Submission to The Harper Review Panel
National Competition Policy Review

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1 Introduction

1.1. Jones Day welcomes the opportunity to make a submission to the Harper Review Panel (**Panel**) as part of the National Competition Policy Review, announced by the Australian Federal Government in March 2014.

1.2. As a global law firm, Jones Day witnesses, on a daily basis, the effects of competition laws on clients (including individuals) at all levels of the Australian economy and how this contrasts with the position in other countries.

1.3. In this submission Jones Day focuses in particular on the way Australian competition law[1] is applied to individuals and how very different this is from the approach in other countries. This submission draws on our interactions with clients and input from our colleagues who practice competition law throughout the world.

1.4. In particular our submissions concern the following five over-lapping areas in which individuals are not accorded a "fair go" and in some cases we consider their internationally recognised human rights are infringed:

- Individuals are exposed to liability not only for hard core cartel violations but also for contraventions of the prohibitions that require a competition test to be applied
- Individuals are exposed to liability for substantial civil penalties following a civil trial and a decision on the "balance of probabilities"
- Companies are prohibited from indemnifying business executives which places the latter under excessive pressure to make concessions
- The privilege against self-incrimination, which Australia is bound under international treaties to accord individuals and which applies in the Common Law is abrogated by section 155 and replaced with an inadequate prohibition against the use of self-incriminatory information only in criminal proceedings. The ACCC is at liberty to use self-incriminatory information in civil proceedings
- Especially in light of the above provisions that tilt the balance heavily against individuals, the substantive provisions are drafted in a manner that is unnecessarily and unreasonably complex when applied to individuals who do not typically have the benefit of substantial teams of advisors as major corporations often do

1.5. In each of these respects, Australia stands alone (eg the lack of any protection against self incrimination and the sheer complexity of the provisions) or is joined only by New Zealand (eg applying civil penalties to individuals involved in prohibitions applying a competition test).

1.6. We take particular exception to the proposal for legislative change to introduce a base penalty for individuals involved in breaches of section 46.[2] That proposal moves in the opposite direction from that which is needed – a rebalancing of the system to make it fairer for individuals.

1.7. This submission proposes the following reforms:

[1] The Competition and Consumer Act 2010 (Cth).

[2] Submission to the Competition Policy Review Committee by Dr Nehme, Senior Lecturer, UNSW and Mr Laman, Solicitor,CBP Lawyers.

- The repeal of the prohibitions applying accessorial liability to sections 45, 46, 47, 48 and 50

- Amendments to the cartel provisions to ensure that individuals are only pursued through a criminal process and that cartels appropriately enforced through a civil process be enforced only against corporations

- Simplification of the criminal cartel prohibitions (and in particular the complex framework for exceptions) so that individuals have a reasonable chance to understand what is expected of them

1.8. If the broadly based civil penalty regime is retained (which we do not support):

- Reform of the provisions that prevent companies from indemnifying individuals so that inappropriate pressure is not placed on individuals to capitulate to propositions put to them during an investigatory process

- A statement of enforcement policy by the ACCC to set out in what circumstances the ACCC might pursue individuals in a civil prosecution

- Bringing the privilege against self incrimination into line with Australia's human rights obligations and international norms by adopting the New Zealand language instead of that which appears in section 155(7) of the *Competition and Consumer Act 2010* (Cth)(**CCA**)

- Simplification of all the competition law provisions so that they are reasonably comprehensible to an individual business person

1.9. In making these submissions, we wish to make it quite clear that we are not advocating for the abolition of individual exposure for hard core cartel behaviour although we do challenge the proposition often advanced that the penalties applied to individuals are inadequate. We merely note that in many cases the penalties have been low but the cartels in question have also often been very small by international standards.

