

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

November 13, 2014

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

The Section of Antitrust Law and the Section of International Law of the American Bar Association (“ABA”) (together, the “Sections”) respectfully submit these comments to the Competition Policy Review Panel (the “Panel”) in response to its Draft Report of September 2014. The Sections previously commented on aspects of the Panel’s Issues Paper,¹ and several of the comments below build on our earlier submission.

The Sections appreciate the opportunity to present views with respect to the Panel’s Draft Report. The Sections’ comments reflect their members’ expertise and experience with competition law in the United States as well as in numerous other jurisdictions worldwide. The Draft Report is an extensive and impressive undertaking, addressing the full breadth of Australian competition law and policy. We have confined our comments to those issues of most importance to our Sections:

- I. Exemptions from prohibitions on resale price maintenance
- II. The proposed defense to Section 46 of the *Competition and Consumer Act 2010* (“CCA”)
- III. Proposed timelines for merger reviews

¹ *Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Australian Competition Policy Review Issues Paper*, submitted June 27, 2014 (“Issues Paper Comments”). A copy of the Issues Paper Comments is annexed for convenience of reference as the Appendix.

I. Resale Price Maintenance

Section 3.11 of the Draft Report proposes an exemption for resale price maintenance between related corporate bodies. The Sections welcome this development and note that this revision is very much in keeping with international norms of modern competition law recognizing that a corporate group comprising a number of individual legal bodies should be treated as a single undertaking for this purpose. It would be inappropriate to regulate the coordination of pricing policies within a single corporate group based on the corporate formalities that they use to organize themselves, rather than on any difference of economic substance.

A question may arise as to when corporate bodies should be treated as related for purposes of applying this principle. The Sections understand that the Panel's proposal involves extending the existing intra-group exemption (which already applies to exclusive dealing, for example) to resale price maintenance. That is, the exemption would apply where one corporate body is (i) the holding company of the other, (ii) a subsidiary of the other, or (iii) a subsidiary of the holding company of the other corporate body.

The Sections propose that if the principle behind the intra-group exemption described above is accepted, its application should not be restricted to wholly-owned companies. In the EU, for example, the intra-group exemption applies where the parent company exercises *de facto* control over its subsidiaries (even where they are not wholly-owned), and the subsidiaries, although having separate legal personality, do not determine their own conduct on the market independently. U.S. courts similarly consider whether entities operate with already aligned interests under common control, including in circumstances involving majority, but not sole, control.

Such a nuanced approach, perhaps in addition to the blanket exemption for wholly-owned subsidiaries and sister companies, would seem to represent a more balanced outcome reflecting economic realities. The Sections understand that true agency agreements have traditionally been excluded from the prohibition on resale price maintenance, and we support this position.

II. Proposed Defense to Section 46 on Misuse of Market Power

Draft Recommendation 25 proposes reframing Section 46 of the CCA (“Section 46”) to clarify its application. The Draft Report also proposes introducing a new defense to the reframed prohibition.

Determining and applying appropriate standards to govern the conduct of firms with market power is a complex exercise, which has evolved over time as the history of U.S. jurisprudence, reports and studies demonstrates.² The Sections applaud the Panel’s concern to ensure that the suggested changes to Section 46 do not inadvertently prohibit or discourage procompetitive conduct. However, given that an effects-based test has now been adopted in Section 46 to distinguish between unlawful and lawful conduct, the Sections question the need to include a statutory defense in the legislation. The range of views and continued evolution in thinking on how best to distinguish between anticompetitive and procompetitive or competitively neutral conduct suggests, moreover, that Australia would be better served by not attempting to tie the effects analysis to any particular standard. The following discussion addresses concerns the Sections see with respect to the proposed statutory defense and proposes the use of a rule of reason analysis under Australia’s existing effects-based approach.

The Panel has proposed a two-prong defense under which a firm with substantial market power would need to show both (i) that its conduct would be a rational business strategy by a

² *Report and Recommendations of the Antitrust Modernization Commission*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

corporation that did not have a substantial degree of market power, and (ii) that the actual or likely effect of the conduct is to benefit the long-term interests of consumers. The Sections understand that the burden to prove that conduct was legitimate would shift to a defendant after a plaintiff has proved the existence of substantial market power. Nevertheless, the Sections submit that the proposed defense is potentially both over-inclusive and under-inclusive and that it may not provide a practical means for businesses to self-assess the legality of their conduct.

In the U.S., a monopolist may rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare.³ For example, conduct may be important to preserve investment incentives or to generate cost savings that will be passed on to consumers. Or, the restraint may be necessary to bring a new product to the market.⁴ Assuming the monopolist shows it had a valid business justification, a plaintiff must then address whether the conduct is reasonably necessary to achieve those efficiencies⁵ and whether substantially the same efficiencies can be achieved by significantly less restrictive available alternatives.⁶ No legal distinction is typically made between short-term versus long-term effects.

It is true that dynamic efficiencies can be as significant as shorter-term efficiencies, even if the benefits are not be immediately realized in the form of lower prices to consumers.

However the limitation of the Panel’s proposed defense to “long-term” consumer interests suggests, perhaps inadvertently, that the achievement of even substantial short-term benefits to

³ See, e.g., *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994) *abrogated on other grounds*, 130 S. Ct. 1237 (2010); see also, e.g., *Aspen Skiing Co. v. Aspen Skiing Highlands Corp.*, 472 U.S. 585, 609-11 (1985).

⁴ See, e.g., ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 304 (7th ed. 2012); Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 1504e, 410-11 (3d ed. 2010).

