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By online submission

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Dear Sir / Madam

Competition Policy Review – Final Report

1 We refer to the Competition Policy Review Final Report released on 31 March 2015.

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

3 This submission follows on from our previous submissions (copies **enclosed**) in response to the Review's Draft Report and the Review's Issues Paper. As with our previous submissions, this submission focuses on issues relating to competition law. It outlines:

(a) the recommendations in the Final Report that we support, and have supported in our previous submissions;

(b) the recommendations that we do not support, or do not think go far enough;

(c) an additional issue regarding civil penalty settlements, which has arisen since the date of the Final Report, and which we consider should be addressed by urgent legislation; and

(d) some issues we have identified with the drafting of the proposed legislation to give effect to the Report's recommendations.

Recommendations supported

4 For the reasons set out in our previous submissions, we agree with the following recommendations advocated in our submissions and made in the Final Report:

(a) Simplify the cartel laws and confine the cartel conduct prohibitions to conduct involving firms that are actual or likely competitors. Given those amendments, we also agree with the proposed removal of the prohibition on exclusionary provisions on the basis set out in the draft report.

(b) Extend the joint venture defence for cartel conduct. In particular, we support:

(i) the proposed removal of the requirement for a joint venture agreement to be in writing; and

(ii) the extension of the defence to include joint ventures for the acquisition or marketing of goods and services (in addition to production or supply joint ventures), as the current exception for joint ventures is too narrow and pro-competitive joint ventures can be caught by the cartel prohibitions.

In our view, however, there should be further clarification of what is meant by a cartel provision being "for the purpose of the joint venture". This is addressed below.

(c) Expand the exception to the cartel laws relating to vertical trading.

(d) Repeal the prohibitions on price signalling, predatory pricing and *per se* third line forcing.

(e) Put reasonable limits on the obligation of parties to comply with excessively onerous s 155 notices, although we also consider the ACCC should be required to act reasonably and proportionately in issuing such notices (discussed below).

(f) Extend the extra-territorial application of the Act so that it covers conduct that damages competition in markets in Australia regardless of whether the contravening firm is resident, incorporated or "carrying on business" in Australia.

(g) Apply the Act to the Crown insofar as it undertakes activity "in trade or commerce".

(h) Improve the merger approval process.

(i) Introduce a block exemption process.

Recommendations not supported

ACCC Cartel Immunity Policy

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

6 Despite the concerns raised about the current immunity regime in our previous submissions, the Final Report maintains the view expressed in

the Draft Report that the current immunity regime provides an "adequate level" of certainty. For the reasons set out in our previous submissions, we strongly disagree and recommend that further consideration be given to issues relating to the immunity regime.

7 We have addressed this issue further in an opinion piece in *The Australian* newspaper (copy **enclosed**).

Joint venture defence

8 As noted above, we support the extension of the joint venture defence for cartel conduct.

9 In our view, however, there should be further clarification of what is meant by a cartel provision being "for the purpose of the joint venture". This concept is difficult to apply in practice, as the cartel provision itself may affect what the purpose(s) of the joint venture may be considered to be. We therefore propose the following additional s 45I(2) be included in the draft legislation in the Report, with the proposed s 45I(2) renumbered as s 45I(3):

> *Without limiting the meaning of paragraph (1)(b)(iii), for the purposes of that paragraph, a cartel provision is for the purpose of a joint venture to the extent that the cartel provision has the purpose, or would have or be likely to have the effect, of:*
>
> *(a) assisting any one or more of the parties (or any of its related bodies corporate) to conduct the joint venture more efficiently, more conveniently or more profitably; or*
>
> *(b) preventing, restricting or limiting any one or more of the parties (or any of its related bodies corporate) from supplying or acquiring goods or services in competition with the joint venture, or in competition with a party (or any of its related bodies corporate) carrying out the joint venture.*

Concerted Practices

10 As set out in our submission on the Draft Report, we do not support the proposed prohibition of "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition. The further explanation of the proposed prohibition in the Final Report has not altered our view that the proposal would create an unwarranted level of uncertainty for businesses.

11 If a prohibition on concerted practices is nevertheless introduced, we agree with the recommendation in the Final Report that the prohibition should not be part of the cartel laws.

Misuse of market power

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

13 Lack of evidence of need for change - It remains unclear what conduct the proposed reform is intended to capture that is not already captured under the existing law. The proposed reform seems to be based on conceptual or theoretical arguments, rather than any identified problem to be addressed.

14 The current section is not unduly focussed on protecting competitors – The Review Panel has said that the current purpose test *"focuses on harm to individual competitors"* as opposed to competition. This is contrary to several landmark High Court decisions regarding the application of the current s 46, which make clear that the current section is concerned with competition, and ultimately consumers, rather than individual competitors. For example, in the *Queensland Wire* case, Chief Justice Mason and Justice Wilson explained that the objective of s 46 is to protect the interests of consumers, and competition is by its very nature "deliberate and ruthless".

15 Increased uncertainty and protracted litigation - The Final Report states that a competition policy that is "fit for purpose" *"includes competition laws and regulations that are clear, predictable and reliable"*. The proposed amendments fail to meet those criteria. The proposed amendments may simplify the drafting of s 46, but they will not simplify the process of applying that section to real-life situations.

16 The proposed s 46(1) is extremely broad and provides little guidance to courts or businesses on how matters are to be decided. It cannot be assumed that there is a simple answer to the question of whether competition is likely to be substantially lessened by unilateral conduct such as, for example, low pricing, increasing production capacity or deleting a product line. Cases would require extensive debate regarding economic theory, in each and every case on a case-by-case basis. This will lead to lengthy and protracted litigation, and consume significant public and private resources.

17 The Final Report attempts to address this issue by including legislative guidance in s 46(2) *"with respect to the section's intended operation"*. That guidance directs that the court must consider numerous complex matters (which are expressed not to be exhaustive), including "efficiency", "innovation", "product quality", "price competitiveness" and "preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market". As well as revealing the significant complexity of applying the proposed s 46(1), the proposed s 46(2) makes it unclear whether the test for determining whether there has been a substantial lessening of competition under the proposed s 46(1) is the same as under other sections of the Act (ss 45, 47 and 50), where the same guidance is not present.

18 Inefficient delegation of law-making to the courts – Whilst the broadness and generality of the proposed section gives it a superficial attraction, it is effectively a delegation to the courts of the power to decide what conduct is prohibited and what is not. By virtue of our court hierarchy and case law system, it will ultimately be necessary for the High Court to establish new principles to provide guidance to lower courts. That process will take years if not decades as suitable cases work their way through the court system. There is then no guarantee that the principles developed will be preferable to principles that could already be laid down in the legislation. Further, until those principles are settled, there will be an additional and unnecessary chilling effect on business, as businesses try to anticipate the potential future effects of their conduct, as well as the significance of those effects on the level of competition in any market, possibly including markets in which they do not operate.

19 Misuse of market power that does not substantially lessen competition – Despite its title, the proposed s 46(1) is not a prohibition against misuse of market power; it is a prohibition against substantially lessening competition. However, whilst it may be difficult to substantially lessen competition unilaterally without misusing market power, not every misuse of market power results in a substantial lessening of competition.

20 The Final Report seems to assume that s 46 need only prohibit a reduction in competition, but this overlooks the fact that, if a firm already has a substantial degree of power in a market, the existing level of competition may be insufficient to prevent that firm from misusing its market power to engage in anticompetitive conduct. That conduct might involve, for example, eliminating a much smaller rival provided that, because of the rival's small size, its elimination will not result in a substantial lessening of competition. Another example would be misusing market power to deter a much smaller rival from engaging in competitive conduct.

21 The problem is illustrated by the following fictional case study:

Case Study

Tap Power is a large wholesale supplier of domestic water taps. It has approximately 80% market share and a substantial degree of power in the market for the wholesale supply of domestic water taps. It supplies a very wide range of products. Other suppliers sell various taps with different designs to Tap Power, but no other supplier in the market is able to match Tap Power's range. As a result, tap retailers are heavily dependent on supply from Tap Power.

One of Tap Power's former employees leaves and starts a rival supplier, Tiny Taps. Tiny Tap has less than 1% market share. Out of spite, Tap Power decides to eliminate Tiny Tap. It tells retailers they will no longer be supplied by Tap Power unless they cease ordering from Tiny Tap. Tiny Tap loses all its customers and goes out of business.

> Tap Power has contravened the current s 46 because it has misused its market for the purpose of eliminating a competitor. However, under the proposed s 46, it would need to be proved that Tap Power's conduct had resulted in a substantial lessening of competition in the market. This would be hard to establish, given that Tiny Tap had such a small market share and, quite likely, its elimination had a negligible impact on the level of competition in the market, which was already dominated by Tap Power. Nevertheless, it is difficult to see why the law should be amended to permit this type of conduct.

22 Increased unmeritorious and intrusive claims and investigations – The Harper Review received and dismissed various claims of "predatory pricing" (above cost), "predatory capacity" and other allegedly anticompetitive conduct, in particular in relation to the grocery sector. The proposed s 46(1) is so broad and general that it would allow claims of that type to be made as allegations of breach, even if a court was ultimately to decide that the conduct did not have the purpose, effect or likely effect of substantially lessening competition. Large businesses would therefore be likely to face a proliferation of unmeritorious claims.

23 The proposed amendments would also give the ACCC power to conduct extensive and intrusive investigations of a business' conduct and decisions, in the search for some aspect that might be likely to result in a substantial lessening of competition.

24 Authorisation – If the amendments proposed to s 46 are made, we agree with the recommendation in the Final Report that authorisation should be available in relation to s 46.

Resale price maintenance

25 For the reasons set out in our previous submissions, we remain of the view that resale price maintenance should be prohibited only if it has a substantial anti-competitive effect (i.e. the *per se* prohibition should be removed). We recommend that further consideration be given to this proposal.

26 However, if our proposal is not adopted, we agree with the recommendation in the Final Report to extend the notification process to include resale price maintenance.

ACCC's coercive powers

27 In our previous submissions, we described the significant financial and operational burden that s 155 notices can place on businesses, including businesses not suspected of any prohibited conduct. We also noted our concern that these notices can be very difficult to challenge.

28 The Final Report recognises these problems, and recommends that:

(a) the ACCC review its guidelines on s 155 notices, having regard to the increasing burden imposed by notices in the digital age; and

(b) s 155 be amended so that it is a defence to a "refusal or failure to comply with a notice" that a recipient can demonstrate that a reasonable search was undertaken in order to comply with the notice.

29 We support the inclusion of the proposed defence referred to in paragraph (b) above.

30 However, we consider that the proposal for the ACCC to review its guidelines does not go far enough. As previously submitted, we consider that the issuing of a s 155 notice should be subject to a legislative requirement of reasonableness and proportionality.

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

Use of admissions in subsequent proceedings

32 In order to facilitate private actions, the Final Report recommends that s 83 be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought (in addition to findings of fact made by the court). For the reasons set out in our submission on the Draft Report, we do not agree with this proposed change.

33 We remain of the view that the proposed change would create a significant obstacle to parties reaching settlements with the ACCC, which has already become much harder as a result of the recent decision of the Full Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59.

Civil penalty settlements

34 As noted above, the Full Federal Court has, since the date of the Final Report, handed down its decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59. The decision makes it extremely difficult to resolve civil penalty proceedings by agreement.

35 The courts had previously given an agreed penalty figure considerable weight in assessing penalties. This was considered to be in the interests

of resolving proceedings expeditiously, and avoiding the expenditure of significant public resources by the regulator. The court retained the power to depart from the agreed figure if the agreed figure was considered inappropriate. However, the recent decision means that the court must now disregard an agreed penalty figure, save that the fact of the agreed penalty figure may be relevant to questions such as contrition or cooperation.

