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via website

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Dear Professor Harper and members of the Review Panel

Submission to the Competition Policy Review

Thank you for the opportunity to make a submission to the Competition Policy Review.

This letter comprises our personal submission to the Review. The submission reflects our personal views drawn from our experience in both private practice and in public enforcement of the *Competition and Consumer Act 2010* (**CCA**) and its predecessor legislation.

Summary

- The real issue with Australia's "highly codified" competition law lies in its overly proscriptive approach, which prohibits too much conduct *per se* and relies too heavily on piecemeal exceptions and administrative processes to make up for this initial overreach.

- This combination represents an undue impediment to competition, and imposes substantial and unnecessary costs on business and ultimately on consumers through increased prices and stifled innovation.

- Relatively straightforward changes to the CCA would reduce this burden and promote dynamic and responsive competition for the benefit of all Australians. These changes would:

  – focus the *per se* prohibitions on the most anti-competitive forms of conduct as described in the cartel provisions, removing the reference to exclusionary provisions from section 45, assessing third line forcing and resale price maintenance under a competition test, and replacing the price signalling provisions with a prohibition against concerted conduct;

  – improve section 46 by retaining the "purpose" test but more closely considering the "take advantage" limb;

  – remove remaining sector-specific frameworks; and

  – provide a coherent set of defences to replace the fragmented defences and exceptions throughout the CCA, including a "single economic enterprise", a "collaborative activity" and an "efficiency or public benefit" defence.

Background

The Terms of Reference charge the Review Panel with the task of:

> considering whether Australia's highly codified competition law is responsive, effective and certain in its support of its economic policy objectives.[1]

[1] Terms of Reference, 3.1.

This question mines a rich seam of criticism of what has become the *Competition and Consumer Act 2010* (**CCA**), and what the CCA has become: its three hefty volumes, its 1500 pages and 400,000 words, and its section 44ZZOAAA(6)(a)(iv).[2] Our legislation contrasts starkly with the elegance of the two operative sections of the *Sherman Antitrust Act* of 1890 – hardly disfigured by the modest ornaments of the *Clayton Antitrust Act* of 1914 – and the two articles and single merger regulation that have served Europe so well.

Some of these criticisms should be seen in context. Part IV of the CCA only makes up 5% of the Act's total bulk; much of the remainder is taken up with details of implementation that are common to all jurisdictions in one form or another. Sections that are rarely or never used take up space but very little time. The section numbers may be impossible to remember, but they are easy enough to look up.

The more fundamental problem with the highly codified CCA is in the real costs imposed by its overly proscriptive approach and design. Its insistence on *per se* prohibitions, and its rigid regulation of specific conduct and specific industries, involve very high compliance and risk costs for business, and these costs are passed on to consumers through higher prices and stifled innovation.

To mitigate these strict prohibitions, the CCA relies on an even more complex system of exceptions and exemptions together with the overlapping administrative processes of authorisations, notifications and formal and informal clearances. These are by their nature *ad hoc* solutions to a general problem, a combination that imposes burdens on businesses, regulators and ultimately consumers that could more easily be avoided by reconsidering the primary prohibitions of the CCA.

Over many years advising clients on navigating the CCA, we have directly experienced the substantial cost and delay that this approach imposes, whether because of the time and cost needed to prepare authorisations and notifications; the uncertainty surrounding ambiguous terms; or the arbitrary limits of *per se* prohibitions, which may be avoided by restructuring the arrangements around the prohibition at considerable cost and to nobody's benefit.[3]

In this submission we suggest some relatively straightforward changes to the competition sections of the CCA that would simplify compliance, improve efficiency and promote vigorous competition for the benefit of the Australian public.

Focusing the *per se* prohibitions

It is increasingly accepted in Australian and worldwide economics and jurisprudence that conduct should be prohibited *per se* only when it is anti-competitive with no redeeming public benefit in the overwhelming majority of cases. This principle was put succinctly by the Hilmer Report:

> *Per se* prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition.[4]

The Dawson Report reiterated this principle:

> The rationale behind a *per se* prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.[5]

[2] See for example Justice Steven Rares, "Introductory Remarks for the 2012 Competition Law Conference", 5 May 2012; Allan Fels, "The Competition Review: The Competition Provisions of the Competition and Consumer Act", May 2014; also cited in Andrew Burrell, "Fred Hilmer backs competition audit", *The Australian*, 6 December 2013.

