Submission on Draft Report of the Competition Policy Review

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Executive Summary

The Draft Report of the Competition Policy Review released in September 2014 (***Draft Report***) is an important contribution to the project of resuscitating productivity growth in Australia through micro economic reform.

We appreciate the opportunity to make this submission, and have focussed on recommendations that concern the *Competition and Consumer Act* (***CCA***). This is based on our Australasian Competition Group's broad experience with a range of clients that centres around competition issues arising for businesses in particular situations and sectors.

Minter Ellison endorses many of the Panel's draft recommendations (DRs) in Part 4 of the Draft Report as likely to improve the conceptual clarity and practical workability of Australia's competition law framework.

There are some draft recommendations in Part 4 of the Draft Report that we suggest require further consideration, outlined below**:**

- **Price signalling and concerted practices** (DR24): The Panel should consider carefully whether the existing attempt provisions in the CCA provide adequate coverage of 'price signalling' before confirming a recommendation that s.45 should be amended to include the uncertain concept of 'concerted practices';
- **Misuse of market power** (DR25): The second limb of the proposed defence which would require proof of conduct being in the '*long term interests of consumers*' is practically unworkable and should be removed;
- **Resale price maintenance** (DR29): Acknowledging that a notification process would at least be an improvement, the operation of the per se prohibition on resale price maintenance conduct is no longer consistent with the objectives of the CCA, and sections 48 and 96 – 100 should be deleted from the CCA;
- **Facilitating private actions by allowing admissions of fact in one proceeding to be used in another** (DR37): Section 83 of the CCA should <u>not</u> be amended to broaden the use of admissions of fact made by the person in enforcement proceedings beyond those proceedings, because that would operate as a potentially significant disincentive to the efficient and appropriate settlement by private parties of ACCC enforcement proceedings.

Minter Ellison is one of Australia's leading commercial law firms and recognised as a leader in competition law and practice. We would welcome the opportunity to expand on any of our submissions.

Please contact me if you have any questions relating to our submission.

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Introduction

Minter Ellison **endorses** many of the Panel's draft recommendations (***DRs***) in Part 4 of the Draft Report as likely to improve the conceptual clarity and practical workability of Australia's competition law framework, including:

- removal of redundant provisions (DR18);
- removal of the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions, as an unnecessary limitation of legitimate private action (DR21);
- clarification of the cartel conduct prohibition (DR22) and, in particular, the recommendations that overreach be avoided in relation to criminal liability by:
  - applying only to cartel conduct affecting goods or services supplied or acquired in Australian markets; and
  - confining the provisions to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility
- removal of the specific prohibition on exclusionary provisions, removing unnecessary overlap with the cartel provisions (DR23);
- no reintroduction of a specific prohibition on price discrimination, leaving an amended s.46 to deal with price discrimination that adversely affects the competitive process (DR26);
- making of typically benign or pro-competitive third line forcing conduct subject to a competition test instead of being a per se offence, thereby focusing the prohibition on competitive harm (DR27);
- qualifying compulsory production requirements under s155 by reference to a requirement for reasonable searches accounting for time and cost of searching. This would thereby reduce the burden on business of unnecessarily broad notices, and the resultant burden on the ACCC in having to unproductively sift through large volumes of material (DR36).

There are several draft recommendations in Part 4 of the Draft Report that we suggest require **further consideration**. The following sections discuss these recommendations in detail.

1. Price signalling and concerted practices

Minter Ellison recommendation: The Panel should consider whether the existing attempt provisions in the CCA provide adequate coverage of 'price signalling' before making a recommendation that s.45 should be amended to include the concept of 'concerted practices'.

Minter Ellison agrees that the current provisions, being confined to a single industry, are inconsistent with the principle that the CCA should be of universal application and therefore should be repealed. The more difficult question is what, if anything, should replace those provisions?