36 We propose that the effect of this decision be overturned urgently by legislation, and the following section be inserted to permit the previous practice, which had operated well for many years:

(1) *In deciding to order any penalty or remedy under this Act in any proceeding other than in a criminal proceeding, the Court may take into account the following matters, in addition to any other matters that the Court may take into account:*

(a) *the views of any party as to what the appropriate penalties or remedies should be;*

(b) *any agreement reached between the parties as to what the appropriate penalties or remedies should be;*

(c) *the desirability of resolving matters by agreement, in order to reduce the cost and expense of contested matters; and*

(d) *a party's cooperation and contrition as evidenced by the party's agreement to penalties or remedies being awarded against the party.*

(2) *Nothing in this section requires a Court to order or not to order a particular penalty or remedy as agreed by the parties if the Court considers that it would not be just to do so.*

Drafting issues

37 We welcome the proposed drafting in Appendix A of the Final Report, which is a major improvement on the current legislation. We propose the following amendments to that proposed drafting:

(a) Sections 45D(1)(a) and 45H(1)(a): replace those paragraphs with "*if the corporation (or any of its related bodies corporate) is party to a contract, arrangement or understanding that contains a cartel provision*". There should be no contravention of giving effect to a cartel provision unless the corporation is party to the contract, arrangement or understanding that contains the cartel provision.

(b) Section 45J(1)(a)(i): change "by the acquirer to the acquirer" to "by the supplier to the acquirer". This is a typographical error.

(c) Section 45J(1)(a)(i)–(iii) and (b)(i)–(ii): after each reference to the "acquirer" or "supplier" add "or any of its related bodies corporate". This reflects the scope of the current s 44ZZRS, under the wording of the current s 47.

(d) Section 45J(1)(a)(iii) and (b)(ii): after the first words "the supply" add "or re-supply". This is to capture the definition of "re-supply" in s 4C, which covers the situation where goods are altered in their form or condition, or incorporated into other goods. This reflects the scope of the current s 44ZZRS, under the wording of the current s 47.

(e) Section 45J(1)(b): We suggest there should be a further sub-paragraph (a counterpart to s 45J(1)(a)(iii)) as follows:

> *(iii) the acquisition by the supplier of the goods or services, or goods or services to be re-supplied as the goods or services.*

This would apply where there is a vertical supply relationship and the acquirer stipulates the goods or services to be used as the raw materials or ingredients for the goods or services to be supplied by the supplier to the acquirer. Such an arrangement would be exempted from the cartel laws, but still prohibited under the proposed s 45M if it would have the purpose, effect or likely effect of substantially lessening competition.

(f) Section 47(2)(a) and (b), 3(a) and (b), 4(a) and (b) and 5(a) and (b): after each reference to the "acquirer" or "supplier" add "or any of its related bodies corporate". This reflects the scope of the current s 47.

(g) Section 47(2)(b)(ii) and (4)(b): after the words "the supply" add "or re-supply". As above, this is to capture the definition of "re-supply" in s 4C, and reflects the scope of the current s 47.

(h) Section 47(4)(b): We suggest that, similar to s 47(2)(b), this should be replaced with:

> *(b) preventing, restricting or limiting:*
>
> *(i) the supply or re-supply by the supplier of goods or services to others.*
>
> *(ii) the acquisition by the supplier of the goods or services, or goods or services to be re-supplied as the goods or services.*

As above with s 45J(1)(b), this would apply where the acquirer stipulates the goods or services to be used as the raw materials or ingredients for the goods or services to be supplied by the

supplier to the acquirer. Such conduct could then be notified to the ACCC under the proposed s 93.

(i) Section 93(4): This subsection provides that the ACCC may give a notice that the public benefit of certain conduct (amounting to exclusive dealing or resale price maintenance) does not outweigh its public detriment. However, it is not clear what is the effect of a notice under s 93(4). It is not, for example, referred to in s 93(2), which provides for the effect of a notice under s 93(3).

38 Please do not hesitate to contact us if you have any queries.

Yours faithfully

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17 November 2014

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Dear Sir / Madam

Competition Policy Review - Draft Report

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

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

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

Recommendations supported

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations not supported

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

ACCC Cartel Immunity Policy

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

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

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

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

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

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

Concerted Practices

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

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

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

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

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

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

Misuse of market power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Resale price maintenance

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

ACCC's coercive powers

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

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

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

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

Use of admissions in subsequent proceedings

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

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

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

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

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

Yours faithfully

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

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Dear Sir / Madam

Competition Policy Review – Issues Paper

1 We refer to the Competition Policy Review Issues Paper dated 14 April 2014.

2 We welcome the opportunity to make the following submission in response to the Issues Paper.

3 It is now more than 20 years since the Hilmer Review of National Competition Policy and more than 10 years since the Dawson Review of the then *Trade Practices Act 1974* (Cth). The present Review is therefore timely to address important issues relating to the *Competition and Consumer Act 2010* (Cth) (**Act**) and its enforcement.

4 In our view, there are a number of important issues that the Panel should consider and address in its Draft Report. In this submission, we draw those issues to the Panel's attention. These issues are of considerable significance to Australian businesses, to whom competition law applies, and we consider there are strong reasons to reform the law in relation to these issues.

Cartel Laws and Enforcement

ACCC Immunity Policy

5 The ACCC's Immunity Policy is now the ACCC's primary tool for cartel detection and prosecution. However, to be effective, the single most important feature of any immunity regime is certainty for applicants that, provided the relevant criteria are satisfied, immunity will be granted. Without that certainty, an applicant faces the risk that, by applying for immunity, all it will do is expose itself to prosecution. That risk strongly deters any application for immunity and undermines the entire immunity regime.

6 The ACCC has recently flagged its intention to amend its policy to remove the disqualification for immunity of "ringleaders". The Immunity

Policy could, however, and should be made more certain by abolishing other uncertain criteria, such as the disqualification for cartel parties who have "coerced" another.

7 Further, it ought not be forgotten that the Immunity Policy is unprecedented in Australian law. No other similar policy exists that aims to provide automatic immunity from such serious enforcement action. The criminalisation of cartel conduct has only exacerbated the issue; the policy now enables parties to avoid punishment for criminal wrongdoing.

8 Despite its significance, the immunity regime currently has no proper legal basis. It rests on nothing more than public policy statements by the ACCC and the CDPP and the breadth of their prosecutorial discretion. This is despite the fact that decisions under the Immunity Policy have a significant impact on private rights. The policy urgently requires legislative backing and decisions to grant, refuse or revoke immunity ought be subject to judicial oversight. This is for two main reasons. First, without legislative backing, the current Immunity Policy raises significant concerns regarding the separation of legislative, executive and judicial power required under the Australian Constitution. Second, the ACCC has an inherent conflict of interest in both enforcing the cartel laws and administering the Immunity Policy. The courts should therefore, at minimum, have oversight of the ACCC's decisions to help ensure good governance and public administration.

9 In addition, the dual administration of the immunity regime by both the ACCC and the Commonwealth DPP should end. Such an arrangement is not only unwieldy and creates administrative duplication, it invites disagreement between the two bodies and jeopardises the effectiveness and certainty of the entire regime.

10 Further detail on these issues is set out in our two recent submissions to the ACCC's review of its Immunity Policy. We enclose copies of those submissions.

Clarify Cartel Laws

11 In the legislative amendments that came into force with the criminalisation of cartels in 2009, cartel conduct is defined in such a complex and convoluted fashion that there is a serious risk that benign commercial arrangements, not anticompetitive at all, may constitute a serious criminal offence.

12 There is much to be said for abolishing these convoluted laws and reverting to the prior definition of price fixing under the former s 45A of the Act. As far as we are aware, the present laws did not, and were not intended to, address any deficiency in that definition. The former definition also had the benefit of having been applied by the courts, over an extended period of time, and so were supported by a substantial and valuable body of case law.

13 At minimum, the definition of cartel conduct ought be amended to address a specific issue that we have previously raised with the Treasury. We enclose a copy of our submission. The issue concerns the "competition condition" part of the definition, and arises where there is a bona fide commercial transaction between, or involving, two competitors. Because related bodies corporate are also deemed to be party to the contract, arrangement or understanding, the issue also arises when a corporate group includes two or more companies that, whilst related bodies corporate, are competitors of each other as a matter of fact. Whilst this is not the case with every corporate group, such a corporate structure is not uncommon and there is no proper policy reason why it should be prohibited.

Joint Ventures

14 The current joint venture exceptions to the *per se* cartel conduct provisions are designed to recognise that commercial collaborations between competitors can often be pro-competitive, and contribute positively to the economy. Given the positive influences of collaboration on competition, it is imperative that the legislative drafting of these exceptions removes confusion and adequately permits competitors to work together in the pursuit of economic efficiencies.

15 The current exceptions do not achieve this objective, and are lacking in several respects. The exceptions apply only to a "joint venture", which requires the joint carrying on of an activity. It remains unclear what is meant by "joint activity". The Act requires that the joint venture must only be for the production and/or supply of goods or services. The joint venture must also be contained in a contract, sometimes requiring the formalisation of existing joint venture arrangements so as to be caught within the exception.

16 By contrast, the United States, Canada, the European Union and proposed new laws in New Zealand embrace the wider term "collaborative venture". In New Zealand, the collaborative activity exception proposed applies to a wide range of collaborative activities, and there is no limitation placed on the commercial endeavours or the particular kinds of economic participants that can qualify for the exception. Further, the proposed collaborative activity exception in New Zealand only requires that the collaborative activity be contained in a "contract, arrangement or understanding". There is no rationale for the limited nature of economic activity which can fall under the joint venture exception in Australia.

Unwarranted Prohibitions

17 Australian competition law is highly codified in the Act, which sets out a relatively large number of prohibitions in minute detail. This is not the case with US competition law, on which the Australian legislation is largely based. US competition law is largely the product of judicial decisions applying very broad legislative principles.

18 A difficulty of the Australian approach is that the level of detail has proliferated in an unending quest to improve the legislation by "tinkering". In some cases, the legislation has been altered in response to a specific court decision. The result can be seen in the various explanatory subsections of s 46 of the Act, as well as the convoluted cartel laws.

19 A further difficulty with codification is that the Australian legislation has not kept pace with developments in competition law thinking, in Australia and overseas, over the past 40 years. While that thinking has progressed over time, Australian competition legislation has remained largely frozen in time.

20 Of particular concern are the *per se* prohibitions referred to below: third line forcing, resale price maintenance, predatory pricing and price signalling. A *per se* prohibition is only justified if there is a very high degree of certainty that the prohibited conduct is anticompetitive, and causes significant anticompetitive detriment. This is so even where ACCC authorisation and, in the case of third line forcing, notification is available. Those processes are bureaucratic, inefficient, time consuming and costly. They require an applicant not only to be aware of the prohibitions and the availability of the authorisation and notification processes, but to justify its conduct against a starting point that the conduct ought to be strictly prohibited. In many cases, the authorisation and notification processes are an unnecessary imposition undertaken by parties in relation to conduct that is not, or is not significantly, anticompetitive.

Third Line Forcing

21 Third line forcing is the only non-price vertical restriction to be prohibited irrespective of its effect on competition. Third line forcing does not always have a pernicious effect on competition, in fact it is often beneficial and procompetitive. For example, if a firm ties a product from a third party, and the tied product is cheaper than that of other producers of the tied product, then this is likely to be procompetitive. Third line forcing can therefore deliver cost savings for consumers, especially when it is more efficient to supply two products rather than one. It can also stimulate competition in the market for the tied product.

22 Third line forcing should only be unlawful if it has an anticompetitive effect, such as when tied sales extend monopoly power into another market or create barriers to entry. By removing the *per se* ban on third line forcing, the real issue of whether monopoly conduct is anticompetitive can be examined. This is more aligned with the approach in the United States, where third line forcing was only prohibited *per se* for a decade, which happened to coincide with the passage of the *Trade Practices Act 1974* (Cth) (see *Continental Television, Inc v GTE Sylvania Inc*, 433 US 36 (1977), which overturned the *per se* rule adopted in *US v Arnold, Schwinn & Co*, 388 US 365 (1967)).

Resale Price Maintenance

23 In the case of resale price maintenance, coordination between upstream and downstream firms should not be a problem, *unless* it has an anticompetitive effect. In fact, there may be legitimate reasons for such conduct.

24 A major problem confronting retailers and other suppliers – particularly in high technology and other industries where products require specialist sales service – is the "free-rider" phenomenon. This arises where one supplier provides valuable sales-related services (such as pre-sale information and advice) to potential customers, who are then free to acquire from another supplier, who has not incurred the cost of providing the relevant services, and who may therefore be able to offer a lower price. In other words, the supplier who did not supply the services "free rides" off the services provided by the supplier who did provide the services. If the situation continues, there is no incentive for the services to be provided, even if they are valuable to customers.

