. § 1.2.

59 Id. § 4.3.2.

60 15 U.S.C. §§ 1401, 1402.

61 Id. §§ 4303, 4305.

protections to qualifying standards-development organizations[62], which, like joint ventures, serve an indispensable function in technology industries.

Robust Protection of Intellectual Property Rights

The United States antitrust agencies acknowledge that intellectual property is frequently an essential component in production processes that require a "combination [of] complementary factors[63]." In order to exploit the commercial value of a patent, trade secret, or other intellectual property, a firm must typically "arrange for its combination with other necessary factors[64]." Rather than developing the necessary manufacturing, distribution, and marketing capabilities in-house—which may entail a prohibitively high investment of capital—intellectual property owners often prefer to collaborate with others by means of a joint venture, licensing agreement, or other contract[65]. Such collaboration allows firms to get their products on the market quicker, more efficiently, and at lower prices.

In order for technology-related joint ventures to work, the balance between the competition laws and intellectual property laws must be appropriately calibrated. To that end, United States antitrust law does not, in general, intrude upon intellectual property holders' statutory right to exclude competition[66]. Of course, certain conduct with respect to intellectual property—such as patent pooling, obtaining a patent by fraud, or paying a patent challenger to refrain from competing—may, in some cases, violate the antitrust laws[67]. But even these cases are ordinarily assessed under the rule of reason, at most[68]. Collaborations that involve the licensing of intellectual property are normally deemed per se lawful, so long as they do not exceed the scope of conduct authorized by the intellectual property laws[69]. This deferential standard permits firms to achieve the procompetitive benefits that usually accompany licenses[70].

The European Commission has articulated similar standards. According to the horizontal cooperation guidelines, for example, intellectual property rights are "in

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62 Standards Development Organization Advancement Act of 2004, Pub. L. 108-327, 118 Stat. 661 (codified at 15 U.S.C. §§ 1401–1406).

63 FED. TRADE COMM'N & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.3 (April 1995)

64 *Id.*

65 *Id.*

66 *See United States v. Line Material Co*., 333 U.S. 287, 309 (1948) ("The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception").

67 *See, e.g., FTC v. Actavis, Inc*., 133 S. Ct. 2223, 2237–38 (2013) (paying potential competitor not to compete); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*., 382 U.S. 172, 179–80 (1965) (patents procured by fraud); *Standard Oil Co. (Ind.) v. United States*, 283 U.S. 163, 169 (1931) (pooling arrangements).

68 *See ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, supra note* 23, § 3.4 ("In the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason"); *see, e.g., Actavis*, 133 S. Ct. at 2237–38; *Standard Oil Co. (Ind.),* 283 at 169–70.

69 See *ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY,* § 2.3

70 *Cf.* ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra note* 23, § 2.0 ("the Agencies recognize that intellectual property licensing allows firms to combine complementary factors of production and is generally procompetitive").

general pro-competitive[71]." Most collaborations that involve the licensing or transfer of intellectual property "will usually improve economic efficiency and be pro-competitive[72]." The appropriate legal analysis must take into account several factors, weighing any negative effects on competition against procompetitive benefits[73].

Industry-Specific Immunities May be Appropriate

Finally, United States law reflects recognition that in some industries, collaborations among competitors are so desirable that they merit limited immunity from the antitrust laws. More than twenty statutory exemptions from the antitrust laws currently exist[74], in industries ranging from ocean shipping[75] to agriculture[76] to newspapers[77] to sports broadcasting[78]. Under most of these statutes, would-be collaborators firms must submit their proposed agreement to a federal government agency for review[79]. The agency's review ordinarily entails consideration of the likely competitive effects of the proposed agreement. If the relevant agency is satisfied that the proposed agreement meets statutory requirements, it may approve the collaboration. Operating under this approval, the collaborating firms enjoy antitrust immunity so long as they operate within the scope of the agreement.

6.14 A Canadian Perspective on Joint Ventures

The most recent amendments to the Canadian Competition Act ("**Canadian Competition Act**"), which came into force in 2010, introduced significant changes to the framework for review of joint ventures under Canadian competition law. The most significant change related to joint ventures in Canada has been the adoption of a more appropriate framework for review through the introduction of a civil provision dealing with competitor collaborations in section 90.1 of the Canadian Competition Act. Joint ventures will now typically be reviewed under either the merger provisions of the Act or the civil agreements provision in section 90.1, rather than the criminal conspiracy provisions of the Act.

The Competition Bureau has also issued Competitor Collaboration Guidelines (the "**Guidelines**") to assist businesses and their counsel in assessing whether a particular form of competitor collaboration is likely to raise concerns under the criminal or civil provisions of the Act. Although not binding on the Bureau, prosecutors, or the courts, the Guidelines outline how the Bureau intends to treat different types of agreements between competitors or potential competitors.

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71 GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 TO THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS, § 7.3.1.