As the detailed drafting of current Division 1A shows, the term 'price signalling' is a term of deceptive simplicity, capable of encompassing legitimate business behaviour likely to be competition-enhancing as well as conduct that is anticompetitive. Publication of information, including prices, is important for an informed market. It is only when the information is a manifestation of an explicit or tacit anticompetitive purpose, or produces an anticompetitive effect, that it is to be condemned as 'signalling', whether in relation to price or any other aspect of the competitive mix. As the Draft Report correctly observes: *'The difficulties of defining the circumstances in which disclosure of price information is pro-competitive or benign, and the circumstances in which it is likely to be harmful to competition, has resulted in a complex set of provisions ...*'

'Price signalling' as we have described is a subset of the broader question concerning the legality or otherwise of providing competitive information (which may be price or non-price), either to competitors or through public release. Such conduct should be susceptible to challenge under the CCA regardless of whether it relates to price. In that regard we note that, in the USA and EU there is no prohibition on 'price signalling' as such. The prohibition is on 'concerted practices'.[1]

The conduct to be challenged is, in essence, either tacit collusion, or an attempt to tacitly collude. Although there are some unresolved issues concerning the scope of the term 'understanding', the law as currently framed may well be sufficient when attempts to collude – a relatively untested area – are taken into account. Admittedly, proving collusion, or attempts to collude, may not be an easy, but nor should it be.

We therefore recommend that the Committee consider whether the attempt provisions provide adequate coverage of this aspect before making a recommendation that s.45 should be amended to include the concept of 'concerted practices'. In any event, based on international precedent, we doubt that such a change would advance matters to any significant degree.[2] Further, Minter Ellison would not support a suggestion that the concept of 'concerted practices' be adopted beyond section 45, for example, as a basis for criminal liability under the reformulated cartel prohibition (which does not require assessment of anticompetitive purpose or effect).

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1 See, for example US v US Gypsum Co 438 US 422 (1978) footnote 16; John Deere Ltd v European Commission [1994] EUECJ T-35/92 (27 October 1994)

2 See Bell Atlantic Corporation v Twombly 550 US 1 (2007); Ahlstrom Osakeyhtio v Commission [1993] ECR I-1307

2. Misuse of market power

Minter Ellison recommendation: The second limb of the proposed defence should be removed as an additional requirement.

There has been considerable public debate regarding different aspects of the Draft Report's proposed changes to section 46.

Minter Ellison wishes to offer a practical perspective which it hopes will assist the Panel in its deliberations.

The Panel has articulated an important principle in the Draft Report that the law should be simple, predictable and reliable. Otherwise it creates business uncertainty and imposes costs on the economy. It is therefore important to look at the law from a really practical perspective. Simplicity in relation to this challenging area of antitrust law is most likely illusory, but we submit it is nonetheless very important to think about how well the law will allow workable *ex ante* guidance for common business conduct.

The Draft Report correctly notes that s46 has been difficult to apply in practice, but we submit that while it has been difficult, it is not impossible. For example, the concept of 'taking advantage' of market power is challenging to apply *ex ante* to business decision-making. However, in truth, it is the factual and theoretical complexity of drawing the distinction between good and bad market conduct which has caused the difficulties with that part of s46, rather than the drafting of the section.

The new formulation of the test proposed in DR25 should be viewed in that light.

From that practical perspective, most of the standards and concepts in the proposed new formulation of section 46 are at least well enough known as to be susceptible to practically workable *ex ante* analysis. For instance, the concepts of 'substantial degree of power', 'purpose', 'effect', and 'substantially lessening competition' are all well understood from past cases and therefore tractable for the purposes of allowing *ex ante* guidance for business conduct.

The principal difficulty with the proposed reformulation of s46 arises in the second element of the Panel's proposed defence. That apparently requires an assessment of whether a particular type of conduct is in all the circumstances likely to benefit the '*long-term interests of consumers*'. Minter Ellison submits that this is a standard which isn't properly capable of practically workable *ex ante* application. Businesses are often not well equipped to assess the long term interests of consumers. They are usually more interested in more immediate buying preferences and buyer behaviour rather then considering how consumers' interests will be served over the long term. Such an assessment cannot realistically be made in advance of engaging in business conduct without a costly and difficult analysis that will in any case produce an unsatisfactorily uncertain outcome.

Even among economists we would expect disagreement about the meaning and application of such a provision in a commercial context. While similar concepts are used in infrastructure regulation (eg. the National Electricity Law, National Gas Law and Part XIC of the CCA) these are laws that are concerned with the regulation of natural monopolies, not the protection of competition from the misuse of market power. In a best case scenario, it would be several years before the meaning of this provision could be clarified by an appellate court.

As such, the second limb of the proposed defence will be practically impossible for a business to be confident it can satisfy. That is important because the first limb of the defence is for conduct which would be a rational business decision even if the company did not have market power. Minter Ellison believes that first limb of the defence is very important to the balance of proposed section 46. Making its availability contingent on proof also of the long term interests of consumers sets the bar too high. In those circumstances there is a very real risk of 'over-capture' from the newly formulated prohibition with pro-competitive conduct being impeded. If section 46 is too intrusive then it risks producing a chilling effect on investment and innovation.