25 The US courts no longer apply a *per se* prohibition to resale price maintenance (*Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877 (2007), overturning *Dr Miles Medical Co v John D Park & Sons*, 220 US 373 (1911)).

Predatory Pricing

26 As the Dawson review acknowledged, predatory pricing may be difficult to distinguish from legitimate procompetitive conduct, such as vigorous discounting. There is therefore a significant risk, in attempting to ban predatory pricing, of harming competition. Accordingly, any prohibition on predatory pricing must be carefully drafted.

27 The present prohibition (s 46(1AA) of the Act) was enacted shortly prior to the 2007 Commonwealth parliamentary election. There was no proper consultation process in relation to the drafting, which is replete with undefined, uncertain and confusing terminology such as "relevant cost", "sustained period" and "substantial share of a market". While the practical impact of the prohibition since its enactment appears to have been limited, the prohibition should be scrapped and, if necessary, the issue of predatory pricing considered by the Panel in relation to the general prohibition of misuse of market power (s 46(1)).

Price Signalling

28 The price signalling prohibitions were introduced in response to two events: the Commonwealth government's displeasure at the major banks announcing publicly (and responding to) interest rate increases and the ACCC's failure to adduce sufficient evidence to prove the required "meeting of the minds" in its cartel proceeding against petrol retailers in Geelong.

29 Needless to say, the cartel laws ought not be augmented to combat market outcomes that are politically embarrassing, or to assist the ACCC to establish liability when it is not able to make out its case.

30 In our view, there is no warrant for specific bans on price signalling. If price signalling amounts to cartel conduct then it ought to be dealt with as cartel conduct. However, if price signalling does not amount to cartel conduct, then the dissemination of price-related information may actually lead to a more informed market and help facilitate efficient and effective competition. As the US Supreme Court explained in *Maple Flooring Manufacturers' Association v US*, 268 US 563, 582-3 (1925), the sharing of information may "*avoid the waste which inevitably attends the unintelligent conduct of economic enterprise*" and "[c]*ompetition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.*"

31 In the case where a price signalling arrangement can itself be shown to have the purpose or likely effect of substantially lessening competition, then s 45 of the Act is sufficiently broad to address that issue.

ACCC's coercive powers

32 Section 155 of the Act confers on the ACCC compulsory information gathering powers. Those powers include the power to cross-examine a person under oath and the power to require the furnishing of information and the production of documents. Failure to comply with the notice may constitute a criminal offence punishable by up to 12 months' imprisonment.

33 A section 155 notice can be extremely burdensome and, indeed, oppressive for a party to comply with. There is, prima facie, no limit to the volume of material that the ACCC can require to be provided, nor the extent of searches that can be required to locate such material. It is common practice for the ACCC to require the production of documents that relate to a particular topic, matter or issue. Depending on the topic, matter or issue in question, this may require an organisation that receives such a notice to conduct extensive searches of its hard copy and electronic documentary records to see what (if any) documents fall within the scope of the notice.

34 In the information age, many communications are recorded in electronic form: emails, SMS, voicemails, electronic calendar appointments etc. Compliance with a notice may therefore require the engagement of information technology professionals. The recipient will also often need to engage legal advisers to assist in relation to decisions about whether certain documents are required to be produced under a notice as worded, the steps that should be taken to comply with a notice and any claims for legal professional privilege. The process is often extremely time consuming and expensive for the recipient.

35 It has recently been reported that, in the last financial year, the ACCC issued 358 section 155 notices — more than double the number issued in the previous year (175).

36 The issue has not received as much public attention as it deserves and this can be partly attributed to the reluctance of parties who have received section 155 notices to make that receipt known publicly by discussing their experiences. That is so even for parties who have ultimately not been subject to any ACCC enforcement action following their response to a section 155 notice.

37 The issue is exacerbated by the fact that it is very difficult to challenge a section 155 notice. The ACCC is presumed to have acted validly unless the recipient can prove otherwise, and the ACCC does not have to disclose the basis of its belief for issuing the notice. The courts will generally not assist recipients of s 155 notices to obtain evidence of a lack of genuine belief by the ACCC unless the recipient already has evidence that the ACCC has acted dishonestly or in bad faith. Recipients are also naturally reluctant to engage the court process because of the associated publicity that will be generated.

38 The proliferation of electronic documents has prompted courts around Australia to narrow the disclosure obligations on parties to civil litigation, through discovery of documents. It is time for the same approach to be taken to section 155 notices, with the recognition that the enforcement of competition laws in a particular case cannot be pursued at any cost. We therefore propose that the Panel consider a requirement of reasonableness and proportionality in the issuing of section 155 notices. This reasonableness and proportionality ought apply to the scope of documents sought, the action required to comply with the notice and the time afforded to do so. Those matters ought to be proportionate to, among other things, the seriousness of the suspected contravention (meaning the degree of harm to consumers or to competition, not the maximum penalty that might possibly apply to the suspected conduct), the urgency of the situation (in particular, if there is any imminent future harm) and the amount of resources available to the recipient to comply with the notice.

39 One situation in which a section 155 notice is particularly inappropriate is where parties have voluntarily approached the ACCC to seek merger clearance. In that context, a section 155 notice is usually superfluous and unnecessary. In our experience, parties are more often than not willing to engage with the ACCC, voluntarily produce information, and work towards allaying any concerns. The spectre of a section 155 notice, or the requirement to comply with one, often hinders, rather than promotes, the timely and efficient resolution of a merger clearance application. In the merger clearance context, section 155 notices should be a measure of last resort and are only appropriate where a party is unable to, or has failed, to provide information in response to a voluntary request, or where necessary to protect the recipient from any claims that the disclosure of specific information or documents to the ACCC would breach confidentiality or similar obligations.

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

Yours faithfully

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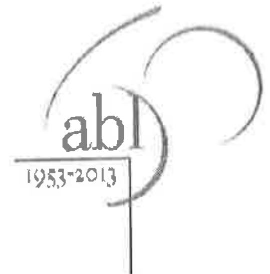

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Dear Sirs

Submission on the ACCC's Immunity Policy for Cartel Conduct

We refer to the ACCC's invitation for submissions on its Discussion Paper, *Review of the ACCC Immunity Policy for Cartel Conduct* dated 30 September 2013. We welcome the opportunity to make the following submission. The ACCC's Immunity Policy is a central feature of the ACCC's enforcement of the cartel laws.

The Need for Certainty

The single most important feature of any immunity regime is certainty for applicants. A business that learns that it is involved in cartel conduct must be able to have complete confidence that, if it applies for immunity, immunity will be granted. Without this certainty, the business faces the risk that, by applying for immunity, all it will do is expose itself to prosecution. That risk strongly deters any application for immunity and undermines the entire immunity regime.

This absolutely critical need for certainty has wide-reaching implications for the immunity regime. It dictates:

- the legal basis of the regime;
- the criteria for granting and revoking immunity; and
- the way the regime is administered.

In these respects, the current regime requires significant changes:

- The immunity regime should be embodied in law, rather than merely policy statements.
- Uncertain criteria for granting and revoking immunity should be scrapped.
- Decisions to grant or revoke immunity should be made by a single body and supervised by the courts.

Section 3.1 of the Discussion Paper argues that certainty should be balanced against flexibility and international conformity. We disagree. From the perspective of an immunity applicant, certainty is paramount and the immunity

regime is undermined if the ACCC has "flexibility" to decide whether or not to grant immunity, or if the ACCC is able to deny or revoke immunity based on the decisions made by overseas competition agencies under different immunity regimes.

The Need for a Statutory Scheme

Whether a person is granted immunity has significant legal consequences — such as whether the person may face severe civil or criminal penalties, including imprisonment. As noted in the Discussion Paper, the Commonwealth Director of Public Prosecutions (**CDPP**) has a statutory power, under s 9(6D) of the *Director of Public Prosecution Act 1983* (Cth), to give an undertaking that a person will not be prosecuted in respect of a specified offence or specified conduct.

By contrast, the immunity regime for cartel conduct rests on nothing more than public policy statements by the ACCC and the CDPP and the breadth of their prosecutorial discretion. Prosecutorial discretion plays an important role in our legal system but it is problematic in terms of the rule of law. The ACCC is established and invested with significant powers in order to enforce competition law. Granting immunity, by definition, involves not enforcing competition law against someone. Although the courts have generally been reluctant to interfere in matters of prosecutorial discretion, that discretion is not absolute and its exercise is subject to law, including the requirements of administrative law and the *Australian Constitution*.

The current Immunity Policy raises concerns regarding the separation of legislative, executive and judicial power required under the constitution. The ACCC and the CDPP are part of the executive branch and responsible for enforcing the law. The Immunity Policy has no legislative basis but has been promulgated publicly by the ACCC and sets out rules of general application that affect legal rights and interests. The policy is akin to legislation. Further, the ACCC and the CDPP are acting in a quasi-judicial manner in applying the rules contained in the policy to particular cases and in deciding whether particular applicants are entitled to immunity.

The very important decisions that are made pursuant to the Immunity Policy might be challenged under administrative law. Given that the policy has no basis in the legislation, and is even arguably inconsistent with legislation, it is unclear whether the ACCC and the CDPP may legitimately have regard to it in making decisions under the legislation. In other words, the Immunity Policy could be seen not as an exercise of prosecutorial discretion but rather an impermissible restriction on that discretion.

Whether or not the current Immunity Policy could be struck down as unconstitutional, or an immunity decision under that policy challenged under administrative law, putting the immunity regime into the legislation would make clear that the regime has a proper legal basis.

The immunity regime could be legislated in a number of ways. The conditions for immunity should be set out in the legislation and there could be either:

- a statutory defence to cartel proceedings of having made an immunity application that satisfied the relevant conditions; or
- a statutory power given to the ACCC to grant immunity from cartel proceedings (similar to the ACCC's power to authorise anticompetitive conduct prospectively).

However if the immunity regime is implemented in the legislation, this would increase certainty for immunity applicants. There are also other good reasons why the regime should be embodied in legislation, as explained below.

Supervision by the Courts

Because the immunity regime operates only as a policy document, it is debatable whether decisions to grant, refuse or revoke immunity can be reviewed by the courts. As noted above, it might be possible to obtain judicial review under administrative law. Alternatively, an application for immunity might create a binding contract between the applicant and the ACCC — similar to the contract that arises when a reward is offered to the public for providing information that leads to the apprehension of a criminal.

These issues have yet to be considered by the courts. The Immunity Policy, however, seems to assume that the ACCC and CDPP's decisions are final and unimpeachable. Even if that assumption is correct, the result is undesirable from the perspective of public policy. Decisions to grant, refuse or revoke immunity have significant legal consequences for the applicant. The ACCC and the CDPP are not infallible, nor impartial. They are organisations that have their own roles and agendas — such as enforcing the law and various public policy objectives. Unlike the courts, the ACCC and CDPP do not enjoy a constitutional guarantee of judicial independence. They are simply not established for the purpose of making legal decisions that are independent and seen to be independent.

If the immunity regime is embodied in legislation (as proposed above), the legislation can and should make clear that the courts have a supervisory jurisdiction.

Uncertain Criteria for Granting Immunity

To be eligible for immunity, the current Immunity Policy requires that an applicant "*has not coerced others to participate in the cartel and was not the clear leader in the cartel.*"

The concept of a "*clear leader*" is inherently uncertain. We agree with the view expressed in the Discussion Paper that this requirement should be abolished.

The requirement regarding "*coercion*" is also uncertain and should be abolished. Different minds may consider different degrees of pressure or persuasion to amount to "*coercion*". Ordinarily, it would be expected that the parties entered into, and then continued, the cartel because it was to their mutual benefit. In those circumstances, a party should be responsible for its own actions. The

Immunity Policy risks setting up an assumption that one cartel party is able to blame its conduct on another.

The requirement regarding "coercion" may also lead to the ACCC receiving information that has been distorted to improve the immunity applicant's prospects of satisfying this requirement.