2. Civil Penalties

2.1. The CCA imposes liability on individuals for conduct found to be in contravention of any of the restrictive trade practices provisions in Part IV of the CCA including conduct that is both prohibited per se and subject to a competition test. The provision in section 76 broadly applies to any person who has:

- aided, abetted, counselled or procured a contravention by a person or a corporation of any of the competition provisions of the CCA;
- induced, or attempted to induce, a contravention by a person or a corporation, of any of the competition provisions of the CCA, whether by threats or promises or otherwise;
- have in any way, directly or indirectly, been knowingly concerned in, or party to, the contravention by a person or a corporation of any of the competition provisions of the CCA; or
- conspired with others to contravene any of the competition provisions of the CCA.

2.2. Australia and New Zealand are the only jurisdictions of which we are aware that actively apply civil penalties to individuals. In the vast majority of other jurisdictions it is either not possible for individuals to be pursued for civil penalties or enforcement agencies exercise their discretion never to take such actions.

2.3. Similarly, Australia and New Zealand are the only jurisdictions of which we are aware that apply penalties of any sort to individuals in relation to prohibitions other than to hard core cartel conduct. In all other jurisdictions it is either not possible for individuals to be pursued for breaches of the prohibitions to which competition tests apply or enforcement agencies exercise their discretion never to take such actions.

2.4. Whilst constitutionally valid,[3] personal or individual liability is very broad. What is of particular concern, and the subject of this submission, is the application of the individual liability to contraventions or alleged contraventions of the competition provisions of the CCA.

2.5. This concern is magnified when regard is had to the fact that, this reaches not only those individuals primarily responsible for an alleged contravention or those individuals who have attempted to contravene a competition provision, but also those individuals who are involved as mere accessories. In the decision in *Yorke v Lucas* (1985)[4](deciding on equivalent provisions to section 75B of the CCA) it was held that accessorial liability requires only that the respondent have knowledge of the essential matters that establish the offence. Knowledge that those matters amount to a breach of the CCA is not required. This position was followed in *Rural Press v Australian Competition and Consumer Commission* (2003).[5]

2.6. Furthermore, the provision provides for a very significant civil pecuniary penalty of up to $500,000 for which no indemnity is permissible (s 77A and 77B discussed further below).

[3] *Fencott v Muller* (1983) 152 CLR 570; 57 ALJR 317; 46 ALR 41; [1983]ATPR 44,201 (40-350).

[4] 158 CLR 661.

[5] ALR 217; (2003) ATPR 41-965.

2.7. In this environment two matters are important to note. The first is that penalties imposed on individuals are on the increase with one individual, in recent years, ordered to pay $1.5 million for his involvement in a cartel. The second is that the court's approach to calculating individual penalties lacks structure and transparency. In particular, there appears to be no attempt to relate the penalties to the seriousness of the contravention found or indeed any other calculation that could be argued to support the intended deterrence of the penalty.

2.8. The liability imposed by section 76 applies equally to the per se offences as to does to those subject to the competition test. Jones Day submits that, having regard to the very significant consequences, it is critical that the legislation be clear on the conduct that is caught. However, as has been seen by recent judicial treatment of various conduct in Part IV, identifying offending conduct is far from a simple exercise.

2.9. The ACCC has brought a limited number of proceedings against individual for contraventions involving a misuse of market power or those prohibitions requiring that a substantial lessening of competition be proved. Jones Day submits that this recognises the difficulties in identifying the individuals that arguably may be liable for the corporation's actions in these types of complex and often multi-allegation cases.

2.10. Jones Day submits that the High Court's decision in *Barbaro v The Queen; Zirilli v The Queen* [2014][6] may have a devastating effect on the level of liability a court may impose on an individual. Relevantly, in the context of this submission, the court held that a prosecutor was unable to specify and recommend a range of sentences to which the sentencing court may have regard in sentencing a defendant upon conviction. The court's statement of principle in this decision is potentially capable of broad application including limiting the ACCC's ability to make submissions as to the range of appropriate penalties. In this environment an unfortunate but likely possibility will be to drive penalties towards the maximum as the ACCC will be limited in the material it is able to put before the court.

