Professor Allan Fels AO
afels@unimelb.edu.au

Nick J. Taylor
NJTaylor@Jonesday.com

Prudence J.Smith
prudencesmith@Jonesday.com

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COMPETITION POLICY REVIEW SECRETARIAT
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/Madam

Competition Policy Review – Simplification draft

We provide, by way of further joint submission, from Professor Allan Fels AO, and Nick Taylor and Prudence Smith, a draft simplification for Part IV, related provisions and definitions.

As noted in previous submissions to the Harper Review Panel as part of the National Competition Policy Review from:

- Professor Allan Fels AO on 25 June 2014; and
- Nick Taylor, Prudence Smith and Jason Beer on 20 July 2014

the current form of Part IV the *Competition and Consumer Act 2010* (Cth) (the **Act**) is desperate need of simplification.

By simplifying Part IV, the focus is re-established on core economic questions and harms of anticompetitive behaviour rather than an emphasis on forms of behaviour which sometimes act as a distraction. Further, simplification allows Australian competition law to move into line with international practice of a principles based law. In this way, the law is easier to comprehend, by those who are subject to it, those who enforce it and also those who interpret it.

It is not our intention that decades of particularly useful Australian jurisprudence be lost. The draft embraces the lessons of the past to deliver a clearer and more effective law and we suggest that the Explanatory Memorandum record the intention that standards established by important cases would continue to apply.

Proposed changes

The **key** areas that the draft proposes to address include:

A. Amend section 45

Over many years of amendments, the prohibition on anticompetitive agreements has become ever more complicated. Legacy prohibitions, such as that in respect of exclusionary provisions survived despite the apparent introduction of a revised prohibition on the same conduct as it was feared that the new definitions in the cartel provisions were not sufficient to cover all anticipated anticompetitive conduct. In short, we do not consider that the convoluted drafting is necessary to deliver the desired outcomes of regulating agreements that affect competition.

In considering an alternative form for the prohibition on anticompetitive agreements we have sought to reduce the complexity by drafting a provision that addresses:

- Both horizontal and vertical (other than in respect of resale price maintenance, discussed below) relationships;
- Cartel conduct; and
- The previous provision addressing covenants that adversely affect competition in sections 45B & C.

We note that the incorporation (for the most part) of section 47 into the draft section 45 also removes the explicit prohibition relating to refusals to deal. As refusals to deal affect competition only where the alleged offender is in possession of a significant degree of market power, we consider the proposed new section 46 (discussed below) incorporating the effects test provides the means by which to address this conduct where it has an anticompetitive effect.

The revised section 45 incorporates the new definition of agreement (discussed below) and together, with the above matters, ensures that the desired conduct is addressed in a clean and efficient fashion.

B Amend section 46.

The Panel is no doubt aware that there is a strong debate around the possible introduction of the so called 'effects test' into section 46. This debate appears to have reached a polarised stage where parties seem unable to reconcile. Despite this we do consider that there is a way forward that delivers three key elements which we would offer up for consideration and discussion.

First, we have sought to present simplification. Having regard to the provision as is currently drafted, the complexity is well known and has caused difficulty for many including market participants and their advisors, the ACCC and even the courts. Our proposal removes much of the complexity introduced into the language as a result of several successive amendments. There are just too many to list and address. Suffice it to say, the provision is complex and unworkable. We wish to return the prohibition to the key concepts of competition policy of efficient allocation of resources through a competitive market place and also the clarity of the law.

In the form that we have proposed, the law is clearer (to those who are subject to it), enforceable (as enforcement by the regulator or private parties is facilitated is not dependent on establishing three unprovable elements including the elusive 'smoking gun') and delivers competition law goals (no longer protecting competitors to the detriment of competition). The simplified form of the provision recognises the prohibition's importance in a highly concentrated market such as Australia.

The second is that our proposal delivers a provision that reflects international norms and incorporates objectives of competition law to encourage competitive behaviour and prevent harm to the economy from anticompetitive behaviour but also not chill competition. The draft proposed section 46 achieves international alignment in two ways; the first is by introducing the effects test. The effects test is almost universally accepted in dealing with unilateral behaviour of this kind. The second is our proposal to limit penalties for conduct found to have the requisite purpose, which is the most closely analogous way to adopt international norms using established Australian terminology.[1]

Finally, our proposal recognises the critical elements raised by all parties in the present debate and offers, through other means, to deliver protections and encouragement to competitive behaviour where appropriate.