Further, in the extreme situation where one party uses criminal conduct (such as blackmail, intimidation or physical violence) to force another to join and/or continue a cartel, the party forced could plead the criminal law defence of duress. At the very least, the circumstances would be taken into account in mitigating any penalty. Immunity granted to a party that has used criminal conduct to facilitate a cartel should be limited to the contravention of the cartel laws, and not extend to the additional criminal conduct that facilitated the cartel.

It might seem unfair to grant immunity to a cartel party that has "coerced" another cartel member to participate. But, rightly or wrongly, the Immunity Policy is not about fairness. It is always unfair to grant immunity to one cartelist. The policy is about detecting and ending cartels. Those considerations continue to apply where coercion was involved. Whether disregarding fairness in this way can be justified by the overall benefits of the Immunity Policy is an important public policy question that is touched on below.

Revoking Immunity

Just as certainty is critical in relation to the conditions for eligibility for immunity, certainty is also critical in relation to the circumstances in which the ACCC and/or CDPP may revoke immunity. A business will be deterred from applying if there is a risk that immunity may be revoked after it is granted. If immunity is revoked, the business faces the spectre of prosecution and would probably have been better never to have made the immunity application in the first place (given the heavy evidentiary burden on the ACCC / CDPP).

The ACCC's expectations of immunity applicants are extremely high: "full disclosure and cooperation". As spelled out in the Interpretation Guidelines, this entails providing:

- full, frank and truthful disclosure;
- full, expeditious and continuous cooperation at the applicant's expense throughout the ACCC's investigation and any court proceeding (this could be a period of years);
- full details of all known facts;
- confidentiality to the ACCC;
- all evidence and information in the applicant's possession, wherever it is located;
- information and documents within the ACCC's timeframes; and
- making relevant individuals available to assist the ACCC.

These obligations can be onerous. Many are in absolute terms. However, in cartel matters, the facts are often not clear, and evidence may be difficult for the applicant to obtain. Even with the best of intentions, and unlimited resources

allocated to the task, there is a risk that the ACCC might consider the applicant has not met the high bar set for cooperation.

In contrast, the Discussion Paper indicates that revocation will only occur "in rare situations", where the applicant is deliberately not satisfying its obligations or where evidence suggests the applicant has engaged in "gaming" of the immunity policy. We welcome the ACCC's apparent desire to restrict the circumstances in which immunity may be revoked. However, the concept of "gaming" is inherently ambiguous and ought not be relied on. Also, a business should not be considered to be deliberately not complying if only some of its staff (for example, those personally involved in the cartel) deliberately fail to provide all information required. What matters should be the intention of the business overall, particularly at senior levels.

These new proposed tests for revoking immunity also raise the question: who will apply the tests and decide whether immunity should be revoked?

In the Discussion Paper, the ACCC proposes to institute a new procedure for revoking immunity. The procedure involves giving the applicant a caution, then a letter from the ACCC's Executive General Manager of Enforcement and Compliance. This process at least gives the applicant notice of the ACCC's intention and an opportunity to respond. However, in light of the drastic consequences of revoking immunity, the process should also give the applicant a right to appeal or seek review of the decision to revoke.

Review of a revocation decision by the courts would best protect the applicant's rights, but there may be operational reasons why a public hearing would be undesirable for the ACCC. The review could therefore be conducted as an arbitration conducted by an independent senior counsel or retired judge (to be appointed by the head of the Australian Bar Association in default of agreement).

Dual Administration by the ACCC and CDPP

From the perspective of certainty, as well as administrative efficiency, it is clearly undesirable to have two different bodies (the ACCC and the CDPP) both making decisions about immunity. The current dual system, as set out in the Memorandum of Understanding between the two bodies, appears to have come about because of the lack of a proper statutory framework for granting immunity. It raises a number of uncertainties. For example:

- What is the nature of the "preliminary advice" that the ACCC gives the CDPP on immunity applications?
- In deciding whether a case is significant enough to be referred to the CDPP, the ACCC uses a number of criteria that are uncertain or matters of degree (eg, whether the conduct is "longstanding" or could cause "significant detriment"). Further, how does the ACCC calculate whether the conduct's "effect on commerce" in a 12 month period exceeds the $1 million threshold?

- There is a possibility that the ACCC and the CDPP may disagree about whether immunity should be granted. This would put the applicant in a very uncertain position.

- In its Interpretation Guidelines, the ACCC says it will not use any information it receives in support of an application for immunity as evidence in proceedings against the applicant in respect of the relevant cartel. Do any similar restrictions apply to the CDPP? Also, is there any bar on derivative use by the ACCC (using the information received to gather information that may be used as evidence)?

It would be far preferable for immunity decisions to be made by a single body, subject to review by the courts (as explained further above).

Is the Immunity Regime Actually Achieving the Benefits Claimed?

The Discussion Paper states that, since the Immunity Policy was published in July 2009, the ACCC has received over 50 approaches under the policy, and these approaches have led to the detection of "many" cartels. Further, the Discussion Paper indicates that 14 of the ACCC's 20 current in-depth cartel investigations or court proceedings began as immunity applications.

The Immunity Policy seems to help the ACCC generate "leads" with minimal work by the ACCC. But does the policy actually result in significant benefits to the Australian economy? Or is it a case of "poor man's enforcement"? The answers to these questions require further information, but the ACCC has provided little public information about the types of approaches it has received under the policy, or the impact the policy has had on enforcement outcomes. This has led to a number of unanswered questions:

- How many immunity applicants are engaged in so-called "hard core" cartels? Such cartelists may consider there is little prospect of being caught, so immunity applications are unattractive. On the other hand, how many applicants are responsible businesses who would have stopped the conduct in any event once senior management became aware of it? Such businesses may consider they have little to lose by seeking immunity, but the public benefits received in return are less, given that the conduct would have ceased anyway.

- Is the evidence provided by immunity applicants reliable and does it stand up at trial given that witnesses who have received immunity may be attacked on the basis of their credibility? To some extent, we will not know until there has been a criminal cartel prosecution based on evidence given by an immunity applicant. Is the credibility concern a reason why no prosecutions have been brought under the criminal cartel laws in the past four years?

- Where a cartel matter is being investigated one party will likely — perhaps even out of an abundance of caution — apply for immunity. But is it true that without the policy the ACCC would never have detected the cartel through its own investigatory powers?

- If (as the Discussion Paper says) approximately half of all self-reported cartels involve immunity or leniency applications in another jurisdiction, could the ACCC have learned of the cartel through overseas competition agencies without granting immunity in Australia?
- How many immunity applicants have been rejected because they did not satisfy the relevant criteria? In how many cases has there been a dispute about whether those criteria were satisfied? What were the criteria in dispute?

It would be desirable if the ACCC provided greater information and transparency about these matters. The Immunity Policy involves a significant public policy choice: that it is more important to detect and end cartels than it is to punish the cartelists. The correctness of this choice is open to debate — in particular, since cartel conduct is now considered a serious crime, which generally involves a judgment that the conduct in question is not only undesirable but immoral. Immunity from criminal prosecution should not be granted lightly. It is incumbent on the ACCC to demonstrate the public benefits that are being received in return for immunity. Further information would help show whether the claimed benefits of the Immunity Policy are being achieved, and whether the right public policy choice has been made.

Conclusion

In summary, and in the interests of providing immunity applicants with certainty:

1 Given its importance, the immunity regime should be embodied in legislation, rather than policy statements.

2 Decisions to grant, refuse or revoke immunity should be made by a single body (rather than by both the ACCC and the CDPP) and be reviewable by the courts.

3 The requirements that an applicant not be the "clear leader" in the cartel, and not have "coerced" another cartel member, should be scrapped.

4 Immunity should only be revoked when, after warnings, the applicant, as an organisation, has deliberately withheld relevant information or failed to cooperate. There should be no adoption of the proposal in the Discussion Paper that immunity may be revoked where the applicant has engaged in "gaming" of the immunity policy.

5 The ACCC should provide greater information and transparency to demonstrate that the Immunity Policy is achieving the public benefits that it is claimed the policy achieves.

Yours faithfully

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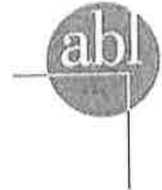

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Dear Sirs

Submission on the ACCC's Draft Cartel Immunity Policy and Frequently Asked Questions

We refer to the ACCC's media release dated 9 April 2014, announcing the release of the ACCC's *Draft Immunity and Cooperation Policy for Cartel Conduct* ("Draft Policy") and *Draft Frequently Asked Questions* ("Draft FAQs").

We welcome the opportunity to make the following submission on the Draft Policy and Draft FAQs.

As stated in our submission dated 28 October 2013 on the ACCC's Discussion Paper, *Review of the ACCC Immunity Policy for Cartel Conduct* dated 30 September 2013:

> "*The single most important feature of any immunity regime is certainty for applicants. A business that learns that it is involved in cartel conduct must be able to have complete confidence that, if it applies for immunity, immunity will be granted. Without this certainty, the business faces the risk that, by applying for immunity, all it will do is expose itself to prosecution. That risk strongly deters any application for immunity and undermines the entire immunity regime.*"

The Draft Policy and Draft FAQs take some steps towards increasing certainty, and we welcome this. However, as outlined below, there remain aspects of the Draft Policy and Draft FAQs that create uncertainty, to the detriment of the effective operation of the policy.

Removal of the "Clear Leader" Requirement

We welcome the ACCC's proposal, in the Draft Policy, to abolish the requirement that, in order for an applicant to be eligible for immunity, the applicant "*was not the clear leader in the cartel*". In our previous submission, we argued that that requirement was inherently uncertain and ought to be scrapped (our recommendation 3).

We also recommended the abolition of the requirement that the applicant "*has not coerced others to participate in the cartel*". Unfortunately, the ACCC has not adopted that recommendation in the Draft Policy.

Instead the ACCC indicates in the FAQs that a degree of pressure having been exerted by both parties to a cartel on each other from time to time will not preclude immunity being granted to one cartel party. This seems inconsistent with the "*coercion*" requirement and highlights the difficulty of applying such a requirement.

We remain of the view that the "*coercion*" requirement should also be abolished due to its uncertainty.

As we argued in our previous submission, any party that uses criminal conduct (such as blackmail, intimidation or physical violence) to force another to join and/or continue a cartel, could be prosecuted for that criminal conduct. Further, the fact that a cartel party had been subject to such criminal conduct by another cartel party might provide grounds for the criminal law defence of duress or, at the very least, could be taken into account in assessing any penalty.

Statutory Scheme and Court Supervision

In our previous submission, we recommended that:

- Given its importance, the immunity regime should be embodied in legislation, rather than policy statements.
- Decisions to grant, refuse or revoke immunity should be made by a single body (rather than by both the ACCC and the CDPP) and be reviewable by the courts.

These recommendations, which are not reflected in the Draft Policy, would have increased the certainty of the regime for applicants.

Admission of Cartel Conduct/Contravention

The Draft FAQs (Q22) indicate that an applicant must admit that it has engaged in cartel conduct. This is inconsistent with the Draft Policy (and the current Immunity Policy), under which there is no such requirement; rather, the applicant must admit that its conduct "*may*" have contravened the Act.

The word "*may*" is important because, in some cases, there may be legal or factual reasons why the conduct in question might or might not amount to a contravention of the Act. As the Draft FAQs acknowledge, this is a matter for the court to decide. Such legal or factual issues might also influence the ACCC's decision whether to investigate or commence proceedings in relation to the conduct.

However, an applicant, merely because of making an immunity application, cannot be required to abandon any defences that might otherwise be available in subsequent proceedings brought by the ACCC (if immunity is not granted or is subsequently revoked) or by third parties.

Although Q22 states that it is for the court to decide whether there is a contravention, this is confusing, as cartel conduct (which Q22 states the applicant is required to admit) is generally understood to mean a contravention.

Accordingly, Q22 of the Draft FAQs should be amended to make it consistent with the requirements of the policy, and remove any suggestion that there is a requirement for the applicant to admit that it has engaged in cartel conduct. To avoid confusion, it would be better for Q22 to refer to the applicant admitting that it has engaged in conduct that may constitute a contravention.

Proffer

The Draft Policy and Draft FAQs introduce a stage in the application process in which an immunity applicant provides the ACCC with a written or oral "Proffer". The "Proffer" is intended to set out the information supporting the immunity application.