2.11. As has been identified by courts on numerous occasions,[7] penalties are directed at deterring persons (and corporations) from contravening the CCA. Having regard to the complexity of many market structures and the sophisticated provisions regulating competitive conduct, Jones Day submits that it is unreasonable for penalties of the nature provided in section 76 to have such a broad application.

2.12. Individuals representing a company at the coal face of competitive interaction are unlikely to have an intimate working knowledge with the prohibitions in Part IV of the CCA to sufficiently predict that certain conduct may have effects that substantially lessen competition in an competition law sense. Further, Jones Day submits that these penalties risk having a detrimental effect on competition. To the degree that they have an effect on the individuals in the market place, there is a real risk that ordinary competitive behaviours may be abandoned in preference to a more risk adverse approach. For example, a salesman approaches his three biggest customers and, in order to meet his sales quotas, offers them a discount if they acquire all their needs of a particular widget from his firm. Those customers A, B, and C, have a combined market share in the downstream market in a local area of 80%. However, from the perspective of the salesman, he knows them only as three of his ten largest customers. The conduct of the salesman may return efficiencies and cost benefits resulting in lower prices in the end user market. Little does he know that two years later a Federal Court, on the basis of economic and other evidence, finds that his conduct results in a substantial lessening of competition in that downstream market and he is liable personally for a penalty in excess of the value of his home.

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[6] HCA 2.

[7] See for example Toohey J in *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296; [1985] ATPR 46,025 (40-503).

2.13. Penalties against individuals have been found to be ineffective as a deterrent as individuals are rarely aware of the risks involved in their conduct until an action for breach is before them.[8] In this way the deterrent effect has failed. Jones Day submit that remedies directed to the highest level of the company or the penalties that the corporation may be liable for in the event of the breach (that may be reduced where the company can positively evidence a culture of CCA compliance including a compliance training program) act as sufficient deterrent to conduct in contravention of the CCA particularly having regard to the maximum possible penalty of $10,000,000.

2.14. In this regard, a 2007 report prepared for the OFT (the **Report**)[9] by Deloitte & Touche LLP studied the motivation of directors to comply with competition laws. In order of importance, the Report found what most motivated directors were: (1) criminal penalties, (2) disqualification of directors, (3) adverse publicity, (4) fines against the company and (5) private damages actions by customers or other third parties damaged by the anti-competitive actions of the company. The Report shows that corporate fines were not in themselves sufficient to encourage compliance and civil penalties did not rate in the top 5.

2.15. Cartels are viewed as among the most damaging behaviours affecting the Australian economy. To the extent that any individual should be held personally liable (a position that Jones Day does not support), such liability should be limited to those individuals who as a corporate officer are obligated to ensure that they fully informed of all regulations, (including the highly complex competition provisions) affecting corporate activity as well as be in the position to fully understand, appreciate and direct those corporate activities. Jones Day submits, as evidenced by the Report, other tools available to the ACCC are far more effective at deterring undesirable conduct than penalties imposed on the individual.

International position

2.16. There is little international support for civil liability for individuals. In view of the increasingly global nature of competition laws, such inconsistent approaches make little sense. An individual might face personal liability for conduct in Australia but not in other jurisdictions. In this way any deterrent effect will be dampened significantly, if it exists at all.

EU

2.17. The European Commission is not authorized to impose fines on individual business executives for their involvement in anti-competitive conduct by their employers.

European Union Member States

2.18. Some member countries such as the UK, France and Germany can impose criminal liability for hard core cartel conduct but not on a civil basis and not for prohibitions applying the competition law test.

2.19. In doing so, all European Union Member States (and many other European countries) must accord the accused fundamental human rights including the right against self incrimination and the 'beyond reasonable doubt' standard of proof.

[8] Beaton-Wells C and Fisse B, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, Port Melbourne, 2011) p 462.

[9] Deloitte & Touche. (2007) 'The deterrent effect of competition enforcement by the OFT', OFT Report No. 962.

