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By online submission

Competition Policy Review Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600

Your Ref
Our Ref MDL ZM
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Dear Sir / Madam

Competition Policy Review - Draft Report

1 We refer to the Competition Policy Review Draft Report dated 22 September 2014.

2 We welcome the opportunity to make this submission in response to the Draft Report.

3 This submission follows on from our previous submission dated 10 June 2014 in response to the Review's Issues Paper. As with our previous submission, this submission focuses on issues relating to competition law.

Recommendations supported

4 We agree with the following recommendations made in the Draft Report, which reflect our previous submission:

(a) Simplify the cartel laws: The current cartel laws are too complex. This undermines the ability of businesses to comply with those laws, and the ability of regulators to enforce them. We agree that the cartel prohibitions should be confined to conduct involving firms that are actual or likely competitors and not merely firms who might possibly compete with each other.

(b) Extend the joint venture defence for cartel conduct: Our previous submission highlighted the limitations of the current joint venture defence. The extension of that defence to protect other forms of business collaborations between competitors can enhance competition.

(c) Repeal the prohibitions on price signalling, predatory pricing and *per se* third line forcing: The general prohibitions in ss 45 and 46 of the *Competition and Consumer Act 2010* (Cth) (**the Act**) are sufficiently broad to address anti-competitive price signalling and predatory pricing. We agree that third line forcing should only be unlawful if it has a substantial anti-competitive effect.

(d) Reasonable limits on s 155 notices: As explained in our previous submission, compliance with s 155 notices can be extremely burdensome and costly and can be abused by the regulator. We agree with making it clear that it is only necessary to undertake a reasonable search for relevant documents, but for the reasons set out below we do not consider the recommendation in the Draft Report goes far enough.

5 We also agree with the following recommendations in the Draft Report:

(a) Extra-territorial application: The Act should be extended to cover conduct that damages competition in markets in Australia regardless of whether the contravening firm is resident, incorporated or 'carrying on business' in Australia. That extension should also apply to the *Australian Consumer Law*. We consider this falls within the Review's Terms of Reference because of the significant impact on small businesses, who face unfair competition from low-cost unsafe or non-compliant goods from overseas. The issue has become particularly acute with the ability of overseas firms to use internet advertisements, Facebook and social media to directly target and ship to Australian consumers.

(b) Application to the Crown: The Act should also apply to the Crown insofar as it undertakes activity "in trade or commerce". The Crown has the potential to harm competition in the same manner as private companies. This is particularly important in government procurement (for example, construction).

(c) Merger approval process: We agree with the Review's suggestion that the formal merger authorisation process, which is currently rarely used, be re-designed so that:

(i) the ACCC is the first instance decision-maker, as it is already for informal merger clearances, with the Australian Competition Tribunal as a Review body;

(ii) there are no prescriptive up-front information requirements; and

(iii) to the extent possible, there are time limits on the process.

However, for the reasons set out in our previous submission and below, we do not agree with the proposal that the ACCC have the power to require the production of business and market information. It is not appropriate for the draconian measure of a s 155 notice to be issued to parties who have approached the ACCC voluntarily, or indeed non-parties. If the ACCC does not have sufficient information to make a decision, it would be preferable for the authorisation process to be suspended.

(d) Block exemptions: We agree a block exemption process may be efficient and effective for businesses, including for small business, in achieving regulatory compliance and certainty.

Recommendations not supported

6 The balance of this submission addresses issues on which we disagree with the recommendations in the Draft Report. We request that the Panel give further consideration to these issues, for the following reasons.

ACCC Cartel Immunity Policy

7 As explained in our previous submission on the Issues Paper, it is critical that the cartel immunity regime provide certainty for applicants that immunity will be granted if the relevant criteria are satisfied. Without this certainty, an applicant faces the risk of incriminating itself with no protection from prosecution.

8 The Draft Report states that the current immunity regime provides an "adequate level" of certainty. We strongly disagree. In our experience advising many clients over the years that the policy has been in operation, potential immunity applicants are naturally very concerned about the risks of the ACCC and/or the CDPP refusing their application. We have had significant disagreement in the past with the ACCC regarding the application of the criteria for immunity in the ACCC's policy and its own guidelines. For potential applicants, those concerns are heightened by the high stakes involved — potential criminal prosecution — and the lack of natural justice in the application process: the ACCC and CDPP are enforcement and prosecution agencies, not impartial arbiters of immunity applications; an applicant has no right to a hearing; and there is no established process for reviewing the ACCC and CDPP's decisions.