⁵ See, e.g., ANTITRUST LAW DEVELOPMENTS, *supra*, at 303; AREEDA & HOVENKAMP, *supra*, ¶ 1505a at 415-16; see also *id.*, ¶ 1507a at 426.

⁶ See, e.g., ANTITRUST LAW DEVELOPMENTS, *supra*, at 303; AREEDA & HOVENKAMP, *supra*, ¶ 658f2 at 192; AREEDA & HOVENKAMP, *supra*, ¶ 1505B, at 417-19; ¶ *id.* 1505a at 384-85; *id.* ¶ 1505b at 385-87; see also, e.g., *National Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 119 (1984).

consumer welfare may be an insufficient defense. The Sections recommend that any statutory defense that is adopted should not be limited to only long-term efficiencies. Efficiencies can benefit consumers equally whether they involve short-term cost savings that are channeled back to consumers or longer-term innovations that may result from combining product features or improving product quality, for example.

Further, the Sections caution that there could be substantial uncertainty for businesses and difficulty for the ACCC in determining whether conduct would be “rational” for firms lacking substantial market power. Certainly, the fact that a strategy has been used for the same purposes by firms lacking substantial market power suggests a procompetitive or neutral purpose and, at a minimum, bears on whether the conduct, when undertaken by a dominant firm, is anticompetitive or not.⁷ However, rather than focusing solely on the nature of the conduct and whether it would be rational for a firm lacking substantial market power, the Sections believe it is necessary to focus as well on the actual or likely impact of the conduct in question on competition and the competitive process.

Instead of incorporating a statutory defense in the legislation, the Panel may wish to support a rule of reason approach in applying Section 46, which would necessarily involve considering the defendant’s business justifications, likely efficiencies and other potential procompetitive and anticompetitive effects. The Panel also may wish to recommend that the ACCC only bring cases in which a firm with substantial market power engages in conduct that produces, or is likely to produce, a clear or concrete anticompetitive effect based on sound economic analysis.⁸ Although this would not rule out the use of Section 46 in instances falling short of an actual showing of anticompetitive effect—e.g., where a company has substantial

⁷ AREEDA & HOVENKAMP., ANTITRUST LAW ¶¶ 776b2, 1744c4

⁸ *See, e.g.*, European Commission, Guidelines on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. C 45, 7, 10-11 (Feb. 24, 2009).

market power and engages in conduct that economic theory and analysis shows is likely to have clear and substantial anticompetitive effects—it would nonetheless help to reduce, if not eliminate, those instances in which arguably procompetitive conduct might be challenged. Such a test could be used in conjunction with a conventional efficiencies test (not distinguishing long-term from short-term efficiencies) and would focus on the nexus between the complained-of conduct and those efficiencies.

Such a rule of reason analysis also would consider whether conduct committed by a firm with substantial market power is reasonably necessary to achieve the claimed efficiencies. Under this approach, a plaintiff still would need to establish that the conduct in question has had, or is likely to have, anticompetitive effects before the defendant would need to prove the existence of efficiencies that are substantially related to the conduct in question.

Whether incorporated as a statutory defense or applied in the effects-based test, giving businesses the ability to prove the existence of likely efficiencies or actual efficiencies that are substantially promoted by the conduct in question would further limit any risk that Section 46 would be applied to potentially procompetitive conduct.⁹

III. Merger Control Timeframe

The Sections commend the Panel’s proposal that the Australian merger control regime (both the informal and the formal processes) should be streamlined. But the Sections are concerned that the proposed timeframes remain out of line with international practice and may delay cross-border transactions.

The Sections understand that, under the new formal notification regime, the ACCC will act as the first phase review body and the Competition Tribunal (the “Tribunal”) as the second

⁹ The Panel may wish to consider whether a plaintiff or the government should bear the burden of disproving any such efficiencies once a firm with substantial market power has shown that they are plausible results of its conduct. *United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*).

phase review body. The ACCC will have three months to conduct its initial review, which may be extended with the consent of the parties.

The Sections' concern is that a first phase review period of three months is already long as compared with other developed merger control regimes. Further, it seems likely that there will be pressure on parties to agree to extensions of the three-month timeframe to avoid the review progressing to the Tribunal stage. These time-frames—especially as extended pursuant to the natural tendency of parties to accommodate agencies during the suspensive period of a merger review—seem inconsistent with present international experience.

As you may be aware, the UK also operates a voluntary notification regime and has recently introduced a new 40-working day statutory time limit for Phase I merger investigations. This replaced the previous statutory deadline of 30 working days (including possible extensions) in cases where parties notify using a statutory merger notice and the non-binding 40 working day administrative deadline in cases where the parties notified by means of an informal submission. The circumstances in which the 40 working day period may be extended are very limited and do not include an option to extend with the parties' consent.

Similarly, the European Commission has a first-phase review period of 25 working days (extended to 35 working days where the parties propose undertakings). The initial waiting period in the U.S. lasts up to 30 calendar days with a shorter timeframe applying in several circumstances (for example, for cash tender offers or transfers in bankruptcy).

The Sections query whether a three month timeframe strikes the right balance between ensuring that proposed transactions are subject to appropriate scrutiny and not unduly obstructing commercial activity, particularly given that cases meriting a first phase clearance will be those where there are no serious competition concerns to consider.

The Sections note that agencies in some jurisdictions rely on focused pre-notification discussions and submissions to achieve shorter first phase timeframes. This is also often beneficial for the parties, as such discussions can be held confidentially prior to the proposed transaction becoming public and the period can be used to ensure that all information required for the filing is provided at the time of filing such that there is no additional delay (beyond the first phase review itself) to the completion of the transaction. The Sections believe that to the extent any pre-notification period is short and focused it is a helpful procedure, but it should not be used artificially to extend the initial review period.