US

2.20. As provided by section 1 of the Sherman Act *",…[e]very contract, combination…., and conspiracy, in restraint of trade….is a misdemeanor."* In this way an individual is only fined for a criminal offence in respect of antitrust contraventions. Certainly there are no personal fines for monopolization, merger conduct or other conduct to which the Rule of Reason applies.

Japan

2.21. The primary remedy that the Japan Fair Trade Commission can seek is "administrative surcharges" which are available only against corporate entities.

2.22. Any investigation concerning the conduct of individuals is separately handled by the prosecutor's office applying strict procedural safeguards and any contested conviction is heard in Court applying the 'beyond reasonable doubt' standard.

3. The prohibition against indemnity by companies

3.1. Corporations are prohibited from indemnifying, directly or indirectly, officers, employees or agents against a pecuniary penalty imposed on any of them or their legal costs incurred in defending proceedings where liability is found under section 77A and 77B. These provisions, Jones Day submits are deficient, unreasonably harsh and unfair.

3.2. In particular, the provisions do not provide for proceedings in which both no liability is found and also liability is found. It appears, as is presently drafted, that the provision would act to defeat the individual from seeking indemnification to the extent that the legal costs relate to proceedings in which no liability is ultimately found by the court. Jones Day submits that this has the very real potential to:

- negatively affect their access to justice by financially incentivising the individual to adopt a defence strategy having regard to the very grave risk that they may be exposed to all costs;
- financially induce an individual to agree to an early settlement, concessions or admissions that have far reaching effects including increased liability for:
    - the individual's own corporation
    - other alleged co-conspirator individuals
    - other alleged co-conspirator corporations;
- deprive the public of jurisprudence.

3.3. The complexities of competition law cases, particularly those involving the competition test are well known. Further, cases relating to conduct alleged under the competition law provisions often allege numerous incidences of conduct. As the provision against indemnification may be read as exposing an individual to significant costs even where no liability is found, the complexity of the substantive law and the provision against indemnification may together further effect on the nature and extent of the defence run and consequently affect individuals access to justice.

3.4. This approach is inconsistent with a significant number of jurisdictions including the United Kingdom, Germany, France and the United States of America (in respect of criminal fines).

3.5. Jones Day submits that these provisions be revised to provide opportunity that companies may indemnify individuals to the extent that no liability is found.

4. The privilege against self-incrimination and s155

4.1. Section 155(7) abrogates the privilege against self incrimination for individuals required to furnish or produce information or give evidence, and is confirmed by section 155(5) which makes it an offence for a person to fail or refuse to comply with a notice issued pursuant to section 155. The provision does provide, in a criminal context, that such self incriminating information is not admissible against the individual.

4.2. The privilege against self-incrimination provides protection against compulsion to give evidence or to supply documents that would tend to prove one's own guilt. As a significant element in the protection of individual liberties, it is recognised as more than a rule of evidence. It is a substantive right.[10] The privilege protects individuals from oppressive methods of obtaining evidence of their guilt for use against them. The privilege has been described as a cardinal principle of our system of justice,[11] part of the common law of human rights,[12] a bulwark of liberty,[13] fundamental to a civilised legal system[14] and an integral part of international human rights law.[15]

4.3. It is sometimes necessary to balance its importance against the need to ensure an investigating authority is able to obtain information relevant to a particular issue. The public interest in pursuing investigations can often assume more significance. This appears to have been the conclusion of the legislature in drafting section 155(7) as abrogating the privilege against self-incrimination.

4.4. Jones Day submits that there are quite clearly serious consequences for individuals who may face hefty pecuniary penalties or an order pursuant to section 86E, disqualifying the person from managing corporations for any period that the court considers to be appropriate, possibly bringing an end to that person's career and/or livelihood.

4.5. Jones Day submits that the abrogation does not recognise the power imbalance of the individual against the financial and other resources of the ACCC. Further, there is a human rights argument in favour of maintaining the privilege because it protects human dignity, privacy, freedom and the right to a fair trial as recognised by Justice Murphy in *Rochfort v Trade Practices Commission*.[16]

4.6. In our view section 155(7) puts Australia in breach of its obligations under the Article 14 of the International Covenant on Civil and Political Rights.[17]

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[10] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J, 508.