We would also note, by way of an aside, that our draft offers for consideration possible authorisation of conduct that might fall for consideration under section 46. By offering statutory protection where the conduct is likely to deliver a net public benefit, perhaps some within the

[1] In this regard, we note that the US regime does not provide for penalties for unilateral conduct and the European Commission's power to impose fines in respect of a finding of an abuse of dominance requires that it be established that the company acted intentionally or negligently.

debate might recognise that the genuine benefits of certain conduct might be realised by consumers, but this is not an easy sell.

C Amend the per se prohibition against resale price maintenance.

Resale price maintenance has historically been prohibited in Australia on a *per se* basis as undesirable conduct that is harmful to competition in all circumstances. Additionally, the prohibition against resale price maintenance is an extraordinarily long prohibition not only located in section 48 but defined in sections 96 to 200 inclusive.

The proposed amendment is a simplification in two respects, it removes the complex provision made necessary by the per se offence, replacing it with a competition test and providing for self assessment.

The per se prohibition creates high compliance costs (time spent preparing authorisation forms, payment of ACCC lodgement fees, delayed conduct until immunity is confirmed) as businesses must seek authorisation from the ACCC, even in circumstances where the proposed conduct would have a neutral or even pro-competitive effect in the market.

Such vertical price restraints are commonly prohibited globally (in the EC, Article 85 prohibits certain anti-competitive conduct in terms broad enough to cover resale price maintenance, in the US, §1 of the *Sherman Act* and in New Zealand s. 37(1) of the *Commerce Act)* but are subject to further analysis in recognition of the fact that it is not the case that there is a high degree of certainty that that resale price maintenance is anticompetitive or causes significant anticompetitive detriment. Indeed, since the decision of the US Supreme Court in *Leegin Creative Leather Products, Inc. V PSKS, Inc* 551 US 877 (2007), resale price maintenance has been addressed under the rule of reason.

Further, the prohibition in its current form fails to recognise that there may be legitimate business justification for the conduct. For example, in respect of product requiring specialist customer service, such as in relation to technology or car sales, the conduct may assist in addressing free riding. A free rider is a person who is able to take advantage of the services offered by someone else without paying for them. Many services offered by retailers can not be sold separately and so are built into the price of the product. A seller is not paid for the services unless the consumer acquires the good. If another seller offers the same product without the services, that seller may offer the product at a lower price. In this way the seller who did not provide the services free rides off the services provides by the supplier who has provided the services. Clearly, having lost sales to the seller not providing the services, there is no longer an incentive that the services be provided regardless of their value to consumers.

Further, our proposal not only imports an assessment of the competitive effect, it provides market participants to undertake a self assessment of the competition law risk.

D. Addition in section 4 of a definition of agreement.

Much of the conduct that falls for consideration under Part IV relates to dealings between two or more parties. In order to provide to improved readability of such provisions, but also to incorporate complex concepts, it is proposed that a single word definition, incorporating the well known and considered concepts of contract, arrangement or understanding but to add additional concepts.

These additional concepts include concerted practices recognising that covert, unwritten or parallel actions between parties may fall short of the current prohibition but yet deliver damaging consequences to competition and the Australian economy. International practice provides for a prohibition of concerted practices (Article 101 of the *Treaty on the Functioning of the European Union*, Section 1 *Sherman Act*).

In Europe, the reasoning behind the term “concerted practice” was to prevent corporations from escaping liability under Article 101, simply by avoiding an explicit agreement but still being able to circumvent the risks of competition by sharing competitively sensitive market information with their competitors, “a form of coordination between undertakings by which, without it having

reached the stage where an agreement properly so called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition."[2] The classic case of such concerted practice is the exchange of confidential information or even the sending by company A of confidential information to company B without company B taking positive steps to distance itself from using / endorsing the sending of information.

Provisions retained

The Panel will no doubt recognise that the provisions previously located in sections 45D, 45DA, 45DB, 45DC, 45DD, 45E, 45EA, and 45EB have been reorganised within one single provision in the draft, section 49. We recognise that these provisions remain important to the current Federal Government and its objectives with respect to industrial relations. Nonetheless we have been able to extract some drafting efficiencies within these provisions which we believe aid in both their readability and enforceability.

We welcome your serious consideration of the proposed attached draft.

Kind regards

Professor Allan Fels AO

Nick Taylor

Prudence Smith

[2] Case C-8/08, T-Mobile Netherlands BV and Others, 2009 E.C.R. I-04529, ¶ 33; ICI v. Comm'n ¶ 60.