Whilst it may be desirable for immunity applicants to provide the ACCC with comprehensive information at the outset, the ACCC may, in response, raise concerns regarding eligibility, or regarding the information provided, that were not anticipated by the immunity applicant. In those circumstances, the FAQs state that the ACCC "*may*" extend the marker to enable the applicant to make further enquiries and a supplementary proffer (Q18 and Q23).

We are concerned that this leaves open the possibility that the ACCC might decide to reject an immunity application on the basis of an issue that was not anticipated by the applicant, and in relation to which the applicant might be able to provide further supporting information if given the opportunity to do so. Such a situation would clearly have dire consequences for the applicant, and undermines the certainty and overall attractiveness of the immunity application process for applicants.

Accordingly, we suggest that, before the ACCC decides to reject an immunity application, the ACCC write the applicant a letter, explaining why the ACCC proposes to reject the application and giving the applicant a further opportunity to submit supporting material. This process would be similar to the process for revocation of immunity (see Draft Policy Section F and Draft FAQs Q51), the consequences of which are similarly dire.

Like the process for revocation, this two-stage process for rejection should also be set out in the Draft Policy and Draft FAQs. This would increase the certainty and fairness of the application process.

Waiver

The requirements of the Draft Policy and Draft FAQs are confusing in relation to the circumstances in which an immunity applicant is, in effect, required to provide a waiver to permit disclosure of information to foreign regulators.

On the one hand, the Draft Policy (para 49) states that conditional immunity is not dependent on a waiver being provided. On the other hand, the Draft Policy

states that a failure to provide a waiver, without "*satisfactory explanation*", may be regarded as a failure to cooperate, which could presumably lead to immunity being revoked.

Based on Examples 1 and 2 in Q26 of the Draft FAQs, it appears that a "*satisfactory explanation*" would be made out if there was any risk of prosecution of the applicant in the other jurisdiction(s), or if any requirement of confidentiality is imposed on the applicant by a law enforcement agency or court. What is not clear is the circumstances in which an explanation will be considered unsatisfactory.

As the Draft Policy acknowledges, providing a waiver is not a condition of obtaining immunity. The Draft Policy and Draft FAQs should be amended to delete the suggestion that a failure to provide a waiver could amount to a failure to cooperate. That suggestion only serves to increase the uncertainty for immunity applicants.

Confidentiality

The Draft Policy states that the applicant must keep confidential its application, as well as any information obtained through cooperating with the ACCC. The Draft FAQs (Q27) explain that this obligation is subject to any disclosure required by law. That exception is important and ought be included in the Draft Policy, not merely in the Draft FAQs.

Please do not hesitate to contact us if you have any queries.

Yours faithfully

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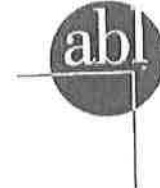

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Dear Ms Abbot

The new definition of cartel conduct, the "competition condition" and related competitors

We refer to our previous discussions.

As foreshadowed in our email on 29 March 2010, we have prepared this letter for you to provide to the ACCC on the basis that it will not be attributed to our client.

As we have discussed, the concerns explained in this letter are very real issues for a number of participants in a wide range of industries. The issue is also serious as cartel conduct is subject to severe sanctions, including, for the first time, terms of imprisonment.

Executive Summary

1 Under the new cartel law,[1] cartel conduct is defined in a novel and complex way. Our concern is that perfectly ordinary, benign commercial arrangements that are not anticompetitive at all may be caught by the definition. This letter considers two specific situations:

- two or more competitors being party to an arrangement that is not anticompetitive;
- corporate groups in which related bodies corporate compete with each other.

2 In drafting the new law, a specific defence was included for one type of arrangement between competitors: joint ventures. There are, however, other types of arrangements between competitors that are not anticompetitive and should not be considered cartel conduct. The sale of goods or services by one competitor to another is a simple example, but it appears to us this could in certain circumstances fall within the definition of cartel conduct under the new law.

[1] *Trade Practices Act 1974* (Cth) ("Act"), as amended by the *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* (Cth). The amendments came into force on 24 July 2009.

3 Further difficulties arise in relation to corporate groups in which related bodies corporate compete with each other. Such groups are not uncommon, but the new law assumes that related bodies corporate always act in concert with each other. Accordingly, where a body corporate is party to an arrangement, the new law deems that all of its related bodies corporate are parties to that arrangement too.[2] If one of those related bodies corporate is a competitor, then the arrangement is considered an arrangement between competitors, and may be prohibited as cartel conduct.

4 In this letter, we explain how these results arise under the provisions of the new cartel law. We also illustrate our concerns with some examples and a comparison of how related competitors are treated under the definition of an exclusionary provision in section 4D of the Act, which predates the new cartel law.

5 In our view, the Act should be amended to rectify this issue. At the very least, Treasury and/or the ACCC should provide assurances that the new cartel law will not be enforced by the regulator in such a perverse way — although that still leaves the risk of private actions.

Explanation of the new definition

6 Under the new cartel law, a corporation commits a criminal offence if it makes or gives effect to a contract, arrangement or understanding that contains a "cartel provision".[3] The fault element for these criminal offences is "knowledge or belief". There are also parallel civil penalty prohibitions,[4] which do not involve the fault element.

7 A "cartel provision" is defined as a provision that satisfies:[5]

a) either the "purpose/effect condition" or the "purpose condition"; and

b) the "competition condition".

8 This is a radical departure from how cartel conduct was previously defined. Prior to the recent amendments, cartel conduct was captured by sections 45A and 4D of the Act. Section 45A (price-fixing) has been repealed entirely. Section 4D (exclusionary provisions) remains but is separate to the new criminal and civil prohibitions on cartel conduct. The differences between section 4D and the new cartel law are discussed below.

9 The "purpose/effect condition" and "purpose condition" (element (a) above) encompass different types of cartel activity. The "purpose/effect condition" relates to price fixing.[6] The "purpose condition" covers three other types of cartel conduct: restricting outputs; allocating customers, suppliers or territories; and bid rigging.[7]

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[2] Section 44ZZRC.
[3] Sections 44ZZRF and 44ZZRG.
[4] Sections 44ZZRJ and 44ZZRK.
[5] Section 44ZZRD(1).
[6] Section 44ZZRD(2).
[7] Section 44ZZRD(3).

10 The "purpose/effect condition" and "purpose condition" are defined so broadly that they cover provisions that are not necessarily anticompetitive. For example, the purpose/effect condition is satisfied by any provision that has the effect of fixing, controlling or maintaining the price for goods or services to be supplied by one of the parties. Such a provision will exist in any ordinary contract for the sale of goods or services.

11 A provision that satisfies the "purpose/effect condition" or the "purpose condition" is not a cartel provision unless it also satisfies the "competition condition" (element (b) above). The competition condition is satisfied if at least two of the parties to the contract, arrangement or understanding are (or are "likely"[8] to be) in competition with each other in a certain way.[9] How those parties must be in competition with each other depends on which category of cartel conduct satisfies the purpose/effect condition or the purpose condition.

12 For example, if a provision satisfies the purpose/effect condition because it fixes the price for goods or services to be supplied by one of the parties,[10] then the competition condition is satisfied if two or more parties are in competition with each other in relation to "the supply of those goods or services".[11]

13 As another example, if a provision satisfies the purpose condition because it has the purpose of preventing, restricting or limiting the production of goods by one of the parties (a form of output restriction),[12] then the competition condition is satisfied if two or more parties are in competition with each other in relation to "the production of those goods".[13]

14 The competition condition is also satisfied if at least two of the parties would be (or would be likely to be) in competition with each other in the required way <u>but for</u> any contract, arrangement or understanding.[14]

15 The competition condition is not a very strict requirement. Although it requires two or more competitors to be party to the relevant contract, arrangement or understanding, it does not say what rights or obligations the competitors must have under the contract, arrangement or understanding. This appears to lead to unintended consequences when combined with the breadth of the "purpose/effect condition" and "purpose condition".

16 We illustrate these problems with two examples, both of which illustrate a contract, arrangement or understanding between competitors that is not a joint venture and is not anticompetitive. After those examples, we explain our further concerns regarding section 44ZZRC, and then illustrate those further concerns with further examples.

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[8] "Likely" is defined broadly to include "*a possibility that is not remote*": s 44ZZRB.
[9] Section 44ZZRD(4).
[10] Section 44ZZRD(2)(c).
[11] Section 44ZZRD(4)(c).
[12] Section 44ZZRD(3)(a)(I).
[13] Section 44ZZRD(4)(f).
[14] Section 44ZZRD(4)(b).

17 In each of the examples in this letter, none of the exceptions or defences in the legislation appear to apply.[15]

Example 1: Sale from one competitor to another (Price fixing)

18 This example involves a company selling a product to one of its competitors.

19 Major Oil is a large international oil company. In Australia, it sells petrol to retailers and wholesale resellers. Aussie Oil is one of those resellers, and there is a long-term supply contract between Major Oil and Aussie Oil. Aussie Oil also sells petrol to retailers and other resellers. Aussie Oil is therefore both a customer and competitor of Major Oil.

20 We can represent this situation diagrammatically as follows:

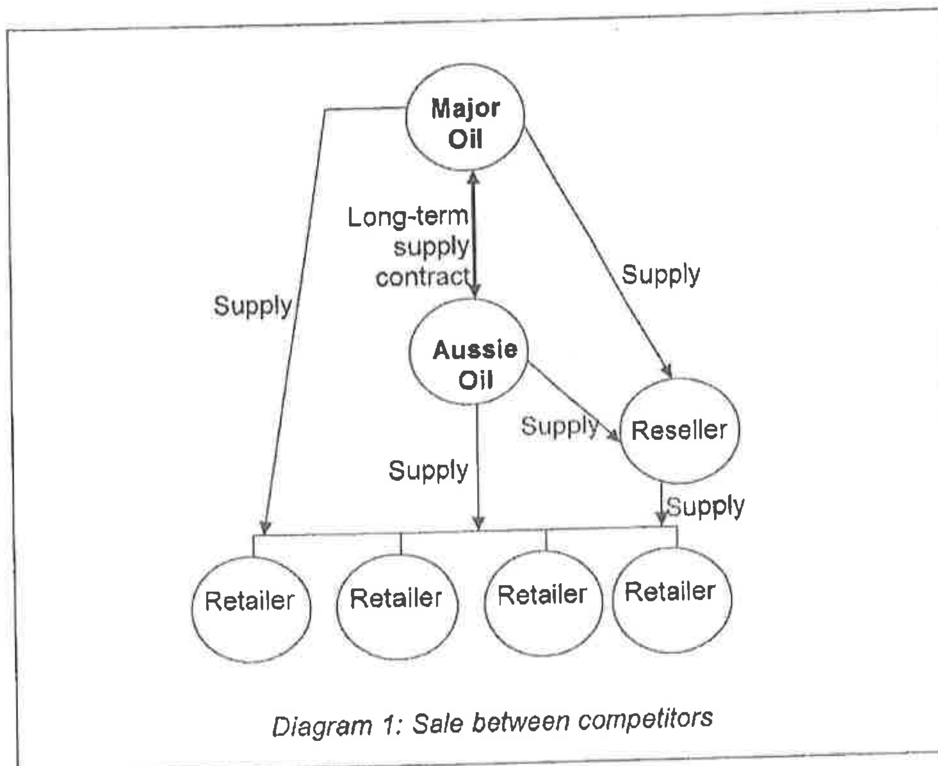

Diagram 1: Sale between competitors

21 We would expect the new cartel law to prohibit Major Oil and Aussie Oil (which are competitors with each other) agreeing to fix the price at which either of them sells to retailers or other resellers. However, our concern is that the new definition of cartel conduct is drafted so broadly that it also prohibits Major Oil and Aussie Oil agreeing to fix the price at which either of them sells to each other. That would be an absurd result as

[15] In broad terms, the exceptions and defences are for where a collective bargaining notice is in force (s 44ZZRL), where the contract is subject to ACCC authorisation (s 44ZZRM), where the contract is only between related bodies corporate (s 44ZZRN) – see further below; joint ventures (ss 44ZZRO and 44ZZRP), covenants affecting land (s 44ZZRQ), resale price maintenance (s 44ZZRR), exclusive dealing (s 44ZZRS), dual listed company arrangements (s 44ZZRT), acquisition of shares or assets (s 44ZZRU) and collective acquisitions (s 44ZZRV).

there is nothing anticompetitive about Major Oil supplying petrol to Aussie Oil and the two parties must agree on the price for that supply. It clearly should not be prohibited as criminal cartel conduct.