[11] *Sorby v Commonwealth of Australia* (1983) ALR 237, 249.

[12] ibid

[13] *Pyneboard Pty Ltd v Australian Trade Practices Commission* (1983) 45 ALR 609.

[14] *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

[15] ICCPR Article 14, par 3(g).

[16] *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150.

[17] "Corporate executives are entitled to human rights in competition law investigations" Taylor and Santi, Competition & Consumer Law Journal, April 2014, Volume 21, Number 3.

International position

UK

4.7. In the United Kingdom the rule of privilege against self-incrimination states that no person is bound to answer any question, or release any document, in civil proceedings, if the answer or document would have a tendency to expose him or his spouse/civil partner to any criminal charge or penalty under the law. The test is whether the relevant criminal charge or penalty is reasonably likely to be pursued, and whether the answer would have a tendency to incriminate the accused or his spouse/civil partner. There must be a "real and appreciable" danger of incrimination rather than a mere possibility for the privilege to apply. The privilege may be claimed persons in civil competition investigations by the Competition and Markets Authority or European Commission.

EU

4.8. The Lisbon Treaty which came into force on 1 December 2009, established the Charter of Fundamental Rights of the European Union as legally binding. This Charter imposes certain limitations on investigative powers associated with allegations of unlawful conduct including cartels, that act to maintain certain privileges including the privilege against self incrimination which must be respected at the investigative stage.

European Union Member States (and many other European countries)

4.9. Individuals enjoy a privilege against self incrimination pursuant to article 6.1 of the European Convention on Human Rights on the right to a fair trial as interpreted by the European Court of Human Right in its Funke Judgement (ECHR, 25 February 1993, *Funke v. France*, n° 10828/84, para. 44.)

4.10. All European Union Member States must apply this human rights protection and the European Union itself (which already applies this standard through its Fundamental Charter) is in the process of accession to the Convention. The Convention can be enforced at the Strasburg based European Court of Human Rights.

US

4.11. In the United States, the privilege against self-incrimination is derived from the Fifth Amendment to the United States Constitution and requires the government to prove a case against the defendant without the aid of the defendant as a witness against themselves. The privilege applies to both civil and criminal cases.

New Zealand

4.12. As in Australia, Sections 106 and 107 of the Commerce Act 1986 provide that the Commerce Commission can require the provision of self-incriminatory information but it cannot be used by the Commission either in civil penalty cases or in criminal prosecutions.

Arguments for removing this provision

4.13. As noted above, among the leading competition law enforcement jurisdictions, there is little international support for the provision. In each of these jurisdictions the privilege is given the greatest respect and in the case of the European Union, characterised as a human right. This aspect of Australian competition law is, therefore, inconsistent with the law in significant jurisdictions.