[3] For example, vertical arrangements subject to a *per se* prohibition may in some cases be avoided through agency arrangements, which fundamentally alter the relationships but have no impact on the consumer.

[4] At page 52.

[5] At page 123.

Although the prohibitions in the Sherman Act are expressed without qualification, the range of conduct that the Act describes was very quickly segregated into mortal sins, subject to *per se* prohibition, and venial sins to be judged according to the "rule of reason", which has been expressed by the Supreme Court in the following terms:

> 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.[6]

The list of *per se* violations has been whittled away over the decades – the category of tying or bundling fell to the rule of reason with *Jefferson Parish* in 1984[7] and resale price maintenance followed it with *Leegin* in 2007.[8] As described by the Antitrust Modernization Commission in that year:

> [A]s new economic learning suggested possible procompetitive explanations for conduct previously assumed to be anticompetitive, the courts moved away from per se rules of automatic illegality toward a more flexible rule of reason analysis that would allow consideration of procompetitive explanations of challenged business conduct.[9]

Although some commentators have wondered whether this trend will leave any *per se* prohibitions standing,[10] it appears for now that the US and European jurisprudence have settled on a handful of hard-core violations that continue to attract *per se* liability: namely, the horizontal agreement between competitors to fix prices, share markets, restrict output or rig bids.

It is no coincidence that these are the arrangements now subject to Division 1A of the CCA, the new cartel provisions – at least according to the simplified outline in section 44ZZRA, though expressed more tortuously in the operative sections. These four categories of horizontal arrangement have not been seriously challenged as the most consistently anti-competitive classes of conduct and the most deserving of *per se* prohibition, and they should be the only *per se* offences in the CCA.

This proposition suggests the following amendments.

Clarify the position of vertical arrangements

We are aware of suggestions that the cartel provisions could be drafted more simply or clearly. Our main concern with the existing provisions is that, given the recent confusion between horizontal and vertical arrangements introduced by the *ANZ* and *Flight Centre* cases, Division 1A should make absolutely clear that arrangements properly characterised as vertical ones should not be assessed *per se* under the cartel provisions but should be subject to a substantial lessening of competition test.

Remove section 4D exclusionary provisions from section 45

Various subsections of section 45 level *per se* prohibitions against "exclusionary provisions", which are defined in section 4D as agreements between competitors to restrict the supply or acquisition of goods or services, either at all or in particular circumstances or on particular conditions. This was a reasonable attempt to capture the most reliably anti-competitive categories of behaviour, but the specific enumeration of the new cartel provisions is a better one. Having identified the specific horizontal arrangements deserving of *per se* prohibition, it is not appropriate to retain the concept of an exclusionary provision in case that concept encompasses conduct not already covered by the cartel provisions. This overlap has real costs, including the necessity of ensuring that joint ventures

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6 *Chicago Board of Trade v. United States*, 246 U.S. 231

7 *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984)

8 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)

9 At page 33.

10 Thomas E. Kauper, "The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective", 100 *Mich L Rev* 1867 (2002)

comply with two sets of defences. Section 4D and all references to exclusionary provisions in section 45 should be removed.

Section 45 would then ensure that all contracts, arrangements or understandings that fall outside the four *per se* categories of the cartel provisions will be prohibited if, and only if, they have the purpose, effect or likely effect of substantially lessening competition. This configuration would be consistent with international jurisprudence and would appropriately discriminate between the most egregious hard-core horizontal arrangements and those that should be judged on their merits.

