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28 October 2016

Dear Rebecca,

Competition Law Amendments: Exposure Draft Consultation

I have pleasure In enclosing a submission prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia ('the Committee'). The submission has been prepared in response to the Exposure Draft Consultation on Competition Law Amendments.

In forwarding this submission, I note that the Business Law Section's SME Business Law Committee lodged a submission with The Treasury on 4 October, jointly with a submission of the Committee (limited to Schedule 7), that addressed some of the same issues raised in this submission. Any differences in approach reflect the different perspectives of the two Committees and are explained primarily by the details in this submission.

If you have any questions, in the first instance please contact the Committee Chair, Fiona Crosbie, on 02-9230 4383 or via email: fiona.crosbie@allens.com.au.

Yours sincerely,

Teresa Dyson, Chair
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Enc.

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Submission of the Competition & Consumer Committee
Business Law Section
Law Council of Australia

Competition Law Amendments: Exposure Draft Consultation

28 October 2016

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Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia provides this submission in response to the Exposure Draft Bill containing amendments to the *Competition and Consumer Act 2010* (Cth) (the ***CCA***), and accompanying Exposure Draft Explanatory Materials (***Explanatory Materials***).

1 Cartels and joint ventures

The Exposure Draft Bill amends the existing Division 1 of Part IV, rather than the Final Harper Report's Model Legislative Provisions (commencing with s45 of the Harper Model Law).

In the Committee's view it would have been preferable to base the Exposure Draft Bill on the Harper Model Law,[1] having regard to the Committee's previous submissions to the Harper Panel that the existing Division 1 was prolix, unintelligible in places - and overly complex, and the Harper Panel's view in its Final Report that the existing cartels legislation was in need of simplification. In the Committee's view, the Harper Panel's Model Law on cartels, whilst requiring further refinement, would have provided a sound basis upon which to implement a cartels law that is clear, intelligible, and easily understood by business, practitioners, and courts.

Relevantly, in its Final Report the Harper Panel by Recommendation 26 recommended that s5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions.[2] By Recommendation 27 the Harper Panel recommended that the prohibitions against cartel conduct in Part IV Division 1 of the CCA should be simplified - and inter alia:

- the provisions should apply to cartel conduct involving persons who compete to supply goods or services to or from persons resident or carrying on business in Australia;
- the provisions should be confined to conduct involving firms that are actual or likely competitors; and
- a broad exemption should be included for joint ventures.[3]

Whilst the Exposure Draft Bill partly addresses the second and third of these bulleted recommendations, it does not simplify the law.

Subject to the above general comments, the Committee makes the following comments on the Exposure Draft Bill.

1.1 Repeal of definition of "likely" in s 44ZZRB

The Committee welcomes the repeal of the existing definition of "likely" in s 44ZZRB of the CCA. The Committee supports the approach that the courts should develop this term with regard to common law explanations.

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[1] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015.

[2] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015.

[3] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015

1.2 Section 5 – Ministerial Consent and extraterritorial application of the CCA to cartel conduct

In its 2014 Submission the Committee stated that the requirement for Ministerial consent (in sections 5(3) to (5) of the CCA) was anachronistic, and should be abolished for proceedings which relate to cartel conduct.[4] The Government endorsed Recommendation 26 of the Harper Report,[5] noting that the requirement for private parties to seek ministerial consent in connection with proceedings involving conduct that occurs outside Australia is an unnecessary roadblock to possible redress for harm suffered as a result of a breach of Australian competition law. This recommendation was adopted in the Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015. However, the Bill lapsed when parliament was prorogued in April 2016, and given the intervening election, the Bill will need to be reintroduced.

The Committee continues to support the amendment of s5 to remove the requirement for ministerial consent and encourages the Government to reintroduce the aforementioned Bill.

Section 5(1) of the CCA provides for the limited extraterritorial application of Part IV to conduct outside Australia by bodies corporate 'incorporated or carrying on business within Australia'. The Harper Panel recommended that section 5 be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.[6]

The Government did not support the Harper Panel's recommendation, but stated it would consider how best to effectively capture conduct that harms competition in an Australian market, taking account of international law and policy considerations.[7] It is unclear on what basis the Government continues to support the requirement based on residence, incorporation or business. For the reasons set out in its 2014 Submission,[8] the Committee considers that more effective regulation of offshore cartels can be achieved by making application of the CCA dependent on the nature of the overseas conduct rather than status of the entity. The Committee expresses its disappointment that Recommendation 26 has not been adopted.

1.3 The Joint Venture Exception: Amendments to ss. 44ZZRO and 44ZZRP paragraphs (1)(a) and (1)(b)

The Committee welcomes the proposed amendment of the joint venture exception to include arrangements and understandings in addition to contracts, and the proposal to extend the joint venture exception to include joint ventures for the acquisition of goods or services, rather than only those for production and supply. The Committee believes that this extension better reflects the commercial reality that joint ventures are not necessarily reduced to contractual terms. The Committee supports the approach taken in the Exposure Draft Bill in clarifying and broadening the scope of the joint venture exceptions in the following respects:

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[4] Section 12.1(c), page 87.

[5] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015.

[6] Recommendation 26, Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015.

[7] Australian Government Response to the Competition Policy Review, p.22.

[8] Pages 55 to 57.

(a) extending the joint venture exceptions to the cartel provisions to apply directly to "arrangements or understandings", in addition to contracts, and repealing the overly complex provisions in ss44ZZRO(1A) and (1B) and 44ZZRP(1A) and (1B);

(b) extending the scope of the joint venture exceptions to joint ventures established for the acquisition of goods or services; and

(c) extending the scope of the exceptions to cartel provisions that are reasonably necessary for undertaking a joint venture.

In respect of the extension of the joint venture exception to cartel provisions in “arrangements or understandings”, the Committee notes the following in favour of these amendments.

(a) First, the current law does not stipulate that the joint venture be in a contract, only that the cartel provision be in a contract (or intended contract). This is significant as some have suggested that the current stipulation is of no major concern because most joint ventures would find their way into a contract. While one would normally expect the cartel provision (i.e. the provision that currently must be in a contract, or intended contract) referred to in s 44ZZRO(1) and 44ZZRP(1) would also be in the joint venture ‘contract’, that is not specified. Thus under the current law parties may have a joint venture (duly documented in a contract) but may have omitted to include in that contract the terms of a non-compete clause for the purpose of that joint venture. If they nevertheless have an ‘arrangement or understanding’ not to compete that may be an illegal cartel provision. In these circumstances, despite the parties having a legitimate joint venture and the non-compete being for the purposes of that joint venture, the non-compete provision would be *per se* illegal under the current law. Whilst this may not be a common scenario, it illustrates the misconception that the issue is about whether the joint venture is or is not in a contract and also demonstrates why the Harper recommendation should be supported.

(b) Second, the Committee does not see a need for the law to be prescriptive on this issue. The Committee submits that law should recognise that there is sound economic principle in exempting from the per se prohibition against cartel provisions what is established on an evidential burden to be a provision in pursuit of joint venture activity, regardless of the legal form adopted. Even if it would be common practice that the relevant cartel provision and joint venture would be set out in a written contract, that does not mean that the law should be prescriptive – particularly in legislation that is intended to apply to all parts of the economy and the myriad of circumstances in which legitimate efficiency enhancing collaborative activity should be encouraged. Being prescriptive as to the form of the joint venture or the place where the cartel provision is to be found leads to unnecessary complexity with no benefit.

(c) Third, the proposed amendment merely aligns the circumstances in which a cartel provision may be (appropriately) caught by the cartel prohibition (i.e. in a contract, arrangement or understanding) with the circumstances in which a cartel provision may also be viewed as being for the purposes, etc of a joint venture (i.e. in a contract, arrangement or understanding). That alignment is appropriate and exposes no material risk of over-extending the joint venture exception.

In addition, some members of the Committee are disappointed that the Exposure Draft Bill adheres to the concept of “joint venture” instead of introducing the wider and more modern concept of “collaborative venture.” In this respect, the concept of “jointly’ in s4J is not entirely clear and may unduly restrict the scope of the exemption in the context of efficient collaboration between competitors. It was accepted by the Government in the context of the price signalling amendments that the concept of ‘joint venture” under s4J was unduly narrow or insufficiently

certain in relation to various possible collaborative arrangements (e.g. buyouts). It is difficult to understand why the same concern has been abandoned in the context of the cartel provisions in the Exposure Draft Bill.

1.4 Inclusion of research and development in joint venture exception

Some members of the Committee are concerned whether the legislation should be clarified to include joint ventures for research and development, on the basis that these high risk and capital intensive activities may not be seen to be for the "production of goods" or "supply of services" if the JV does not have a direct intention or imminent proposal to proceed directly to commercialise the output of the R&D undertaken by undertaking or licensing production. Other members consider that such activities would in any event fall within the supply of services in s44ZZRO(1)(b)(ii) of the CCA.

The current approach, which involves the use of drafting notes in sections 44ZZRO(1) and 44ZZRP(1) is undesirable.

The Committee submits that one way to address this issue would be to insert a new paragraph (b)(iii) to each of ss44ZZRO(1) and 44ZZRP(1) to refer to "research and development in relation to the production of goods or supply of services" and renumber current paragraph (iii) as paragraph (iv).

Additionally, the provisions may make clear that references to production, supply, or acquisition of goods or services include “potential” production, supply or acquisition, or simply “research and development”. In either event, the Committee strongly considers that R&D joint ventures should be capable of being brought within the exception.

1.5 Determining the Purposes of a Joint Venture

In its submission to the Harper Panel, the Committee noted uncertainties about the scope of the joint venture exceptions to the cartel provisions, which made advising companies and managers difficult and costly. These included whether:

(a) for the exceptions to be available, must the relevant cartel provision be solely, or predominately, or merely 'substantially for' the purpose of a joint venture?

(b) the cartel provision must be in furtherance of a joint venture or necessary to it in some sense?

(c) there should be a test that the cartel provision is believed to be "reasonably necessary for the activity", so it is both a subjective and objective test, given the risk of criminal liability?

The Committee notes the Exposure Draft Bill omits any explicit assistance on the question of whether in determining if a cartel provision is "*for the purposes of a joint venture*", there is a subjective or objective or mixed subjective and objective inquiry. Further, the Exposure Draft Bill does not indicate whether or not the cartel provisions must be solely or substantially for the purposes of a joint venture, and it fails to clarify that the exception is not to apply where the dominant purpose is to lessen competition between any two or more of the parties to the venture.

The Committee's preferred response to the "subjective / objective" debate about the joint venture exceptions is that:

(a) for the criminal exception provision in s44ZZRO, the test of whether a cartel provision is for the purposes of a joint venture or reasonably necessary for undertaking a joint venture, should be capable of being satisfied on a **subjective basis**; and

(b) for the civil liability provision in s44ZZRP, the test of whether a cartel provision is *for the purposes of a joint venture or reasonably necessary for undertaking a joint venture*,

should involve an **objective element, or mixed subjective and objective inquiry** such that there must be shown to be a reasonable and objective connection between the relevant cartel provision in question and the purposes and scope of the joint venture. Some members of the Committee consider, however, that as presently drafted, s44ZZRP is wholly objective in the sense that the defendant will need to prove objectively that the cartel provision was included for the purposes of, or was reasonably necessary for undertaking, a joint venture. The defendant's belief and intention are relevant to that enquiry only to the extent that they may prove that purpose objectively. In the Committee's view, a defendant will not by itself establish a defence by this means, because the purpose for including a cartel provision in a joint venture must be the sum of the purposes of all the joint venture participants, and not that of an individual defendant.

The formulation of the new s44ZZRO in clause 13 of the Exposure Draft Bill provides for two alternatives in (a)(i) and (a)(ii). The inclusion of these two limbs suggests that the approach proposed is that the JV exception can be made out if either limb is satisfied, that is to say, if:

- the cartel provision is, on an objective analysis, 'reasonably necessary' for undertaking the joint venture; or
- alternatively, the cartel provision is subjectively believed to be related to or 'necessary' for undertaking the joint venture.

The inclusion of both limbs as alternatives is a more permissive approach and widens the scope of the exceptions. The drafting of the Exposure Draft Bill suggests, by implication, that the first limb in (a)(i) *'for the purposes of a joint venture*' has a purely subjective meaning, because otherwise, that limb would tend to overlap the second limb in (a)(ii) and therefore be superfluous.