72 Commission Reg. (EU) No. 316/2014, ¶ 4.

73 Id. ¶¶ 5, 8.

74 ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 1 (2007).

75 46 U.S.C. §§ 40101–40119.

76 7 U.S.C. §§ 291–92.

77 15 U.S.C. §§ 1801–1804.

78 15 U.S.C. §§ 1291–1295.

79 *See, e.g.,* [Capper Volstead, Shipping Act, Airlines, Newspaper].

The Guidelines are very helpful and recognize that pro-competitive collaborations (including many joint ventures) can benefit Canadians by allowing firms to make more efficient use of resources and accelerating the pace of innovation. Even though there has been little judicial treatment of the new framework, where a joint venture does not constitute a merger, the Canadian Bureau will now generally assess the agreement or arrangement under the new civil provision, reserving the criminal offence for "naked restraints" on competition ("hard-core" cartel conduct), specifically, price-fixing, market allocation or output restriction agreements.

The Guidelines are also instructive in that they identify a number of different types of competitor collaboration agreements, their respective benefits, and potential for anticompetitive effects. Through the Guidelines, the Canadian Bureau has identified a number of factors that it will consider when assessing various types of collaboration agreements, which include: research and development agreements, production agreements, and commercialization and joint selling agreements. The Guidelines also provide examples of the Canadian Bureau's approach to each type of joint venture agreement and identify the competition law risks associated with each.

6.15 Conclusion on Anti-Competitive Agreements

While the United States antitrust regime nor those of New Zealand or Canada are by any means the only ways to regulate business interactions among companies, the Working Group believes that any competition authority or policymaker should be mindful of the foregoing considerations and options to more simply regulate economic activity in terms of prohibitions on anti-competitive agreements.

The Working Group in particular notes that unduly restricting joint ventures and similar collaborations, particularly in technology-heavy industries, threatens to throttle back innovation, undermine economic growth, and deprive consumers of lower priced and higher quality goods and services in Australia.

7. MARKET INVESTIGATIONS / MARKET STUDIES

7.1 Introduction

At paragraph 5.48, the Issues Paper referred to the United Kingdom experience of market studies and asked (in part).

> **Questions:**
>
> The Panel is interested in whether there are other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian Context.

7.2 The United Kingdom Experience

Alongside the usual antitrust prohibitions, the UK's antitrust regime provides for the possibility of a market investigation where a potential adverse effect on competition ("**AEC**") has been identified by the competition authority. The market investigation regime is unusual because it grants autonomy to the Competition and Markets Authority ("**CMA**") (the UK's main competition authority) to both gain information

which might then inform legislation, and to impose remedies to address any identified AEC.

In some cases, market participants face being required to divest key assets even though no unlawful conduct has taken place. In addition, the CMA's decisions are subject to a limited "judicial review" standard of oversight by the courts, and it is argued that the CMA is subject to limited democratic or parliamentary accountability for its individual decisions.

Since its implementation in 2002, there have been sixteen market investigations under the current market investigations legislation.

For example, an investigation into aggregates, cement and ready mix concrete markets concluded that a combination of structural and conduct features led to co-ordination by the three largest cement producers, imposed divestments on two firms and restrictions on the publication of data by suppliers. An investigation into private healthcare found an AEC resulting from structural and conduct features, and ultimately required divestments by one hospital provider, the publication of certain fee data by providers, and the withdrawal of certain clinician incentives.

An investigation into the supply of airport services by a single firm, BAA airports (which operated the main airports in London and Scotland) was motivated by concerns regarding BAA's market power as well as the barriers to entry arising from the regulatory regime relating to airports. The remedies imposed were the divestment of two main London airports and one of the two main airports in Scotland, and behavioural remedies as well as recommendations to the government in relation to airport regulation.

7.3 Transparency, certainty and accessibility

Given the powerful remedial aspect of market investigations, it is important that such a tool be used sparingly and be subject to appropriate judicial oversight. An incautious application of the market investigations regime could negatively influence investors' decisions and ultimately reduce the supply of capital to the economy. In the UK, the legal framework does not require the CMA to take into account possible negative long-run economic effects of its decisions, but the modest number of market investigations so far suggests regulators may have taken into account such risks.

Safeguards of this nature are arguably necessary to reduce the risk of a heavy handed use of any markets regime. Using competition policy to punish and deter acquisition or abuse of market power through acquisitions or agreements is uncontroversial. Using it to penalise market power attained through organic growth – investing to create a market, developing superior products or creating intellectual property through innovation – risks being anticompetitive itself and introducing business risk and uncertainty, or as some would argue sovereign risk in investing in some countries.

7.4 Australian Productivity Commission

Leaving aside questions of Constitutional power for any remedies arising from market studies in Australia, questions arise as to the appropriate regulatory structure for such assessments in terms of the ability for competition agencies to self initiate such

studies, impartiality as to market dynamics (the agency having instituted an investigation), due process, accountability and the resources and experience to conduct such studies. In Australia, many would argue that the Productivity Commission already fits this role of undertaking market studies well.

