COMPETITION POLICY REVIEW

Submission responding to the Panel's draft report, September 2014

1. COMPETITION POLICY

1.1. The "competition principles" to guide competition policy set out in Recommendation 1 and the Panel's endorsement of "public interest" as a central tenant of that policy are supported. However, it is suggested that in connection with the prescription of these principles the Panel should make clear what it sees as the goal or goals of competition policy and why it rejects those it does not adopt. This approach was taken in the Hilmer Report and given that the thrust of the Panel's recommendations will involve rejecting an often cited and popular goal of competition policy (protecting small firms from the predatory conduct of larger businesses, without regard to whether the latter's conduct substantially lessens competition in a market) it may be advisable to address this matter at the outset.[1] In this connection the following are noted.

1.1.1. Section 2 of the *Competition and Consumer Act* 2010 (the CCA) says that its "object" is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection." This object – because it joins "fair trading" with "competition", rather than with "provision for consumer protection" - can easily be read as embracing goals beyond that which the Panel appears to adopt when it says (at 15) "competition policy concerns the competitiveness of markets as a whole, not individual competitors".

1.1.2. The Panel expresses itself somewhat ambiguously when it says (at 4) that "competition policy is aimed at improving the *economic* welfare of Australians" but then when expressing the same point (at 15) omitting the reference to "economic", thereby bringing it closer into line with s. 2 of the CCA. The Panel then goes on to say (at 16) that "competition policy, laws and institutions serve the national interest best when focused on the long term interests of *consumers*" (my emphasis) which can be read as excluding other welfare considerations that "Australians" may value such as the diffusion of economic power and concerns about the political interference that can accompany economic concentration.

1.1.3. Reference is made throughout the Draft Report to the values and interests of "consumers"; indeed, promoting "consumer welfare" may be what the Panel sees as the goal of competition policy. If so, the Panel may wish to make clear what it means by the concept. This is because, in the present context, the phrase "maximising consumer welfare" is sometimes used to mean pursuing "allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare".[2] In other words, "consumer welfare"

[1] Some extracts dealing with the goals of competition policy, that may be helpful, can be found in Clarke, Corones and Clarke, *Competition Law and Policy*, OUP (3rd edn2011) chp 4.

[2] See Bork, *The Antitrust Paradox*, Basic Books, 1978 at 91.

is used as a euphemism for "total welfare", rather than as a reference advancing the interests of the consumers of goods and services, with competition policy seen as having no interest in the allocation within society of its resources between producers and consumers. Some adherents to this position also eschew "competition" as meaning "a process of rivalry"[3] whereas in Australia this meaning has been adopted ever since the seminal decision in *QCMA*.

1.2. Recommendations 2, 4-16 are all supported for the reasons outlined by the Panel.

2. COMPETITION LAWS

2.1. Recommendations 17-19 are supported.

2.2. Recommendation 20 is supported, subject what is said below in relation to Recommendation 22.

2.3. The first limb of Recommendation 21 (removing the requirement of a specified connection with Australia) is supported. However, the second limb (removing the requirement for ministerial consent) is not. This requirement is designed to allow public ("national") interest considerations to be taken into account before private litigants use the CCA extra-territorially. Despite the international growth in competition laws to which the Panel refers, the extra-territorial operation of domestic competition laws still has the potential to damage international comity. The requirement for ministerial consent created by s. 5(5) of the CCA allows this issue to be taken into account. When considering whether this requirement is prejudicial to private litigants, it is important to bear in mind that once consent has been sought the Minister must grant it unless of the opinion that (i) the law of the country in which the conduct in question took place required or specifically authorised that conduct (ie – that there was "true conflict" between that law and Australian law) and (ii) it is not in the national interest for consent to be given. Unless *both* elements are satisfied consent must be given to the private action proceeding. It is submitted that in a case in which both *are* satisfied it would not be in the public interest (as distinct from the litigant's private interest) for action to be taken and as a result it should not be allowed. Adopting this approach (ie – retaining s. 5(5)) is consistent with the Panel's approach (in Recommendation 1) of making competition principles "subject to a 'public interest' test".

2.4. Recommendation 22 is supported other than the limb that would restrict the cartel provisions to conduct occurring in an Australian market. As the Panel is aware, currently, unlike the prohibitions in ss. 45, 47 and 50 (which require a substantial lessening of competition in an Australian market) the cartel provisions in Part IV, Division 1, require only that the parties are "in competition with each other". This difference was crucial in *ACCC v Air New Zealand* [2014] FCR 1157. That case was brought under ss. 45 and the old 45A and as such required the price fixing to occur in an Australian market. As this could not be established, the case failed even though

[3] Indeed, Bork describes the identification of competition with rivalry as "analytically disastrous" (at 59).