If the first limb has a purely subjective meaning, and forms an alternative to the objective limb in (a)(ii), the 'purposes' of a joint venture will turn on the subjective purposes of one or more of the parties to the cartel provision, who genuinely believed the cartel provision was related to the JV and was necessary for it (even if there is no necessary objective basis or justification for that belief).

The Committee sees merit in that more permissive approach being available for the purposes of the criminal prohibition in s44ZZRO, given the seriousness of the consequences of a criminal contravention. For the civil prohibition in s44ZZRP there are mixed views within the Committee whether a purely subjective standard for the JV exception is appropriate or too lax. Some Committee members are concerned that a purely subjective test may make the cartel law difficult to apply and may give too much leeway to parties to attach cartel provisions to joint enterprises without objective justification being required.

In our submission to the Harper Panel, the Committee favoured a subjective test for joint ventures being applicable in relation to the criminal liability provisions of the cartel offence, because of the requirement for *mens rea* in a serious criminal offence. That approach would apply to s44ZZRO, to be renumbered as s45AO.

That continues to be the Committee's preference in relation to the Exposure Draft Bill.

(a) Proposed approach to submissions in response to Exposure Draft Bill concerning joint ventures

The consideration of this test in the Report of the Harper Panel, appears to favour an objective test, at least in part, as can be seen from comments in the Report that:

> *…the exemption should apply to provisions that satisfy any of the following tests;*

- *the provision relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture; and*
- ***the provision is reasonably necessary for undertaking the joint venture****; or*
- *the provision is for the purpose of the joint venture". (emphasis added).*[9]

What is less clear is whether the Harper Panel concluded it was sufficient that either an objective standard or subjective belief that a provision is relevant or necessary for a joint venture, be made out.

The Committee continues to press for additional commentary or changes to the Exposure Draft Bill to address and resolve this concern, as it causes considerable uncertainty in application of the law. The Committee offers some further comments on this issue as follows.

(b) Previous approaches to joint venture exceptions

The thinking of the Swanson Committee in 1976, which led to the original joint venture exception to the price fixing provisions, did not consider in detail either a subjective or objective test, although the latter appears to have been intended. The discussion at paragraph [4.81] of the Swanson Report appears to favour an approach which recognised and permitted joint venture restrictions that *"can reasonably be regarded as necessary"* to the proposed joint venture.[10]

That language suggests there needs to be an objective link between the cartel provision and the scope and activities of the joint venture and not just a belief by a party that the cartel provision is necessary.

The 2005 Explanatory Memorandum which introduced the s76C test "for the purposes of a joint venture" stated that "*genuine joint venture activity which does not substantially lessen competition will have a defence under these provisions*".[11] That approach suggests the expression "for the purposes of a joint venture" in ss76C and 76D required more than a party's subjective belief that a cartel provision relates to the joint venture - that there needs to be an objective or genuine link between the cartel provision and the joint venture.

The Committee understands that the corresponding approach under antitrust law in the United States and EU Directives is objectively based, in the sense of the requirement to show that the restraints in question are reasonably necessary for, and proportionate to, the joint venture in question.[12] For example as the US Supreme Court has stated:

> *"Under the doctrine, courts must determine whether the joint venture restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid."*[13]

(c) Section 4F and 'purposes of a provision'

[9] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015, p.364.

[10] http://www.australiancompetitionlaw.org/reports/pdf/swanson1976.pdf

[11] https://www.legislation.gov.au/Details/C2005B00022/Explanatory%20Memorandum/Text

[12] See *Texaco Incorporated, Petitioner v Fouad N Dagher, et. al.; Shell Oil Company, Petitioner v Fouad N Dagher, et. al.* 547 US 1 (2006); Areeda and Hovenkamp, *Antitrust Law*, (2003), ch 21; EC Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/08, [28]-[31]

[13] *Texaco Incorporated, Petitioner v Fouad N Dagher, et. al.; Shell Oil Company, Petitioner v Fouad N Dagher, et. al.* 547 US 1 (2006), p6

In this context, the Committee also notes that the accepted interpretation of s4F of the CCA in determining the purposes of a provision, for the purpose of s45 of the CCA, has settled on a subjective approach rather than an objective interpretation.

This was decided in relation to ss45 and 4D in the High Court of Australia decision, *News Limited v South Sydney Rugby League* (2003),[14] where the majority held that references to purpose of a provision requires a subjective test.[15]

The Committee considers that the approach taken in the two aforementioned cases is the approach that is highly likely to be held applicable to determining the purpose of a provision under the new cartel laws.

However, that subjective approach to s4F does not necessarily determine the issue of whether determining the *"purposes of a joint venture"* also involves a subjective test.

There is a distinction between the task of determining the purpose behind a provision being included in a cartel arrangement under s4F, and determining the purposes of a joint venture for the joint venture exception. In this respect, the "purposes of a joint venture" being established is not the same as the inquiry as to the purpose behind a contractual or collusive arrangement. Some may argue that part of the legislative intention is not to pick up s4F, but to require an objective nexus. The joint venture question may include reference to the reasons why the parties chose to establish the joint venture. However, the nature of the exception and the recognition that legitimate joint venture activity should be an exception to cartel activity, could suggest that the actual scope and activities of the joint venture are relevant, as to whether the joint venture is a legitimate exception for competitors otherwise adopting a cartel arrangement.

In the Committee's view, these issues should be clarified in the legislation.

1.6 The proposed vertical arrangement exemption in s 44ZZRS

The current vertical arrangements exemption to cartel conduct in s44ZZRS(1) of the CCA applies to conduct which would, or would but for the operation of but for s47(10), contravene s47(1) of the CCA. The Exposure Draft Bill removes this link between ss44ZZRS(1) and 47 of the CCA and provides a standalone exemption for certain restrictions on competition that are imposed by either a supplier or acquirer in circumstances where they are also in competition with each other.

The Explanatory Materials state that the proposed s44ZZRS(1) of the CCA is designed to "better target the prohibition on cartel provisions toward anti-competitive conduct."[16] The Committee welcomes the proposal to amend this provision to the extent that it provides for a clearer and targeted exemption to cartel conduct for a broader range of vertical trading restrictions.

The Explanatory Materials also state that the amendments are intended to broaden the exemption to vertical trading restrictions by removing the specific reference to s47 and providing for the types of vertical trading restriction arrangements that fall within the exception.

Contrary to the Explanatory Materials' comment, the Committee considers that the proposed amendment materially narrows the application of the exemption in certain circumstances. The amendment does not provide an exemption for some vertical restrictions that would be exempt under the current law because of the breadth of the exclusive dealing practices in section 47. The proposed amendment requires a specific type of relationship or connection between the goods or services supplied or acquired and the goods or services which are subject to the restriction, that

[14] 215 CLR 563 at [43].

[15] See also Seven Network v News (2009) 182 FCR 160 at [862]-[876].

[16] Explanatory Materials, paragraph 2.29.

being that the goods or services must be "substitutable for" or "otherwise competitive with" one another. Currently, ss47(2)(d) and 47(4) of the CCA do not require this relationship or connection between the goods or services supplied or acquired and the goods or services which are the subject of a restriction (although, it is acknowledged s47(2)(d) requires that the restriction be on acquiring goods or services from *a competitor* of the supplier).

The Committee considers that the amendment may result in arrangements between parties being per se prohibited that would be exempted under the current law. For example, if a purchaser acquires goods or services (Product X) (e.g. a particular type of wool) from the supplier for use as an input in manufacturing or some other transformative process to create a different type of good or service (Product Y) (e.g. a suit) on condition that the supplier does not also supply Product Y (in circumstances where Product X and Product Y are not substitutable or competitive with one another), this restriction would not benefit from the proposed exemption but would likely fall within the exclusive dealing practices in section 47(4) and therefore be able to rely on the current exemption in s44ZZRS.

This limitation would apply in any instance involving the supply of an input or component that is then transformed or used up to produce a good or service. Equally, if the supplier of Product X were to impose conditions on the purchaser for the supply of Product Y (e.g. limiting the areas in which they may supply Product Y), this may not be captured under the Exposure Draft Bill. Accordingly, the Committee recommends that the proposed “goods or services that are substitutable for, or otherwise competitive with” requirement is replaced with, simply, “goods or services” to more closely align the drafting of the proposed exemption with the existing scope of restrictions in s47.

The proposed drafting does not provide an exemption for circumstances where the purchaser acquired goods or services from the supplier on the condition that the supplier does not acquire goods or services from any third party. This could have implications, for example, where a restriction involves a restraint on both the supply and acquisition by the supplier. There would seem to be no basis for not permitting a restriction of this type to receive the benefit of the proposed exemption to the cartel laws. Accordingly, the Committee recommends that s44ZZRS(1)(b) of the Exposure Draft Bill be amended to include obligations imposed on the supplier that relate to the acquisition by the supplier, from any person, of goods or services.

In other respects, the proposed exemption expands the application of the exemption available to parties in a supplier and acquirer relationship. For example, the exemption would apply to restrictions imposed on an acquirer not to supply goods or services that are substitutable for, or otherwise competitive with the goods or services supplied by the supplier to the acquirer. Currently, s47(2) does not include this condition and therefore the current exemptions could not apply to this restriction.

Another potential expansion of scope is that a price restriction imposed by an acquirer or a supplier could potentially be exempt from the *per se* cartel prohibitions. As was identified by the Full Federal Court in *ACCC v Safeway*,[17] the exclusive dealing provisions do not apply to price restrictions imposed by an acquirer on supplying to third parties (therefore, the current exemptions in ss45(6) and 44ZZRS(1) also would not apply). However, given the broad drafting of the exemption and the stated intention of the exemption to broaden the types of restrictions receiving the benefit of the exemption, it would be open to the court to interpret the exemption so as to permit a supplier or acquirer to place a price obligation on the other party provided it "relates to" the supply by the supplier (or acquisition by the purchaser) of the goods or services they are supplying or acquiring (as the case may be). If this view were accepted, this exemption would

[17] *ACCC v Australian Safeway Stores Pty Ltd* [2003] FCAFC 149

apply in circumstances where an acquirer of goods or services (Product A) (e.g. bread) from a wholesale supplier of Product A, which also operated its own retail supply business, imposed a condition on the supplier that the supplier must not supply Product A to retail customers below a particular price. It is not clear whether it was intended that *any* obligation relating to the supply by the supplier of goods or services would fall within the potential scope of the exemption (including conditions relating to price which might otherwise be prohibited by the operation of s44ZZRD(2)).

2 Concerted Practices

2.1 Introduction

The effect of the proposed amendments to s45 are, in short, to:

- repeal the price signalling provisions;
- include a prohibition on engaging in a concerted practice that has the purpose, effect, or likely effect of substantially lessening competition; and
- repeal the prohibition on exclusionary provisions.

The Committee supports the repeal of the prohibitions on price signalling and on exclusionary provisions and confirms that the repeal implements Harper Review Recommendations 28 and 29.

The Committee considers that the current drafting of the prohibition against concerted practices will result in significant uncertainty and requires amendment.

2.2 The proposed prohibition on Concerted Practices will cause uncertainty

The term 'concerted practice' is not defined in the Exposure Draft Bill and there will be substantial uncertainty as to its interpretation because of the complexity of European law concerning the concept and the uncertain interaction of that body of law with existing Australian law concerning arrangements and understandings.

The European law concerning 'concerted practices' is replete with variations and nuances which will, inevitably, introduce considerable uncertainty into Australian law. The relevant European law has, moreover, developed in circumstances which are quite different from the current Australian law concerning arrangements and understandings. The intersection of existing Australian law and European law concerning 'concerted practices' will cause additional uncertainty.

The significance of that uncertainty should be assessed in light of the fact that a contravention of the proposed prohibition would have severe consequences, including pecuniary penalties up to a maximum for individuals of $500,000 and for corporations potentially the greater of $10 million and 10% of annual turnover.

(a) European law concerning concerted practices

The Explanatory Materials state that:

> The concept of a concerted practice is well established in competition law internationally.

It is probably more accurate to say that the concept is well established in European law. The concept is found in the Treaty on the Functioning of the European Union, which prohibits, in Article 101:

> … all agreements between undertakings … and concerted practices … which have as their object or effect the prevention, restriction or distortion of competition within the internal market …

Although the concept may be well established in Europe, its scope and reach are not settled. The prohibition on concerted practices in the European Union has been the subject of numerous court decisions over more than 40 years. Unsurprisingly the body of case law contains a number of definitions and implied definitions of concerted practices which evidence the evolution of its interpretation.