On that basis, Minter Ellison recommends that the second limb of the proposed defence be removed. By doing so, we submit that the proposed law will strike an appropriate balance between permissible and impermissible conduct by firms with market power, which should permit practically workable *ex ante* guidance for business conduct.

3. Resale price maintenance

Minter Ellison recommendation: The operation of the prohibition on resale price maintenance conduct is no longer consistent with the objectives of the CCA, and sections 48 and 96 – 100 should be deleted from the CCA.

Draft recommendation 29 is that the prohibition on resale price maintenance should be retained in its current form as a per se prohibition, but that the notification process (which currently applies for third line forcing) should be extended.

Minter Ellison acknowledges that permitting a simple notification process for RPM as recommended would be an improvement on the current law. However, that improvement is not significant and DR29 is, in our view, a 'second best' solution. Preserving RPM as a per se offence at all is neither necessary nor consistent with important principles espoused by the Draft Report.

In relation to resale price maintenance, the Draft Report makes two important observations:

1. '*Like many forms of vertical trading restrictions, in many circumstances RPM may have little effect on competition in a market*'

2. '*... in a competitive market RPM may be beneficial to competition and consumers*'.

Given those observations there is an inconsistency between preservation of RPM as a per se offence and the principle that only conduct that is anticompetitive in most circumstances should be prohibited per se.

Further, to preserve per se treatment for RPM will actively create inconsistency with other provisions in the CCA. For example, a vertical restraint by a supplier completely prohibiting resupply by a retailer in, for example, the Australian Capital Territory, will be tested by its purpose or effect on competition. In contrast, if the same supplier allows the retailer to resell in the ACT but sets a minimum resale price, then the conduct is per se illegal, regardless of its likely effect on competition. How can a lesser restriction be worse?

Minter Ellison submits that the operation of the per se prohibition on resale price maintenance conduct is no longer consistent with the objectives of the CCA and it can be removed entirely. Other provisions of the competition law could effectively deal with aspects of behaviour the RPM provision prohibits if it were removed. RPM provisions in supply arrangements between manufacturers or distributors and retailers, or attempts to make such arrangements, would risk infringement under the s45 prohibition on anticompetitive contracts, arrangements and understandings, if there is a likely adverse effect on competition. Even refusals to supply a retailer because the retailer had not agreed not to discount the product could amount to an attempt to make an anticompetitive arrangement, if an adverse effect on competition is established.

The arguments in favour of permitting RPM, except where it is likely to have an adverse effect on competition, include that efficient distribution can be enhanced by allowing manufacturers and suppliers to determine the basis on which their products are sold, including price. Manufacturers and suppliers may have many reasons for wanting to manage distribution of their products, and those reasons can be pro-competitive, or at least are not are not presumptively anticompetitive.

In the absence of evidence of consumer harm, it is in the public interest to allow manufacturers to set the price at which their products are on-sold. They should be entitled to choose the most efficient, effective and competitive way to do so.

4. Facilitating private actions

Minter Ellison recommendation: Section 83 of the CCA should not be amended to broaden the use of admissions of fact made by the person in enforcement proceedings beyond those proceedings.

Draft recommendation 37 is that section 83 of the CCA should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact by the court.

The Draft Report notes that the effectiveness of section 83 as a means of reducing the costs of private actions would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of facts. That may be the case, but Minter Ellison submits that DR37 fails to adequately weigh the burden that may be imposed on the timely and efficient disposition of public enforcement proceedings against that benefit of enhancing private actions.

Many ACCC proceedings are resolved by the corporate defendant making admissions of fact that establish the contravention. If those admissions will also constitute prima facie evidence against the corporation in another proceeding in accordance with DR37, then this will:

- operate as a potentially significant disincentive to the efficient and appropriate settlement by private parties of ACCC enforcement proceedings; and
- mean that litigants in public enforcement proceedings who do wish to settle will be encouraged to agree facts calculated to minimise potential damages liability in follow-on private actions rather than facts properly reflecting the core conduct at the heart of the ACCC's concerns.

On balance, deriving efficient enforcement outcomes from ACCC court actions seems to be a compelling reason for not making the change in DR37.

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