9 We remain of the view that the Immunity Policy should be set out in legislation, and the decision to refuse or revoke immunity subject to independent judicial oversight. This would:

(a) address concerns regarding the legitimacy of the immunity policy, the lack of natural justice and the separation of legislative, executive and judicial power;

(b) avoid concerns regarding the dual administration of the policy by the ACCC and CDPP, which is inherently problematic; and

(c) encourage potential applicants to come forward voluntarily under the policy, thus increasing the effectiveness of the policy as a detection and enforcement tool.

Concerted Practices

10 We do not support the proposed prohibition of "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition.

11 The proposal would effectively remove the requirement, in order for conduct to be prohibited by s 45, that there be some form of meeting of the minds or consensus that gives rise to a "contract, arrangement or understanding". That requirement plays an important role in assisting businesses to understand what is prohibited and what is not.

12 The proposal would create an unwarranted level of uncertainty for businesses by introducing inherently uncertain concepts such as "regular practice" and "regular disclosure". This has the potential to create significant confusion, compliance costs and the stifling of legitimate competition in relation to conduct decided upon and carried out by a firm independently of any other firm.

13 The fact that the ACCC has failed to prove a meeting of the minds or consensus in particular cases of information sharing does not mean that the law is defective, or that those cases should have been decided differently.

14 Further, the disclosure of price information is not, in itself, anti-competitive and can in fact promote effective and informed competition. Indeed, the ACCC recently recognised the value of information sharing between competitors when it authorised the Jewellers Association of Australia's Retail Tenancy Database, an online service which allows jewellery retailers to share information pertaining to their retail leases in order to facilitate more informed bargaining with landlords.

15 Moreover, anti-competitive information sharing arrangements are already prohibited by s 45. For example, the ACCC has recently initiated proceedings in respect of an alleged anti-competitive information sharing arrangement in the petrol industry.

Misuse of market power

16 We do not support the proposed amendments to s 46 of the Act for the following reasons.

17 First, the fact that s 46 cases have been difficult to prove is not in itself a reason to overhaul the prohibition. It has not been established that those cases should have been decided differently, or would have been decided differently under the proposed changes to s 46. A high threshold is appropriate given the serious nature of the prohibition, as well the risk that the provision might be applied to a wide range of often pro-competitive and legitimate commercial activities. Further, the fact that different judges have had different views in particular cases, does not in itself justify revising the prohibition. The issues raised by misuse of market power are complex, and permit legitimate differences of opinion. In our view, that would continue to be the case under the version of s 46 proposed in the Draft Report.

18 Second, we do not agree that the current s 46 focuses inappropriately on the protection of competitors, rather than competition itself. High Court

decisions such as *Queensland Wire*,[1] *Melway*[2] and *Boral*[3] have made clear that s 46 is concerned with competition, and ultimately consumers. For example, in *Queensland Wire*, Mason CJ and Wilson J explained:

> *"the object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort (see Keeble v. Hickeringill [1809] EngR 7; (1809) 11 East 574 (103 ER 1127)) and these injuries are the inevitable consequence of the competition s.46 is designed to foster."*[4]

19 Third, the current requirement of "purpose" assists businesses to distinguish between what is prohibited and what is not. This is important not only for business certainty but also for the rule of law. In theory, it may be desirable for there to be no unilateral conduct that harms competition but, in formulating a law, it is necessary to consider the practical implications of such a broad prohibition.

20 Fourth, it is unclear what conduct the proposal is intended to capture that is not captured under the current prohibition. The proposed prohibition is in extremely general terms. This makes it impossible to tell whether the benefits of preventing the targeted conduct outweigh the potential detriments of the proposal.

21 Fifth, although it may be difficult to prove in court that unilateral conduct has the effect or likely effect of substantially lessening competition, it is a relatively easy thing to claim or allege. The Review itself has received numerous complaints about so-called "predatory capacity" and other behaviour that is alleged to be anti-competitive because of its adverse effect on competitors but, in the Panel's view, is legitimate competition on the merits. We are therefore concerned that the proposed "effects test" will give rise to a flood of unmeritorious claims and this in itself may have a chilling effect on pro-competitive conduct.

22 Sixth, s 46 regulates companies with a "substantial degree of market power". The courts have interpreted "substantial" to mean "a greater rather than less" degree of power,[5] and s 46(3D) makes clear that more than one firm may have a "substantial degree" of market power in the same market. As such, it is clear that s 46 may apply to a range of businesses, including relatively small businesses in niche markets.

23 In recognition of the potential for the proposed changes to adversely impact pro-competitive conduct, the Draft Report suggests a defence that would apply if:

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[1] (1989) 167 CLR 177.
[2] (2001) 205 CLR 1.
[3] (2003) 215 CLR 374.
[4] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at [24].
[5] *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 DLR 238, at 260.

(a) the conduct would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and

(b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

24 As a preliminary point, it is inappropriate for the onus to be on the defendant to establish such a defence. Misuse of market power is a serious allegation and a person making such an allegation should, at minimum, have a proper factual and legal basis for that person's case in relation to the types of matters referred to in any such defence.