Only prohibit third line forcing when it has an anti-competitive purpose or effect

The *per se* prohibition of third line forcing is a quirk of history and an anomaly in international jurisprudence and in section 47 itself. The Swanson Report considered that the practice, then denoted somewhat less opaquely than it is today, deserved its *per se* prohibition in 1977:

> In the opinion of the Committee the practice of forcing another person's product may be justifiable in certain cases. However, the Committee is of the opinion that the practice will, in virtually all cases, have an anti-competitive effect and that it should accordingly, continue to be capable of justification upon the ground only of public benefit.[11]

That is, the Swanson Report considered that the benefits of third line forcing should be assessed in the context of the authorisation process. The Hilmer Report recommended both that the *per se* prohibition of third line forcing be removed and that notification should be available.[12] The government of the day ignored the former but implemented the latter, again relying on administrative processes to patch up the increasingly embarrassing conduct provision.

The Dawson Report constructed what should have been the conclusive argument against the *per se* prohibition of third line forcing, identifying its historical roots in the lending practices of the 1970s, searching in vain for any analogous treatment in international jurisprudence, and counting the unchallenged notifications piling up at the ACCC.[13] The government of the day was unmoved.

The third line forcing impasse is perhaps the epitome of the problem with the CCA, pitting a manifestly unjustified *per se* prohibition against a notification process that almost seems painless enough to just put up with. But there are real costs associated with the notification process that go far beyond the $100 filing fee and even the in-house or external legal fees and management time required to prepare notifications and respond to the ACCC's further inquiries: there is a drag on competitive response, and even if that delay is measured in weeks rather than months it is an unnecessary compromise to the dynamics of a business and ultimately a market. It is like dealing with a puncture by carrying a bicycle pump everywhere you go.

And sometimes the delay is measured in months. For example, the third line forcing notification for Qube Logistics, which used a third-party booking system to more efficiently manage empty shipping containers, took ten months to resolve, although a very similar arrangement involving the same booking system had been notified the previous year.[14] The ACCC did not need to define a market and found there would be no public detriment whatsoever from the conduct, suggesting that if third line forcing had not been prohibited *per se* the arrangement would have raised no issues.

Third line forcing could be considered under a substantial lessening of competition test by amending section 47(10) to provide that conduct under subsections (6), (7), (8)(c) and (9)(d) is to be treated like every other kind of exclusive dealing described in that section, and prohibit the conduct only where it has the purpose, effect or likely effect of substantially lessening competition.

[11] At page 30.

[12] At page 53.

[13] At page 129.

[14] Qube Logistics (Aust) Pty Limited - Notification - N96205 at http://registers.accc.gov.au/content/index.phtml/itemId/1085618/

Alternatively, section 47 could be removed altogether and the relevant conduct assessed under section 45. That would suggest two consequential amendments. First, the elements of offer and refusal could be added to section 45 to cover conduct that does not manifest in a contract, arrangement or understanding, by providing that:

> a corporation shall not offer to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; and
>
> a corporation shall not refuse to deal with a person for the reason that the person has not made or given effect to a contract, arrangement or understanding where a provision of the proposed contract, arrangement or understanding has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Second, since the anti-overlap provision in 44ZZRS would have nothing to apply to, the cartel provisions would need to be examined to make sure that they exempted the kind of conduct currently assessed under section 47 – that is, vertical supply arrangements. As discussed above, a clarification of this nature is critical in any event.

Only prohibit resale price maintenance when it has an anti-competitive purpose or effect

The rehabilitation of resale price maintenance is lagging that of third line forcing, at least in Australia. The Hilmer Report decided to maintain the *per se* prohibition in section 48, although it recognised that it would not always be anti-competitive:

> The economic theory associated with RPM does, however, present a convincing argument that RPM can, in certain circumstances, enhance economic efficiency. These arguments are highly technical, and could appropriately be examined in an authorisation context.[15]

Here the Hilmer Report found itself in the same position as the Swanson Report did in relation to third line forcing almost twenty years before, deferring to the authorisation process conduct that it recognised could be pro-competitive but did not feel comfortable endorsing more fully. Again, this was an unfortunate evasion. Conduct should be prohibited *per se* where in the overwhelming majority of cases it will be anti-competitive with no offsetting public benefit; in other cases it should be subjected to the substantial lessening of competition test even if highly technical arguments are involved.

