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OF AUSTRALIA

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24 November 2014

Dear Sir or Madam,

### **Competition Policy Review Draft Report**

I have pleasure in enclosing a submission which has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia in response to the Competition Policy Review Draft Report.

If you have any questions regarding this submission, please contact the Committee Chair, Caroline Coops, by phone on (03) 9643 4097 or via email: [caroline.coops@au.kwm.com](mailto:caroline.coops@au.kwm.com)

Yours faithfully,

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# **Submission on the Competition Policy Review Draft Report September 2014**

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**Submission by the Competition and  
Consumer Committee of the Business Law  
Section of the Law Council of Australia**

20 November 2014

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## 1. INTRODUCTION AND OVERVIEW OF SUBMISSION

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) appreciates the opportunity to make a submission to the Competition Policy Review Panel (**Review Panel**) regarding the Competition Policy Review Draft Report September 2014 (**Draft Report**).

The Committee wishes to congratulate the Review Panel on the publication of the Draft Report, which is the most significant review of competition policy in Australia for over 20 years. The Draft Report is a well-balanced and thoughtful response to the complex issues presented by Australia's concentrated industry structures, ageing population and gradual transition to an increasingly services based economy.

The Draft Report has generated healthy debate within the Committee and the community at large on key issues for Australia's competition policy, which will help shape Australia's economy and broader society into the future.

The Committee is pleased to see many of the proposals and comments made by the Committee in its submission on the Australian Government Competition Policy Review dated 27 June 2014 (**June 2014 Submission**) adopted or supported by the Review Panel in the Draft Report.

To the extent that the Review Panel has taken an approach that differs from that advocated in the June 2014 Submission, the Committee does not propose to repeat its comments in detail in this submission, but rather seeks to focus on those recommendations in the Draft Report that the Committee considers to be most significant, having regard to the Committee's particular focus on competition law and its enforcement.

To assist the Review Panel, set out below in summary form are the key propositions put forward by the Committee in this submission, and the draft recommendation and Chapter of the Draft Report to which they relate. The start of each section of this submission also contains a summary of the key points contained in that section. Recommendations of the Committee are contained in boxes and highlighted text for ease of reference. A glossary of defined terms is contained in Appendix A.

<b>Draft recommendation number and subject matter</b>	<b>Summary of key points</b>
<p><b>20, 21, 22, 23 and 24 – Cartel provisions and introduction of a new prohibition on concerted practices (Chapter 17, sections 17.1 and 17.2)</b></p>	<ul style="list-style-type: none"> <li>• The Committee endorses the Review Panel's recognition of the need to simplify the existing cartel provisions.</li> <li>• There is a divergence of views within the Committee on how the appropriate jurisdictional nexus with Australia should be framed in cases involving extra-territorial conduct. The Committee suggests that the Review Panel give further consideration to this issue.</li> <li>• The Committee agrees that whether competitors are likely to be in competition should be assessed on the balance of probabilities.</li> <li>• The Committee welcomes the proposed broader exemption for joint ventures and similar forms of business collaboration. However, further clarification is needed in relation to the meaning of certain terms.</li> <li>• Further consultation is needed on the definition and application of the concerted practices prohibition, so that the law is clear on what conduct is intended to be prohibited, having regard to overseas legislative responses to this issue.</li> </ul> <p>(See section 2 of this submission).</p>
<p><b>25 - Misuse of market power (Chapter 16, section 16.1)</b></p>	<p>The Committee supports the retention of s46(1) in its current form. It works effectively and with a substantial body of jurisprudence explaining its application, which would be lost if the provision was replaced. Notwithstanding the Committee's view, the following important issues</p>

<b>Draft recommendation number and subject matter</b>	<b>Summary of key points</b>
	<p>should be considered carefully in advancing any alternative proposed provision:</p> <ul style="list-style-type: none"> <li>• the proposed provision may have unintended regulatory impacts (e.g. it may be more difficult and expensive to prove cases);</li> <li>• there is serious concern that “purpose” in the proposed provision is over-inclusive and risks prohibiting statements of hostile intent, rather than only anticompetitive conduct;</li> <li>• there is a real concern whether the proposed defence is appropriate and whether it could ever be made out; and</li> <li>• rather than relying on a “back-stop defence” for pro-competitive conduct, the Committee suggests three possible alternative approaches focusing on the primary proposed provisions and what must be taken into account by a Court.</li> </ul> <p>(See section 3 of this submission).</p>
<p><b>30 – Mergers (Part 4, Chapter 15)</b></p>	<ul style="list-style-type: none"> <li>• The Committee believes that the Review Panel's proposals to improve the informal and formal merger review processes are desirable and necessary.</li> <li>• The Committee considers that a key objective of a combined ACCC and Tribunal formal merger process must be timely, transparent and predictable decision-making. Any first instance review process by the ACCC should be subject to a strict time constraint.</li> </ul> <p>(See section 4 of this submission).</p>
<p><b>35 – Block exemption powers (Chapter 19, section 19.3)</b></p>	<ul style="list-style-type: none"> <li>• Consistent with the Review Panel's strong focus on removing or reducing regulatory burdens, the Review Panel should reconsider the introduction of a general efficiency or similar defence, as proposed in the Committee's June 2014 Submission.</li> <li>• The Committee agrees with the Review Panel that the introduction of a block exemption regime, consistent with the approach which has been adopted in the EU, would be beneficial.</li> </ul> <p>(See section 5 of this submission).</p>
<p><b>41 and 47 – Market studies power and ACCC governance (Chapter 22, section 22.3 and Chapter 23, section 23.3)</b></p>	<p>In the Committee's view:</p> <ul style="list-style-type: none"> <li>• the proposed ACCP should be assigned a market studies function as part of its role in the development of policy recommendations, but should not be given mandatory information-gathering powers;</li> <li>• an advisory body or review officer to oversee the ACCC's decisions and actions may not be necessary due to the significant changes proposed by the Review Panel with respect to the review of merger decisions, the exercise of powers under s155 of the CCA and the regulatory role of the ACCC; and</li> <li>• the proposal that a board with independent, non-executive directors be added to the governance of the ACCC should be reconsidered.</li> </ul> <p>(See section 6 of this submission).</p>
<p><b>7, 8 and 32 – repeal of s51(3) and vesting State/Territory Courts with jurisdiction for secondary boycotts</b></p>	<ul style="list-style-type: none"> <li>• The Committee supports the Review Panel's draft recommendation 7 that there be an overarching review of IP undertaken by an independent body.</li> <li>• It is premature to recommend the repeal of section 51(3) of the CCA (draft recommendation 8) in light of this proposed review, given the complex policy and practical implications involved in resolving the interplay between IP protection, and encouragement of competition. The Committee has had the benefit of reading the more detailed submission of the Intellectual Property Committee of the Law Council of Australia, which also supports that section 51(3) be considered as</li> </ul>

Draft recommendation number and subject matter	Summary of key points
	<p>part of the overarching IP review.</p> <ul style="list-style-type: none"> <li>The Committee is not aware of anything that would deny a State Supreme Court jurisdiction over the secondary boycott provisions of the relevant State's Competition Code. The Committee submits that consideration should be given to whether existing legislation relating to the enforcement of the Competition Code is adequate, or whether further legislation to vest federal jurisdiction in relation to secondary boycotts in State courts is desirable.</li> </ul>

In addition to the comments made in this submission, the Committee has also set out:

- a list of the recommendations of the Draft Report that are supported by the Committee, but in respect of which it makes no further comment (see Attachment 1 to this submission); and
- a list of the other recommendations of the Draft Report in respect of which the Committee has no further comment (see Attachment 2 to this submission).

## 2. CARTEL PROVISIONS AND INTRODUCTION OF A NEW PROHIBITION ON CONCERTED PRACTICES (CHAPTER 17, SECTIONS 17.1 AND 17.2)

### Key points in this section:

- (a) The cartel provisions should be repealed and redrafted using clear, simple and effective language and terms that are well understood.
- (b) There is a divergence of views within the Committee on how the appropriate jurisdictional nexus with Australia should be framed in cases involving extra-territorial conduct. The Committee suggests that the Review Panel further consider whether applicants should be required to demonstrate that a market in Australia existed for the goods or services affected by the relevant cartel or whether it should be sufficient that the conduct affected prices or other terms of supply in Australia.
- (c) The current requirement of ministerial consent for private litigants should be removed.
- (d) The Committee agrees that the cartel provisions should only apply to corporations that are in competition with each other or likely to be in competition with each other, where the likelihood is assessed “on the balance of probabilities” (i.e. more likely than not).
- (e) The Committee welcomes the proposed broader exemption for joint ventures and similar forms of business collaboration and the recommendation to repeal the joint venture defence in s76C. However, further clarification is needed in relation to the meaning of certain terms. For example, the Committee recommends the term “for the purposes of a joint venture” should be replaced with clearer terms for civil liability and criminal liability.
- (f) Further consultation is needed on the definition and application of the concerted practices prohibition, so that the law is clear on what conduct is meant to be prohibited, having regard to overseas legislative responses to this issue. This would include what is meant by a concerted practice, what degree of ‘concerted’ behaviour is required, whether the concept of regularity is consistent with EU competition law, clarity and sound policy, and whether it extends to unilateral, price disclosures or signalling.
- (g) The per se prohibition on exclusionary provisions is no longer necessary as an addition to the cartel provisions and should be repealed. The Committee also supports the proposed repeal of the price signalling provisions.

### 2.1 General response to the Draft Report’s recommendations on Cartels

The Committee welcomes the Panel’s recognition of the need for simplification of the cartel provisions.<sup>1</sup> The Committee considers the cartel provisions of the CCA to be confusing, prolix, unnecessarily complex, and in places unintelligible. This cannot be a good thing for perception, understanding or enforcement of the law. The Committee repeats its June 2014 Submission that Division 1 of Part IV should be repealed and redrafted in a way that communicates the mischief addressed clearly and simply, using language that is well understood. The Committee also suggests that in redrafting Division 1, the Panel have appropriate regard to overseas legislative responses to anticompetitive concerted practices.

The redrafting should strive for simplicity, clarity and effectiveness. The importance of this point cannot be over-stated.