25 In our view, the first limb of the proposed defence would raise many of the same difficult questions that have arisen under the current requirement of "taking advantage". If anything, those issues would be more complex given that the inquiry would shift from actual purpose (a matter of fact) to hypothetical rational purpose (a matter of significant conjecture).

26 Further, the first limb does not, in our view, properly capture exclusionary conduct. For example, predatory pricing might be "rational" for a firm with sufficient financial strength to outlast its competitors in a price war, whether or not the firm had market power before engaging in the predatory pricing.[6]

27 The second limb of the proposed defence is far too broad and uncertain to be a criterion for such a serious legal prohibition. It could also give rise to an extremely long list of issues in dispute and extremely onerous discovery obligations.

28 If, contrary to our views, an "effects test" is to be included with a defence, then we would propose that the defence apply if the conduct in question was:

(a) for a legitimate business purpose that was not anti-competitive; **or**

(b) competition on the merits of the relevant goods or services being supplied or acquired.

29 The language of "legitimate business purpose" would pick up the test laid down by the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, where the conduct was held not to breach s 46 if it had a "legitimate business purpose". Such a defence would provide businesses with greater clarity in the form of established precedent, and be consistent with the underlying rationale of the provision and the Act as a whole. The two limbs should operate as alternatives, so that a firm alleged to have engaged in misuse of market power need only prove one.

[6] Financial strength does not equate to market power: *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90.

30 For the reasons given above however, it would be better to include the elements of the defence as part of the substantive prohibition, with both limbs needing to be alleged by the applicant, rather than as a defence.

31 Further, if there is any significant expansion of s 46, the authorisation regime should be extended so that it also covers s 46.

Resale price maintenance

32 For the reasons set out in our previous submission, we remain of the view that resale price maintenance should only be prohibited only if it has a substantial anti-competitive effect (i.e. the *per se* prohibition should be removed). The ACCC has recently accepted those reasons in a draft authorisation determination for power tool company Tooltechnic. However, if our proposal is not adopted, we agree with the recommendation in the Draft Report to extend the notification process to include resale price maintenance.

ACCC's coercive powers

33 In our previous submission we described the significant financial and operational burden that s 155 notices can place on businesses, including businesses not suspected of any prohibited conduct, and noted our concern that these notices can be very difficult to challenge. We also raised particular concern with regard to s 155 notices that are issued after parties have voluntarily approached the ACCC to seek merger clearance.

34 The Draft Report recognises these problems, and recommends that, either by law or guidelines, the requirement to produce documents in response to a s 155 notice should be qualified by an obligation to undertake a "reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents".

35 In our opinion, this does not go far enough. Rather, we propose that the issuing of a s 155 notice should be subject to a legislative requirement of reasonableness and proportionality. This requirement should apply to the scope of documents sought, the action required to comply with the notice and the time afforded to do so. Those matters ought to be proportionate to, among other things, the seriousness of the suspected contravention, the urgency of the situation and the amount of resources available to the recipient to comply with the notice.

36 Further, in the merger approval context, s 155 notices should be a measure of last resort and only appropriate where a party is unable to, or has failed to, provide information in response to a voluntary request, or where necessary to protect the recipient from any claims that the disclosure of specific information or documents to the ACCC would breach confidentiality or similar obligations.

Use of admissions in subsequent proceedings

37 In order to facilitate private actions, the Draft Report recommends that s 83 be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought (in addition to findings of fact made by the court). The effect of this recommendation would be that admissions made by a business in one proceeding (typically brought by the ACCC) could be used as prima facie evidence in separate proceedings (typically brought by a private litigant).

38 The proposed change would create a significant obstacle to parties reaching settlements with the ACCC. The importance of such settlements has been recognised by the courts on numerous occasions. They result in a substantial saving of resources for the ACCC, and for the community as a whole. One study determined that 83% of ACCC cartel proceedings were resolved consensually.[7]

39 Similarly, parties may choose to make admissions for various reasons that do not reflect actual culpability. These include the cost, time and inconvenience of protracted litigation. Others may not wish to take the risk of an adverse court finding. Moreover, very often a company may not know what its potential exposure is for breaching the Act. This is because the relevant conduct was engaged in by employees or agents without the knowledge of senior management.

40 It is for all these reasons that the courts encourage settlement, as they do in all litigation. This is also why the ACCC removed the requirement of compensating victims from its cartel immunity policy, particularly when class action investors increasingly look for cartel cases to fund.

41 Please do not hesitate to contact us if you have any queries. We look forward to receiving the Panel's Final Report.

Yours faithfully

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[7] Centre for Competition and Consumer Policy, Working Paper, *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases* (May 2004), 20, 83.