For example, in *Dyestuffs*[18] the highest court in Europe, the Court of Justice, described a concerted practice as:

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[18] Cases 48/69 etc *ICI vs Commission* [1972] ECR 619 paragraph 64

> … a **form of coordination** between undertakings which, short of the conclusion of an agreement properly so-called, **knowingly substitutes practical cooperation** between the undertakings for the risks of competition. [Emphasis added]

In the same decision the Court of Justice held that it was:

> ... contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to **determine a co-ordinated course of action** … and to ensure its success by **prior elimination of all uncertainty** as to each other's conduct regarding the essential elements of that action[19] [Emphasis added]

By contrast, in *Suiker Unie,* the Court of Justice stated that the law precluded:

> ... any direct or indirect contact between such operators, the **object or effect whereof** is either to influence the conduct on the market of an actual or potential competitor or **to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market**.[20] [Emphasis added]

In *Anic*, the Court of Justice has stated, in another formulation, that a concerted practice will be held to exist where:

> ... a concerted practice implies, besides undertakings **concerting together**, **conduct** on the market **pursuant to those collusive practices**, and a relationship of cause and effect between the two... [21]

The Court also stated in *Anic* that there is a rebuttable presumption that:

> ... the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market …[22]

It is not an exaggeration to say that each of these formulations is pregnant with nuances and subtle but important differences. The absence of a statutory definition of concerted practice means that the Australian courts will have no guidance as to how to navigate their way through 40 years of European jurisprudence.

Issues which arise from this uncertainty include:

- **The requirement of intent:** The *Dyestuffs* formulation requires knowing substitution of practical cooperation for the risks of competition. By contrast, one element of the *Suiker Unie* formulation requires an object of influencing the market conduct of a competitor. The drafting of the proposed prohibition leaves it quite unclear what is intended to be the requisite mental element for a 'concerted practice' in Australia.
- **The necessary degree of coordination:** In *Dyestuffs* there are references to a 'form of coordination … short of an agreement' and to 'determining a co-ordinated course of action' (neither of which appear materially different from the current interpretation of 'understanding). By contrast, in *Suiker Unie* it is apparently sufficient that there is indirect contact which discloses to a competitor a possible course of conduct. In *Anic* the requirement appears to be that the firms 'concert together … and behave on the market pursuant to those collusive practices'. These formulations are subtly but importantly different and the drafting of the proposed prohibition gives no guidance as to the degree of coordination required for a 'concerted practice' in Australia.

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[19] *Dyestuffs paragraph 118*

[20] Joined cases 40/73 *Cooperatieve Vereniging 'Suiker Unie' and others vs Commission* [1975] ECR 1663

[21] Case – 49/92P *Commission vs Anic Partecipazioni* [1999] ECR I-4125 [paras 118 and 121]

[22] Case – 49/92P *Commission vs Anic Partecipazioni* [1999] ECR I-4125 [paras 118 and 121]

- **Rebuttable presumption:** the relevant European law also includes an important rebuttable presumption that a party exposed to another party's information will act on it. The drafting of the proposed prohibition provides no guidance as to what weight, if any, should be accorded to a presumption such as this in Australia.

(b) Intersection of European law concerning concerted practices and Australian law concerning arrangements and understandings

The purpose of having the concept 'agreement' and 'concerted practice' in Article 101 has been said, in a leading text on European competition law, to:

> ... cover all types of arrangements by which undertakings mutually accept a limitation of their freedom of action instead of independently determining their future conduct on the market ...[23]

In other words, the prohibition on concerted practices in Europe was addressed to those circumstances where there was insufficient evidence of an agreement.

The approach in Australia is different. Arrangements by which firms mutually accept a limitation of their freedom of action, but which fall short of being a contract, are considered under the prohibitions in s45 on provisions in arrangements and understandings which have the purpose, effect or likely effect of substantially lessening competition.

The impact of the absence of guidance as to which strands of the European jurisprudence should be imported into Australia referred to above is exacerbated because the interpretation of Article 101 by the European courts has involved no consideration of 'arrangements' or 'understandings' and the possible relationships between those concepts and concerted practices. By contrast, the proposed prohibition of concerted practices will sit alongside the current prohibitions in s45 on provisions in arrangements and understandings. In the absence of a definition of concerted practice it is uncertain how the current law concerning the interpretation of 'understanding' is intended to affect the interpretation of 'concerted practices'.

(c) Conclusion

The Committee submits that the uncertainties resulting from the adoption of the term 'concerted practice' cannot be cured by the current abbreviated discussion in the Explanatory Materials, or by any guidelines issued by the ACCC.

The uncertainties require a statutory definition or a statutory list of factors which will guide interpretation of 'concerted practice'. The definition or factors should address, at a minimum:

- the relationship, if any, between the participants in the conduct;
- the degree of concertation required;
- whether practice implies some element of repetition;
- whether any causal nexus between the concertation and a party's subsequent conduct is required; and
- the requisite mental element.

A proposed definition and a proposed list of interpretative factors are set out in section 2.3 below.

2.3 Proposed options: definition or list of interpretative factors

It seems undisputed that the essence of a concerted practice is communication, which is intended to provide information as to likely future conduct and thereby to remove some of the risks and uncertainties of competition.

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[23] Bellamy & Child *European Union Law of Competition* Seventh addition [paragraph 2.055]

The proposed definition is intended to reflect that essential feature, without importing the uncertainties of European jurisprudence, including presumptions. It is also drafted to avoid any requirement that any party assumes an obligation to act in any particular way, as is required under Australian law for arrangements and understandings.

(a) Proposed definition

> *A corporation engages in a concerted practice with one or more other persons, at least one of whom is competitive with the corporation or a related body corporate, if the corporation communicates, directly or indirectly to one or more of those other persons, information which is not publicly available concerning the corporation's conduct and which is intended to eliminate or substantially reduce uncertainty as to the corporation's likely conduct.*

(b) Proposed list of interpretative factors

In determining whether a corporation has engaged, with one or more persons in a concerted practice, without limiting the matters to which the Court may have regard, the Court shall have regard to the following:

(i) whether the conduct leads to cooperation between the parties that is contrary to normal competitive processes;

(ii) whether the conduct has the effect of reducing uncertainty as to the conduct of the parties on the market;

(iii) whether the conduct has the effect of altering or maintaining the commercial conduct of the parties; or

(iv) whether the conduct involves a disclosure of confidential information to one or more competitors or potential competitors of the corporation in the market, and not to any other person; or

(v) whether the conduct involves the disclosure of a future price for, or a discount, allowance, rebate or credit in relation to goods or services supplied or likely to be supplied, or acquired or likely to be acquired, by the corporation; or

(vi) whether the conduct involves the disclosure of the capacity, or likely capacity, of the corporation to supply or acquire goods or services; or

(vii) whether the conduct involves the disclosure of any aspect of the future commercial strategy of the corporation that relates to the goods or services.

3 Merger Authorisations

3.1 Introduction

This section of the submission concerns the Government’s proposal to combine the processes for authorisation of mergers, which are currently determined by the Australian Competition Tribunal (***Tribunal***) and the formal clearances for mergers, which are currently determined by the ACCC.

This submission makes four key points:

(a) the Tribunal should have the power to conduct full merits review of the ACCC's determinations to authorise or to decline to authorise mergers. This is consistent with the Tribunal’s powers to review determinations of the ACCC for authorisation of other conduct;

(b) rather than the ACCC approving the form of an application for authorisation of a merger, the ACCC should issue a policy document setting out what it prefers to see in the application. This is consistent with the ACCC's approach for applications for informal clearance of mergers, where its approach is described in policy documents that may be updated from time to time with ease;

(c) the amending legislation should contain a provision, similar to one that is proposed to be repealed as part of the transfer of power from the Tribunal to the ACCC, which allows for the regulated disclosure of confidential information to specified persons where the ACCC is taking that information into account in its assessment of an application for authorisation of a merger; and

(d) the ACCC should be required to give procedural fairness to applicants for authorisation of overseas mergers.

The importance of point (a) should not be underestimated. The Committee considers that there is a very high risk that the merger reform will simply fail if full merits review is not specified, and that this process will never be used, as has been the case with the formal clearance process. This would represent a missed opportunity to establish a world's best practice merger review system that will service the Australian consumer and business community well for decades to come.

This submission also notes a typographic error in the Exposure Draft Bill.

A Full merits review by the Tribunal

3.2 The Harper Panel's recommendation

The Harper Panel recommended that:

(a) the Tribunal’s review of the ACCC’s determinations to authorise mergers should be based upon the material before the ACCC when it assessed the application for authorisation; and

(b) the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.[24]

3.3 The Government’s response to the Harper Panel's Final Report

In the Government’s response of November 2015 to the Harper Panel's Final Report (***Government Response***), the Government indicated that it supported the Harper Panel's recommendation and stated:

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[24] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015, p. 333.

The recommended changes will streamline and simplify the formal merger review process, reducing burden on business while maintaining the integrity of the system.[25]

3.4 The changes in the Exposure Draft Bill fall short of the Harper Panel's recommendation and the Government's response to the recommendation

The changes proposed by the Government in the Exposure Draft Bill are much narrower than the changes recommended by the Harper Panel. This is because the changes do not provide the discretion to the Tribunal to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is a sufficient reason.

Rather than reflecting the Harper Panel's recommendation, Paragraph 109 of Schedule 10 of the Exposure Draft Bill provides that the Tribunal must not, for the purposes of the review, have regard to any information, documents or evidence other than:

(a) information that was referred to in the ACCC's reasons for making the determination;

(b) information furnished, documents produced, or evidence given to the ACCC in connection with the making of the determination, to which the review relates;

(c) information given to the Tribunal as a result of the Tribunal seeking such relevant information, and consulting such persons, as it considers reasonable and appropriate for the sole purpose of clarifying the information, documents or evidence referred to above; and

(d) any information or report given to the Tribunal by the ACCC as may be required by the Tribunal to furnish such information, make such reports and provide such other assistance as specified by the member presiding over the Tribunal.

Paragraph 109 of the Exposure Draft Bill:

(a) provides no right:

  (i) for a party to receive and review the totality of the information, documents and evidence referred to or relied on by the ACCC in making its determination;

  (ii) for a party to make submissions, adduce new or clarifying information or evidence or to cross examine witnesses who have given evidence to the ACCC, despite not having seen the totality or the information, documents or evidence on which the ACCC's determination was made;

(b) limits the Tribunal's discretion to seek further information or 'consulting' persons for the **sole purpose** of clarifying information provided by the ACCC.

This is a very restrictive basis on which the Tribunal would be required to review subject matter which, by its very nature, involves complex questions of fact, economics and law.

No such limitation was recommended by the Harper Panel or proposed by the Government in its response to those recommendations. Moreover, no such limitations exist for non-merger authorisations and neither did they exist under the earlier two-stage merger authorisation process that was in place prior to the 2007 reforms.

The limitation proposed in the Exposure Draft Bill has the potential to greatly curtail the power of the Tribunal to exercise the discretion to allow a party to adduce further evidence, or to call and question a witness, as it sees fit in the circumstances of each application brought before it.

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[25] Australian Government Response to the Competition Policy Review, p.28.

The Committee's view is that the Government should, at the very least, implement the Harper Panel's recommendation to provide the Tribunal with the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.

However, for the reasons set out below, the Committee's preference is for the Government to empower the Tribunal to conduct a full merits review of the ACCC's determinations of merger authorisations.

3.5 Tribunal should have power to conduct a full merits review

The Committee submits that the Tribunal should have powers to conduct a full merits review of the ACCC's determinations of merger authorisations because:

(a) such a power would be consistent with the Tribunal's powers of review for all other types of applications for authorisation under the CCA. There is no basis for distinguishing merger authorisations from other types of authorisations; and

(b) based on past experience, the ACCC is not the proper final decision-maker for all merger cases, particularly complex ones.

3.6 Consistency with powers of review of all other applications for authorisation

The limitation on the Tribunal's power to conduct a full merits review is inconsistent with its powers of review of all other types of applications for authorisation undertaken by the Tribunal.

This is expressly recognised in the Exposure Draft Bill which provides that a review by the Tribunal is a re-hearing of the matter, unless it is a review of a determination of the ACCC in relation to a merger authorisation.[26]

The Committee does not consider there is any logical reason for the inconsistency between the proposed highly restrictive power of the Tribunal to review the ACCC's determinations for authorisations of mergers, and the Tribunal's much broader power to review the ACCC's determination of all other types of applications for authorisations.