<sup>1</sup> In this respect, the Draft Report recommends that the: “*prohibitions against cartel conduct should be simplified*” and “*the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility.*”

The Committee welcomes the opportunity to provide further comment on the proposed new provisions and to make submissions on the drafting of them once more specific proposals are released. The Committee is cognisant of the fact that the present provisions fail to achieve the objectives of the CCA, and that the effectiveness of the redrafted provisions will depend on the skill with which they are redrafted.

## 2.2 Complex Drafting

The Committee agrees with the Review Panel that the present cartel provisions are overly complex. Whilst the requirements of the Commonwealth Criminal Code must be addressed and the cartel provisions must function consistently with it, this factor should not displace the need for the cartel provisions to be readily understood by those regulated by them and those charged with their enforcement. Indeed, the Committee submits that it is inexcusable for a Division that imposes criminal sanctions for its contravention to be expressed, as it now is, in language that is prolix, ambiguous, or unintelligible.

A court's primary function is to apply the words of the statute to the facts before it. A law imposing potential criminal sanctions must use terms and expressions that are well understood, in order to provide adequate clarity and certainty, both to those subject to the law and to those charged with its enforcement. As noted in the Committee's June 2014 Submission, the present cartel provisions fail miserably in this regard.

## 2.3 Connection of cartel participants with Australia, amendments to s5 to address extra-territorial conduct, and application of cartel provisions to conduct affecting goods or services supplied or acquired in Australian markets

The Review Panel recommends (draft recommendation 21) the removal of the present requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence. The Review Panel also recommends (draft recommendation 21) removal of the requirement that private parties seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Section 5 of the CCA presently requires a corporation be resident, incorporated or carrying on business in Australia before its extra-territorial conduct may be relied on under the CCA. The Committee agrees that this requirement should be removed.

Committee members expressed differing views as to how the appropriate jurisdictional nexus with Australia should be framed in cases involving extra-territorial conduct. In this respect, members recognise that Australian consumers and businesses adversely affected by extra-territorial cartel conduct ought have a remedy under the CCA without the need to demonstrate carrying on business or other presence requirements. On the other hand, they acknowledge the need to ensure that the CCA does not arrogate jurisdiction (and potentially attract the operation of blocking statutes).

Some members consider that requiring conduct to occur in a "market in Australia", which the Panel appears to favour, provides a strong jurisdictional nexus with Australia, and consequently will minimise any risk that the CCA is perceived as interfering in the sovereignty of other countries (with the consequent risk of them enacting blocking statutes). This approach met with support from those members who felt that something more should be required than an effect on local prices or terms of supply.

Other members, however, considered that a "market in Australia" test may be too high a threshold to establish in all cases, and that it should be a sufficient jurisdictional nexus for the CCA to apply where extraterritorial conduct has an effect on local prices or terms of supply. An example of where a "market in Australia" test may be too onerous a test occurred in *ACCC v Air NZ Limited* [2014] FCA 1157 at [20], where Perram J stated that

'[p]rices may well have been affected in Australia by the conduct but that does not mean the market in which the airlines were competing was located here'.

This finding was made, despite the fact that there were corporations in Australia who were organising, from within Australia, to have their freight shipped to Australia, and who were paying for the freight here. If Draft Recommendation 22 in its present form is adopted, the CCA

may leave persons in Australia affected by a cartel without a cause of action because they cannot demonstrate that the goods or services were supplied or acquired in an Australian market.<sup>2</sup> The Committee consequently urges the Panel to give further consideration to the appropriate jurisdictional nexus the CCA should require when extraterritorial conduct is relied on.

The arguments for requiring Ministerial consent before a private litigant can bring legal action in respect of cartel conduct with an extra-territorial element are unconvincing. The Committee supports the Review Panel's draft recommendation 21 to remove this requirement.

## **2.4 Market and competition definition**

As to market definition, there is now a detailed body of jurisprudence on the term "market" in s 4E of the CCA, and the legal and economic principles applicable to this term are tolerably clear. Consequently, the Committee agrees with the Review Panel's draft recommendation 20 that this definition be retained.

Further, although the definition of "competition" in s 4 specifically provides that competition includes competition from imported goods and services, the Committee has no objection to the definition of competition being clarified.

## **2.5 Competing Firms**

The present threshold for application of the cartel prohibitions is a possibility other than a remote possibility that the corporations concerned are or would be in competition with each other. For the reasons stated in its June 2014 Submission the Committee agrees with the Review Panel that this threshold is too low. The present definition of "likely" distorts the word's true meaning, and should be replaced by a definition that better accords with the word's commonly understood meaning and judicial consideration.

The Committee agrees with the Review Panel's draft recommendation 22 that the cartel prohibition should apply only to corporations that are in competition with each other, or where those corporations are likely to be in competition with each other. The Committee agrees with the Review Panel's proposal that likelihood should be "assessed on the balance of probabilities (i.e. more likely than not)".

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<sup>2</sup> In *Auskay International Manufacturing v Qantas Airways Limited (No 5)* [2009] FCA 1464, Tracey J said that the existence of a global market extending into the geographic boundaries of Australia did not preclude a finding that there existed "a market in Australia."

## 2.6 Joint Ventures

The Committee welcomes recommendation 22 in the Draft Report that a broader exemption be included in the CCA for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services). The Committee also welcomes draft recommendation 24 that the price signalling provisions (including those relating to joint venture and other collaborative conduct) be repealed and notes that the joint venture defence in s 76C would be repealed on implementation of draft recommendation 23 that the prohibitions relating to exclusionary provisions be repealed).

The Committee cautions that care will need to be given to any extension of Division 1 to cover price signalling and other areas of anti-competitive concerted practices to ensure that pro-competitive collaborative activities are not subject to liability.

The Committee submits that the Final Report should provide further clarification in the following respects:

- (a) Sections 44ZZRO, 44ZZRP and 4J should be repealed and a fresh start made. Apart from the arbitrary limitations that these provisions impose, the meaning of the key elements of 'joint venture' and 'purposes of a provision' is unclear. Moreover, the drafting of these provisions is convoluted and inconsistent with the general recommendation in the Draft Report that the CCA be simplified (see section 3.1).
- (b) The Draft Report refers to the collaborative venture exemption proposed in New Zealand in the Commerce (Cartels and Other Matters) Amendment Bill 2011 by way of comparison and states that 'the New Zealand exemption may be too broad' (p 224). This comment does not provide sufficient guidance for the redrafting of the CCA by the expert legal panel proposed in the Draft Report (p 189). Nor does it adequately guard against the risk that the current sections will be tinkered with instead of replaced by new principles-based provisions. The Review Panel should recommend either the adoption of an exemption closely similar to the collaborative activity exemption in the New Zealand Bill or an alternative model. The New Zealand provisions on collaborative ventures have been the subject of extensive consultation and wide support by business and competition law practitioners.<sup>3</sup> They are also the subject of detailed practical draft guidelines prepared by the Commerce Commission.<sup>4</sup>

The Committee does not consider the term 'collaborative activity' in the New Zealand Bill to be too broadly defined. Under the proposed s 31(2) of the *Commerce Act*, 'collaborative activity means an enterprise, venture, or other activity, in trade, that - (a) is carried on in co-operation by 2 or more persons; and (b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.' An important safeguard under the proposed s 31(1)(a) is the requirement that the alleged cartel provision be 'reasonably necessary for the purpose of the collaborative activity'. The meaning of the term 'reasonably necessary for the purpose of the collaborative activity' is the subject of detailed practical guidance in draft guidelines prepared by the Commerce Commission.<sup>5</sup> Those guidelines seek to apply the term 'reasonably necessary' in a commercially realistic way.

- (c) The Draft Report does not indicate whether or not the term 'for the purposes of a joint venture' in s44ZZRO and s44ZZRP should be retained. The term should not be retained because it is notoriously unclear. For example, it is uncertain whether:
  - (i) the word 'purposes' imports a subjective or objective test and how s4F which is directed to the singular 'purpose' applies to it;

<sup>3</sup> See <http://www.med.govt.nz/business/competition-policy/cartel-criminalisation>.

<sup>4</sup> Available at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaborationguidelines/>.

<sup>5</sup> See at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaborationguidelines/>.

- (ii) the alleged cartel provision must be solely, predominantly or merely substantially for the purposes of a joint venture; and
- (iii) the alleged cartel provision may be merely in furtherance of a joint venture or must be necessary in some yet to be defined sense.

A better approach would be to use the term 'reasonably necessary for undertaking the collaborative activity' in the context of a collaborative venture exception or exemption from civil liability under s44ZZRJ and s44ZZRK, and the term 'believed to be reasonably necessary for undertaking the collaborative activity' in the context of a collaborative venture exception or exemption from criminal liability under s44ZZRF and s44ZZRG. The rationale for the latter subjective test is that liability for offences as serious as the cartel offences under s44ZZRF and s44ZZRG should be based on a subjective mental element and not an objective test of reasonable necessity.

## 2.7 Concerted Practices

The Committee considers further consultation is needed on the definition and application of any concerted practice prohibition, so that the law is clear on what is meant by a concerted practice, what degree of 'concerted' behaviour is required, whether the concept of regularity is consistent with EU competition law, clarity and sound policy, and whether the concept of a concerted practice extends to unilateral price disclosures or signalling.

The Committee suggests that appropriate regard be had to overseas legislative responses to anticompetitive concerted practices as part of further development of the proposal. Care will need to be given to any extension of the current law to prohibit concerted practices to ensure that pro-competitive collaborative activities are not subject to liability. The Committee also recommends further consultation on the circumstances in which price signalling should be prohibited.

## 2.8 Small Business

The Committee agrees with the Review Panel's draft recommendation 49 that the CCA should provide small business with accessible and cost-effective relief in respect of contraventions of the law.

Although one means of providing an enforcement avenue is the introduction of a specific dispute resolution scheme for small business matters covered by the CCA where the particular area of dispute is not a priority for the ACCC, the Committee is unable to comment further as to the desirability or otherwise of such proposal unless greater detail is provided of the scheme, the criteria for its application, and its integration with the provisions of the CCA.

The Committee is conscious that the object of the CCA is to enhance the welfare of Australians through the promotion inter alia of competition. It submits that this object should not be undermined by well-meaning but ill-conceived amendments<sup>6</sup> directed to protecting small business from vigorous but competitive activity.

<sup>6</sup> Such as the Birdsville amendments.