Of course, arguments that seem highly technical at first become simple over time. The Dawson Report did not evaluate whether the *per se* prohibition was still appropriate, but in the 2007 *Jurlique* case Spender J traversed the economic literature and found many arguments for the efficiency benefits of resale price maintenance:

> There is a respectable view among economists, particularly those belonging to the so-called 'Chicago School of Economics', that vertical price restraints such as retail price maintenance are not anti-competitive. Such economists would argue that there is absolutely no basis on which such practices should be illegal *per se*, even if there is room for the view that they should be subject to a 'rule of reason'.[16]

Spender J lamented that this discussion was literally academic due to the *per se* nature of the prohibition under the proscriptive Australian legislation. Four months later, the US Supreme Court, bound only by 96 years of precedent, decided that resale price maintenance should indeed be subject to a rule of reason rather than a *per se* prohibition in *Leegin,*[17] using many of the same economic arguments that Spender J had been prevented from applying.

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[15] At page 58.

[16] *Australian Competition and Consumer Commission v Jurlique International Pty Ltd* [2007] FCA 79.

[17] *Leegin Creative Leather Products Inc v PSKS Inc dba Kay's Kloset…Kay's Shoes* 551 U.S. 877 (2007).

Vertical restraints can reduce competition between retailers of a single brand, but they can also increase competition between brands. Since few if any markets comprise a single brand, in almost every market inter-brand competition will be more significant than intra-brand competition, and resale price maintenance will rarely result in a substantial lessening of competition in the relevant market properly defined. These principles are no more technical than the other economic principles that underpin competition law; the courts have shown themselves capable of understanding and applying them where the legislation permits it; and in this case the certainty of a *per se* prohibition comes at a significant cost to efficient and pro-competitive behaviour that should be addressed by a change in the law rather than a continued reliance on administrative authorisation.

Section 48 could be made subject to the provision that resale price maintenance would only be prohibited where it had the purpose, effect or likely effect of substantially lessening competition; or the section could be removed altogether. Since resale price maintenance is a vertical restraint it should be dealt with along with other vertical restraints, either by including it in section 47 or, if that section were to be removed, by leaving it to a section 45 extended to embrace offers and refusals.

Replace the price signalling provisions with a more effective treatment of concerted conduct

The price signalling provisions in Division 1A of Part IV represent a clumsy and compromised solution to a problem that appears to be poorly characterised. The current provisions should be removed completely and certainly not extended beyond the banking sector.

There is a credible view that a gap exists in the Australian competition law, as interpreted by the Courts, insofar as the concept of a "contract, arrangement or understanding" requires an element of commitment or obligation to act in accordance with the arrangement or understanding.[18] The result of this requirement is that competitors sharing information for anti-competitive purposes without a commitment on any part may not be caught by the CCA.

The law of attempts may provide a solution in many cases – disclosure of price information may be seen under section 76(1)(d) or 79(1)(b) as an attempt to induce a contract, arrangement or understanding with the requisite commitment or obligation – but it may be preferable to more precisely tailor the primary conduct provision to the behaviour of concern.

In these circumstances the ambition of the legislation is appropriate but its implementation is not. In focusing on the disclosure of pricing information it addresses the problem at the wrong level of abstraction. Price information is essential for markets to function; it is almost always pro-competitive and often legally mandated. Equally, the range of potentially anti-competitive communications between competitors is by no means limited to price information; sharing information about capacity, output, investment and entry decisions may be just as damaging. Having started from the wrong place, the current provisions are forced to tie themselves in knots of inclusions and exclusions – and, once again, authorisations and notifications – in an attempt to get back to a sensible position. This approach cannot be as effective as properly targetting the primary conduct provisions.

Since the gap in the primary conduct provisions is the limit in the concept of a contract, arrangement or understanding, the solution should address this limit directly. The prohibition of contracts, arrangements or understandings that substantially lessen competition in section 45 could be supplemented by a prohibition against concerted practices, to the effect that:

> a corporation shall not, in concert with a second person, engage in conduct for the purpose of substantially lessening competition in the acquisition or supply of goods or services in respect of which it is in competition with the second person.