All applications for authorisation can raise complex factual, economic or legal questions of significance to the Australian economy and its consumers.

The Tribunal is a highly respected expert body that is well placed to review all applications for authorisation, be they of a merger or otherwise.

In some instances, businesses undertake 'synthetic mergers' where they agree to co-ordinate all or a substantial amount of their activities, including their prices, capacity, outputs, procurement and back-office functions. 'Synthetic mergers' are common in the international airline industry. Applications for authorisation from the ACCC for 'synthetic mergers' have the benefit of full merits review by the Tribunal and involve the same type of complex factual, economic and legal questions as other types of mergers that involve acquisitions of shares or assets. There is no logical basis for limiting the review process for 'non-synthetic mergers' when compared to 'synthetic mergers'.

(a) Would full merits review create incentives to withhold relevant information from the ACCC or cause timing issues?

The Committee is aware of two possible reasons for making an exception for mergers that are sometimes advanced against full merit review:

[26] Paragraph 101 of Schedule 10 of Exposure Draft Bill inserting new subsection 101(2).

- possible incentives to withhold relevant information from the ACCC at first instance; and
- timing issues.

(b) No incentive to withhold relevant information

In the Committee's view, providing the Tribunal with the power to conduct a full merits review of the ACCC's determinations of applications for authorisation of mergers would not create an incentive for the parties to the merger to withhold relevant information from the ACCC.

Based on the Committee's members' experiences, parties will continue to have a very strong incentive to provide all relevant information to the ACCC because not to do so would only risk an adverse decision by the ACCC, or the Tribunal, or cause unnecessary delays.

The ACCC will continue to have powers to compel the production of documents, to compel information to be furnished and to compel persons to provide oral evidence under oath during its reviews of applications for authorisation of mergers. Its practice has been, and will likely continue to be, to use these powers extensively in complex matters.

Applicants for authorisation of a merger will be acutely aware that, even with full merits review, the Tribunal has broad discretion to control proceedings before it and may not admit or may only place limited weight on evidence that it considers should have been provided to the ACCC at first instance and tested through a public review process.

(c) No timing issues

The Committee acknowledges that a full merits review by the Tribunal of the ACCC's determination of authorisation could take longer than a limited merits review. However, the Committee is of the view that such timing considerations are a matter for the merger parties who may consent to an extension of the statutory timeframes should the need arise.

In any event, recent consideration of merger authorisations by the Tribunal has shown that the Tribunal is clearly capable of conducting full merits review within a three month time period. This is so even without the benefit of a formal first instance investigation by the ACCC, which is likely to expedite a subsequent full merits review by the Tribunal. A time line of between six to seven months for a first instance determination by the ACCC and review by the Tribunal is a reasonable and practicable time frame for complex merger cases. It is comparable with equivalent time frames in other major OECD jurisdictions, including the EU and US.

3.7 The ACCC should not be the sole decision-maker in all merger cases, particularly complex ones

The CCA itself recognises that the ACCC should not be the final decision maker in all merger cases. This is evident from s50A of the CCA, which regulates foreign-to-foreign mergers that result in a change of control of an Australian subsidiary. It is also an inherent feature of the formal clearance and merger authorisation processes.

Section 50A confers exclusive power on the Tribunal to make findings about the likely competitive effects and benefits to the public of foreign-to-foreign mergers that result in a change of control of an Australian subsidiary and to make orders requiring the Australian subsidiary to cease carrying on business.

Further, the Committee submits that there are some complex and contentious mergers that are particularly suited to a formal process where the ACCC is not the final decision-maker. The proposed merger authorisation process should ensure that it remains a viable and efficient process for those mergers. In making its decision the Tribunal will have the benefit of the reasoning of the ACCC and the materials that were before it. However, it is critical that the

Tribunal at the very least be able to seek new evidence as it sees fit as it may take a different approach to the ACCC in its review.

There are three aspects to the ACCC's history with applications for authorisation of mergers which support the Committee's submission:

- the first aspect relates to the Dawson Committee's recommendation to transfer to the Tribunal the ACCC's then powers to authorise mergers;
- the second aspect relates to the ACCC's determinations of applications for authorisation of mergers between 2003 and 2007, before the Dawson Committee's reforms took effect; and
- the third aspect relates to the ACCC's recent track record in contested merger cases.

(a) The Dawson Committee's recommendation

The Dawson Committee recommended in 2003 that the ACCC's powers to authorise mergers be transferred to the Tribunal because of widespread dissatisfaction, at that time, with the way the ACCC exercised its power to authorise mergers.

The Howard Government accepted the Dawson Committee's recommendation in 2005 and introduced legislation to give effect to the recommendation in the same year. The legislation took effect on 1 January 2007. This resulted in the ACCC's previous powers to authorise mergers being transferred to the Tribunal.

The Committee is not aware of any dissatisfaction with the way the Tribunal has exercised its power to authorise mergers.

It has been observed that the ACCC has acted in an adversarial role when it has been assisting the Tribunal in recent applications for authorisation of mergers.[27]

(b) Summary of applications for authorisation for mergers determined by the ACCC between 1993 and 2007

Figure 4.1 below summarises the outcomes of some of the authorisation applications to the ACCC prior to that power being transferred to the Tribunal on 1 January 2007.

As can be seen from Figure 4.1, only 13 applications for authorisation for mergers were made to the ACCC between 1993 and 1 January 2007, averaging less than one application each year.

Of the 13 applications:

- the ACCC declined to authorise 6 of the applications. 1 of those decisions was the subject of an application for review by the Tribunal and was overturned by the Tribunal;
- the ACCC authorised 4 of the applications subject to undertakings or conditions;
- the ACCC authorised 2 of the applications without undertakings or conditions; and
- one application was withdrawn.

[27] *Application by Sea Swift Pty Limited* [2016] ACompT 9 at [293].

Figure 4.1: Applications to the ACCC for authorisation of mergers between 1993 and 2007

Case citation	Outcome
CSR Limited, McKay Sugar Co-operative Association Ltd, E D and F Mann Australia Pty Ltd and NewCo (1993) ATPR 50-138	Authorisation denied
Davids Ltd (1995) ATPR 50-185	Authorisation granted subject to conditions
Silver Top Taxi Service Ltd (1995) ATPR 50-209	Authorisation denied
Application by Davids Ltd (1996) ATPR 50-224	Authorisation granted subject to a condition
Application by DuPont and others (1996) ATPR 50-231	Authorisation granted
Application by Wattyl (Australia) Pty Ltd, Courtaulds (Australia) Pty Ltd and others (1996) ATPR 50-232	Authorisation denied
Bristile Holdings Ltd (1997) ATPR 50-250	Authorisation denied
Adelaide Brighton Limited (1999) ATPR 50-272	Authorisation granted subject to undertakings
Adelaide Brighton Limited (1999) ATPR 50-273	Authorisation granted
Australian Pharmaceutical Industries Limited and Sigma Company Limited, ACCC Public Register File No. C2002/1089, Final Determination 11 September 2002	Authorisation denied
Little Company of Mary Health Care Ltd and St Vincent's Hospital Launceston Ltd, ACCC Public Register File No. C2004/1958, Final Determination 11 March 2005	Authorisation granted subject to undertakings
Qantas Airways Limited and Air New Zealand Limited, ACCC Public register File No. C2002/1774, Final Determination 9 September 2003	Authorisation denied by the ACCC The ACCC's decision was overturned by the Tribunal: *Qantas Airways Limited* (2004) ATPR 42-027
Foodland Associated (1993)	Withdrawn

(c) Recent experience in contested merger cases

There have been four recent contested merger cases. In each instance, the ACCC did not prove its case and, on occasion, the ACCC has been criticised for the way it has attempted to do so, including for putting forward theoretical based speculation rather than evidence based on commercial reality. In one instance, it was found that the ACCC's evidence "*not been identified by reference to the dynamics and constraints really at work, but by reference to the need to supply a foundation for the hypothesis which the ACCC wished to offer about the future state of the 'market'.* Further detail is set out below.

Case Study No 1: Sea Swift's acquisition of Toll (2016)

Sea Swift's proposed to acquire certain shares and assets relating to Toll Marine Logistics' (***TML***) marine freight business in the Northern Territory and Far North Queensland. Sea Swift and Toll (through TML) both provided scheduled marine freight services in these regions.

The parties first sought informal clearance from the ACCC.

The application for authorisation followed a decision by the ACCC in July 2015, at the end of the informal clearance process, to oppose the proposed transaction.

ACCC's case theory

The transaction was characterised by the ACCC as a 'merger to monopoly' that would substantially lessen competition in the market for supply of marine freight services to some of Australia's most remote and disadvantaged communities. The ACCC contended that, absent authorisation, Toll would wind up the TML business in a way which provided a 'unique opportunity' for an alternative service provider to establish itself by gaining access to TML's customer contracts (and/or vessels). The ACCC also contended that the proposed acquisition would heighten barriers to entry (including reputational barriers).

Evidence

The ACCC's case relied on witness statements from 14 lay witnesses, as well as 3 experts.

The merger parties initially presented evidence from 22 lay witness and 3 expert economists. Further evidence from key lay witnesses and experts was filed in reply to the ACCC's report to the Tribunal and from an additional expert to respond to evidence filed by the ACCC from a business reconstruction expert.

The Tribunal also considered submissions from several interested parties, including from government.

The majority of evidence was subject to cross examination and direct questions from the Tribunal. Experts gave evidence both individually and concurrently as directed by the Tribunal.

Outcome – authorisation granted (with conditions)

In its reasons, the Tribunal favoured 'commercial reality', rather than 'theoretically based speculation' put forward by the ACCC. In concluding that 'theory must give way to fact', the Tribunal was persuaded by the lay witness evidence given by key company executives and customers, over the evidence given by the ACCC's expert as to what Toll could or might do if the proposed acquisition did not proceed.

The Tribunal also carefully considered the evidence given by competitors (largely filed by the ACCC), and was not persuaded that the potential aspirations of competitors aligned with their expectations or the requirements of key customers. It concluded that Sea Swift was the party most likely to assume key customer contracts if the proposed acquisition did not proceed in any event.

The Tribunal not only found that there was no substantial lessening of competition, but no competitive detriment *at all* (other than some detriment in relation to one landing facility which was addressed through a s87B undertaking), and further found that there were significant public benefits.

Significance

The Tribunal clearly benefitted from hearing from a wide range of witnesses and experts through the hearing, and its conclusions drew upon all the evidence before it, including evidence filed in reply and throughout the hearing, and from evidence given under cross examination. It was able to hear such evidence because of the flexibility afforded by Tribunal's processes (in particular, the ability to call for and receive additional information, and to permit parties to undertake cross examination), as well as the obligations built into the existing merger authorisation process which require, among other things, the ACCC to file a report providing its evidence.

The difference of opinion between the ACCC and Tribunal was not attributable to the different tests which each were required to apply. Put simply, the Tribunal reached a very different conclusion on what the future would look like after the merger, based on evidence.

The decision highlighted the need for a specialist competition body to thoroughly test evidence underpinning the ACCC's case theory

The decision also highlights the capacity of the Tribunal to handle complex, contested competition matters, including a full merits review within a period of 3 months.

Case Study No 2: AGL's acquisition of Macquarie Generation (2014)

AGL Energy Limited (***AGL***) submitted a bid for Macquarie Generation's assets, including the Bayswater and Liddell power plants. The bid was submitted to the NSW Government which was then privatising a number of electricity generation assets.

AGL applied to the ACCC for informal clearance but the ACCC decided to oppose the bid and declined to accept a s87B undertaking from AGL committing to make hedge contracts available should its bid be successful.

AGL then applied to the Tribunal for authorisation of its bid.

ACCC's case theory

The ACCC's report to the Tribunal opposed the bid. The ACCC argued that the bid, should it be successful, would increase barriers to entry and expansion in the retail supply of electricity in NSW by reducing liquidity in the supply of hedge contracts. It also argued that combining Macquarie Generation's and AGL's generating capacities would substantially lessen competition in wholesale electricity markets.

Merger party (or parties) case theory

AGL contended that no competitive detriment would arise from the transaction as, after it had won the bid process, AGL will remain effectively constrained by its competitors. In addition, AGL contended that significant public benefits would arise from its bid, including because AGL would spend significant sums on Macquarie Generation's assets to maintain and improve them, which was likely to result in a more reliable, long-term, baseload electricity supply into the National Electricity Market from Bayswater.