## 2.9 Exclusionary provisions

The Review Panel considers that the per se prohibition of exclusionary provisions, as defined in s4D, is no longer necessary as the conduct is materially the same as cartel conduct in the form of market sharing.<sup>7</sup>

The Committee agrees with this view, but notes the need for careful formulation of the cartel provisions to ensure that anticompetitive conduct is prohibited, but pro-competitive conduct is not unintentionally caught by the CCA, as well as addressing the concerns noted above. In this respect, a suitable definition of “cartel provision” will need to be formulated so as to cover acquisitions in appropriate instances, and careful consideration will need to be given by the framers of the revised Division to the concept of “commitment” in the context of cartels and the extent to which it is (or is not) a requirement of any proposed concerted practices prohibition.

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<sup>7</sup> This view gives rise to Draft Recommendation 23 that the Act should be amended “to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i).”

### 3. MISUSE OF MARKET POWER (CHAPTER 16, SECTION 16.1)

#### Key points in this section:

- (a) The Committee supports the retention of s46(1) in its current form. It works effectively and with a substantial body of jurisprudence explaining its application, which would be lost if the provision was replaced. Notwithstanding the Committee's view, the Committee has drawn out important issues to be considered carefully in advancing any alternative proposal, such as the one suggested by the Review Panel. The Committee submits that the Review Panel should proceed carefully in this critical and subtle area of the law.
- (b) The Committee is concerned that the proposed provision may have unintended regulatory impacts. For example, a contravention of the proposed provision may be more difficult and expensive to prove than is the case under the current s46. There is also a risk that the proposed provision may stifle effective competition by making it too easy for complaints to be made by less successful competitors and too onerous for respondents to defend them.
- (c) In the Committee's view there is a risk that "purpose" in the context of the Review Panel's proposed provision is over-inclusive. It risks prohibiting statements of hostile intent, rather than truly anticompetitive conduct. To address this concern, the Committee respectfully suggests that the words "*the purpose, or has*" be deleted from the form of the proposed provision.
- (d) There is a concern that the proposed defence is not appropriate and may result in more complex cases. The Committee is concerned that the second element requires evidence which supports a clear link between conduct and the "*long-term interests of consumers*", in circumstances where the alleged conduct is very significantly removed both functionally from the transactions which directly involve Australian "consumers" and in time from their "long-term interests".
- (e) The Committee acknowledges the Review Panel's concern that pro-competitive conduct may be inadvertently captured by the proposed provision without a "back-stop defence" and suggests three alternative approaches for consideration. Rather than propose a defence, the proposed provision could:
  - (i) require that conduct be "anti-competitive" in character, with the effect, or likely effect of substantially lessening competition;
  - (ii) include a requirement that the court must have regard to whether the conduct is efficiency enhancing or whether any potential lessening of competition is a product of "superior competitive performance"; or
  - (iii) rely solely on whether the conduct has the effect of substantially lessening competition as the appropriate filter without any backstop, and with the identification of factors to which a Court must have regard.

### 3.1 The case to retain s46(1)

The Committee's view, on balance, is that it is preferable to retain s46(1) in its current form, rather than to amend it as proposed. The current form of s46(1) has the following advantages.

#### "Taking advantage"

All around the world, it has historically been difficult to distinguish unilateral conduct by a dominant firm which should properly be prohibited, from that which is vigorously competitive (and should not be). As Dawson J said in *Queensland Wire*:<sup>8</sup>

"The difficulty in determining what conduct constitutes taking advantage of market power and what conduct does not, stems inevitably from the need to distinguish between monopolistic practices, which are prohibited, and vigorous competition, which is not. Both here and the United States the search continues for a satisfactory basis upon which to make the distinction. For the most part, all that emerges are synonyms which are not particularly helpful. Words such as "normal methods of industrial development", "honestly industrial", "anticompetitive", "predatory" or "exclusionary conduct" merely beg the question."

The Committee accepts that the meaning of the "take advantage" element of s46(1) is "subtle" and that it can be "difficult to apply in practice".<sup>9</sup> However, the Committee submits that these difficulties stem from the inherent subtleties of competitive (and anti-competitive) conduct, rather than from the wording of s46(1) itself. The leading antitrust regimes elsewhere around the world have prohibitions which are broadly consistent with the approach in the current form of s46(1).

Further, even though it is correct to say that the Courts have "wrestled with the meaning of the expression ... over many years"<sup>10</sup>, the Committee submits that the "take advantage" element of s46(1) is far less likely to be "difficult to apply" in Australia prospectively, in light of the extent and emerging consistency of the jurisprudence to date on the issue.

#### "Purpose"

The Review Panel is concerned that the "purpose" element in s46(1) "focuses upon harm to individual competitors" and is inconsistent with the general propositions that, "ordinarily, competition law is not concerned with harm to individual competitors ... Competition law is concerned with harm to competition itself – that is, the competitive process."<sup>11</sup>

However, as the Review Panel is aware, it is the "take advantage" element in s46(1) which distinguishes dominant firm conduct which is essentially pro- or anti-competitive. Once the impugned conduct involves a "taking advantage of substantial power in a market", the purpose element in s46(1) serves only to identify which type of anti-competitive conduct is prohibited: i.e. that which has one of the proscribed purposes.<sup>12</sup>

The Review Panel's heading, "*Difficulties with the current language of section 46*" on page 208 of the Draft Report, suggests that the Review Panel appreciates the legal position, but is nevertheless alive to the public controversy over the "purpose" element (and a missing "effects test"), in light of the "current language" of the "purpose" element of the provision. While concern over popular perceptions of the provision is legitimate, it should not be determinative, in the Committee's view.

<sup>8</sup> *Queensland Wire Industries v BHP Co Limited* (1989) 167 CLR 177, at 202.

<sup>9</sup> See page 208 of the Draft Report.

<sup>10</sup> *Ibid.*

<sup>11</sup> See page 210 of the Draft Report.

<sup>12</sup> Practically, this third, "purpose" element of s46(1) distinguishes conduct by the firm with substantial market power, which takes advantage of that market power as lawful on the one hand (eg. in the case of the firm raising prices to monopoly levels – which is conduct which does not have a proscribed purpose), or unlawful on the other (eg. in the case of the firm refusing to deal with a potential downstream rival – which will have a proscribed purpose).

In short, the Committee's view is that:

- s46(1) works effectively and is increasingly clear in its application, with the benefit of many cases explaining the application of the provision; and
- s46(1), with its principal focus on whether the firm has "taken advantage" of, or "used" its substantial market power, is consistent with the NZ, US and EU approach to regulating dominant firm conduct, such that we can continue to draw usefully from their thinking and jurisprudence on the issues.

### 3.2 An alternative approach

Notwithstanding the above, the Committee acknowledges the long-running, persistent controversy over the current form of s46.

The Review Panel has suggested that s46(1) be amended (with consequential amendments to the remainder of s46) to read along the following lines:

"A corporation that has a substantial degree of power in a market shall not engage in conduct which has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market, unless that conduct:

- (a) 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) has or is likely to have the effect of benefitting the long term interests of consumers."

The Committee draws out the following points in relation to this proposal:

- (a) **Regulatory impact:** There are three criticisms of the regulatory impact of the proposed provision.

First, in the Committee's view, a contravention of the proposed provision is likely to be more difficult and more expensive to prove and to defend than is the case under the current s46.<sup>13</sup>

Establishing that conduct has the likely effect of "substantially lessening competition in a market":

- is potentially a much more wide-ranging inquiry, traversing the market as a whole, rather than to examine whether a particular firm's conduct took advantage of its substantial market power;
- this will broaden the extent of document discovery, testimony and the potential issues involved in cases litigated under the provision; and

<sup>13</sup> This conclusion assumes the absence of "smoking gun" purpose documents in the respondent's record, which may establish that it had the purpose of substantially lessening competition in the relevant market.

- requires the application of a counterfactual context (or contexts), in circumstances where the assumptions behind, and the identification and proof of, that counterfactual context(s) can be contentious and difficult.<sup>14</sup>

These factors may point away from the proposed provision being appreciably less "subtle" or "difficult to apply" than the current form of s46(1).

Secondly, it is possible that conduct by a firm which takes advantage of its substantial market power, but which has as its purpose harming only a very small market rival, may not be prohibited by the proposed provision (whereas it would be under the current form of s46(1)), as the conduct may have neither the purpose nor the likely effect of *substantially* lessening competition in the market.

Thirdly, but for the proposed defence (as to which, see further below), the proposed provision may stifle effective competition by making it too easy for complaints of a 'substantial lessening of competition' to be made by less successful competitors suffering at the hands of those which are more successful and efficient.

- (b) **"Purpose" in this context is over-inclusive:** The Committee is very concerned that a corporation with substantial market power may contravene the proposed provision simply where it is found to have the "purpose" of substantially lessening competition in a market. This risks prohibiting statements of hostile (but aggressively competitive) intent, rather than only anticompetitive conduct, by firms with substantial market power.

In the Committee's view, the current form of s46(1) is clearly superior to the proposed alternative in this regard. The current form of s46 includes the requirement that the corporation with substantial market power must "take advantage" or "use" that market power to establish a contravention – this requirement clearly goes beyond the corporation's "purpose".

In the context of dominant firm conduct, there have been many warnings that "intent" should not be determinative of liability. See for example:

"Although excesses in the use of "intent" have been most apparent in the law of predatory pricing, our qualification on the usefulness of intent as a determinant of liability is not limited to that area. The problem, quite simply, is that the aggressive firm always "intends" to harm rivals if injury to rivals is a consequence of one's own increase in market share. To be sure, sometimes this intent seems directed to a specific firm rather than to competitors in general. But the point is that the same manifestations of intent show up both in robustly competitive markets and in markets that are vulnerable to monopolization. As a result, bad intent is easily proven but seldom serves to distinguish situations where monopolization is possible from those where it is unlikely or even impossible.

Indeed, only in the perfectly competitive model do firms have no intent whatsoever respecting competitors. In any oligopolistic market – that is, in virtually every market where monopoly is plausible – firms necessarily observe the decisions of their rivals and respond accordingly. In such circumstances one generally cannot distinguish appropriate and inappropriate "intent to harm rivals" apart from the conduct itself, thus making the separate intent inquiry moot."<sup>15</sup>

and

"... the object of s46 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.

<sup>14</sup> See *ACCC v Metcash Trading* (2011) 198 FCR 297, *AGL v ACCC (No 3)* (2003) 137 FCR 317 and *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38.