22 Let us assume that clause 5 of the long-term supply contract sets the price at which Major Oil supplies petrol to Aussie Oil. In the language of the new cartel law, clause 5 has the effect of fixing, controlling or maintaining the price at which one party to the contract (Major Oil) will supply goods (petrol). Clause 5 therefore satisfies the purpose/effect condition.[16]

23 Major Oil and Aussie Oil are also in competition with each other in relation to the supply of "those goods" (petrol). Clause 5 therefore appears to satisfy the competition condition.[17]

24 In our view, the existence of the long-term supply contract does not prevent the competition condition from being satisfied. This is because the competition condition can be satisfied if the parties would be (or would be likely to be) in competition with each other but for "<u>any</u> contract, arrangement or understanding" (emphasis added).

25 It might be argued that Major Oil and Aussie Oil are not "in competition with each other in relation to ... the supply of those goods"[18] on the basis that "those goods" means the <u>actual</u> goods the subject of the contract — that is, the actual petrol supplied or to be supplied by Major Oil. Aussie Oil, so the argument would go, is not in competition to supply "those goods" because "those goods" are owned by Major Oil. Such a narrow interpretation would mean, however, that the competition condition would not be satisfied where two competitors, X and Y, agree the price at which X will supply X's customers with X's goods, but do not agree what Y will charge. In that situation too, one of the parties (Y) is not able to supply the actual goods the subject of the agreement (X's goods).

26 As clause 5 seems to satisfy both the purpose/effect condition and the competition condition, it appears to be a cartel provision. Both parties appear to have breached the new cartel prohibitions by entering into the long-term supply contract.[19] They will also apparently breach the new cartel prohibitions if they give effect to the cartel provision, by charging/paying the price for petrol set under that clause.[20]

Example 2: Master Development Agreement (Price fixing)

27 This is another example of a contract to which two competitors are parties, but there has been no anticompetitive collusion between them.

28 Port Developments Pty Ltd is the owner of coastal land suitable for the construction of a new port for commercial cargo shipping. Port

[16] Section 44ZZRD(2)(c).
[17] Section 44ZZRD(4)(c).
[18] Section 44ZZRD(4)(c).
[19] Sections 44ZZRF (criminal offence) and 44ZZRJ (civil penalty provision). The fault element for the criminal offences is "knowledge" or "belief" but a defendant cannot escape liability on the basis that it did not know or believe that the cartel provision was a cartel provision: see section 9.3 of the *Criminal Code* (ignorance of the law).
[20] Sections 44ZZRG (criminal offence) and 44ZZRK (civil penalty provision).

Developments enters into a Master Development Agreement relating to the site with several parties:

- Maritime Constructions Pty Ltd — which is responsible for developing the harbour and building the wharves;
- Coastal Constructions Pty Ltd — which is responsible for constructing the terminal facility (excluding the works Maritime Constructions is responsible for); and
- Port Services Pty Ltd — which will be responsible for running the port for a period of 10 years after construction is complete.

29 Maritime Constructions and Coastal Constructions are competitors. Port Developments could have chosen either of them to undertake the whole construction project but decided to allocate part of the project to each of them in light of their respective expertise and quoted prices.

30 Port Developments decided to enter into a Master Development Agreement with all three parties (rather than separate agreements) for convenience and because Maritime Constructions and Coastal Constructions have mutual obligations to each other in terms of providing access to the site.

31 Clause 5 of the Master Development Agreement sets the price Port Developments will pay Maritime Constructions for the works Maritime Constructions will undertake.

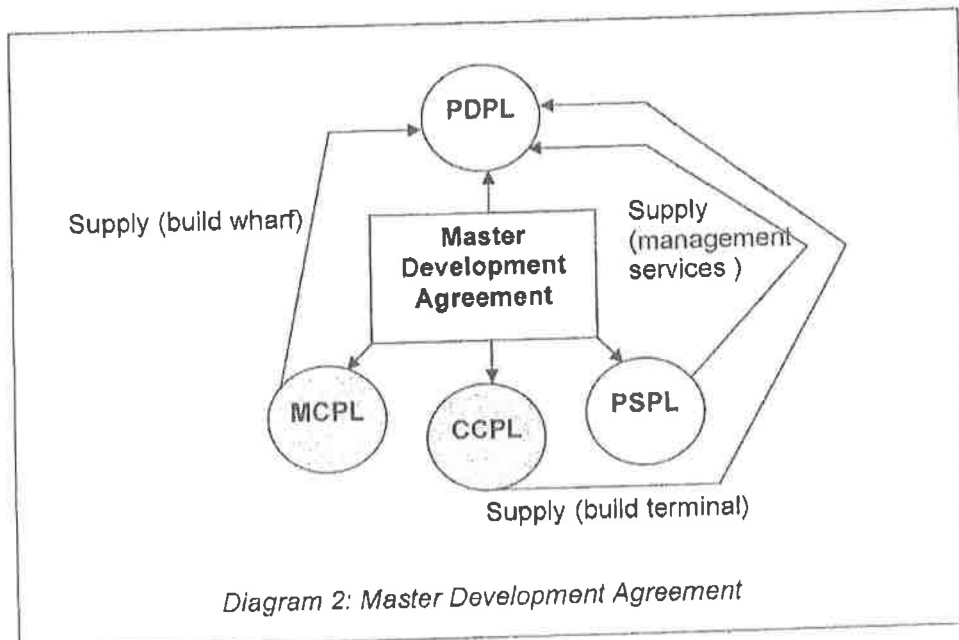

Diagram 2: Master Development Agreement

32 Clause 5 satisfies the purpose/effect condition, as it has the effect of fixing, controlling or maintaining the price for goods or services to be supplied by a party to the contract (Maritime Constructions).[21]

[21] Section 44ZZRD(2)(c).

33 As Maritime Constructions and Coastal Constructions (both shaded in Diagram 2) are in competition with each other in relation to the supply of those goods or services, the competition condition also seems satisfied,[22] and clause 5 appears to be a cartel provision. This is notwithstanding that the price set under that clause was negotiated between Port Developments and Maritime Constructions without any involvement by Coastal Constructions.

34 Each of the parties to the Master Development Agreement has apparently made a contract containing a cartel provision. They might try to argue that the joint venture defence applies but the relationship between Maritime Constructions and Coastal Construction seems not close enough to be a "joint venture for the production and/or supply of goods or services".[23]

Related Bodies Corporate (Section 44ZZRC)

35 This problem with the new definition of cartel conduct is compounded by section 44ZZRC. That section gives an "extended meaning" to the word "party" (emphasis added):

> *For the purposes of this Division, if a body corporate is a party to a contract, arrangement or understanding (otherwise than because of this section), each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding.*

36 We are concerned by the application of this section to corporate groups in which related bodies corporate are competitors of each other. If any body corporate within that group becomes party to a contract, arrangement or understanding, then its related competitors will be deemed to be parties to the contract, arrangement or understanding as well. There could therefore be two or more competitors (the related competitors) who are party to the contract, arrangement or understanding, thereby satisfying the competition condition.

37 There is an exception to the criminal and civil prohibitions of cartel conduct where "*the only parties to the contract, arrangement or understanding are bodies corporate that are related to each other*".[24] However, this exception does not apply in the situation where one body corporate within a group enters into a contract, arrangement or understanding with an unrelated entity, as in the examples below.

Comparison with Exclusionary Provisions (Section 4D)

38 To understand our concerns with section 44ZZRC, it is helpful to compare that section with section 4D of the Act. Section 4D defines an "exclusionary provision" as a provision of a contract, arrangement or understanding "*between persons any two or more of whom are competitive with each other*" where the provision has one of certain proscribed purposes. Those purposes involve, in broad terms,

[22] Section 44ZZRD(4)(c).
[23] Section 44ZZRO(1)(b).
[24] Section 44ZZRN.

preventing, restricting or limiting the supply or acquisition of goods or services.

39 In relation to the requirement of persons being competitive with each other, section 4D(2) provides (emphasis added):

> *(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if,* ***the first-mentioned person or a body corporate that is related to that person*** *is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with* ***the other person, or with a body corporate that is related to the other person,*** *in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates.*

40 For convenience, let us refer to:

- the "first-mentioned person" in section 4D(2) as "Company A";
- the "other person" in section 4D(2) as "Company B";
- the related bodies corporate of Company A as "Company A1", "Company A2", "Company A3" etc;
- the related bodies corporate of Company B as "Company B1", "Company B2", "Company B3" etc;
- Company A and all of its related bodies corporate as "Group A"; and
- Company B and all of its related bodies corporate as "Group B".

41 In simple terms, section 4D(2) provides that Company A is "competitive with" Company B if and only if a member of Group A is in competition with a member of Group B.

42 We can represent section 4D(2) diagrammatically:

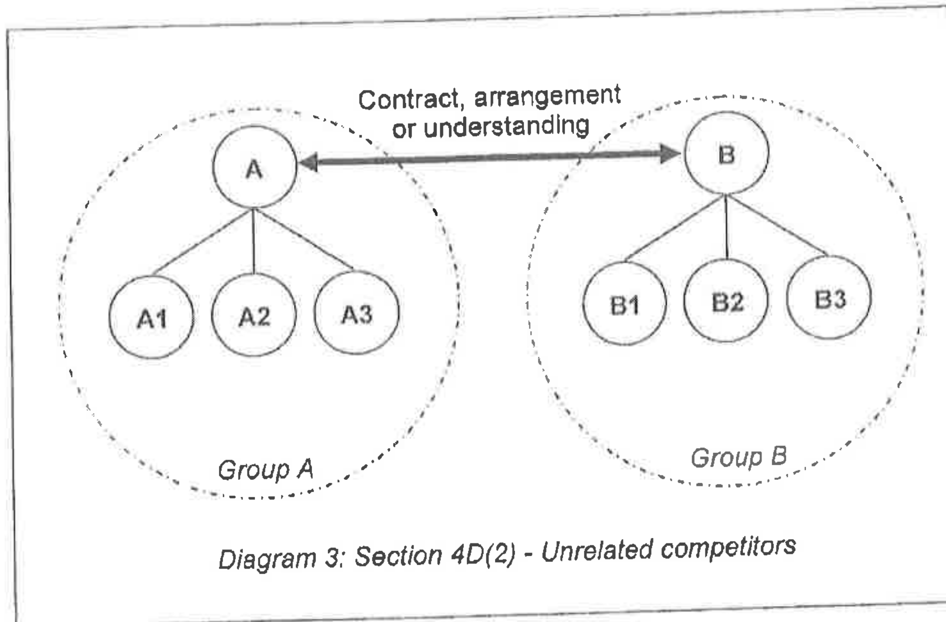

Diagram 3: Section 4D(2) - Unrelated competitors

43 Let us assume that Company A1 and Company B2 (both shaded in Diagram 3) are in competition with each other. Then, section 4D(2) is satisfied because there is a member of Group A (Company A1) that is in competition with a member of Group B (Company B2). Put another way, there is a company in the left circle (Group A) that is in competition with a company in the right circle (Group B).