Perram J found that the price fixing involved could have affected prices in Australia. On the other and, had the cartel provisions applied to this case the ACCC would have succeeded. Given that price fixing did occur, it is submitted that this would have been the preferable outcome and a good reason for the current competition requirement in the cartel provisions to be retained.

2.5. Recommendation 23 is supported. However, it is suggested that it is made clear that the cartel provisions in Part IV, Division 1 now make the separate prohibition of exclusionary provisions redundant by showing that there are no significant forms conduct currently caught by s 45(2)(a)(i) and (b)(ii) that they do not also cover. It may also be worth noting that the consequences of a firm contravening the cartel provisions are more severe than they are for contravening s. 45.

2.6. The price signalling repeal limb of Recommendation 24 is supported. Extending s 45 to make clear that anti-competitive concerted practices are to be caught by that section is also supported. However, it is suggested that this may be best done by defining one or more of the terms 'contract', 'arrangement' and 'understanding' to include concerted practices, rather than introducing a new prohibition.

2.7. The thrust of Recommendation 25 is supported. However, the following suggestions are made concerning the precise nature of the reform proposed by the Panel.

2.7.1. Changing the focus of s. 46 from harming individual competitors to harming competition should be seen as flowing from the adoption of certain competition policy goals (see 1.1 above). Unless it is accepted that 'a', or 'the', goal of competition policy is the preservation and promotion of *competition*, rather than of *competitors* / *small firms*, the reform proposed by the Panel is likely to face opposition from those concerned about the latter, rather than competition generally. In this connection, it may also be useful to suggest that the best way of protecting the interests of small businesses is through enhancing the Act's unfair contract terms or unconscionable conduct provisions, rather than through s. 46.

2.7.2. Whilst the removal of the "taking advantage" test is strongly supported, for the reasons advanced by the Panel, its removal does raise the question: why retain the threshold requirement that a respondent firm have "a substantial degree of power in a market"? If the object of s 46 is to "capture anti-competitive unilateral behaviour" as the Panel rightly suggests (at 208) then this should be caught regardless of whether the perpetrator has substantial market power. This is the position under s. 45 which prohibits anticompetitive conduct by conspirators without any requirement that they, or their combination, have substantial market power. Whilst it is acknowledged that, in practice, a firm without substantial would usually be unable to engage in anti-competitive unilateral behaviour, this is no reason to restrict the scope of the prohibition so as to directly exclude that possibility.

2.7.3. Altering the purpose test to include anti-competitive effect is supported as is the Panel's concern not to "over capture" conduct; that is, (for example) not to punish the introduction into the market of a new product or innovation that is so successful that the firm introducing eliminates its competitors through superiority. As long as barriers to entry are not erected as a result, such outcomes should not be sanctioned for otherwise innovation will be stifled.

2.7.4. However, it is suggested that a better of guarding against this risk would be to introduce a "pro-competitive purpose" defence, rather than the defence proposed by the Panel. In other words, making it a defence for the respondent firm to show that its purpose was pro-competitive. In this connection, it is noted that existing provisions in the CCA (including the proposed s. 46) prohibit *anti*-competitive purpose, which indicates that the courts can determine a firm's purpose, so that creating a defence based on a firm showing the opposite should be practicable practicable. Such a defence would also be more in keeping with the competition principles advocated by the Panel than would the introduction of a new concept such as 'a rational business decision'.

2.7.5. Regardless of 2.7.4, it is suggested that the "advancing the long term interests of consumers" limb of the defence proposed by the Panel should not be adopted. To require a respondent firm to show both limbs of the proposed defence would be unfairly burdensome and because of its inherent ambiguity, costly to litigate. As a result, it would risk not preventing the "chill" on competitive behaviour the Panel is rightly concerned to see not accompany its proposed reform.