<sup>15</sup> Areeda and Hovenkamp, *Antitrust Law*, ¶601.

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.<sup>16</sup>

These warnings refer particularly to the "intent" to harm competitors, rather than to substantially lessen competition. Nevertheless, the warnings should be heeded – where the respondent or the rival is a significant market participant (as will necessarily be the case in this context), it is only a small step from one to the other finding.<sup>17</sup>

The Committee's concerns that the "purpose" element is overly inclusive are exacerbated by two factors:

- the degree to which "purpose" may be drawn from the evidentiary record with the assistance of s4F (which permits the "purpose" of the corporation to be only one of potentially several "substantial" purposes); and
- the fact that the "purpose" need not be capable of being achieved – see the Full Federal Court's reasoning in *Universal Music*.<sup>18</sup>

#### *A solution*

To address this concern, the Committee suggests that the words "the purpose, or has" be deleted from the form of the proposed provision, set out above.

This amendment will address the Committee's concern on the "purpose" issue.

- The form of s46 would then be in line with that of s50 of the CCA, which also focuses (properly, in the Committee's view) on the effect or likely effect of the conduct – in that case, the acquisition of shares or assets.
- Evidence of the corporation's purpose would still be relevant to the matter. In discerning the effect or likely effect of the corporation's conduct, the Court may properly have regard to the corporation's internal records and the views of its management as to the intended outcome/effect of its conduct.<sup>19</sup>

Also, the provision would be in line with the similarly cast s79 of the Canadian *Competition Act*, which has been in force since 1986. That provision prohibits abuse of a dominant position in the following terms:

"Where, on application by the Commissioner, the Tribunal finds that

- (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
- (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
- (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

<sup>16</sup> *Queensland Wireat* [24], per Mason CJ and Wilson J.

<sup>17</sup> *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529, at [266], "Whether the purpose of lessening competition with a particular market participant amounts also to the purpose of substantially lessening competition in the market must depend upon the facts of the particular case; ... even elimination of competition with a minor market participant might have no more than a trivial effect on competition in the market, whereas only reduction of competition with a major participant might dramatically lessen competition."

<sup>18</sup> *Ibid* at [259] and [274].

<sup>19</sup> See *Rural Press Ltd v ACCC* (2003) 216 CLR 53 per Gummow, Hayne and Heydon JJ, "The views and practices of those within an industry can often be most instructive ... on the question of assessing the quality of particular competitive conduct in relation to the level of competition and the impact of its cessation."

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice." (emphasis added).

- (c) **Form of the defence:** The Committee is concerned that the form of the proposed defence is not appropriate for various reasons.

In that context, the Committee suggests three alternative approaches to dealing with the concern raised by the Review Panel that (Draft Report, Page 210):

"... in recommending reform, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct, thereby damaging the interests of consumers."

#### *Defence not appropriate*

In the Committee's preliminary view, the form of the proposed defence, in two, cumulative parts, is such that it is unlikely ever to be made out. Thus, there may be little utility in its inclusion and it will not serve the Review Panel's objective, above.

While the underlying concepts of a legitimate, "rational business decision" (apparently drawn from the current jurisprudence on what constitutes a "taking advantage" of substantial market power), and the "long-term interests of consumers" may be sound from a theoretical perspective, the Committee is concerned that a defence cast in these cumulative terms is unlikely to be practically established by a respondent, bearing the onus of proof on the many issues involved. This is for several reasons.

- The second element requires evidence which supports a clear link, as a matter of "likely effect", between the conduct and the "long-term interests of consumers". In cases involving "up-stream" products such as steel "Y-bar", concrete masonry sold to builders, sterile fluids sold to hospitals, flyash sold to concrete suppliers and the acquisition of television broadcasting rights,<sup>20</sup> the conduct is very significantly removed from transactions which directly involve end consumers within s4B of the CCA, although it is unclear whether the Review Panel intends to focus on that subset of consumers. Further, even in matters involving consumer products more directly,<sup>21</sup> there would be a very complex forensic task (with the respondent bearing the onus and requiring extensive evidence drawn from across the relevant industry across several functional levels – not just the market concerned), involving both factual material and expert economic evidence, to establish that the particular conduct (a refusal to deal, or low pricing, in a particular limited context, for example) was in the "long-term interests of consumers".
- The first element of the defence is less complex and will draw upon a more limited evidentiary record than the second element. However, it is not straightforward. On its face, the element appears to be a variation on the "take advantage" test within the current form of s46(1), but with the onus reversed and the relevant inquiry narrowed.<sup>22</sup> This is unlikely to be any less complex than the current "taking advantage" element under s46(1) and the inquiry will still involve potentially complex and uncertain assumptions.<sup>23</sup>
- Combined, the two elements of the defence will result in more complex cases under the provision. In any case in which they are invoked, there will have to be a very extensive inquiry and record and the defence as a whole is unlikely to be made out.

<sup>20</sup> See previous cases Queensland Wire, Boral, Baxter, Cement Australia and Seven Network.

<sup>21</sup> Examples may be found in *Australian Safeway Stores* (supply of bread to supermarkets), and *Universal Music* (supply of CD's to record stores).

<sup>22</sup> Whether there has been a "taking advantage" of substantial market power under s46(1) in its present form may draw upon a range of inquiries, only one of which is the "legitimate business conduct" consideration. See ss46(6A) and *Aspen Skiing in a Sunburnt Country*, Reid, (2005) 73 Antitrust Law Journal 209.

<sup>23</sup> See *Melway Publishing v Robert Hicks* (2001) 205 CLR 1, "To ask how a firm would behave if it lacked a substantial degree of market power in a market ... involves a process of economic analysis which, if it can be undertaken with sufficient cogency, is consistent with the purpose of s46. But the cogency of the analysis may depend upon the assumptions that are thought to be required by s46."

For these reasons, the proposed provision may not achieve the Review Panel's broader objectives of clarifying the meaning and scope of s46.

#### *Alternative approaches?*

The Committee acknowledges the Review Panel's concern that pro-competitive conduct may be inadvertently captured by the proposed provision without a "backstop" defence.

The Committee suggests three alternatives for consideration by the Review Panel. The Committee considers that each will involve less extensive forensic inquiry than the proposed defence, but may nevertheless achieve its intended outcome.

- *Conduct must be "anti-competitive"*: Rather than propose a defence, the proposed provision could require that the conduct be "anti-competitive" in character, with the effect, or likely effect, of substantially lessening competition. This proposal is drawn from the form of the Canadian prohibition on dominant firm conduct – see s79 of the *Competition Act*, set out above. In the Canadian s79, the second element is that the dominant firm (in that case, with the power to "control" the market) must have engaged "in a practice of anti-competitive acts", which has the effect, or likely effect, of substantially lessening competition. The expression "anti-competitive act" is explained in s78, with an inclusive, rather than definitive, list of market practices.

To take up this suggestion, one might amend the proposed provision as follows:

"A corporation that has a substantial degree of power in a market shall not engage in anti-competitive conduct which has ..."

The term "anti-competitive" is not currently used in the CCA. However, it (and consideration of an appropriate definition) may serve to ensure that only conduct which has a clearly exclusionary or other anti-competitive character is prohibited – thus not "capturing pro-competitive conduct" as the Review Panel has identified.

- *Court must have regard to efficiency elements*: Instead of including a formal defence, the proposed provision could include a requirement that, without limiting the matters to which the Court may have regard, it must have regard to whether the conduct is efficiency enhancing or (to draw again on the Canadian provision) whether any potential lessening of competition is a product of "superior competitive performance".<sup>24</sup>

In commentary on the Canadian provision,<sup>25</sup> it is made clear that "superior competitive performance" is not a basis on which conduct by a dominant firm is permitted – rather it is a factor to be taken into account in assessing the cause of the substantial lessening of competition:

"While there is no explicit efficiencies defence to allegations of abuse of dominance, the Tribunal is bound to consider ... whether the prevention or lessening of competition is attributable to superior competitive performance of the dominant firm (e.g. by virtue of economies of scale, scope or location, innovation, and research or distribution and marketing methods). The Tribunal is not required to balance superior competitive performance against the effects of anticompetitive acts, as it is only a factor to be considered in determining the cause of the lessening of competition, and not a justifiable goal for engaging in an anticompetitive act."

The Review Panel's concerns may be addressed by this possible approach, as it seems to go to the Tribunal/Court having to consider and determine the "cause of

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<sup>24</sup> See subsection 79(4) of the Canadian *Competition Act*, which provides that: "*In determining, for the purposes of subsection (1), whether a practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.*"

<sup>25</sup> See *Competition Act and Commentary*, Stikeman Elliott, LexisNexis, 2013 edition, at p119.

the (contended) lessening of competition" by reference to factors which include potentially pro-competitive elements.

- *Follow the lead of s50 - rely on "the effect ... of substantially lessening competition" and include factors a Court must take into account:* Just as is the case with s50 of the CCA presently, the proposed provision might simply prohibit conduct which has the effect, or likely effect, of substantially lessening competition in a market (in Australia) – with no "backstop".

While (as noted above) the forensic inquiry required to establish an effect of substantially lessening competition is potentially broader than that required by s46(1) today, it is an established benchmark and will draw upon the cases resolved on the issue already, particularly those under s50. In short, the Courts might be given the challenge to ensure that the benchmark is applied sensibly, and that it does not operate to "capture pro-competitive conduct thereby damaging the interests of consumers", per the Review Panel's concerns.

If so, the Explanatory Memorandum to the required legislation should clearly emphasise this point.<sup>26</sup>

If this proposal is to be seriously considered, the Committee suggests also that, by extension of the position under s50, the proposed provision should also include a subsection in similar terms to ss50(3),<sup>27</sup> which sets out factors which the Court must take into account in assessing whether conduct has the effect, or likely effect, of substantially lessening competition.

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<sup>26</sup> The EM might usefully point out, for example, that the reform Bill has as its objectives:

- to foster competition on the merits;
- to encourage conduct which promotes the long-term interests of Australian consumers;
- not to deter efficient, competitive conduct by larger firms, even if it results in lost sales for less efficient competing firms; and
- to permit firms with substantial market power to engage in legitimate, competitive business conduct, being that which would be engaged in by firms without substantial market power.