Evidence

AGL filed evidence from 12 lay witnesses and experts, as well as reply evidence.

The ACCC filed evidence from 14 lay witnesses and experts.

The Tribunal also considered submissions from seven interested parties.

Expert evidence was given concurrently in five tranches dealing with specific issues, from a total of nine economic and accounting experts.

The hearing lasted approximately two weeks.

Outcome – authorisation granted (with conditions)

The Tribunal determined that the acquisition was likely to result in no material public detriments and substantial public benefits, contrary to the ACCC's view.

In its decision, the Tribunal was 'not persuaded by the key theory of competitive harm said by the ACCC to arise' from the proposed acquisition and authorised the transaction subject to conditions reflecting the s. 87B undertaking AGL had offered to the ACCC, and which the ACCC had declined to accept.

Significance

The Tribunal reached a very different conclusion to the ACCC about the level of competition which AGL would face should it be the winning bidder, based on evidence put forward at the Tribunal. It compared possible outcomes with and without the bid succeeding and endeavoured to make a 'robust and commercially realistic judgment' on the public benefits and detriments.

In making its decision, the Tribunal indicated that it was greatly assisted by the probative tools available to it during the hearing. It described the hearing process as 'efficient, focused and helpful', allowing counsel to test and challenge evidence or elicit additional information.

While the nine economic and accounting experts differed in some respects, the Tribunal noted that questioning from counsel assisted in identifying areas of consensus and disagreement and the reasoning behind particular opinions. Hearing evidence given concurrently allowed the Tribunal to assess whether the methodology and inputs were appropriate. The Tribunal’s process provided an effective forum for evidence to be brought and tested in a transparent and effective way.

Case Study No 3: Metcash's acquisition of Franklins (2010)

On 1 July 2010, Metcash entered into an agreement with Pick n Pay to acquire the Franklins supermarket business for $215 million, conditional on ACCC clearance.

Franklins

Franklins was a grocery retailer that owned 80 supermarkets in New South Wales, operated 10 Franklins supermarkets in New South Wales through franchise agreements, and owned the Franklins and No Frills brands. Since 2005, Franklins supplied groceries to its corporate and franchise stores through the use of third party logistics providers. Franklins' share of grocery retail sales was approximately 6% in New South Wales and 1% nationally.

Metcash

Metcash was a listed Australian marketing and distribution company specialising in grocery, fresh produce, hardware, liquor and other fast moving consumer goods. Metcash supplied grocery products throughout Australia to around 2,800 independent supermarkets operating, principally, under its IGA brand. Metcash's share of grocery retail sales was approximately 11% in New South Wales, compared to around 17% or more in all other States.

The agreement to sell Franklins to Metcash reflected a decision taken by Pick n Pay in June 2010 to exit its investment in Australia, following a strategic review of the business in the first half of 2010.

Metcash approached the ACCC for informal clearance

Metcash sought informal merger clearance from the ACCC in late July 2010.

In mid-November 2010 the ACCC announced that it would oppose the acquisition on the basis that it was likely to substantially lessen competition.

Notwithstanding the ACCC's opposition to the transaction, Metcash announced on 23 November 2010 that it intended to complete the acquisition.

The ACCC commenced proceedings in the Federal Court to prevent Metcash from acquiring Franklins

By 8 December 2010, the ACCC had commenced proceedings in the Federal Court of Australia seeking an injunction to prevent the transaction from completing, and the parties agreed not to complete pending an urgent final hearing on an expedited basis.

The ACCC alleged that Metcash and Franklins were the only two suppliers in the market for the wholesale supply of packaged groceries to independent supermarkets in New South Wales. A striking feature of the ACCC's case was that it claimed that Coles, Woolworths and Aldi were not in the same market as Metcash and did not otherwise closely constrain Metcash's pricing discretion.

The Court found against the ACCC

The Court found against the ACCC.

The Court noted that the ACCC's separation of Metcash's wholesale activities from its activities at the retail level involved a "significant degree of artificiality", given Metcash was not only a wholesaler, but "intimately involved in the retail activities of the IGA stores". The Court also found that the constraint imposed by the major supermarket chains on Metcash was strong and increasing.

In the course of the informal merger clearance process and litigation processes, the ACCC made various claims about what would happen to Franklins if Metcash did not acquire and abandoned all bar one of them. The Court rejected the one claim that the ACCC did not abandon finding that it was not a credible claim.

Rather than being likely to substantially lessen competition, the Court concluded that the acquisition would strengthen the position of independent retailers operating under the IGA banner to compete more vigorously with the major supermarket chains.

The Full Court dismissed the ACCC's appeal

The ACCC lodged an appeal to the Full Court of the Federal Court. The appeal was unanimously dismissed on 30 November 2011 (more than one year after the ACCC had opposed the transaction under its informal clearance process). In dismissing the ACCC's case, the Full Court found that:

- the market propounded by the ACCC was "artificial". In particular, Buchanan J noted that it had "not been identified by reference to the dynamics and constraints really at work, but by reference to the need to supply a foundation for the hypothesis which the ACCC wished to offer about the future state of the 'market'"; and
- the ACCC's contention as to what would have happened to Franklins if it were not acquired by Metcash was a matter of pure speculation and that the primary judge had made a "real world" assessment based on matters that were commercially relevant and meaningful and was not required to move on mere possibilities, let alone speculative possibilities.

Case Study No 4: AGL's acquisition of Loy Yang (2003)

The Australian Gas Light Company (***AGL***), as part of a consortium with the Commonwealth Bank and Tokyo Electric Power Company, sought to acquire the brown-coal-fired power station business, Loy Yang A (***Loy Yang***). The acquisition would have given AGL, a major electricity, gas and energy services retailer, a 35% share in Loy Yang.

AGL sought informal clearance from the ACCC. The ACCC declined to grant informal clearance and indicated that, should the acquisition proceed, it would seek appropriate remedies from the Federal Court, including divestment.

AGL subsequently instituted proceedings in the Federal Court seeking a declaration that the proposed acquisition would not contravene s 50 of the then *Trade Practices Act* 1974 (Cth) (now the CCA).

ACCC's case theory

The ACCC contended that the acquisition would lead to a less competitive, and less efficient market structure which would result in higher prices and increased barriers to entry.

Merger party (or parties) case theory

The merger parties contended that the acquisition was not likely to cause a substantial lessening of competition, as there was a single market for the supply of electricity and electricity derivative contracts in the National Electricity Market. They contended that there were many entities with the necessary expertise, systems and financial resources to market and sell electricity to Victorian retail customers. They also contended that hurdles to commencing electricity retailing were reasonably low and the requirements for a licence were not onerous.

Evidence

The ACCC filed evidence from five experts.

AGL sought to rebut the ACCC's complex econometric modelling evidence by introducing its own economic evidence; by cross-examining the witnesses of the ACCC, and by calling industry participants to testify against the likely effects of the acquisition and likelihood of ACCC's counterfactuals being realised. In support of its case, AGL filed evidence from approximately 12 economic and industry experts.

The trial was expedited and heard over twelve and a half sitting days.

Outcome

The Federal Court made a declaration that the acquisition by AGL of the 35% stake in Loy Yang was not likely to have the effect of causing a substantial lessening of competition, subject to AGL giving certain undertakings to the ACCC. The undertakings were substantially similar to those AGL had offered the ACCC when it applied for informal clearance from the ACCC.

Significance

The Federal Court found that the market was considerably broader (both in geographic and product terms) than alleged by the ACCC. The ACCC also did not introduce any evidence from participants in the electricity industry to support its arguments. Having considered this evidence, the Court did not accept that AGL would obtain a 'natural hedge' through the acquisition of a 35% stake in Loy Yang, nor that Loy Yang had market power.

Justice French concluded that the case theory proposed by the ACCC was not likely to occur, and found that the ACCC's economic evidence was not useful in determining the relevant issues in the absence of supporting 'real world' industry evidence.

These four recent cases, all of which involved criticism of the ACCC, demonstrate that the ACCC should not be the only decision-maker for all merger cases, particularly complex ones. The two cases determined by the Tribunal also demonstrate the utility and benefits of the Tribunal's processes for full merits review.

B Form of application

3.8 Current practice - form prescribed by regulations

Currently, the CCA requires applications for authorisations of mergers by the Tribunal and applications to the ACCC for formal clearance of mergers to be in a form set out in regulations.[28]

The inflexible and onerous nature of the process designed by the ACCC has meant that no application for formal clearance of a merger has ever been made. Representatives of the ACCC, including its former Chairperson, are on the record as stating that they would be "inflexible" in the way they administered the process for obtaining formal clearance of mergers.

For example, Mr Graeme Samuel, a former Chairperson of the ACCC, said in an interview with the Australian Broadcasting Corporation on 15 January 2007:

> I think what's happened is that we've toughened up on our processes. The lack of flexibility is probably going to occur more with the new formal processes that have come into force as from 1 January this year, through legislation known as the [Dawson] legislation, passed by Parliament towards the end of last year. There are now two processes for clearing mergers through the ACCC. One's the informal process. It's been in place for some time 30 years, if you like, and has worked very well. There's a new formal process. It's very complicated. There are hundreds of pages of regulation that's associated with that process and we've given the clear indication that under that formal process there will be no flexibility at all. Business wanted this process. It's a process that's defined very clearly by the law. We can't allow an informality into what is now a formal process that has been asked for by business.[29]

Further, the ACCC's *Formal Merger Review Process Guidelines* state:[30]

> 3.14 Consistent with the requirements in the Act and given the timeframes and requirements on the ACCC in assessing an application for formal clearance, the ACCC will strictly enforce the legislated validity requirements.
>
> …
>
> 3.18 ... In the event that the applicant fails to provide information that is legitimately available to the applicant, the ACCC will declare the application invalid.
>
> 3.19 Applicants should also submit any additional information which will be relevant and necessary for the ACCC to obtain a complete and accurate picture of the operations of the acquirer and target, the relevant markets and the competitive environment.
>
> 3.20 It is in the best interests of the applicant to provide such information regardless of whether a question contained in the form specifically requires it. ... The applicant should also be aware that there are significant penalties associated with providing false or misleading information to the ACCC, including by way of omission.

3.9 The Exposure Draft Bill

The Exposure Draft Bill provides that an application for a merger authorisation must be: [31]

(a) in a form "approved by the ACCC";

(b) be accompanied by any other information or documents prescribed by the regulations; and

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[28] Sections 89(1) and 95AE(1) of the CCA.

[29] Australian Broadcasting Corporation, *ACCC boss ready to tackle mergers* (15 January 2007): http://www.abc.net.au/7.30/content/2007/s1827412.htm

[30] *Formal Merger Review Process Guidelines*, January 2007, pp.10-11.

[31] Paragraph 72 of Schedule 10 amendment to s89(1)(a) and the current s 89(1) of the CCA.

(c) be accompanied by the fee (if any) prescribed by the regulations.

3.10 A policy document would be preferable

The Committee submits that rather than having a "form approved by the ACCC", the ACCC should publish a policy document setting out its expectations for the content of applications for authorisation of mergers.

There are six reasons for the Committee's submission in this regard.

(a) Approved form is unnecessary and may impose a higher cost on applicants

First, an approved form is unnecessary to ensure that the ACCC receives all of the information it needs. An applicant for authorisation will have sufficient incentive to ensure it provides the ACCC with all of the information the ACCC needs to assess the application as expeditiously as possible. In such circumstances, requiring all applicants to address all of the aspects of an approved form – regardless of the particular circumstances and relevance of such information to the application at hand – will result in some applicants being required to provide more information than would be the case in the absence of an approved form, unnecessarily imposing higher costs on such applicants.

(b) Approved form may result in the ACCC rejecting applications for technical reasons

Secondly, an approved form may unduly slow down the application process due to the ACCC's ability to reject applications, including those that are only technically invalid. The ACCC currently has a power to reject an application for authorisation under s89(1A) of the CCA. Under s89(1A) of the CCA, if the ACCC receives a purported application that it considers is not a valid application, it must give the applicant a written notice within 5 business days of receiving it. The notice must let the applicant know that he or she has not made a valid application and provide reasons why the purported application does not comply with the CCA. Section 89(1A) of the CCA will apply to applications for authorisation of mergers.