This is a simple change that introduces no new or untested concepts but draws on concepts already familiar from other contexts of the CCA, particularly the secondary boycott provisions. It would more effectively address the relevant conduct and would be suitable for application across the economy.

[18] *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161.

In addition to focusing the *per se* prohibitions, the following changes would improve the certainty of the CCA and reduce the burden in complying with it.

Retain the "purpose" test but consider the "take advantage" problem in section 46

For many years it has been argued that section 46 is too difficult to prove because it relies on establishing one of the proscribed purposes, and accordingly that the section should be broadened with some kind of effects test. In fact very few section 46 cases have failed because they have not proved purpose; and the addition of an effects test would not address the real difficulty with section 46 and would result in significant business uncertainty as decision-makers tried to predict the likely effects of their every action on their competitors.

Only recently has there been an appreciation that the real difficulty with section 46 appears to be with the "taking advantage" standard.[19] This formulation makes perfect sense in principle: a corporation with market power should not be prevented from conduct that has no connection with that market power. But in practice this requirement has proved difficult to pin down. Judicial and legislative attempts to clarify the test have not yet led to any consistency in its application, with a wide variety of views within and between courts in most major cases.

The first problem is in deciding what degree of possibility or likelihood is appropriate in asking whether a corporation could or would have acted in the way it did in the absence of market power. The second is in deciding what such a hypothetical corporation would or could in fact (or counterfact) have done, a task in which judges have proved themselves more richly imaginative than might have been predicted.

The clarifications introduced in 2008 by section 46(6A) provide a range of questions for the court to ask in deciding whether advantage has been taken, generally along the lines of the alternatives raised in previous cases, in an attempt to shift the ultimate test away from the "could" test of *Rural Press.* The recent *Cement Australia* concerned facts that occurred before the amendments took effect, and so Greenwood J did not take the section 46(6A) factors into account in deciding that:

> The question, put simply, is whether a firm profitably could have engaged in the conduct in question in the absence of a substantial degree of power in the relevant market. Because that question involves a hypothetical construct it must be answered by applying an objective test but one which takes into account the legitimate business reasons identified by the firm for engaging in the conduct...[20]

This is probably as good a question as any, and is, indeed, put about as simply as possible. It is not at all clear that the outcome of the case would have been affected if the legislative amendments had been taken into account. As the case is yet another in a long line of cases in which the courts have not found a taking of advantage, it may be that this element is simply too difficult to prove positively.

In this regard there may be potential in the suggestion by Dr Philip Williams that the "taking advantage" test be removed as a limb of section 46 but retained as a defence: that is, if a corporation with a substantial degree of market power engages in any conduct for a proscribed purpose, it has the onus of showing that it did not take advantage of its market power in doing so.[21]

Remove any remaining sector-specific frameworks

The price signalling regime discussed above is undesirable not only because it is poorly adapted to the problem it is trying to solve, but also because it is designed to apply only to certain sectors, and presently applies only to the banking sector, with a range of exceptions that seem tailored to that

[19] See for example Rod Sims, "The need to elevate competition in our public policy", CEDA State of the Nation Conference, 23 June 2014. Available at http://www.accc.gov.au/speech/the-need-to-elevate-competition-in-our-public-policy.

[20] *ACCC v Cement Australia* [2013] FCA 909 (10 September 2013)

[21] Dr Philip Williams, "Should an effects test be added to s 46?" Competition Law Conference, Sydney, 24 May 2014.

sector. Sector-specific regulation is frequently duplicative and imposes often unnecessary burdens on businesses and regulators alike; it generates uncertainty by introducing new tests and concepts that may take many years to elucidate.

As well as the price signalling provisions, the international liner shipping regime in Part X and the telecommunications industry provisions of Part XIB should be removed and the relevant sectors dealt with under the general provisions of Part IV.

A more coherent set of defences

Exceptions, exemptions and defences are littered throughout the CCA, and are characterised by both overlaps and gaps. These could usefully be rationalised into a set of general defences that would apply throughout the CCA.