<sup>27</sup> Subsection 50(3) would need to be amended in order to be adopted in this context – particularly, for example, paragraphs (e) and (h) will require amendment to substitute "the conduct" for the current references to "the acquisition". The new provision could be added to, with reference to the notion of "superior competitive performance", as an (exculpatory) element of the character of the conduct, drawn from the Canadian provision referred to above.

#### 4. MERGERS (CHAPTER 15)

##### Key points in this section:

- (a) While the mechanisms in Australia to veto or impose conditions on mergers and acquisitions that are anti-competitive are, by and large, appropriate and effective, the Committee believes that the Review Panel's proposals to improve the informal and formal merger review processes are desirable and necessary.
- (b) The Committee agrees in principle with the Review Panel's proposals to reform the merger review processes. The Committee considers that a key objective of a combined ACCC and Tribunal formal merger process must be (i) to avoid protracted or unpredictable decision-making by the ACCC or the Tribunal; and (ii) to ensure that the timing and process of merger reviews do not unnecessarily undermine commercial certainty, and thus the efficacy of a new process.
- (c) A key change required is to overhaul the formal merger review provisions in the Act to introduce an effective and transparent decision-making process by the ACCC. This is of increased importance if, as the Review Panel proposes, the ACCC becomes the first instance decision-maker in all matters (instead of parties having the option to go direct to the Tribunal for authorisation).
- (d) The Committee supports retaining the existing authorisation merger process with the option for a direct request to the Tribunal for authorisation.
- (e) If a new combined ACCC and Tribunal review process is introduced as proposed by the Review Panel, it must not run the risk of resulting in protracted decision-making. In particular, any first instance review process by the ACCC should be subject to a strict time constraint. For example, the ACCC could be provided with 20 working days to conduct a pre-assessment decision process to determine whether it can reach a final decision in fixed 3 month period thereafter. In the event that the ACCC determines this is not possible, the applicant could elect to have the matter referred directly to the Tribunal, which would also have a 3 month period that could be extended to 6 months in exceptional cases (as per the current model). Members of the Committee have mixed views on whether the review period afforded to the ACCC and the Tribunal should be further restricted, for example to two months instead of three.
- (f) Another mechanism by which greater certainty over timeframes might be achieved is that rather than a full merits review, appeal to the Tribunal is limited to a review of the evidence put to the ACCC (unless the Tribunal determines it requires additional material or if the ACCC or the applicant can demonstrate there are exceptional circumstances to justify introduction of new evidence). Members of the Committee have mixed views on this issue.

#### 4.1 No need for change to substantive merger laws

The Committee agrees with the Review Panel that overall the merger provisions of the CCA are working effectively and no changes to the substantive law are necessary.

The Committee agrees with the Review Panel that there is no need to change the definition of 'market' in the CCA (which refers to a market in Australia). Global competitive constraints on markets in Australia are however an increasingly important factor in merger review decisions by the ACCC and the Tribunal.

The Committee agrees with the Review Panel that the definition of 'competition' in the Act could be amended to expressly include competition from **potential** imports of goods and services, not just actual imports.

## 4.2 Informal clearance process to be improved following further consultation

As discussed in its June 2014 Submission (page 66), the Committee submits that for the relatively small proportion of mergers that are complex and require detailed application of sophisticated market and competition analysis, the benefits of the informal clearance process do **not** outweigh the downside. The Committee agrees with the Review Panel that, while the informal process works well for the majority of non-complex mergers, issues of transparency and timeliness arise in more complex and contentious matters.

As discussed in detail in its June 2014 Submission (pages 66 to 70), the Committee strongly supports the following amendments to the informal review process.

- **Transparency** - merger parties to be granted increased access to, and ability to test and challenge, evidence from third party consultations conducted by the ACCC. Confidentiality protocols and procedures, if necessary, would adequately address any issues the ACCC may have with disclosing information. The ACCC regularly relies on mandatory information gathering powers during market inquiries, such that greater transparency would not adversely affect the ACCC's ability to obtain information from merger parties and market participants.
- **Timeliness** - a requirement for the ACCC to set and meet a formal timeline for making a decision (within 12 weeks of a SOI being published) and to meet certain mileposts along the way.
- **Detailed reasons** - a requirement for the ACCC to publish detailed reasons for decisions to clear or block a merger (whereas Public Competition Assessments often currently fail to detail evidence relied upon to reach decisions) in a timely manner.

The Committee agrees with the Review Panel that further consultation is required to reach consensus on how to frame and implement these improvements to the informal review process. The Committee submits that the ACCC, business representatives and other experts should participate in the consultation process.

The Committee would be pleased to develop options for improvement for further consideration should there be merit in it doing so. The Committee considers that the informal review process could be regulated to achieve these improvements without jeopardising the benefits of the flexible and informal decision-making process.

## 4.3 The ACCC formal merger review process needs to be overhauled to operate effectively alongside an appeal process to the Tribunal

The Committee agrees with the Review Panel that the formal approval process, as an alternative to informal clearance, should be reviewed to ensure that it is accessible to and efficient for businesses. As discussed in its June 2014 Submission (pages 70 to 71), the Committee supports a full review and overhaul to remove unnecessary restrictions and requirements that represent a significant barrier to the adoption of the formal process by business, including in particular prescriptive information requirements. The Committee reiterates the importance of transparency in any revised formal merger process.

As discussed in its June 2014 Submission (page 71 to 72), the Committee supports the existing merger authorisation process, where parties have the option to approach the Tribunal directly, remaining in place. The Committee has mixed views as to the efficacy of the current authorisation process contained within the CCA and the extent to which improvements should or could be made.

The Review Panel has suggested in its Draft Report that the formal review process could be reformed to combine variations of the current ACCC formal merger review process and the Tribunal authorisation process. The Review Panel also considers that the ACCC should be the first instance decision-maker, rather than the Tribunal (which in its view is better suited to an appellate or review role).

In the event that a formal procedure is introduced to combine a first instance ACCC decision and a Tribunal review process, the Committee's members have mixed views on how these procedures should be combined to implement the reform. Some initial observations of the Committee in response to the Review Panel's Draft Report are set out below.

The Committee submits that significant changes would be required to the ACCC's current formal review procedure before it would be an acceptable forum for first instance decision-making. In addition, careful consideration needs to be given to timing implications for transactions if parties are required to complete an ACCC process before they can approach the Tribunal. The initial observations of the Committee on these matters are set out below:

- (a) In the event the ACCC becomes the first instance decision-maker in all matters (rather than parties having the option to by-pass the ACCC and go straight to the Tribunal), an appropriate framework must be introduced to govern this review by the ACCC and its interaction with the Tribunal's review.
- (b) The Committee agrees with the Review Panel that any first instance formal process by the ACCC should be subject to a merits review by the Tribunal. The Committee considers it vital that the Tribunal retain the role of ultimate decision-maker. As discussed below, the Committee's members have mixed views on the extent to which parties should be permitted to submit new evidence during such a review.
- (c) The Committee agrees with the Review Panel that the ACCC's first instance decision would need to take into account whether the merger is likely to substantially lessen competition and whether it would result in public benefits that would be likely to outweigh any anti-competitive detriment. The ACCC has extensive experience in assessing public benefits arguments in non-merger matters.
- (d) As discussed above and in its June 2014 Submission (pages 70 to 71), the Committee submits that the ACCC's formal decision-making process requires **significant reform** to provide an effective merger clearance option for business. Getting this right is of paramount importance if the ACCC is required to assess competition and public benefit matters, and if parties no longer have the alternative option of presenting public benefit arguments directly to the Tribunal in the first instance.
- (e) The Committee agrees with the Review Panel that the information requirements in the current ACCC formal merger process are unduly prescriptive. The Committee supports a relaxation in the information requirements as proposed by the Review Panel. However, the Committee recognises that there is a tension between the degree of relaxation of information requirements, and the imposition of stricter time limits on the ACCC for a decision. For this reason, the Committee would support a recommendation that the ACCC issue revised guidelines which set out the type of information that the ACCC would expect to accompany a formal merger application, without being proscriptive.
- (f) An issue of particular importance is that further consideration must also be given to the **timing** implications of a combined review, in particular if the ACCC blocks a merger and the merger parties are required to go through a second process appealing the matter to the Tribunal. The Warrnambool Cheese & Butter sale process is an example of the potentially fatal adverse impact of competition review processes on the success of bids in a sale process. It is important that a formal review mechanism from the commencement of a review by the ACCC to a decision by the Tribunal on appeal from the ACCC's decision is not so protracted and susceptible to "clock stop" events that it becomes impractical for all but the most exceptional mergers. A protracted review process is likely to mean that it will not be used in the majority of competitive bid situations, and may be confined to limited types of mergers where there is effectively only one likely buyer and no pressing time constraints.

- (g) The Review Panel has proposed a maximum of three months for review by each of the ACCC and the Tribunal. The Committee submits that it is unlikely to be desirable for the Tribunal review period to be truncated from the current three month process (that can be extended to six months in limited circumstances) given the likely complexity of matters that would reach this review stage. The Committee submits therefore that the ACCC should be required to reach a decision within a set and reasonably short timeframe to avoid protracted decision-making in complex matters that require review by both bodies.
- (h) One option that is supported by some members of the Committee would be for the ACCC to be required to conduct a **pre-assessment** of the matter and to reach a preliminary decision (say within **20 working days**) either:
  - (i) to commit to making a final written decision within a three month period from notification; or
  - (ii) to refer the matter directly to the Tribunal (perhaps at the election of the applicant if the ACCC proposes a decision timeline longer than three months).
- (i) Members of the Committee have mixed views on whether the review period afforded to the ACCC and the Tribunal should be further restricted, for example to two months instead of three months.
- (j) Some members of the Committee are of the view that the Tribunal's review should, rather than a full merits review, be limited to the evidence put to the ACCC unless:
  - (i) there are exceptional circumstances requiring otherwise (such as the ACCC's decision having raised issues that the parties have not had the opportunity to fully respond to or a material change in market conditions); or
  - (ii) further evidence is requested by the Tribunal.

As well as increasing the likelihood of a timely Tribunal decision within the initial three month period, such a constraint would reduce the potential risks of removing the mandatory information requirements because it would encourage merger parties to make a full notification from the outset and provide all relevant information to the ACCC.