The Committee's concern about the ACCC rejecting application for immaterial technical reasons arises, in part, from what the Committee understands occurred during Murray Goulburn's application to the Tribunal for authorisation of its proposed acquisition of Warrnambool Cheese and Butter.[32]

In that case, the Committee understands that the ACCC showed a willingness to insist on the highly prescriptive requirements of the form prescribed by the Competition and Consumer Regulations – the Form S – when the Tribunal demonstrated a willingness to adopt a more focussed approach. Even after the Tribunal had notified Murray Goulburn that the application was valid, the ACCC asserted it was not and then made detailed information requests (which the Tribunal had previously declined to pursue) that added unnecessarily to the burden of the process.

(c) Scope for the ACCC to avoid the impact of the statutory timeframes

Thirdly, the combination of ss89(1) and 89(1A) which regulate the process around mandatory requirements in a form approved by the ACCC means that the applicants for an authorisation of a merger may become bogged down in pre-application procedures before the statutory clock in s90(10) is started. In other words, the Committee submits there is a risk that the ACCC will use the structure in ss89(1) and 89(1A) to, in effect, relegate requests for information to the pre-

[32] Murray Goulburn's application to the Tribunal was withdrawn before it was determined due to Warrnambool Cheese and Butter being acquired by Saputo.

application stage as a mechanism to avoid the impact of the statutory timing stipulations for its assessment of the application.

(d) A policy guideline would give greater flexibility

Fourthly, a policy guideline would provide the applicant with more flexibility to tailor their application to their particular business and industry, without wasting time and cost on providing information that may not be relevant to the ACCC's review of their application.

A policy document would also give the ACCC flexibility. A policy document can be relatively easy to change and is not binding on the ACCC.

(e) Consistency of approach

Fifthly, a policy document would be consistent with the approach adopted by the ACCC to date for all of the key aspects of its assessment of applications for mergers. These are set out in the ACCC's:

- Merger Guidelines, June 1999;
- Guideline for Informal Merger Reviews, October 2004;
- Merger Review Process Guidelines, July 2006;
- Formal Merger Review Process Guidelines, January 2007; and
- Merger Guidelines, November 2008.

(f) Consistent with Harper Panel's recommendations and Government's response

Sixthly, a policy document would be consistent with the following Harper Panel's recommendation in its Final Report,[33] which was accepted by the Government:[34]

> The formal merger exemption processes (i.e., the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use.

C Claims for confidentiality

3.11 Denial of access to confidential information will reduce the utility of the authorisation process

The Committee is concerned about the way the ACCC will administer the provisions that relate to claims for confidentiality in the merger authorisation process.

The Committee's concern is that applicants (and their advisers) may be denied access to submissions made by third parties under a claim of confidentiality, thus reducing the utility of the proposed statutory process as a process suited to more complex and contentious mergers.

3.12 An analogue to one of the provisions that is to be repealed should be added to the Exposure Draft Bill

Under the Exposure Draft, the existing provisions for claims of confidentiality and for the administration of the public register in subsections 89(2) and (6) of the CCA will apply to applications for authorisation of mergers. In large part, these provisions are reflected in s95AZA that currently applies to applications to the Tribunal for authorisation of mergers, and which are proposed to be repealed under the Exposure Draft. However, the provisions proposed to be

[33] Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015, p.333.

[34] Australian Government Response to the Competition Policy Review, p. 28.

repealed include subsection 95AZD(3) which has no equivalent in s89 of the CCA. In its context subsection 96AZD(3) reads as follows:

95AZD Tribunal may seek further information and consult others etc.

(i) *The Tribunal may give a person a written notice requesting the person to give the Tribunal, within a specified period, particular information relevant to making its determination on the application.*

(ii) *The Tribunal may consult with such persons as it considers reasonable and appropriate for the purposes of making its determination on the application.*

(iii) *The Tribunal may disclose information excluded from the merger authorisation register under subsection 95AZA(3), (4), or (7) to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application.*

Importantly, subsection 95AZD specifically empowers specified persons to gain access to confidential information on regulated terms even where the confidential information would be otherwise excluded from the public register.

3.13 Suggested new s89(7)

The Committee submits there should be a similar provision to regulate the ACCC's processes as a support, for example, for a confidentiality regime to allow at least solicitors, counsel and, potentially, experts and others to gain access to information excluded from the public register but that is being considered by the ACCC in its assessment of the application for authorisation of the merger.

In that regard, the Committee suggests the following as a new s89(7):

(iv) The ACCC may disclose information excluded from the register under subsection 89(5A) or 5(D) to such persons and on such terms as it considers reasonable and appropriate for the purposes of making its determination on the application.

D Overseas mergers

3.14 Procedural fairness is needed

The proposed provisions for authorisation of overseas mergers do not require the ACCC to publish a draft determination.

Publishing a draft determination is necessary for the ACCC to ensure it gives procedural fairness to those who might be adversely affected by its decision, including decisions to deny authorisation or to place conditions on an authorisation.

There is no reason to deny procedural fairness in the context of applications for authorisation of overseas mergers.

The Committee submits that the procedure for overseas merger authorisations should be the same as that for non-overseas merger authorisations insofar as the ACCC should be required to publish a draft determination and allow sufficient time for interested parties to make submissions to it in that regard.

E Minor typographic error

The reference at 115 on page 64 of the Exposure Draft Bill to “Subparagraph 155(2)(b)(iv)” should be a reference to Subparagraph 155(1)(b)(iv).

4 Non-merger authorisations, notifications and class exemptions

The Committee largely supports the authorisation, notification and class exemptions amendments proposed by the Exposure Draft Bill, and is of the view the changes appropriately capture the Harper Panel's overall approach to the simplification of the these provisions.

While supportive of the changes, we have a number of specific concerns and observations in relation to the implementation of those changes.

4.1 Class exemptions

While not fully importing the same 'block exemption' language proposed by the Harper Panel,[35] the new 'class exemptions' provision inserted in Division 3 of Part VII captures the substance of the recommendation.

The Committee is of the view the provision sits comfortably alongside the authorisation and notification frameworks offered by the Exposure Draft Bill, which in turn will reduce the administrative burden placed on, and create more certainty for, businesses seeking confirmation that their conduct is not in breach of Part IV of the CCA.[36]

The Committee supports the grant of exemptions by way of 'legislative instrument' (which by nature last for a period of no more than 10 years).[37] This provides welcome consistency in approach with the regime for legislative instruments (formerly class orders) overseen by ASIC under the *Corporations Act 2001* (Cth). The use of legislative instruments for orders of this kind provides a degree of transparency and parliamentary oversight which is appropriate, given the potential significance that class exemptions may have to markets and the wider national interest.

However, we wish to raise the following concerns and comments in relation to the approach adopted to implementation:

- like the ASIC legislative instruments framework, and as recommended in the Harper Panel model provisions,[38] it is important that the provisions require the ACCC to maintain a public register for all exemptions granted by the ACCC, including those no longer in operation. Such a register will ensure the transparency and openness of the class exemptions process, and is consistent with the insertion of a Tribunal review framework to be available to persons dissatisfied with a class exemption;[39]
- the powers of Tribunal in relation to any application for review of a class exemption determination are significantly narrower than in relation to individual authorisations – although the reason for this is not explained. In relation to other authorisations, under s102(1) of the CCA, the Tribunal may exercise all of the functions and powers of the ACCC, including varying the ACCC determination (such as by imposing new or modified conditions on an authorisation). However, the new s102(5F) provides that the Tribunal may only affirm or set aside the determination. The Committee consider that it is appropriate that a consistent approach is adopted, that respects the important and valuable role played by the Tribunal in considering the scope of any authorisation or exemption with the full powers of the ACCC. We submit that consideration be given to

[35] See Harper Review, Appendix A - Block Exemptions, p 521

[36] Law Council of Australia – Business Law Section Submission, pp 75-76.

[37] Exposure Draft Bill, section 95AA(3).

[38] See Harper Review, Appendix A - Block Exemptions, p 521. See also Harper Review, Recommendation 39 at p 70.

[39] Exposure Draft Bill, section 101B.

providing for the review of class exemption determinations by the Tribunal to be dealt with in s102(1) or otherwise in the same manner as for other individual authorisations;

- evidently, the introduction of a block exemption power into Australian law is a welcome development. However, it is potentially significant and the Committee considers that the ACCC should be required to publish a guideline on its intended approach to the new regime;
- the Committee suggests that consideration be given to whether third parties may be able to apply to the ACCC to have a class exemption enquiry commenced. This could either be addressed through legislation or, perhaps more appropriately, through ACCC guidelines; and
- finally, we note a specific, but important, drafting issue with the way in which the public interest test is framed for making a class exemption under s 95AA(1)(a). This presently refers to the ACCC being satisfied that the conduct would not have the effect, or would be 'likely not' to have the effect, of substantially lessening competition. We are concerned that there may be seen to be a difference between conduct that would be 'not likely' to have the effect of substantially lessening competition, and conduct that would be 'likely not' to have such an effect. There is long history and case law around the meaning of the term 'likely' in the context of the CCA. 'Likely', in the context of Part IV, has been equated to a possibility that is not remote. Read literally, therefore, a class exemption may be found to be justified under s 95AA(1)(a) if the ACCC was satisfied that there was merely a possibility, that is not remote, that the conduct in question would not have the effect of substantially lessening competition. We doubt it was intended that the threshold for allowing a class exemption would be set this low. We therefore recommend that the phrase 'not likely' is used.

4.2 Authorisations (non-merger) and notifications

(a) Authorisations

(i) The Committee is satisfied that the Exposure Draft Bill gives effect to the recommendations made in submissions to the Competition Policy Review (June 2014) that relying on the current authorisation or notification processes imposed a number of inefficient costs on businesses.[40]

(ii) The Committee also considers the new authorisation process in s88 (allowing the ACCC to grant authorisation for conduct to which 'one or more provisions of Part IV' specified in the authorisation would or might apply)[41] supports the intent of the Harper Panel’s recommendation that the authorisation process be simplified. Here, this is achieved by replacing the separate provisions currently in place in s88 with a single, consolidated provision.[42] The breadth of the revised wording in s88 captures a wider range of conduct including, for example, a misuse of market power under s46, and in doing so provides greater certainty for businesses.

(b) Notification of resale price maintenance

[40] Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (27 June 2014), pp 10-11 (“Law Council of Australia – Business Law Section Submission”).

[41] Exposure Draft Bill, section 88(1).

[42] Competition Policy Review – Final Report, Recommendation 38, p 70.

(i) Both our submission and the Harper Panel questioned the appropriateness of a per se prohibition on resale price maintenance (***RPM***),[43] given comparable jurisdictions (notably, the US and Canada) have moved away from such a prohibition. The Committee continues to query the appropriateness of the decision to maintain the per se prohibition on RPM and believes there is a strong case for only prohibiting RPM where it has the purpose, or likely effect, of 'substantially lessening competition', consistent with other jurisdictions.[44]

(ii) However, if the per se prohibition is maintained, the Committee supports making available the notification process in s93 for this conduct, which should assist to temper the harshness of the per se prohibition.

(iii) In order to provide for greater clarity and guidance moving forward, the Committee recommends the ACCC publish guidelines on when notifications may be set aside or allowed to stand under this new regime. Given the ACCC may impose conditions on an applicant as part of the notification process,[45] the Committee also invites the ACCC to clarify the types of conditions that may be imposed on notifications under the new s93 framework.

(iv) We also make the following comments on the proposed drafting approach:

(A) while not included in the Harper Panel's proposed amendments, the Committee supports the approach proposed in the Exposure Draft Bill to allow for conditions to be placed on exclusive dealing notifications, which is sensible and consistent with the process adopted for other authorised conduct. This is also likely to increase the scope for the ACCC to allow notified conduct, rather than requiring parties to renotify; and

(B) in terms of detailed drafting, we note that the amendments made to s93(3) in order to reframe the test into the negative creates ambiguity about the way it is intended to operate. Evidently, the ACCC should not be able to object to exclusive dealing notification in cases where there is no substantial lessening of competition, but also where there may be a likelihood of a substantial lessening of competition but sufficient countervailing public benefit exists. However, as framed, these tests operate as strict alternatives – so that the ACCC could object to a notification on either basis (i.e. it could object to conduct on the basis there is no public benefit associated with conduct, even in cases where it accepted that there was no substantial lessening of competition).

4.3 Collective boycotts - stop notices

(a) The Committee supports the intent of introducing greater flexibility for parties (particularly, but not exclusively, small business) seeking to notify collective bargaining conduct, including extending the notification process to include collective boycotts (although with a longer 60-day objection period).