Annexure

Draft simplification

Part IV

45. Agreements affecting competition

(1) A corporation shall not make or give effect to an agreement with one or more other parties having the purpose or effect or likely effect of substantially lessening competition.

(2) A corporation shall not:
a) enter into an agreement that contains a cartel provision; or
b) give effect to an agreement that contains a cartel provision.

(3) Where a cartel provision means a provision, that has the purpose, effect, or likely effect of 1 or more of the following:
a) price fixing;
b) restricting output;
c) market allocating;
d) bid rigging.

(4) subsection (1) does not apply to any:
a) agreement containing or giving effect to a cartel provision if the cartel provision is for the purposes of a joint venture;
b) buying group conduct

(5) In addition to constituting a civil prohibition, conduct in contravention of section 45(2) is also an indictable offence for which the fault element is intention, knowledge, belief or recklessness.

46. No corporation, that has a substantial degree of power in a market shall engage in conduct, including doing or refraining from doing any act, for the purpose or effect or likely effect of substantially lessening competition in any market.

47. *[If a third line forcing prohibition is to be retained]* A corporation shall not supply goods or services on the condition that the purchaser buys goods or services from a particular unrelated third party, or refuses to supply because the purchaser will not agree to that condition.

48. A corporation shall not engage in resale price maintenance unless that corporation is able to demonstrate that there is no substantial lessening of competition arising from the conduct. *[The extensive list of conduct included in sections 96 – 100 could be included in the Explanatory Memoranda - delete sections 96-100]*

49.

(1) A person must not enter into an agreement:
a) that hinders or prevents a third person supplying goods or services to a fourth person (who is not an employer of the first person or the second person) or a third person

acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

(2) A person must not, must not enter into an agreement, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

(3) If 2 or more persons (the **participants**), each of whom is a member or officer of the same organisation of employees, engage in conduct in concert with one another, whether or not the conduct is also engaged in in concert with another person, then, unless the organisation proves otherwise, the organisation is taken for the purposes of paragraphs (1) and (2):

a) to engage in that conduct in concert with the participants; and

b) to have engaged in that conduct for the purposes for which the participants engaged in it.

(4) A person does not contravene, and is not involved in a contravention of, paragraph (1), (2) or (3) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related:

a) to the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person;

b) to environmental protection; or

c) to consumer protection.

(5) In a supply situation, the first person must not make an agreement, with an organisation of employees, if the proposed agreement contains a provision with the purpose, of:

a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or

b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:

(i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in an agreement between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

(6) In an acquisition situation, the first person must not make an agreement, with an organisation of employees, if the proposed agreement contains a provision with the purpose, of:

a) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person; or

b) preventing or hindering the first person from acquiring or continuing to acquire such goods or services from the second person, except subject to a condition:

(i) that is not a condition to which the acquisition of such goods or services by the first person from the second person has previously been subject because of a provision in an agreement between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

50. A corporation or a person must not directly or indirectly:

a) acquire shares in the capital of a body corporate or a corporation; or

b) acquire any assets of a corporation or a person;
if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

[*section 50(3) factors could be incorporated in merger guidelines indicating the matters that the ACCC will consider in assessing a merger]*

Part VI

76.

[*The debate over whether to introduce an effects test for section 46 has become highly polarised. In that context, we consider that the following proposal should be considered by the Harper Review and all parties to the debate.*]

(7) A court must not make a penalty order for contravention of section 46 if the defendant satisfies the court that the conduct was not or the purpose or a substantial purpose of:
a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
b) preventing the entry of a person into that or any other market;
c) deterring or preventing a person from engaging in competitive conduct in that or any other market; or
d) otherwise substantially lessening competition.

(8) Upon a criminal conviction in relation to a contravention of section 45(2), a fine not exceed the greater of the following:
a) $10,000,000;
b) if the court can determine the total value of the benefits that:
(i) have been obtained by one or more persons; and
(ii) are reasonably attributable to the commission
3 times that total value;
c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

76C *[delete as exclusionary provisions are no longer provided for under the Act]* and insert

(1) For the purposes of an action under subsections 49(1), (2) or (3):

a) Loss or damage taken to have been caused by organisation's conduct;
b) Any loss or damage suffered by a person as a result of the conduct is taken, for the purposes of this Act, to have been caused by the conduct of the organisation;

(2) If the organisation is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organisation in respect of the conduct.