2.8. Recommendations 26-28 are supported

2.9. The limb of Recommendation 29 recommending the retention of the *per se* prohibition of RPM is supported. This is because –

2.9.1. although there are a number of theoretical pro-competitive justifications for RPM, an analysis of reported Australia cases shows that these are very rarely the actual explanation of why the practice occurs in this country and that by far the more common explanations are anti-competitive. [4]

[4] Of the 54 cases I have found since 1974 in which RPM was established, in not one did the respondent allege that the practice was engaged in to encourage dealers to provide pre or post sales services (the free-rider explanation). In 6 cases the reason given was to protect the image of the product (*Jurlique* [2007] FCA 79 and *Palmer Corporation* [1989] FCA 766 are examples). In 1, the explanation was consumer safety (*Netti Atom* [2007] FCA 1945). Far more common explanations were that the respondent supplier had engaged in RPM in response to complaints from its dealers about price cutting by other dealers (15 cases ranging from *Stihl* (1978) ATPR 40-091 to more recently *Eternal Beauty* [2012] FCA 1124 and *Mitsubishi Electric* [2013] FCA 1413); or to protect its own margins that were threatened by the operation of its dealer price support scheme (the explanation in a number of petrol company cases such as *Caltex* (1974) ATPR 40-000, *Mobile Oil* [1974] FCA 246, and *BP* [1985] FCA 538); or general preference for orderly marketing in which everyone makes a profit and price wars are avoided (for example, *Simpson Pope* [1980] ATPR 40-169, *Chaste Corporation* [2003] FCA 180, *Westminster Retail* [2005] FCA 1299 and *Teac Australia* [2007] FCA 1859. (It is noted that in 15 cases, no reason could be identified).

2.9.2. Most, if not all, of the pro-competitive scenarios advanced as reasons for suppliers engaging in RPM can be achieved without them curtailing the freedom of their dealers to price goods or services as they see fit.

2.9.3. Recent research in the USA comparing the prices and outputs of a range of consumer items in states that since the 2007 decision in *Leegin* no longer have a per se prohibition of RPM with those states that have retained such a prohibition, has concluded that "in aggregate, consumers are worse off in the rule-of-reason states".[5] Although the results of this research are contested by proponents of a rule of reason approach to RPM, at the very least it suggests that the cautious approach advocated by the Panel is to be preferred to the removal of the per se prohibition.

2.10. On the other hand, I see no justification for the introduction of notification for RPM. As members of the Panel will be aware, authorisation for RPM has been available since 1995 and yet there has been only one application (late this year). It is submitted that the case for introducing notification requires evidence that meritorious applications for authorisation are being made and that the cost of making these applications places such an unreasonable burden on the applicants involved that notification should be available as a less burdensome means of having their cases assessed. However, no such evidence has been advanced.

2.11. It is also suggested that RPM between related bodies should not be permitted as the Panel proposes. Although the corresponding conduct is permitted under ss. 45 and 47, the panel's proposal appears to be predicated on the assumption that most instances of RPM are supplier initiated when (as noted above) this is not the case. In "dealer initiated" cases of RPM, adoption of the change proposed would make it more difficult for the supplier to resist pressure to introduce RPM at the behest of dealers complaining about price competition from its related dealer. Currently, the supplier can resist such pressure by relying on the prohibition and the dealers pressing it to introduce RPM would themselves commit an offence under s. 76(1). The change proposed would immunise anti-competitive conduct of this nature. Furthermore, the proposed change is not needed to cover cases in which a *supplier* does wish to fix the selling prices of a related dealer, as it can do this now without contravening s. 48 by adopting an agency arrangement with the dealer.

2.12. Recommendations 30, 31 and 32 are supported. It is suggested, however, that the text on p. 50, to the effect that public campaigns by environment groups against trading businesses are outside the scope of s. 18 of the ACL, is incorrect for the reasons advanced in Clarke P, "Misleading Conduct and Public Debate" (2011) *27 Competition & Consumer Law News.*

[5] Mackay & Smith "The Empirical Effects of Minimum Resale Price Maintenance on Prices and Output" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513533.. See also Peeperkorn, "Resale Price Maintenance and its Alleged Efficiencies" (2008) 4 *European Competition Journal,* 201.

2.13. Recommendations 34, 35, 37, 39, 40, 42, 43, 44, 45, 48 50, 51 and 52 are supported.

2.14. Recommendation 41 is supported with the proposed ACCP having the same mandatory information gathering powers as the PC.

2.15. Recommendation 47 is supported with a strong preference for the "Advisory Board" model, rather than replacing the current Commission with a Board. As the Panel will be aware, the Advisory Board model was used successfully when Professor Baxt was the Chair of the TPC.

2.16. Recommendation 49 is supported. However, it is submitted that a specific dispute resolution scheme should not be introduced for small business. Rather, consideration should be given to giving jurisdiction over competition law matters to state courts and tribunals, some of which are less expensive and more accessible than the Federal Court.

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