(b) The Committee also supports providing scope for the ACCC to impose conditions as part of the grant of a notification, which (as noted above in relation to RPM notifications), is consistent with the process adopted for other authorised conduct.

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[43] Ibid, p 9. See also Harper Review, Recommendation 34, page 64.

[44] See further Law Council of Australia – Business Law Section Submission, pp 9, 61-62.

[45] See Exposure Draft Bill, section 88(3).

(c) However, the Committee has a number of concerns with the introduction of 'stop notices' in the manner proposed by the Exposure Draft Bill. In answer to the specific question posed as part of the consultation (question 5), we do not consider that these concerns are resolved through the limited statutory timeframe associated with a stop order (90 days with ability for the ACCC to extend by another 90 days).

(d) First, as a point of principle, the ability for the ACCC to issue a stop notice without any change of circumstances having occurred, fundamentally undermines the certainty which is intended to be provided by the notification process. A stop order is, in effect, the equivalent of a revocation of the original decision to permit the conduct. For authorisations, the ACCC is not permitted to revoke an existing authorisation without a 'material change in circumstances'.[46] An equivalent test needs to apply to collective boycott notifications.

(e) This is especially the case for collective bargaining (and boycott) notifications, which will typically be applied for in the lead up to commercial negotiation period – which are often, if not mostly, time-constrained. Counterparties are likely to seek stop orders as negotiations reach their conclusion, and when a boycott is most likely and effective to support bargaining power by the collective group. It is not commercially realistic for the ACCC to expect the parties – at that point – to wait three or six months to have concerns reconsidered.

(f) The Committee does not support the inclusion of stop orders in the regime, and would prefer a formal process for the ACCC to seek to revoke a collective boycott condition, based on a material change in circumstances (consistent with s91B of the CCA).

(g) If a stop order regime is retained, we consider that the following changes, as a minimum, are required to prevent it from undermining the intent and effectiveness of the other changes:

(i) the test for the issuing of a stop order should require a material change of circumstances from those at the time the ACCC considered the notification (when it was already required to reach a view of likely detriment). We do not consider that simply increasing the threshold to 'serious' detriment is sufficient;

(ii) the timeframes should be shortened. Commercial parties at the end of complex negotiations are not able to wait 3-6 months for the ACCC's new-found concerns to be resolved, after they had earlier taken the step of seeking and obtaining ACCC approval through notification. The parties are likely to have arranged themselves and their negotiating structure around the collective process based on the notification. A stop order, in this context, is likely to be highly disruptive and potentially fatal to the interests of the collective bargaining group;

(iii) there needs to be a right to seek immediate Tribunal review. The Tribunal has proven capable of dealing with matters extremely quickly (generally within its 3-month period, without the need for extensions); and

(iv) the drafting does not clarify whether the ACCC is able to issue a stop notice with respect to the same conduct more than once. It would not be appropriate for the ACCC to be able to issue multiple stop notices with respect to the same conduct unless a further notice was justified on new grounds.

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[46] Section 91B(3)

4.4 Minor variations

The Committee wishes to make two drafting comments in relation to the proposed amended s91A(4)(a), which provides that the ACCC may not approve a minor variation unless satisfied that the variation would not have, or would be likely not to have, the effect of substantially lessening competition.

We observe that:

- it does not seem correct to speak of a variation having an effect on competition, as opposed to the conduct that is varied. This drafting suggests that the relevant counterfactual would be the existing authorisation. It is doubtful a minor variation would ever fail, based on this threshold; and
- the comments made above in relation to the words 'likely not' to have the effect of substantially lessening competition are also applicable here.

We suggest a reworking of the test as follows:

> the ACCC may not approve a minor variation unless satisfied that the conduct specified in the authorisation, if the variation were granted, would not have, or be likely to have, the effect of substantially lessening competition ...

5 Access to Services

5.1 Introduction

The Committee previously made submissions to the Harper Panel regarding several of the proposals to amend Part IIIA of the CCA that are contained in the Exposure Draft Bill. It also made submissions to the Productivity Commission's (***PC's***) Inquiry into the National Access Regime and appeared before the Commission. The Committee does not repeat those submissions here. Instead, in this section of this submission the Committee focuses its comments on Question 7 of the specific questions posed by Treasury in relation to the Exposure Draft Bill,[47] by addressing the issue of whether further amendments to the proposed drafting in the Exposure Draft Bill are required in order to give effect to the changes that the Commonwealth government intends to introduce in relation to Part IIIA of the CCA.

The Committee considers that, aside from the matters addressed in its observations on Question 7:

- **Question 8**: there are no additional transitional arrangements necessary for existing certifications; and
- **Question 9**: there are no additional amendments necessary to address the matters that have come to light since the release of the PC's 2013 Inquiry into the National Access Regime.[48]

Since the reforms proposed in the Exposure Draft reflect the Commonwealth Government's decision to adopt the reform recommendations arising from the PC's review of the National Access Regime,[49] rather than the recommendations of the Harper Panel, this submission considers the recommendations of the PC without discussing the recommendations of the Harper Panel.

5.2 Background

The Committee supports the statement, contained in the Explanatory Materials, that the National Access Regime contained in Part IIIA of the CCA:

- "is geared towards addressing the economic problem of an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services" (at [13.4]);
- addresses the problem that arises "where there is a lack of effective competition in markets for infrastructure services, [such that] a provider might deny access to, or restrict output and charge monopoly prices for, its infrastructure service" (at [13.5]); and
- "provides a means of promoting competition in markets where the ability to compete effectively is dependent on being able to use a service provided by a piece of nationally significant infrastructure" (at [13.6]).

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[47] https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/supporting_documents/Competition_Law_Reform_specific_questions.pdf

[48] https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments/supporting_documents/Competition_Law_Reform_specific_questions.pdf

[49] See Australian Government Response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime, http://www.treasury.gov.au/~/media/Treasury/Publications%20and%20Media/Publications/2015/Government%20response%20to%20the%20National%20Access%20Regime/Downloads/PDF/Govt_response_NAR.ashx, and Productivity Commission, *Inquiry into the National Access Regime*, Report No 66 (2013) (***PC Report***).

The Committee considers that it is appropriate and desirable for the Explanatory Materials to reflect these purposes.

5.3 Question 7: Are further consequential amendments required to give effect to the proposed changes?

The Committee raises the following matters for consideration in relation to the amendments proposed by the Exposure Draft to the declaration criteria in Part IIIA of the CCA.

(a) Purpose of the proposed amendments

As noted above, the Commonwealth Government has expressed its intention to implement the recommendations of the PC in the PC Report.

The Explanatory Materials appear to reiterate this intention by stating:

> 13.13 As part of the Government response to the Harper Review, the Government decided to implement all of the recommendations of the Productivity Commission. These amendments seek to refocus and clarify the intent of the Regime, in particular the declaration criteria that the Council and Minister must be satisfied of in order to recommend that a service be declared, as this determines when arbitration by the Commission will and will not be available to access seekers or access providers.[50]

The Committee notes that the language used in the Exposure Draft Bill differs slightly from that recommended by the PC (as outlined below). In these circumstances, the Committee submits that it would be desirable for the Explanatory Materials to clarify those respects in which the drafting of the Exposure Draft Bill is intended to differ from the wording of the relevant PC recommendations, otherwise there is a risk of unintentional confusion.

(b) Criterion (a)

Currently, the "promotion of competition" test in declaration criterion (a) is expressed as follows:

> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;[51]

The Exposure Draft proposes to replace this with the following revised criterion (a):

> (a) that access (or increased access) to the service, on reasonable terms and conditions, following a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;[52]

This proposal arguably differs in one respect from the PC's recommendation to amend paragraphs 44G(2)(a) and 44H(4)(a) of the CCA "such that criterion (a) becomes a comparison of competition with and without access on reasonable terms and conditions *through* declaration" (emphasis added).[53]

The Exposure Draft has proposed to use the words "following a declaration" instead of the words "through declaration" as recommended by the PC. It is not clear from the Explanatory Materials why, or whether this is intended to achieve a different effect from that sought to be achieved by the PC.

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[50] Explanatory Materials, [13.13].

[51] Sections 44H(4)(a), 44G(2)(a) of the CCA.

[52] Exposure Draft Bill, Schedule 13, Item 3.

[53] PC Report, Recommendation 8.1, p. 33.

The Committee considers that it is important to clarify these matters, as the use of "following" rather than "through" in criterion (a) may impact on the operation of the criterion in some circumstances. In particular:

- the word "following" requires only a temporal connection between access and declaration - it tests simply whether there would be a material promotion of competition as a result of the access which occurs *after* declaration;
- the word "through", however, arguably suggests a causal connection between access and declaration - it tests whether there would be a material promotion of competition as a result of access which occurs *through*, or because of, declaration.

This distinction may be significant if the intention of the reforms to criterion (a) is to focus the analysis on the incremental competition benefits brought about by *declaration*, rather than the competition benefits from access alone. This may be particularly significant in circumstances where declaration is sought of a particular service, and some level of access is already available. In these instances, the incremental impact of *declaration* on competition may (or may not) be material. However the proposed new criterion (a) would not necessarily measure this question, to the extent it focusses on access *following*, rather than access *through*, declaration.

If it is intended that a causative test be applied it may be appropriate to amend criterion (a). This could be done by removing the word "following", and instead using the word "through", or, alternatively, using the words "as a result of" or "as a consequence of".

In the light of the Tribunal's consideration of criterion (a) in Glencore's application for declaration of the Port of Newcastle shipping channel[54] (***Glencore Decision***), which was not available to the PC, it may also be useful to provide some guidance on the appropriate focus of the test. It should focus on the characteristics of the service for which declaration is sought. This would reflect the PC's focus on access to the service on reasonable terms and conditions through declaration (the factual), as compared with something less than that (the counterfactual).

(c) Criterion (b)

The Exposure Draft proposes to repeal the current declaration criterion (b), which is expressed as follows:

> that it would be uneconomical for anyone to develop another facility to provide the service.[55]

and would replace it with the following wording:

> that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market at the least cost.[56]

The Exposure Draft also proposes to insert the following provision:

> (2) For the purposes of paragraph (1)(b), the cost referred to in that paragraph is to take into account the costs, to the provider of the service, of co-ordinating multiple users of the facility.[57]

This largely, but perhaps not entirely, reflects the recommendation of the PC that criterion (b) be amended such that it:

> … is satisfied where total foreseeable market demand over the declaration period could be met at least cost by the facility. Total market demand should include the demand for the service under

[54] *Application by Glencore Coal Pty Ltd* [2016] ACompT 6

[55] Sections 44H(4)(b), 44G(2)(a) of the CCA.

[56] Exposure Draft Bill, Schedule 13, item 3.

[57] Exposure Draft Bill, Schedule 13, item 3.

> application as well as the demand for any substitute services provided by facilities serving that market. The assessment of costs under criterion (b) should include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.[58]

The Committee understands that the key purpose of these amendments to criterion (b) is to replace the current "private profitability" interpretation of criterion (b) with a "natural monopoly" test.

Given that matters in which the application of criterion (b) is disputed can give rise to significant, time consuming and costly disputes regarding this criterion, it is desirable that the criterion be drafted as clearly as possible. In that light it may be desirable for the Exposure Draft Bill to clarify the following matters:

- **The meaning of "cost"**: the natural monopoly test contained in the suggested criterion (b) requires an assessment of "least cost", but the meaning of "cost" has not been defined. In previous matters under Part IIIA where criterion (b) has been contested, the question of what types of costs are to be taken into account has been controversial. Therefore it may be desirable for the proposed criterion (b) to be amended to include a definition of the costs to be taken into account in the analysis under this criterion. This could be a simple inclusive definition, such as "all costs incurred in order to meet total foreseeable market demand".
- **The period over which the analysis under criterion (b) is to be conducted**: the PC's recommendation specifies the period in relation to which total foreseeable market demand should be considered ("total foreseeable market demand over the declaration period"), and this is reflected in the Explanatory Material,[59] but not in the Exposure Draft Bill. However, the Committee notes that adopting the declaration period as the period for consideration possibly introduces some circularity, insofar as the decision maker will necessarily not have determined the declaration period at the time that they come to apply criterion (b).