Single economic enterprise

For example, related bodies corporate, dual listed companies and partnerships are separately dealt with throughout the CCA; related bodies corporate have only recently been exempted from third line forcing and are still in theory subject to the resale price maintenance prohibition. All of these exceptions could be more effectively dealt with by a unified “single economic enterprise” defence similar to the US[22] and EU[23] doctrine that the members of a corporate group are not considered separate economic entities and so cannot conspire with each other in violation of the antitrust laws. The fact that the related parties exception to third line forcing is even being debated suggests that such a doctrine could very usefully be implemented in Australia.

Collaborative activity

Exceptions relating to joint ventures, collective bargaining and collective acquisitions are similarly fragmented and are subject to arbitrary limitations – for example, the joint venture exceptions to the cartel provisions in sections 44ZZRO and 44ZZRP, and to the price signalling provisions in 44ZZZ(3), apply only to joint ventures for production and supply, and not to joint ventures for acquisition, marketing or research. The cartel exceptions apply only to provisions contained in a contract, while the price signalling exceptions apply more broadly.

Meanwhile, section 76C provides a much broader joint venture defence for exclusionary provisions, requiring only that the provision is for the purposes of a joint venture (of any kind) and does not have the purpose, effect or likely effect of substantially lessening competition. This is getting towards the position that should apply in relation to all collaborative ventures, which would ideally be a general “collaborative activity” defence similar to that proposed in the New Zealand cartels legislation.[24] That legislation will provide an exception where a cartel provision is “reasonably necessary for the purpose of the collaborative activity”, defined to include any enterprise, venture or other activity in trade that “is not carried on for the dominant purpose of lessening competition” between the parties.[25]

Efficiency or public interest

Finally, a general “efficiency” or “public interest” defence applying to all proscribed conduct apart from the cartel offences would provide an extremely useful alternative to the administrative notification and authorisation processes, and reduce the cost and burden of regulation in many circumstances, by allowing businesses to assess for themselves the overall efficiency or public benefit impact of their conduct. A business that felt sufficiently confident that the efficiency or other public benefits of its conduct would outweigh any anti-competitive detriment would be able to pursue opportunities with an absolute minimum of cost and delay – balanced against the risk that the ACCC might see things

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22 *Copperweld Corp v Independence Tube Corp* 467 U.S. 752 (1984).

23 *Akzo Nobel NV v Commission of the European Communities* ECJ Case C-97/08 (10 September 2009)

24 *Commerce (Cartels and Other Matters) Amendment Bill 2011*, inserted proposed s 31 to the *Commerce Act 1986*.

25 See Brent Fisse, “Proposed NZ collaborative activity exemption”, e-Concurrences 11 July 2013.

differently and that this divergence might end up being resolved in court. The courts are already accustomed to applying the substantial lessening of competition test and this defence would present no greater difficulty, particularly taking into account the body of precedent from the Tribunal on the assessment of public benefit.

This approach would greatly enhance the dynamic efficiency and responsiveness of businesses and markets by focusing administrative intervention on cases that are potentially problematic. Both the ACCC and businesses should feel confident that a business's rivals, suppliers and customers will raise any concerns they have over a business's conduct, allowing business and regulators to respond in a way that is proportionate to the concerns raised.

This would in many cases be a far more efficient and responsive approach than the current requirement to lodge at least notifications for a wide range of conduct that does not raise significant concerns. Of course, businesses seeking certainty before engaging in any potentially anti-competitive conduct could continue to obtain it through the traditional avenues of notification and authorisation.

Such a defence would be consistent with the "rule of reason" approach that applies in relation to all but the hardest-core cartel conduct in the US. Similar defences are increasingly applied in other jurisdictions to more and more forms of conduct.

For example, the Canadian *Competition Act 1985* provides a statutory efficiency defence in merger cases before the Competition Tribunal, which provides that:

> The Tribunal shall not make an order [against a merger] if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made. [26]

The section further requires the Tribunal to consider whether these efficiency gains will result in a significant increase in the real value of exports or a significant substitution of domestic products for imported products; and that a mere redistribution of income will not be considered an efficiency gain.