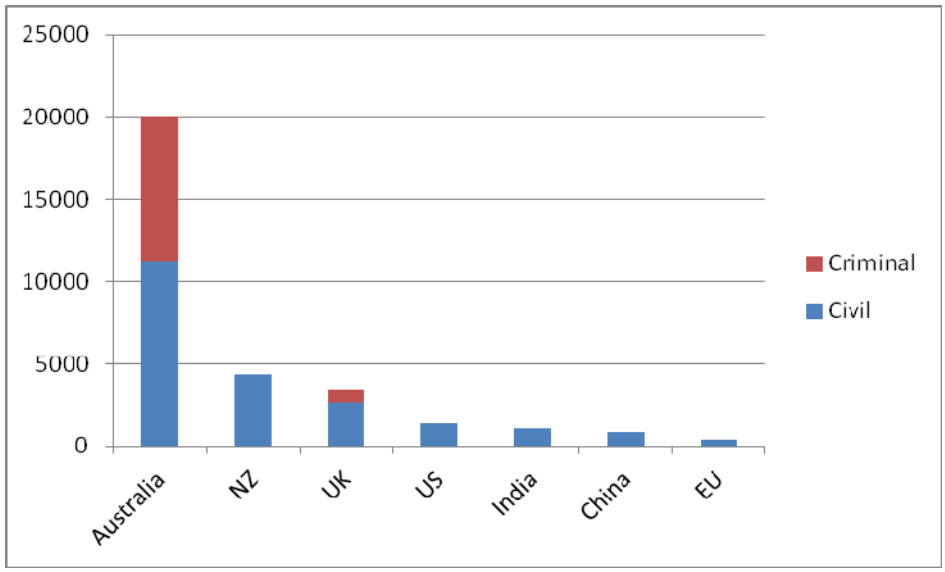
5. Unreasonably complex and opaque

5.1. He complexity of the drafting of the Australian competition law provisions is particularly sticking when compared with similar laws of other countries. In the absence of empirical studies testing the comprehensibility of the relevant documents, it is difficult to benchmark the Australian law and substantiate the comparative impression that we hold. Nevertheless, below we present an illustration of the issue.

5.2. Throughout the world the substantive prohibitions applying to anticompetitive agreements, abuse of dominance and mergers tend to be complex while the substantive provisions applying to cartels tend to be relatively simple.

5.3. In almost all jurisdictions the full details of what is expected of businesses and individuals can be obtained only from a review of the primary legislation, secondary legislation, guidelines and court decisions. Taking primary legislation alone, it is clear that the Australian system is substantially more intricately drafted than any comparable system.

Figure 1: Number of words used in competition law prohibitions (excluding mergers)



5.4. In the above table we have illustrated the complexity of the primary legislation by taking the core competition law provisions and applying a word count in Word. We acknowledge that this is a 'rough and ready' comparison because it is not possible to completely separate substantive and procedural provisions. We have deliberately been over-inclusive with what we have included from foreign jurisdictions and under-inclusive with the Australian legislation. We have excluded the merger provisions (except in the US where the merger prohibitions are largely contained within the same provisions as the other prohibitions) because the approach to legislation varies substantially between countries. Our word counts are as follows:

(a) Australia: Part IV of the Competition & Consumer Act excluding section 50 and 50A: Civil non-cartel provisions: 11,201 words; civil and criminal cartel provisions: 8,883 words;

(b) NZ: Part 2 of the Commerce Act without sections 42 to 46 and without the cartel provisions that are yet to be passed: 4,369;

(c) UK: Competition Act sections 1-11 for the general provisions: 2,700 words and Enterprise Act sections 188-190 for the criminal cartel provisions 739 worlds;

(d) US: Sherman Act sections 1 & 2, Clayton Act price discrimination and exclusive dealing provisions and the Federal Trade Act unfair competitive methods provisions: 1,423 words;

(e) India: Chapter II excluding the mergers provisions: 1,113 words;

(f) China: unofficial English language translation of the Antimonopoly Law Chapters II and III from Mofcom's website: 830 words; and

(g) European Union: Articles 101 and 102 of the Treaty on the Functioning of the European Union: 408 words.

5.5. It could be said that much of the complexity in other jurisdictions comes from the case law (eg US) or the extensive subordinate legislation and guidance (eg EU). On the other hand, we would respond that in many cases the primary legislation is so complicated that the ACCC is less able to publish guidance and, if it did, the complexity of the guidance would be in proportion to the complexity of the legislation that it would be required to explain. Indeed the ACCC publishes fewer guidelines than any of its counterparts listed above and this contributed to the law and its administration being even more opaque for individuals and general commercial lawyers.

5.6. In summary, the sheer volume of words in the Australian primary legislation and the lack of guidance from the authority make it unreasonably difficult for individuals to appreciate what is expected of them and in practice they must largely rely on the investments that their employers make in obtaining advice on the provisions. In our view this contributes substantially to the unfairness of applying individual liability for breaches of the Australian competition law.

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