(d) Criterion (d)

The existing public interest test (currently contained in criterion (f)) states that the decision maker must be satisfied that:

> access (or increased access) to the service would not be contrary to the public interest.[60]

The Exposure Draft proposes to amend this public interest test (and for it to become criterion (d)) to require:

> that access (or increased access) to the service, on reasonable terms and conditions, following a declaration of the service would promote the public interest.[61]

The PC recommended that this criterion require "a test of whether access on reasonable terms and conditions through declaration promotes the public interest".[62]

The language in the proposed criterion (d) differs from that recommended by the PC in the same respect as noted above in relation to criterion (a): while the proposed amendment refers to

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[58] PC Report, Recommendation 8.2, p. 33.

[59] Explanatory Material, p. 80, [13.33].

[60] Sections 44H(4)(f), 44G(2)(f) of the CCA.

[61] Exposure Draft Bill, Schedule 13, item 3.

[62] PC Report, Recommendation 8.4, p. 33.

promotion of the public interest "*following a declaration*" (emphasis added), the PC refers to promotion of the public interest "*through declaration*" (emphasis added).

For the reasons as set out above in relation to criterion (a), the Committee submits that it may be more consistent with the intention of the proposed criterion (d) to amend that criterion by removing the word "following, and instead using the word "through" as recommended by the PC, or, alternatively, using the words "as a result of" or "as a consequence of".

6 Additional considerations

6.1 The definition of 'competition' (Schedule 1)

The amended definition of 'competition', in relation to services, includes a reference to 'services that are capable of being rendered in Australia by persons not resident or not carrying on a business in Australia'.

The word 'rendered' with respect to services, sits in the CCA alongside 'supply', 'provide', 'grant', 'confer' and 'sell'. The Committee is concerned that the continued use of this variety of terms invites consideration of whether any one of these terms is intended to have a distinct meaning.

The Committee supports Recommendation 25 of the Harper Panel, and considers that the Exposure Draft Bill accurately implements this recommendation. Nevertheless, the Committee suggests that there is an opportunity to remove a layer of duplication by referring instead to the 'supply' of services. The Committee has suggested an amendment to the Exposure Draft Bill text below.

> **'competition'** includes:
>
> **(a)** competition from goods that are, or are capable of being, imported into Australia; and
>
> **(b)** competition from services that are supplied ~~rendered~~, or are capable of being supplied ~~rendered~~, to persons in Australia by persons not resident or not carrying on business in Australia.'

6.2 Secondary boycotts (Schedule 6)

The Committee supports the proposed increase in penalty for contravention of the secondary boycott provisions, as recommended by the Harper Panel.[63]

6.3 Third line forcing (Schedule 8)

The Committee welcomes the proposed amendment of s47 of the CCA to remove the per se prohibition of 'third line forcing' (as described in ss47(6), 47(7), 47(8)(c) and 47(9)(d)) and to proscribe such conduct only where it has the purpose, effect or likely effect of substantially lessening competition, as recommended by the Harper Panel (Recommendation 32).

The Committee also supports the changes proposed by Schedule 10 items 4 to 6 of the Exposure Draft Bill, which amend the notification process for all exclusive dealing conduct. The Committee notes, however, that whilst third line forcing conduct must presently be the subject of a valid notification to the ACCC in order to be lawful, the Exposure Draft Bill does not make provision for transitional arrangements following the amendment. This may have the effect of creating uncertainty about the legitimacy of conduct that is already the subject of notification and its status should an existing notification be withdrawn.

Businesses should not be required to re-assess the competitive effects of notified conduct that has already been accepted by the ACCC. Moreover, businesses should be permitted to have existing third line forcing notifications removed from the public register without concern about affecting the legal status of the conduct. Further, it should be permissible to withdraw a redundant

[63] Recommendation 36, Professor Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan QC, *Competition Policy Review: Final Report*, March 2015.

notification without concern that it will not be possible to re-notify the conduct in the future, should a change in market circumstances require it.

In the Committee's view, it is necessary to include further transitional provisions to give effect to the following:

(a) That conduct amounting to third line forcing that, on the day of commencement of the amendment, is the subject of a notification that has been allowed to stand on the exclusive dealing notifications register be deemed not to have the purpose, effect or likely effect of substantially lessening competition.

(b) That withdrawal of a notification relating to third line forcing on any day following commencement of the amendment have no effect on the deemed purpose, effect or likely effect provided for in (1).

(c) That the prohibition against further notifications for the same conduct (or conduct of a like effect) following a withdrawal of a notification, as provided for by s47(10)(b)), not apply to notifications that include third line forcing conduct.

The Committee looks forward to further simplification of s47 of the CCA, as proposed by the Harper Panel (Recommendation 32).

6.4 Resale price maintenance (Schedule 9)

While the Committee has previously submitted that the prohibition on resale price maintenance should be subject to a competition test, this proposal was not accepted by the Harper Panel (Recommendation 34). The Committee does however:

- welcome the introduction of notification process under s93 for conduct contravening s48 of the CCA, and in particular a process that provides the ACCC with the ability to impose conditions on an application (rather than just accept or reject an application), as provided by item 6 of Schedule 10 of the Exposure Draft Bill;
- welcome and support a related bodies corporate exception for resale price maintenance; and
- accept that a default 60 day period before a notification becomes effective is appropriate given the availability of a conditional acceptance by the ACCC, so as to provide adequate time for consideration and consultation.

6.5 Transitional provisions (Schedule 10)

The transitional provisions in Part 3 of Schedule 10 of the Exposure Draft (specifically section 144) appropriately deal with existing merger authorisation and formal clearance decisions. However, the provisions say nothing about a scenario where an application for merger authorisation (or clearance) has commenced prior to the commencement of the proposed reforms. This is of major concern to merger parties, particularly where an application for merger authorisation has been filed in the Australian Competition Tribunal under the current law.

Currently there are no such merger authorisation applications pending in the Australian Competition Tribunal (or clearance applications with the ACCC). However, the Committee understands that it will potentially be a number of months before any amendments to the law commence under the proposed reforms. In those circumstances it is quite possible that merger parties would have commenced an application for merger authorisation in the Australian Competition Tribunal on the expectation that the process will proceed through to determination. However, on the current approach in the Exposure Draft, parties who have not obtained the Tribunal’s decision could find themselves having advanced an authorisation application (with all

of its attendant expense and dedicated effort) only to find that the Tribunal is unable to make a determination and they must then restart under the new 2-step ACCC/Tribunal process). This would result in substantial prejudice both in terms of direct costs and also undermine the ability of the merger parties to pursue any necessary merger approval, for example due to the additional delay that will mount on top of that already incurred during the process commenced under the existing law.

Accordingly, the Committee submits that that in order to maintain the integrity of a procedure which has been properly commenced and not prejudice parties unjustly, the transitional provisions must be extended to permit the Australian Competition Tribunal (in respect of merger authorisations) and the ACCC (in respect of formal merger clearance) to make determinations under Division 3 of Part VII where the application commenced prior to the commencement of the amendments.

6.6 Admissions of fact (Schedule 11)

Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically brought by the regulator) to be prima facie evidence against the corporation in another proceeding (typically brought by a private litigant).

Under the ACCC Cooperation Policy for Enforcement Matters 2002,[64] it is common for the ACCC and respondent to "settle" proceedings by way of an agreed statement of facts and proposed orders that are presented to the court for its consideration and approval. It is common practice for an agreed statement of facts to expressly qualify the admissions made by the respondent as being for the purpose of those particular proceedings only.

In its 2014 Submission, the Committee raised the issue of whether s83 of the CCA should be amended to clarify its scope and specifically whether it applies to admissions made and agreed facts in proceedings in which liability is not in issue. The Submission noted differing views within the Committee about what reforms are appropriate, if any, and canvassed relevant views.[65]

The Harper Panel recommended (Recommendation 41) that s83 be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the Court, noting this amendment would remove doubt about its operation in the context of factual admissions and reduce the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contravening conduct.

The Government agreed that s83 should be so amended.[66]

Those of the Committee in favour of amendment welcome the proposed amendment contained in the Exposure Draft Bill, on the basis it will clarify the scope of the provision, increase its effectiveness as a means of reducing the cost of follow-on private damages claims, and enhance access to remedies by Australian consumers.

The Committee notes however that the current form of drafting, which differs from that proposed by the Harper Panel in the Model Law, may inadvertently capture conduct not intended to be an admission and create unnecessary interlocutory disputes. For that reason, the Committee has suggested an amendment to the Exposure Draft Bill text below.

(2) The finding or admission may be proved by production of:

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[64] https://www.accc.gov.au/system/files/ACCC%20cooperation%20policy%20July%202002.pdf

[65] Section 12.1(c), commencing on page 87.

[66] Australian Government Response to the Competition Policy Review, p.32.

(a) in any case – a document under the seal of the court from which the finding or admission appears; or

(b) in the case of an admission – a document filed in the proceedings in which the admission was made.

6.7 Power to obtain information, documents and evidence (Schedule 12)

(a) Scope of section 155: extension to undertakings under section 87B of the CCA and section 218 of the ACL

The Committee supports the extension of the power to issue a notice under s155 to investigate possible breaches of an undertaking given to the ACCC pursuant to either s87B of the CCA or s218 of the ACL, as recommended by the Harper Panel (Recommendation 40).

The Committee notes however that any such power should be limited to the investigation of compliance with notices issued by the ACCC, and not notices issued by a state or territory ACL regulator.

The Committee has suggested amendments to the Exposure Draft Bill text below, which also seek to provide additional precision in relation to subsection 2(a)(iii).

(2) For the purposes of subsection (1), the matter must be a matter that:

(a) constitutes, or may constitute~~, a contravention of~~:

(i) a contravention of this Act; or

(ii) a contravention of Division 4A or 4B of Part 3.3 of the Radiocommunications Act 1992; or

(iii) a failure to comply with any of the terms of an undertaking given to the ACCC under section 87B of this Act or under section 218 of the Australian Consumer Law; or

(b) Search for documents: reasonable search defence

As noted in its 2014 Submissions, the Committee supports the introduction of a 'reasonable search' defence to s155 of the CCA, as recommended by the Harper Panel (Recommendation 40). The Committee welcomes the Government's decision to introduce the defence by legislation rather than guideline.

The proposed amendments to s155 mirror the standard of a 'reasonable search' employed by Rule 20.14 of the Federal Court Rules 2011 in the context of discovery orders. Possibly because parties to litigation are also required by the FCR to negotiate a discovery plan, there is relatively little case law on the meaning of the 'reasonable search' limitation. In addition, the FCR 'reasonable search' limitation operates in the context of other rules of discovery, such as the requirement that documents sought be 'directly relevant' to the issues.[67]

Since a breach of s155 results in criminal penalties including possible imprisonment, it is important that the 'reasonable search' defence be more certain in scope than the 'reasonable search' limitation contained in the Federal Court Rules 2011 (which in any case operates together with other procedural and substantive rules not found in the current or proposed s155). To that end, the Committee suggests that factors which appear in case law regarding the scope of a reasonable search should be listed in proposed s155(6), rather than be picked up (as possibility only) in the catch all at s155(6)(e) as 'any other relevant matter'.

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[67] Federal Court Rules 2011, 20.14(1)(a).

The Courts have recognised that factors relevant to whether a reasonable search has been conducted include: the cost of the search (including the cost of document review, and not only retrieval), the time available to conduct the search and whether the parties agreed on a particular approach.

The Committee has suggested amendments to the Exposure Draft Bill text below, which also seek to provide additional precision in relation to the operation of the proposed s155(6) defence to criminal penalties:

> 155(6) For the purposes of paragraph (5B)(b), in making a reasonable search, the person may take into account the following:
>
> a) the nature and complexity of the matter to which the notice relates;
>
> b) the number of documents involved;
>
> c) the ease and cost of the search, including costs of retrieving and reviewing a document;
>
> d) the significance of any document likely to be found;
>
> e) the time allowed by the relevant notice to conduct the search;
>
> f) whether the ACCC and the person agreed on the scope of the search;
>
> g) any other relevant matter.

(c) Penalty for non-compliance with section 155

The Committee supports the proposed increase in penalty for non-compliance with s155, as recommended by the Harper Panel (Recommendation 40).

6.8 Ministerial consent

The Committee refers to section 1.2 above in relation to the requirement under sub-sections 5(3) to (5) that a litigant obtain the consent of the Minister before relying on conduct occurring outside Australia in a claim for private damages. These provisions have effect beyond the cartel provisions to all provisions of Part IV of the CCA and the Australian Consumer Law (and the related Part XI).

As noted above, the Committee continues to support the amendment of s5 as it applies to all sections of the CCA listed in sub-section 5(1).