- (k) The Committee considers that, given the Tribunal has only been involved in two authorisation matters to date, it would be appropriate to defer a further more comprehensive review of the Tribunal's role until such time as it has been involved in sufficient matters against which to test the effectiveness of any review process. Further consideration may also be required to be given at a future date to how effectively the ACCC adopts a role of reviewing and reaching decisions based on public benefits factors in a merger context, and whether further guidance is required in this regard.

One critical element of the current formal review processes that must be retained in any event is **transparency** of all materials produced by the merger parties, interested parties and the ACCC, subject only to the application of appropriate confidentiality regimes, where required.

The Committee submits that while in principle a combined review process is workable and desirable, given the issues with the existing ACCC formal merger review process and the significant commercial uncertainty that can result from a lengthy or unpredictable review timeline, it is important to regulate these matters to create an effective decision-making process that does not threaten the competitive nature of sale processes. In particular any new mechanism must provide certainty from a timing perspective or the new system may become as little used as the current formal ACCC process.

## 5. BLOCK EXEMPTION POWERS (CHAPTER 19)

### Key points in this section:

- (a) The Committee supports the recommendation of the Review Panel's Draft Report that a block exemption regime be introduced into the CCA, consistent with the approach which has been adopted in the EU.
- (b) The current authorisation process, while working well, remains time consuming and costly for business, and typically requires a high degree of information disclosure to the ACCC and, at times, to other industry participants (including competitors).
- (c) The Committee agrees that a block or class exemption mechanism can provide a means to reduce these costs in the case of common practices. However, like authorisation itself, block exemptions remain a complementary solution, and the Committee reiterates its June 2014 Submission that Australian competition law would benefit from the introduction of a general rule of reason or efficiency defence to per se conduct or that which substantially lessens competition. This would be consistent with the evolution of other leading global antitrust regimes.
- (d) There is Australian precedent for class or block exemptions – including under powers exercised by ASIC. While the ATO also has legislative power to issue class rulings, unlike ASIC powers, ATO rulings operate as binding interpretative decisions and not as legislative instruments capable of formally exempting conduct from the operation of the law.
- (e) In the absence of a general 'rule of reason' or similar general efficiency defence for individual agreements under Australian law, the current authorisation process in Part VII of the CCA would need to be retained in parallel with any block/class exemption framework.

### 5.1 Background and Review Panel draft recommendation

As noted in the Committee's June 2014 Submission, Australian competition law is relatively reliant on individual administrative processes to exempt per se conduct at a time when other leading jurisdictions have developed general efficiency (or similar) defences to per se conduct, including the United States, EU and more recently, New Zealand.

By contrast to this international practice, Australian authorisation and notification processes can prove time-consuming, costly and expose business to significant disclosure requirements (including, at times, to third parties).

The Committee considers that Australia's continued reliance on individual authorisations for per se conduct contributes to the regulatory and compliance burden of business and is increasingly out-of-step with international regulatory practice. The CCA would benefit from the introduction of a general efficiency or similar defence – akin to the rule of reason in the United States, the direct applicability of Article 101(3) in the EU and the collaborative ventures defence proposed in New Zealand in respect of cartel conduct.<sup>28</sup>

In the absence of such a defence, or to supplement it, the Committee would support the introduction of a block exemption regime within the CCA, so that business can rely on decisions of the ACCC without the need to seek individual authorisation or notification of their agreements.

<sup>28</sup> Commerce (Cartels and Other Matters) Amendment Bill (NZ)

Consistent with the Review Panel's strong focus on removing or reducing regulatory burdens, the Committee would encourage the Review Panel to reconsider the introduction of a general efficiency or similar defence to per se conduct, as proposed in the June 2014 Submission. This would simplify the operation of the CCA and be consistent with the Review Panel's focus and operate as a useful discipline on the ACCC in prosecuting alleged per se contraventions.

However, absent such a general defence, the Committee agrees with the Review Panel that the introduction of a block exemption regime in Australia would be beneficial.

As the Committee noted in its June 2014 Submission, the current authorisation process has a number of features that make it expensive, time-consuming and cumbersome for business, even where conduct is relatively benign or pro-competitive.

The benefits of a block exemption alternative are likely to include:

- (a) greater administrative certainty for business;
- (b) a more transparent and consistent application of competition law and reduces the compliance cost and complexity for business;
- (c) reduced costs and greater efficiency for the ACCC, reducing its need to focus resources on conduct which is common or poses low risks; and
- (d) allowing businesses to structure their commercial activities and arrangements with greater clarity and legal confidence.

These benefits have been recognised in the EU and in Australia, most recently in the 2011 review of the ATO's administration of class rulings.

Failing the removal of per se illegality, or the introduction of a generally applicable efficiency defence, it will likely be necessary that the current individual authorisation regime in Part VII of the Act is also retained, notwithstanding any block exemption powers granted to the ACCC.

In the EU, parties can rely on the defences in Article 101(3) which operates as a broad exemption for conduct that satisfies a reasonably general efficiency/competition test.<sup>29</sup> In the United States, which also does not have a mechanism for exemption of particular or individual conduct, parties have the benefit of the rule of reason defence.

Australia does not have any such general exemption or defence – with the closest analogy being the public benefit test applied by the ACCC in the case of individual authorisations.

## 5.2 The EU approach to block exemptions under the Modernisation Regulation

A system of block exemptions has operated in the EU for several decades. Until the introduction of Regulation (EC) No 1/2003 of 16 December 2002 (the **Modernisation Regulation**), this was supplemented by a system of individual exemptions granted by the European Commission (akin to the Australian system of authorisations).<sup>30</sup>

The Modernisation Regulation empowers the European Commission (in the areas defined by those Regulations) to apply the exemption in Article 101(3) by Regulation to certain categories

<sup>29</sup> For an agreement to satisfy Art.101(3) it must:

1. contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2. allow consumers a fair share of the resulting benefit;
3. not impose restrictions which are not indispensable to the attainment of (1) and (2); and
4. not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>30</sup> [http://europa.eu/legislation\\_summaries/competition/firms/l26092\\_en.htm](http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm)

of agreements.<sup>31</sup> When the European Commission issues a “block exemption regulation” (**BER**) – basically a group exemption - it exempts a category of agreement from the prohibition under Article 101 TFEU. If an agreement complies with a BER, it is valid and enforceable (unless it involves an abuse of dominance under Article 102). This enables business to ‘self assess’ the compliance of their agreements with existing administrative decisions.

Since 2004, a number of block exemptions have been implemented across various categories of agreements and in particular industry sectors:<sup>32</sup>

- Regulation 330/2010/EU - block exemption for vertical restraints<sup>33</sup>
- Regulation 772/2004/EC – block exemption for technology transfer agreements<sup>34</sup>
- Regulation 1218/2010/EU – block exemption for specialisation agreements<sup>35</sup>
- Regulation 1217/2010/EU – block exemption for research and development<sup>36</sup>
- Regulation 267/2010/EU – block exemption for agreements in the insurance sector<sup>37</sup>
- Regulation 906/2009/EC – block exemption for agreements between liner shipping consortia<sup>38</sup>
- Regulation 461/2010/EU – block exemption for agreements in the motor vehicle sector<sup>39</sup>

The European Commission retains the power to withdraw the benefit of a block exemption or to set limitations or conditions on the exemption applying in particular cases. The European Commission has also published guidelines that accompany BERs. The guidelines are not binding on the courts but are likely to influence questions of interpretation, and have proved helpful for practitioners and business.

Under this regime, the parties to conduct are required to conduct their own assessment of the proposed conduct to identify whether it benefits from a legal exemption. It is no longer possible to apply to the European Commission to carry out an assessment to grant an individual exemption or “comfort letter”. There is no procedure in the EU for individual exemption or authorisation by the European Commission. The benefits of the EU approach include:

- (a) increased ‘up front’ legal certainty for business, which can structure their commercial arrangements to comply with the block exemptions;
- (b) a reduced workload for the European Commission as previously a large number of individual agreements were being notified;
- (c) more effective and uniform application of EU competition law; and
- (d) increased responsibility of businesses which must ensure their agreements do not affect free competition.

It is acknowledged that there are also potential disadvantages to the operation of the block exemption regime, including the tendency for these decisions to impose a degree of rigidity on

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<sup>31</sup> Regulation (EC) No 1/2003 of 16 December 2002 at [10]

<sup>32</sup> C Tobler, J Beglinger, W Geursen, *Essential EU Competition Law in Charts* (2001).

<sup>33</sup> European Commission Regulation (EU) No 330/2010.

<sup>34</sup> European Commission Regulation (EU) No 316/2014.

<sup>35</sup> European Commission Regulation on (EC) No 1218/2010.

<sup>36</sup> European Commission Regulation (EU) No 1217/2010.

<sup>37</sup> European Commission Regulation (EU) No 267/2010.

<sup>38</sup> European Commission Regulation (EU) No 906/2009.

<sup>39</sup> Commission Regulation (EU) No 461/2010.

the commercial models and structures used. However, the corollary of this is that it provides more up front certainty and clarity, and avoids the need for individual administrative review.

On balance, therefore, the Committee considers that a block exemption regime is likely to increase commercial certainty and reduce compliance costs

### 5.3 ASIC – power to grant class exemptions from Corporations Act

*The Corporations Act empowers ASIC to grant block exemptions (or class exemptions) in respect of many parts of the Corporations Act.*

The *Corporations Act* contains a number of provisions conferring discretionary powers upon ASIC to grant class exemptions in respect of sections of the *Corporations Act*.

ASIC's powers to issue class exemptions operate provisionally, with there being no broad overarching power. As such, the scope and nature of ASIC's class exemption power varies throughout the *Corporations Act* according to the specific part or section. Most notably, ASIC is conferred significant class exemption powers through Chapter 7 of the *Corporations Act*, 'Financial Services and Markets'.<sup>40</sup>

Class orders will operate to apply to a class of persons or entities who carry out a particular activity in certain circumstances, for example, timeshare scheme operators, corporations conducting market research, operators of managed investment schemes based on syndicate arrangements. Under the *Corporations Act*, ASIC class orders are issued as legislative instruments that must be passed through Parliament. Under the *Legislative Instruments Act 2003*, all legislative instruments including ASIC class orders are repealed automatically after 10 years. Under s 39 of the *Legislative Instruments Act 2003*, ASIC class orders must be tabled to each House of Parliament with an explanatory statement.