This provision is very similar to the existing section 50A of the CCA applied by the Tribunal to mergers outside Australia, and there is no reason why the Tribunal or a court could not apply effectively the same test to mergers and other conduct within Australia.

In Europe, Article 101(3) provides that a restrictive agreement or concerted practice that would otherwise breach Article 101(1) will be permitted where it:

> contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit

Article 101(3) further provides that the agreement or practice must not impose restrictions that are not indispensable to the attainment of these objectives or afford the possibility of eliminating competition in respect of a substantial part of the products in question. Since 2004 this defence has been available directly to parties with no prior finding by a regulator required.[27]

European courts and regulators have also recognised an efficiency defence in Article 102 dominance cases. In *Post Danmark* the Grand Chamber of the European Court of Justice restated that:

> [I]t is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under Article 82 EC [now Article 102 TFEU]… In particular, such an

[26] §96, Canadian *Competition Act 1985*.

[27] European Commission, "Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)", 24 April 2004.

> undertaking may demonstrate, for that purpose, either that its conduct was objectively necessary… or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers.[28]

The European Commission has adopted this position in its enforcement priorities:

> [A] dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise… The efficiencies… may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution.[29]

More broadly, the South African *Competition Act 1998* provides a defence to anti-competitive mergers and prohibitions against restrictive horizontal practices (apart from price-fixing, market-sharing or bid-rigging), restrictive vertical practices, exclusionary acts in abuse of dominance, and engaging in complex monopoly conduct, where (typically):

> [T]he firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act.[30]

In Australia, the existing body of administrative and jurisprudential precedent that has arisen around the concept of "public benefit" in the context of authorisations and certain notifications suggests that the most appropriate defence might also be framed in terms of public benefit.

Although public benefit certainly encompasses benefits arising from increased economic efficiencies, it may also go further, as the Tribunal held in *QCMA*:

> [W]e would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.[31]

However, a review of Tribunal decisions and ACCC guidelines and determinations suggests that most of the public benefits likely to be provided by the relevant conduct can be characterised as improvements in economic efficiency, whether by addressing market failures or market imperfections. In its recent Authorisation Guidelines the ACCC notes that these benefits may include reducing transaction costs; addressing an externality (which may provide environmental benefits); reducing information asymmetry; achieving economies of scale, scope and/or density; and facilitating the provision of public goods.[32]

A defence expressed in terms of "public benefit" would therefore align closely with the efficiency or pro-competitive defences of other institutions, while benefiting from the existing body of precedent and allowing for the possibility of further public benefits that are not directly related to economic efficiency.

A "public benefit" formulation that tied in with the Australian precedent would also appropriately deal with the question of whether efficiencies that benefit only the participating businesses should count against any lessening of competition. The Australian jurisprudence,[33] echoed by the ACCC's

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28 Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, 27 March 2012, citing Case 311/84, *CBEM* [1985] ECR 3261, Case C-95/04 P, *British Airways plc v. Commission* [2007] ECR I-2331.

29 European Commission, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", 2009/C 45/02.

30 At sections 4(1), 5(1), 8(c) and (d), 12A(1)(a)(i) and the upcoming section 10A(1).

31 *Re Queensland Co-operative Milling Association, Defiance Holdings* (1976) ATPR ¶40-012.

32 ACCC, *Authorisation Guidelines*, June 2013.

33 *Re Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd* (1977) ATPR ¶40-023; *Qantas Airways Ltd* (2005) ¶ATPR 42-065.

guidelines,[34] appears to strike an appropriate balance between the consumer and total welfare standards by recognising the public benefit in efficiencies that accrue to the participating businesses but giving more weight to benefits that flow through to consumers.

Applying the accumulated jurisprudence around the “public benefit” test would ensure that a complementary “public benefit” defence would promote the objective of the CCA to “enhance the welfare of Australians.”

We would welcome the opportunity to further discuss these proposals with the Review Panel.

Sincerely

Luke Woodward and Matt Rubinstein

[34] ACCC, *Authorisation Guidelines*, June 2013.