44 Now, let us assume that instead of Company A1 and Company B2 being in competition, the only competitors are Company A1 and Company A3:

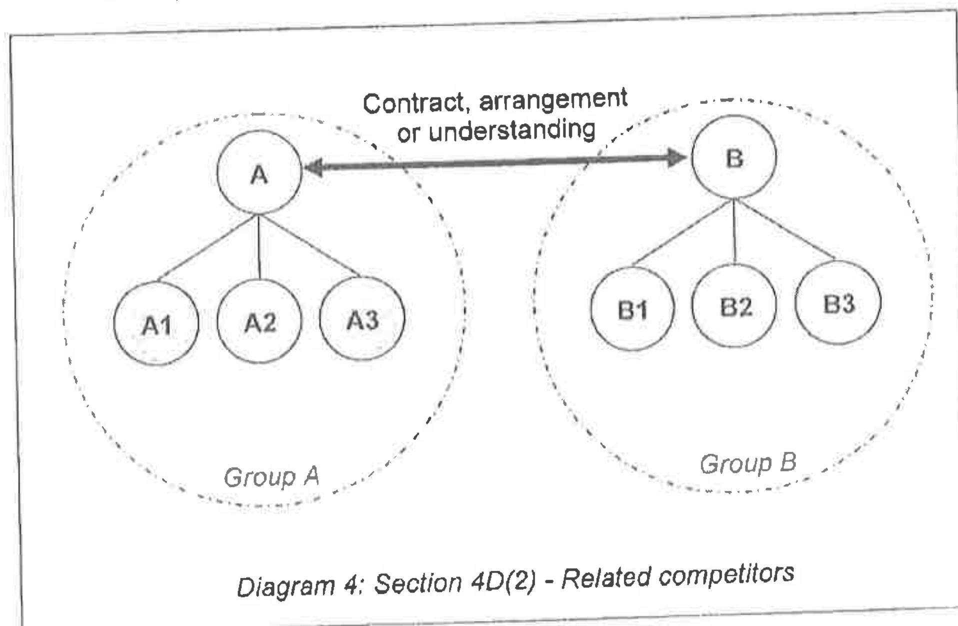

Diagram 4: Section 4D(2) - Related competitors

45 In this case, section 4D(2) is not satisfied because there is no member of Group B that is in competition with a member of Group A. Put another way, there is no competitor in the right circle (Group B). In other words, the only competitors are *related to each other*. As section 4D(2) is not satisfied, there can be no exclusionary provision.

46 For completeness, we note that section 4D also deals with related bodies corporate in another way. In simple terms, under section 4D(1), an exclusionary provision can be a provision of a contract, arrangement or understanding between Company A and Company B where the provision has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services by all or any of their related companies (that is, Company A1, Company A2 etc, Company B1, Company B2 etc), rather than Company A and Company B themselves. This does not, however, avoid the need for an exclusionary provision to satisfy section 4D(2), and thus the requirement that there be at least one unrelated competitor.

47 Let us now return to the scenario outlined above in Diagram 3 and consider how it is treated under the new cartel laws. Company A and Company B have entered into a contract, arrangement or understanding. Company A and Company B are clearly parties to that contract, arrangement or understanding. However, section 44ZZRC deems that each of Company A1, Company A2, Company A3, Company B1, Company B2 and Company B3 are also parties to the contract, arrangement or understanding in their own right.

48 For convenience let us refer to the following group of companies as "Group (A + B)": Company A, all of the related bodies corporate of Company A, Company B and all of the related bodies corporate of Company B. In short, Group (A + B) is equal to all of the companies in Group A and all of the companies in Group B.

49 Under the extended meaning of "party" in section 44ZZRC, if there is a contract, arrangement or understanding between Company A and Company B, then each and every company in Group (A + B) is deemed to be a party to the contract, arrangement or understanding.

50 If we then apply the competition condition in section 44ZZRD(4) to this situation, the question is whether there are at least two parties to the contract, arrangement or understanding who are in competition with each other in the relevant way. Because of the extended meaning of "party" in section 44ZZRC, this is equivalent to asking whether there are at least two companies in Group (A + B) who are in competition with each other in the relevant way.

51 We can represent this diagrammatically:

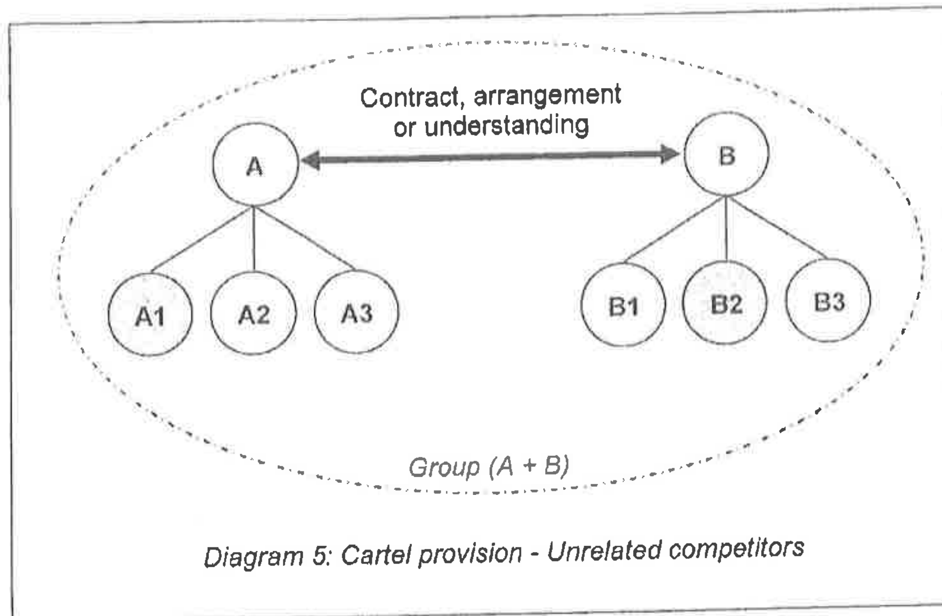

Diagram 5: Cartel provision - Unrelated competitors

52 In Diagram 5, as in Diagram 3, Company A1 and Company B2 are (by assumption) competitors in the relevant way. It can clearly be seen from Diagram 5 that there are at least two competitors (Company A1 and Company B2) within the ellipse Group (A + B). Thus, the competition condition is satisfied.

53 In the case where there are unrelated competitors, the competition condition is satisfied in the same situations that section 4D(2) is satisfied. However, a different result is reached in the situation where there are *related competitors*.

54 Let us return to the situation in Diagram 4, where Company A1 and Company A3 are related competitors:

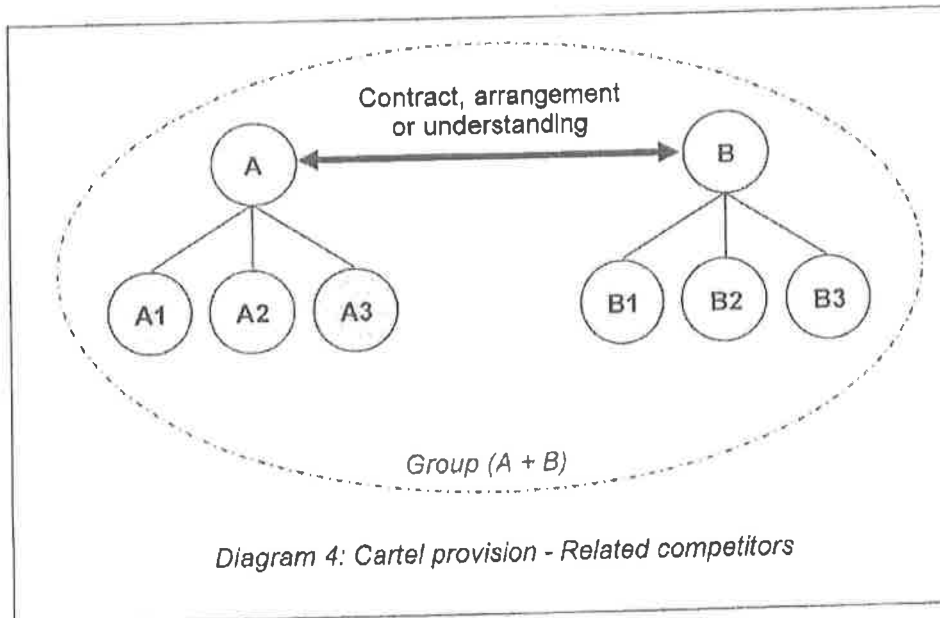

Diagram 4: Cartel provision - Related competitors

55 In this situation, there are at least two companies within Group (A + B) that are competitive with each other — that is, Company A1 and Company A3. Thus, the competition condition is satisfied, even though section 4D(2) would not be (see Diagram 4 above).

56 The problem with the extended meaning of "party" in section 44ZZRC and the competition condition in section 44ZZRD(4) is that they fail to distinguish between related and unrelated competitors. This means that that there can be a cartel provision even though the relevant contract, arrangement or understanding is not *between* competitors.

Example 3: Construction Group (Price fixing)

57 This is an example of a corporate group in which related bodies corporate compete with each other.

58 Construction Holdings Limited is the parent company of a large corporate group of construction companies. It has two subsidiary "operating companies", Operating Company 1 and Operating Company 2, which compete with each other in the delivery of major construction projects, including the construction of bridges.

59 Operating Company 1 enters into a contract to build a bridge for a client. Clause 10 of the contract sets the price of $4 million. The client is not a related body corporate of Operating Company 1 (or any other body corporate in the Construction Holdings Group).

60 We can represent this diagrammatically:

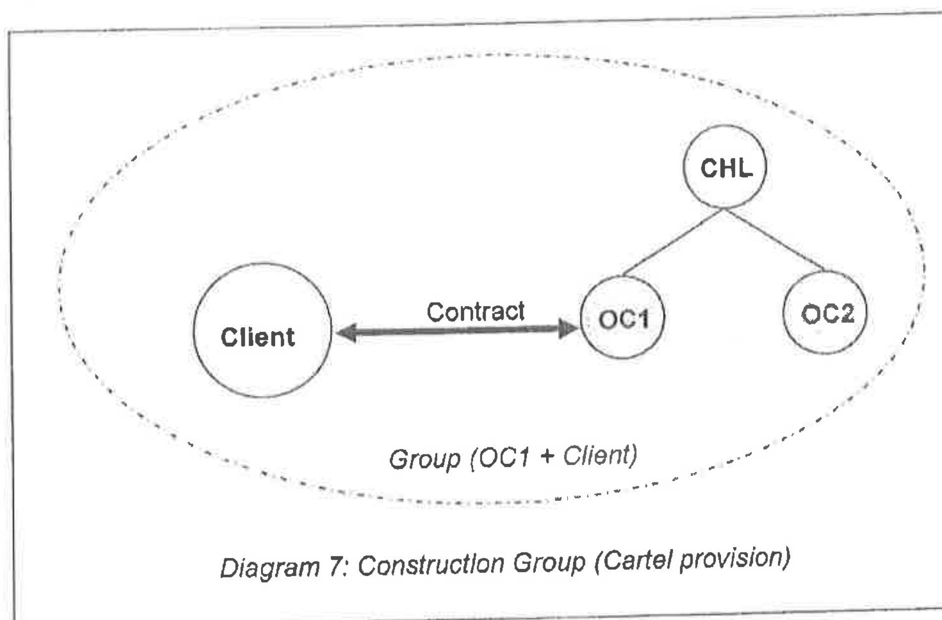

Diagram 7: Construction Group (Cartel provision)

61 Clause 10 satisfies the purpose/effect condition because it has the effect of fixing the price at which one party to the contract (Operating Company 1) will supply construction services.[25]

62 It seems that the competition condition[26] is also satisfied. This is shown in Diagram 7 in that there are two shaded parties (competitors) within the Group (OC1 + Client) ellipse. Operating Company 2 is deemed to be a party (under section 44ZZRC) — notwithstanding that, factually Operating Company 2 had nothing to do with the contract. Further, Operating Company 1 and Operating Company 2 are apparently in competition with each other in the relevant way (in relation to the supply of bridge-building services).

63 As Operating Company 2 is a related company of Operating Company 1, Operating Company 2 is deemed, under section 44ZZRC, to be a party to the contract between Operating Company 1 and the Client. Accordingly, clause 10 appears to be a cartel provision.

64 Operating Company 1 and the Client have apparently breached the cartel prohibitions by making a contract that contains a cartel provision (clause 10). They will apparently further breach the cartel prohibitions if they give effect to that cartel provision by charging/paying $4 million.

65 The exception for contracts that are only between related bodies corporate[27] will not apply since the Client (which is not related to Operating Company 1) is a party to the contract.

[25] Section 44ZZRD(2)(c).
[26] Section 44ZZRD(4)(c).
[27] Section 44ZZRN.