(3) If the organisation is not a body corporate:
a) a proceeding in respect of the conduct may be brought under section 77, 80 or 82 against an officer of the organisation as a representative of the organisation's members and the proceeding is taken to be a proceeding against all the persons who were members of the organisation at the time when the conduct was engaged in; and
b) subsection 76(2) does not prevent an order being made in a proceeding mentioned in paragraph (a) that was brought under section 77; and

c) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in subsection 49(3) that was brought under section 77 is the penalty applicable under section 76 in relation to a body corporate; and

d) (d) except as provided by subsection 49(3), a proceeding in respect of the conduct must not be brought under section 77 or 82 against any of the members or officers of the organisation; and

e) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in paragraph 49(3) that was brought under section 77 or 82, process may be issued and executed against the following property or interests as if the organisation were a body corporate and the absolute owner of the property or interests:
   (i) any property of the organisation or of any branch or part of the organisation, whether vested in trustees or however otherwise held;
   (ii) any property in which the organisation or any branch or part of the organisation has a beneficial interest, whether vested in trustees or however otherwise held;
   (iii) any property in which any members of the organisation or of a branch or part of the organisation have a beneficial interest in their capacity as members, whether vested in trustees or however otherwise held; and

f) if paragraph (e) applies, no process is to be issued or executed against any property of members or officers of the organisation or of a branch or part of the organisation except as provided in that paragraph.

Part VII

[*Authorisation would be possible for any of the provisions in Part IV applying the existing net public benefit test. The purpose of this change is to substantially simpler than the existing approach. We note that this would theoretically expand the possibility of authorisation to section 46 conduct. We would not expect that there would be many instances in which section 46 conduct would be suitable for authorisation but it may also prove useful in certain unusual circumstances such as enabling potentially loyalty enhancing rebates which could be assessed ex ante through the public process where currently many companies will refrain from this form of potentially pro competitive conduct fearing the risk that an ex post assessment may conclude that the discount was objectionable under the new effects test*.]

Delete sections 88(1A) to (5), (6A) to (8), (8A) to (9).

Section 88

(1) Subject to this part the Commission may, upon application by or on behalf of a corporation, grant and authorisation to the corporation to do anything specified in the application that would otherwise contravene Part IV of the Act.

Renumbering:

(6)	(2)
(8AA)	(3)
(8AB)	(4)

(8C)	(5)
(10)	(6)

Section 4

[We would proposed the insertion of the following new definitions to section 4]

agreement means any contract, arrangement, understanding or concerted practices, (however so described) between two or more parties including where there is no reasonable explanation for the conduct than an agreement.

bid rigging means restraining 1 or more parties to a combination from making a bid, or requiring a bid to comply with certain requirements where:

a) the parties to the combination with each other for the supply or acquisition of the goods or services that are the subject of bid; and
b) the essential features of the combination are no disclosed in full to the person running the bid before the bid is lodged.

bid includes:

i. a tender; and
ii. any step preliminary to making a bid, such as providing an expression of interest.

buying group conduct means an agreement that would otherwise constitute a cartel provision to the extent that the agreement concerns:

a) the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the agreement;
b) provides for joint advertising of the price for the resupply of goods or services jointly acquired;
c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or
d) provides for an intermediary to take title to goods and resell or resupply them to another party to the agreement.

industrial action means:

a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
    i. the terms and conditions of the work are prescribed, wholly or partly, by a workplace instrument or an order of an industrial body; or
    ii. the work is performed, or the practice is adopted, in connection with an industrial dispute; or
b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by a workplace instrument or by an order of an industrial body; or
c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute;

d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work; or
e) conduct including conduct relating to part only of the duties that persons are required to perform in the course of their employment; or
f) a course of conduct consisting of a series of industrial actions.

For this purpose, ***industrial body*** and ***workplace instrument*** have the same meanings as in the *Fair Work Act 2009*.

market allocating means allocating between any 2 or more parties to a combination, or providing for such an allocation of, either or both of the following:

a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:
b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

price fixing means, as between the parties to a agreement, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of:

a) the price for goods or services that any 2 or more parties to the supply or acquire in competition with each other; or
b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties supply or acquire in competition with each other.

restricting output means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of:

a) the production or likely production by any party to the combination that any 2 or more of the parties to the combination supply or acquire in competition with each other; or
b) the capacity or likely capacity of any party to a combination to supply services that any 2 or more parties to the combination supply or acquire in competition with each other; or
c) the supply or likely supply of goods or services that any 2 or more parties to a combination supply in competition with each other; or
d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a combination acquire in competition with each other.

[remove 4D]