ASIC will exercise these powers on its own initiative where it identifies an issue that may be resolved by a class order, but will also consider applications for class exemptions from interested parties. In issuing these rulings, ASIC will grant relief where it is "consistent with Parliamentary intention" and in situations where they deem it appropriate to address "atypical or unforeseen circumstances" and "unintended consequences of the licensing provision of the *Corporations Act*".<sup>41</sup>

Any exercise of power has to be justified by the net benefits that will arise, with ASIC considering the impact of any relief on consumer protection.

ASIC publishes a record each year of the class orders that it makes under these provisions.<sup>42</sup>

### 5.4 Australian Tax Office

*The Tax Administration Act 1953 empowers the European Commissioner of Taxation to issue public rulings in relation to how relevant provisions may apply to "entities generally or a class of entities"*

Under s 358 of Schedule 1 of the *Tax Administration Act 1953*, a written public taxation ruling may be made in relation to taxpayers generally, a specific class of taxpayers, or particular

<sup>40</sup> See s 798L granting class exemption discretion in relation to Part 7.2A "Supervision of financial markets", s 854B in relation to Part 7.4 "Limits on involvement with licensees", s 893A in relation to Part 7.5 "Compensation regimes for financial markets", ss 907D and 907E in relation to Part 7.5A "Regulation of derivative transactions and derivative trade responsibilities", ss 926A and 926B in relation to Part 7.6 "Licensing of financial services", s 926B in relation to Part 7.6 "Licensing of financial services" and ss 951B and 951C in relation to Part 7.7 "Financial services disclosure".

<sup>41</sup> RG 167.3, Regulatory Guide 167: Discretionary Powers, available from [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps167.pdf/\\$file/ps167.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps167.pdf/$file/ps167.pdf)

<sup>42</sup> Publication of ASIC class orders, <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Instruments>

arrangements or schemes, in what are known as 'Class Rulings' or 'Product Rulings'. 'Taxation determinations' issued by the Commissioner of Taxation under specific provisions provide similar powers to enact 'class wide' determinations, however they operate on a provision by provision basis and do not require the same detail justifying the ruling. Both public rulings and determinations have general operation and apply retrospectively, even where that would be less favourable to the taxpayer.

Section 358 of the *Tax Administration Act 1953* confers upon the Commissioner of Taxation the power to issue Class Rulings in relation to a 'relevant provision' which include: income tax; Medicare levy; fringe benefits tax; franking tax; withholding taxes; petroleum resource rent tax; mineral resources rent tax; indirect tax; excise duty; the administration or collection of the above taxes, levies and duties; product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000*; net fuel amounts; net amounts; and wine tax credits.<sup>43</sup>

Importantly, unlike EU block exemptions (which operate to legally exempt conduct from the legislative prohibitions), the ATO rulings are simply **binding interpretations** of the law. Therefore, while public rulings provide the ATO's interpretation of the law and are legally binding on it, they are not laws in and of themselves.

In September 2011 the Inspector-General of Taxation released its "Review Panel into the Australian Taxation Office's administration of class rulings" that assessed both the benefits and problems of the public ruling framework.<sup>44</sup> The review was generally supportive of the ATO class ruling system, noting that "the class ruling system is generally considered to be a useful element of the tax system... In general, class rulings effectively mitigate operational costs and reduce risk by providing greater administrative certainty to relevant taxpayers."

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<sup>43</sup> Taxation Ruling TR 2005/10 available at <http://law.ato.gov.au/atolaw/view.htm?Docid=txr/tr200610/nat/ato/00001>

<sup>44</sup> Review into the Australian Taxation Office's administration of class rulings, available from [http://www.igt.gov.au/content/reports/ATO\\_class\\_rulings/ATO\\_class\\_rulings.pdf](http://www.igt.gov.au/content/reports/ATO_class_rulings/ATO_class_rulings.pdf)

## 6. MARKET STUDIES POWER AND ACCC GOVERNANCE (CHAPTER 22)

### Key points in this section:

- (a) The Committee agrees with the Review Panel's conclusion that the ACCP should be assigned a market studies function, as this would naturally form part of the ACCP's core functions in the development of competition policy recommendations. It is appropriate for the ACCP to hold this function, rather than the ACCC, due to the ACCP's independent status and proposed accountability to all governments.
- (b) The Committee does not support the introduction of mandatory information-gathering powers for the ACCP, as this is likely to create an adversarial environment that is not appropriate for the ACCP's proposed role and culture. The Committee is also concerned that mandatory information-gathering powers would cause substantial cost and inconvenience for market participants, the ACCP and, in turn, consumers, as a result of additional formalities, expenses and delays.
- (c) The Committee now queries the need for an advisory body or review officer to oversee the ACCC's decisions and actions. The significant changes proposed by the Review Panel in relation to the exercise of powers under s155 of the CCA, review of merger decisions and the regulatory role of the ACCC would seem likely to meet the concerns previously raised by the Committee.
- (d) The Committee is concerned about the efficiency, and efficacy, of the proposed board with independent, non-executive directors. Non-executive board members may face significant difficulties in keeping across the heavy volume and range of matters dealt with by the Commission on a day-to-day basis and that this would likely result in substantial delays in decision-making. Further, the Committee questions the need for independent non-executive members with a purely strategic role, particularly in light of the proposed development role of the ACCP.

### 6.1 Market Studies Power

The Committee agrees with the conclusion of the Review Panel that the new national competition body proposed by the Review Panel, the Australian Council for Competition Policy (ACCP) should be assigned a market studies function and that this would create "a convenient, consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues" (Draft Report, page 284). Such a function would naturally form part of the core functions of the proposed ACCP and it is difficult to envisage the Council undertaking its role without it.

It is also clearly appropriate that it is the ACCP that holds this function, rather than the ACCC. As noted by the Review Panel, reinvigorating competition policy requires "independent, transparent reviews of progress" (Draft Report, Page 283). The independent status of the ACCP, and its proposed accountability to all governments, State and Territory as well as Federal, are core tenets which underlie the essential rationale for the body and elevate it over the ACCC as the appropriate body for a market studies function.

That said, providing the ACCP with a market studies function will have potentially significant resource implications for the body if such studies are to be done sufficiently regularly and properly, with appropriate expertise. The resource implications will depend on how many studies per annum are seen as necessary or desirable, how many staff such studies would warrant and the relevant mix of expertise, which could vary depending on the particular study.

The majority of respondents to an ICN survey have reported conducting less than five studies per year.<sup>45</sup> However, as is evident from the ACCC's experience with price inquiries (for example, its 2007 inquiry into the fuel sector and its 2008 inquiry into the grocery sector), even

<sup>45</sup> *Market Studies Project Report*, ICN Advocacy Working Group, 2009, [7.35] – [7.37]

one study could command substantial time and resources. The ICN report showed that there is a large variation in the number of full-time equivalent staff allocated to such work on an ongoing basis. The largest teams comprised 15-25 FTEs and the smallest, one member of staff. Clearly, there is likely to be considerable variation also depending on the nature of the study being undertaken.

One way to tackle this issue is for the ACCP to contract out aspects of the research (as is not uncommon in other countries where market studies are conducted) and/or to second ACCC (and/or possibly Productivity Commission) personnel. A further option is that the ACCP and ACCC conduct market studies jointly. This would be a useful model where a study is to be carried out into a market or sector into which the ACCC has previously conducted an inquiry or had substantial enforcement experience. It makes sense in this regard to draw on the ACCC's considerable expertise.

However, the Committee has concerns about whether mandatory information-gathering powers should be conferred on the ACCP in connection with such a market studies function. As noted by the Review Panel (Draft Report, page 285), conferring powers of a mandatory nature "may create an adversarial environment where participants show reluctance to cooperate and share information with the market studies body". Powers of this sort are much more in the nature of enforcement powers and conferring them on the ACCP risks colouring the perception, and perspective, of the ACCP as a body whose role is the development of policy recommendations. Enforcement of the information-gathering powers themselves would require an approach, and additional resources, which would not be consistent with the core function and culture of the ACCP.

The Committee is also concerned that mandatory information-gathering powers will incur substantial cost and inconvenience for not only market participants but also the ACCP itself. In the experience of the Committee, the exercise of mandatory powers of this type introduces very significant formality, expense and delay. It would be naïve to believe that these costs would not be passed on to consumers in some form, such as higher prices or delayed or reduced investment and innovation.

Lastly, experience demonstrates that there is no need for the exercise of mandatory information-gathering powers to conduct effective policy reviews and produce sound reform recommendations. Consistent with the observations of the Review Panel (Draft Report, page 282) there is no indication that the absence of the exercise of mandatory information-gathering powers by the Productivity Commission has hindered or reduced the effectiveness of that Commission in its review and recommendations concerning the efficiency of various markets. Moreover, the work of the Review Panel itself is evidence of the ability to conduct sound policy reviews without the exercise of mandatory powers.

Notably, the ACCC would undoubtedly make submissions and perform a significant role in informing the work of the ACCP, as it has done with a number of Productivity Commission reviews and the current review of the Review Panel itself. There is therefore no basis for concluding that the ACCP would be deprived of information and arguments reflecting a wide range of perspectives and approaches if it did not have mandatory powers.

## **6.2 ACCC governance**

In its submission in response to the Review Panel's Issues Paper, the Committee suggested that there was a significant role that could be played by an advisory body or review officer (such as an ombudsman) in the oversight of the ACCC's decisions and actions. However, in view of the other recommendations that have been put forward by the Review Panel in its Draft Report, the Committee now queries whether there would be a need for such an agency or officer. The Committee also questions whether the proposed changes remove the basis for the proposal by the Review Panel that the current Commission be replaced with a board with executive and non-executive members with business, consumer and academic expertise.

The concerns of the Committee about the accountability and governance of the ACCC, as expressed in its previous submission, substantially revolved around review of merger

decisions, the exercise of powers under s155 of the CCA and the regulatory role of the ACCC. In each of these areas, the Review Panel has proposed very significant changes which would seem likely to meet the concerns of the Committee about accountability and governance of the ACCC's decision-making in those areas. The Committee accordingly submits that, should these other proposals of the Review Panel be adopted, there is perhaps no need for the oversight or advisory body previously suggested by the Committee.

To the extent that a need remains, the Committee considers that any such oversight body be focussed upon those processes of the ACCC that are not readily subject to judicial review (because they are not in fact actions governed by specific provisions in the legislation, for example, the informal merger clearance process). Another example of such processes is the issue of infringement notices, as infringement notices have no legal standing if the parties do not elect to pay the relevant infringement notice amount. There may be some merit in the establishment of a limited review process of some kind in these areas.