7.5 Conclusion

The United Kingdom experience has been mixed with concerns expressed as to the time, cost and approach in recent market studies and whether the outcomes in some industries justify the intervention.

The Working Group considers that the Productivity Commission already plays a significant and useful role in Australia in which to conduct market studies. Given possible Constitutional issues in relation to consequences of market studies and the uncertain level of outcomes from such studies overseas, the Productivity Commission's existing role in Australia may well suffice.

8. MERGERS

8.1 Introduction

At paragraph 5.31 of the Issues Paper, the following question was raised:

> **Questions:**
>
> Do the mergers provisions of the CCA operate effectively, and are they being applied efficiently by regulators and the Courts?

8.2 Australian Merger Control Process

The Working Group acknowledges Australia is one of the few jurisdictions that has a non mandatory pre-merger notification regime and supports the submission made to the Review by the Merger Streamlining Group as to the benefits of Australia's informal clearance system in terms of its flexible nature.

While much is made of the mandatory merger control processes undertaken by many jurisdictions, the time and cost involved in merger filings is raising issues as to the efficiency of such processes. The delays and expenses are substantial even where a merger is dealt with on an expedited basis where no overlap issues arise but a merger filing is required because the two parent entities have turnover in the relevant jurisdiction or the target itself does.

The recent United Kingdom reforms, while making procedural changes to strengthen aspects of the system, also concluded in favour of a non-mandatory system due in large part to the recognised efficiency benefits for the large number of mergers that pose no conceivable competition issues, and the benefit of allowing the authority's staff to focus finite public resources on a more limited number of cases that may raise at least prima facie issues.

In light of those circumstances the Working Group commends the Australian system and its administration by the ACCC.

8.3 Merger Review Processes for the 5-10% of Mergers that Raise Substantive Issues

The relatively small proportion of mergers that are contentious and result in litigation in Australia is broadly consistent with such percentages in other jurisdictions, which are being estimated to be approximately 5-10% of all mergers[80]. The Working Group in these circumstances notes the process put into place following the Dawson Committee Review of a process to allow mergers to be taken directly to the Australian Competition Tribunal as part of the merger authorisation process. It would appear that even in a relatively complex case such as occurred recently in the AGL/Macquarie Generation matter[81] the Tribunal is proposing to hear and determine a matter within three months. That is a commercial, timely and internationally expeditious timeframe and the Working Group notes these timeframes allow mergers to be considered in a timeframe consistent with commercial transactions and provides a very good appeal forum for those 5-10% of mergers where it is considered appropriate to take them directly to the Tribunal or as occurred in AGL/Macquarie Generation, take them to the Tribunal if not satisfied with the ACCC's decision in an informal clearance process. Indeed that was also the position in the other recent application to the Australian Competition Tribunal involving Murray Goulburn which was seeking to acquire Warrnambool Cheese & Butter Company (an application that did not proceed for commercial reasons as the takeover was withdrawn).

8.4 The Tribunal Authorisation Process

The Working Group notes that there is some uncertainty about whether it is the optimal process for mergers to go to the Tribunal on the basis of a public benefits argument where the matter is essentially a question of whether the acquisition actually substantially lessens competition for example, the AGL/Macquarie Generation matter. However, the Working Group welcomes the process of an expeditious hearing for contentious mergers before the Tribunal and notes that in any event the Tribunal found on the facts in AGL/Macquarie Generation, quite substantial public benefits.

8.5 Conclusion

The Working Group acknowledges the difficulty that the ACCC would face if merger matters are not appropriately notified to the ACCC with sufficient time to provide an opportunity to test legal and economic propositions. Equally, a process which requires a merger party under an authorisation process to first notify the ACCC, then having the matter rejected by the ACCC and only then having an ability to take the matter to the Tribunal may not be optimal as it will create a process which takes at least six months. Such a situation only serves to put in place a process which restricts the ability to have an expeditious hearing before the Tribunal.

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[80] See The United States Department of Justice Antitrust Report to the Attorney General and Assistant Attorney General for Antitrust – International Competition Policy Advisory Committee final report (ICPAC Report) – 2000-chapter 3

[81] See footnote 1

The Working Group accordingly makes no recommendations in relation to reform of the current Australian merger processes. The Working Group notes that if the ACCC approach to mergers continues to be quite "structural" in its merger assessments in terms of basing its decisions quite heavily on the number of market participants (rather than focussing more on dynamic issues as the merger parties will likely argue), it is quite possible this trend of taking contentious merger matters to the Tribunal will increase.

In these circumstances the Working Group suggests that it would be worthwhile for the Tribunal to make comments on the procedural issues which have arisen in recent cases so they may be improved and for the Review to ask the question whether the Tribunal has sufficient resources to hear merger matters so that it is appropriately resourced.