However, the Committee has real concerns about the efficiency, and efficacy, of the proposal that a board with independent, non-executive directors be added to the governance of the ACCC. Through the frequent interaction of its members with the ACCC, the Committee is well-acquainted with the extremely heavy workload of the ACCC Commissioners and the need for the Commissioners to be intensively engaged with Commission matters to enable (relatively) timely decision-making.

There are likely to be very significant difficulties in non-executive board members keeping across the volume and range of the matters dealt with by the Commission on a day-to-day basis. It is hard to envisage that non-executive board members would be able to acquire a sufficient understanding of the details of the large number of matters handled by the ACCC to make a material contribution to the decision-making of the ACCC. Even with weekly, rather than monthly, meetings of the proposed board, there would be likely to be substantial delays in decision-making.

Further, the Committee notes that significant conflict issues are likely to arise in the context of such a body, leading to possible or actual bias or conflict issues, such that the ACCC could be seen to lose its status as an independent body that is appropriately accountable to the Courts in most areas.

As the ACCC's predominant role is enforcement of the law, as expressly set out in legislation and interpreted by the Federal and High Courts, there is a substantial degree of prescription in relation to the work of the ACCC and it is not clear what strategic role would be left to independent, non-executive members of a board. This is particularly the case if a policy development role is to be assumed by the ACCP, as proposed by the Review Panel, as this would leave the ACCC in a pure enforcement body, and there would appear to be even less need, or opportunity, for input from independent board members in relation to strategy.

### **6.3 ACCC's role in competition policy matters**

The Committee also notes that, notwithstanding the role of the ACCP, the ACCC has a role to play in the development of competition policy and its advocacy. This is consistent with the approach in most other jurisdictions and in fora such as the International Competition Network, which support an advocacy role for competition authorities (that is, advocacy as it relates to competition policy and not just education of businesses and consumers about the law).

Accordingly, the Committee would consider it appropriate for the ACCC to be represented, along and as one of others, on the ACCP.

## 7. Other comments – draft recommendations 7, 8 and 32

### Key points in this section:

- (a) The Committee supports the Review Panel's draft recommendation 7 that there be an overarching review of intellectual property undertaken by an independent body.
- (b) It is premature to recommend the repeal of section 51(3) of the CCA (draft recommendation 8) in light of this proposed review, given the complex policy and practical implications involved in resolving the interplay between IP protection, and encouragement of competition.
- (c) In respect of draft recommendation 32, the Committee is not aware of anything that would deny a State Supreme Court jurisdiction over the secondary boycott provisions of the relevant State's Competition Code. The Committee submits that consideration should be given to whether existing legislation relating to the enforcement of the Competition Code is adequate, or whether further legislation to vest federal jurisdiction in relation to secondary boycotts in State courts is desirable.

### 7.1 Subsection 51(3) of the CCA

The Committee supports recommendation 7 of the Draft Report that an overarching review of IP to be undertaken by an independent body, such as the Productivity Commission. As noted by the Review Panel, an appropriate balance needs to be struck between fostering innovation and encouraging investment in new technologies, and ensuring that associated IP rights are not used to stifle competition.

The relevant policy and principle considerations, and the practical impacts of changes to the CCA in this context, should be fully ventilated and debated as part of this review. The review could, for example, consider and examine in detail issues such as the efficiencies of IP protection, the circumstances under which various kinds of IP licensing restrictions are or are not justified on efficiency grounds, the extent to which IP restrictions that are justifiable on efficiency grounds should be exempt from legal prohibition and whether existing or proposed avenues of exemption are themselves efficient and appropriate.

The Committee believes that this broader review would be the appropriate avenue through which to explore whether, for example:

- s51(3) should be repealed, as recommended by the Review Panel (draft recommendation 8);
- the recommendations of the Ergas Committee should be adopted;<sup>46</sup> or
- s51(3) should be broadened to provide a safe harbour for dealings with IP rights, which is not subject to a substantially lessening of competition test.

The review should also take into account the IP/competition interface issues arising elsewhere in the context of patent and antitrust litigation and, for example, the revised Canadian Competition Bureau IP Enforcement Guidelines released in September 2014, the ongoing evaluation by and policy papers released by the European Commission and the FTC and cases on appeal or ongoing in the US in this area.

The review could also consider in detail, and with the benefit of additional and focussed submissions:

- (a) whether the existing CCA notification and authorisation processes are adequate to deal with cases where IP related restrictions on competition are justifiable on efficiency grounds, and take the benefit of overseas approaches to this question (for example, a key feature of US and EU competition laws is that efficiency-

<sup>46</sup> Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement (2000)*, p.19.

enhancing restrictions in IP licences or assignments are exempted under the rule of reason test in the US or, in the EU, under Article 101(3) of the TFEU);

- (b) the extent to which it is or is not appropriate to treat IP rights like other forms of property for the purposes of competition law and other legislative frameworks; and
- (c) the practical impacts of repeal or amendment of s51(3), such as whether it could increase compliance costs, by requiring IP right owners to consider whether a commercially justified restriction (or multiple restrictions) may substantially lessen competition.

The Committee has had the benefit of reading the more detailed submission of the Intellectual Property Committee of the Law Council of Australia, which also supports that section 51(3) be considered as part of the overarching IP review.

The Committee believes that it would be more appropriate for the issues raised by s.51(3) to be further and more fully explored as part of the overarching IP review recommended by the Review Panel (draft recommendation 7) and that it would be premature to recommend the repeal s51(3) prior to this review.

## 7.2 Draft recommendation 32 – State/Territory jurisdiction for secondary boycott provisions

The Draft Report notes that the Federal Court has exclusive jurisdiction in respect of the prohibitions in s45D, 45DA, 45DB, 45E and 45EA (by virtue of subsection 4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)) (Draft Report, Page 244). Accordingly, the Review Panel recommends that jurisdiction for the secondary boycott provisions be extended to the State and Territory Supreme Courts (draft recommendation 32).

Whilst it is true that s4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) deprives a State Court of federal jurisdiction to enforce the secondary boycott provisions of the Commonwealth CCA, the Competition Policy Reform Acts of each State apply the Scheduled version of Part IV (the **Competition Code**). Prior to the High Court's decision in *Wakim*<sup>47</sup>, the State Competition Policy Reform Acts<sup>48</sup> purported to give the Federal Court exclusive jurisdiction (ss 21 and 22).<sup>49</sup> However, following the repeal of these provisions after the decision in *Wakim*, the Committee is not aware of anything in those statutes that would deny a State Supreme Court jurisdiction over the secondary boycott provisions of the relevant State's Competition Code. Further, section 51AAA of the CCA makes it clear that Part IV does not cover the field and that it is intended that Part IV of the CCA operates concurrently with the Competition Policy Reform Acts of each State.

The Committee submits that consideration should be given to whether existing legislation relating to the enforcement of the Competition Code is adequate, or whether further legislation to vest federal jurisdiction in relation to secondary boycotts in State courts is desirable.

<sup>47</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

<sup>48</sup> *Competition Policy Reform Act 1995* (NSW), *Competition Policy Reform Act 1995* (Vic), *Competition Policy Reform Act 1996* (Qld), *Competition Policy Reform Act 1996* (WA), *Competition Policy Reform Act 1996* (SA), *Competition Policy Reform Act 1996* (Tas).

<sup>49</sup> The constitutional issues raised by *Wakim* did not apply to the Territories and therefore they did not repeal s21 and s22.

## Attachment 1: Draft recommendations supported by the Committee with no further comment

To assist the Review Panel, set out below a list of the recommendations of the Draft Report that are supported by the Committee, but in respect which the Committee does not propose to make further comment.

#	Draft recommendation and subject matter
1	Competition principles
4	Repeal of Part X (international shipping liners)
11	Regular regulation review by all Australian governments to remove unnecessary restrictions on competition
13, 14 and 15	Competitive neutrality policy, complaints and reporting
16	Electricity, gas and water ongoing reform
17, 18	Competition law concepts, competition law simplification
22 [part]	Exemptions for conditional supplies covered by expanded and simplified s47
26, 27, 28, 29	No reintroduction of price discrimination, introduction of effects test for third line forcing, simplification of s47, introduction of notification process and RBC exception for RPM
34	Simplification of authorisation and notification processes, application of SLC and public benefits test
35	Section 155 powers limited to reasonable search, ACCC guidelines to be reviewed
39, 40, 42, 43	Establishment and role of ACCP
45, 46	Retention of competition and consumer functions within ACCC, access and pricing regulation function given to single national regulator
50	Greater flexibility introduced into collective bargaining process, ACCC to enhance awareness of process

## Attachment 2: Draft recommendations with no further comment

To assist the Review Panel, set out below is a list of the recommendations of the Draft Report in respect of which the Committee has no further comment.

#	Draft recommendation
2, 3, 5, 6	Human services, road transport, coastal shipping, taxis
9, 10, 12	Parallel imports, planning & zoning, standards review
19	Application of the law to Government activities
31	Secondary boycotts enforcement and complaints reporting by ACCC
33	Apparent conflicts between CCA and <i>Fair Work Act</i>
37	Facilitating private actions by amending section 83 so that it extends to admissions of fact
38	National Access Regime
44	Use of competition payments
48, 49	ACCC to develop Media Code of Conduct, small business access to remedies/ADR scheme
51, 52	Removal of retail trading hours restrictions, removal of ownership and location of pharmacy restrictions

## Appendix A - Glossary

ACCC	Australian Competition and Consumer Commission
ACCP	Australian Council for Competition Policy
ASIC	Australian Securities and Investments Commission
ATO	Australian Tax Office
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Corporations Act	<i>Corporations Act 2001</i> (Cth)
Committee	The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia
Draft Report	Competition Policy Review Draft Report (September 2014)
EU	European Union
Hilmer Review	Independent Committee of Inquiry, <i>National Competition Policy</i> (25 August 1993)
IP	Intellectual property
Issues Paper	Competition Policy Review: Issues Paper (14 April 2014)
June 2014 Submission	Committee's submission on the Australian Government Competition Policy Review dated 27 June 2014
Review Panel	Competition Policy Review Panel
TFEU	Treaty on the Functioning of the European Union
Tribunal	Australian Competition Tribunal