66 This result would not be obtained under section 4D, which distinguishes between related and unrelated competitors:

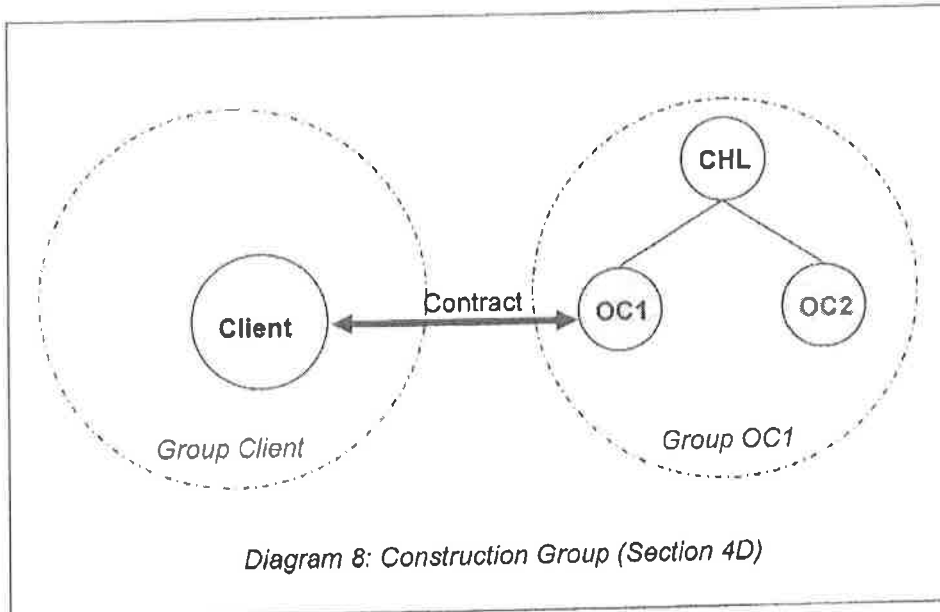

Diagram 8: Construction Group (Section 4D)

67 In this case, as in Diagram 4, section 4D(2) is not satisfied because there is no member of Group Client that is in competition with a member of Group OC1. Put another way, there is no competitor in the left circle (Group Client) and the only competitors are *related to each other*.

Example 4: Retail Corporate Group (Price fixing)

68 This is another example of a corporate group containing related competitors. It illustrates both supply-side and acquisition-side price fixing.

69 Australian Retail Limited is a large, national retail group. It has two wholly-owned subsidiaries, Grocery World Ltd and Cheap Food Ltd. Each subsidiary runs a separate national chain of supermarkets. The chains operate independently and have different marketing strategies (Cheap Food caters to the budget end of the market). The chains compete with each other in the retail grocery market. One day, Grocery World sells a bottle of milk from one of its stores to a consumer for $2 (see Diagram 9).

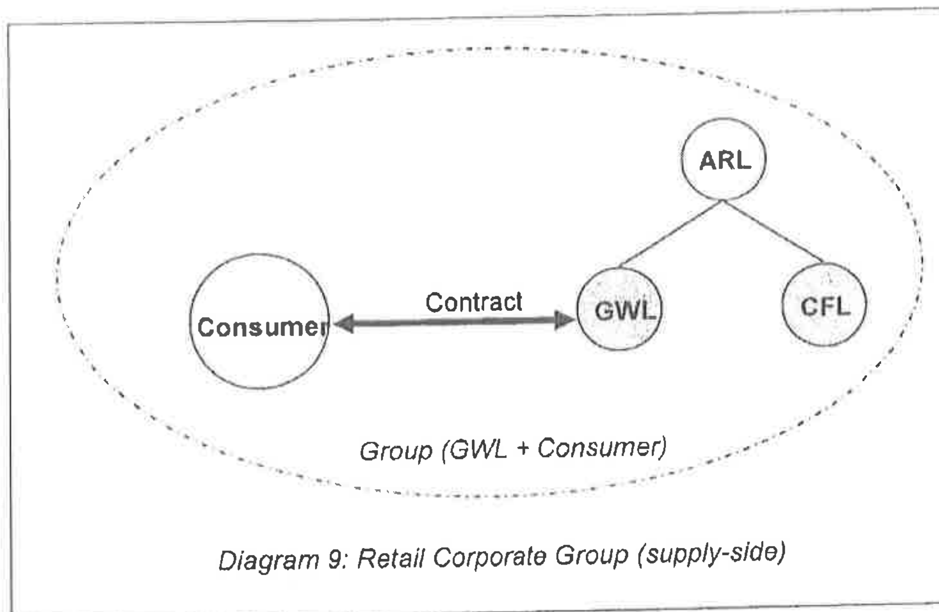

Diagram 9: Retail Corporate Group (supply-side)

70 Grocery World has entered into a contract with the consumer. A provision of that contract has the purpose and effect of fixing the price ($2) for goods (milk) supplied by a party to the contract (Grocery World). Thus, that provision satisfies the purpose/effect condition.[28]

71 Grocery World and Cheap Food are in competition with each other in relation to the supply of the relevant goods (milk). Under section 44ZZRC, Cheap Food is deemed to be a party to the contract with the consumer. Therefore, the competition condition seems to be satisfied.[29]

72 As the provision of the contract with the consumer seems to satisfy both the purpose/effect condition and the competition condition, it appears to be a cartel provision.

73 Grocery World cannot rely upon the exception for contracts, arrangements and understandings that are between related bodies corporate only.[30] This is because not <u>all</u> the parties to the contract are related bodies corporate. Although Grocery World and Cheap Food (the relevant competitors) are related bodies corporate, the consumer is not.

74 A similar problem arises when Cheap Food agrees to pay Supermarket Sparkles Pty Ltd (an unrelated cleaning company) $1,000 per week per supermarket to clean Cheap Food's supermarkets (see Diagram 10). This satisfies the purpose/effect condition because it has the effect of fixing the price at which one of the parties (Cheap Food) will acquire services.[31] Further, Grocery World is in competition with Cheap Food in relation to the acquisition of commercial cleaning services. Therefore,

[28] Section 44ZZRD(2)(c).
[29] Section 44ZZRD(4)(c).
[30] Section 44ZZRN.
[31] Section 44ZZRD(2)(d).

the competition condition also seems satisfied.[32] Cheap Food and Supermarket Sparkles have apparently made an agreement containing a cartel provision.

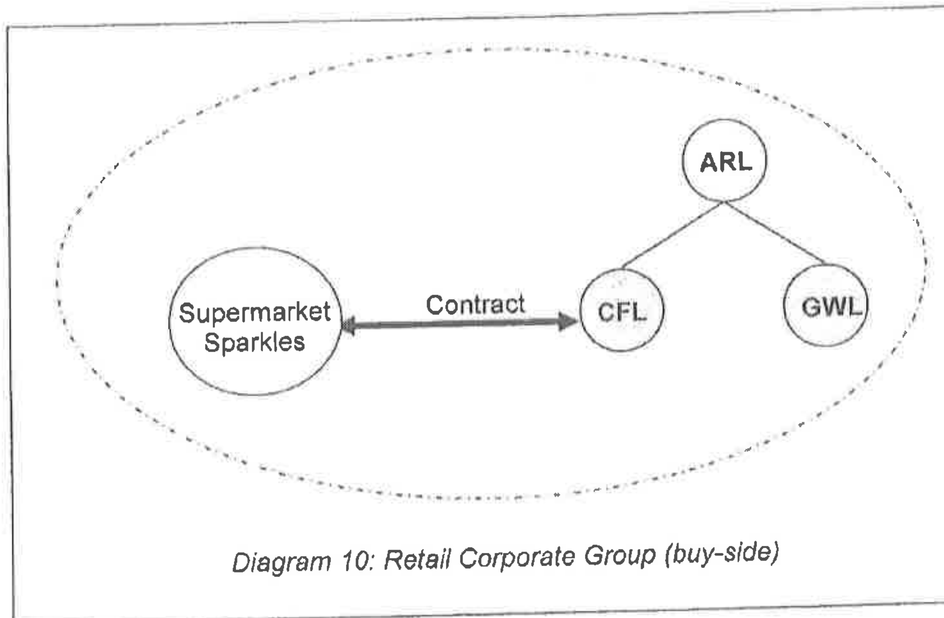

Diagram 10: Retail Corporate Group (buy-side)

Example 5: Manufacturing Corporate Group (Output restriction)

75 This is a further example of a corporate group containing related competitors, but in a manufacturing context. It illustrates a provision characterised as an output restriction.

76 Motors Australia Limited is a large, national car manufacturing group. It has two wholly-owned subsidiaries, General Vehicles Ltd and Astral Motors Ltd, each of which manufactures cars in Australia. General Vehicles and Astral Motors each operate independently of each other and have different marketing strategies (focusing on family and luxury cars respectively). They are in competition with each other in relation to the production of cars.

77 One day, General Vehicles enters into an agreement with Save the Planet Ltd, an environmental organisation (see Diagram 11). Under the agreement, Save the Planet will endorse General Vehicles' cars (clause 1), General Vehicles will commence building the first Australian-made electric cars (clause 2) and General Vehicles will phase out the manufacture of one of its car models, the Maximus, which emits a large amount of greenhouse gases (clause 3).

[32] Section 44ZZRD(4)(d).

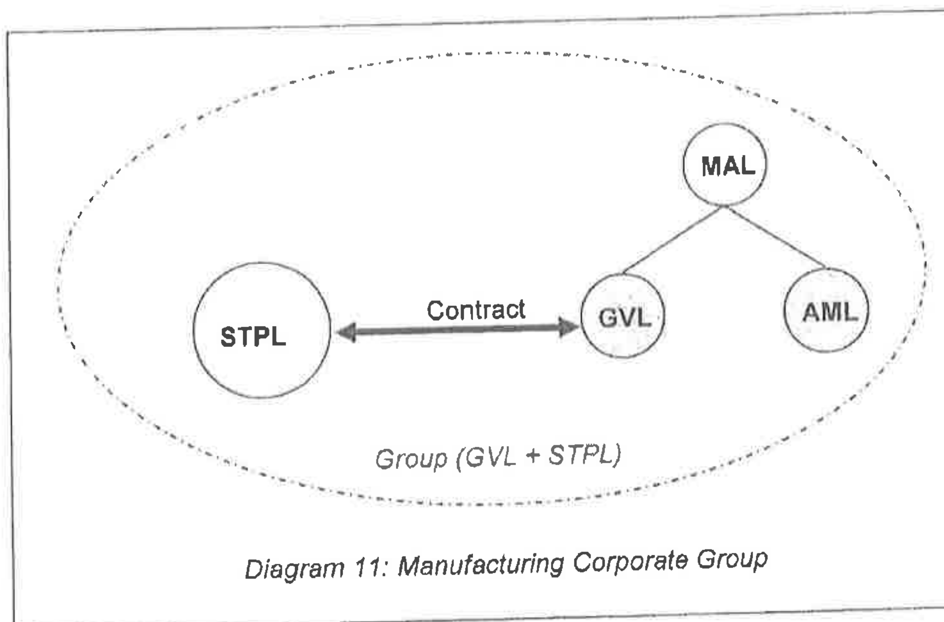

Diagram 11: Manufacturing Corporate Group

78 Clause 3 has the purpose of preventing, restricting or limiting the production, or likely production of goods (cars) by one of the parties to the agreement (General Vehicles). Clause 3 therefore satisfies the purpose condition.[33]

79 Astral Motors is a related body corporate of a party to the contract (General Vehicles) and is therefore deemed a party to the contract under section 44ZZRC. General Vehicles and Astral Motors are in competition with each other with respect to the production of cars. The competition condition therefore appears to be satisfied.[34]

80 As the purpose condition and the competition condition both seem satisfied in relation to clause 3, that clause is apparently a cartel provision.

81 The exception for contracts, arrangements and understandings between related bodies corporate[35] will not apply because Save the Planet, which is a party to the contract, is not a related body corporate of General Vehicles.

Conclusion

82 The above examples are not intended to be exhaustive. There may be other situations in which a provision of a contract, arrangement or understanding falls within the new definition of a "cartel provision" but the relevant conduct cannot reasonably be considered anticompetitive — let alone cartel conduct.

[33] Section 44ZZRD(3)(a)(i).
[34] Section 44ZZRD(4)(f).
[35] Section 44ZZRN.

83 It might be thought that, in situations such as the above examples, the ACCC and/or Commonwealth DPP would decide not to prosecute the parties involved and, even if they did, the Courts would not consider it appropriate to impose a penalty. However, the civil prohibitions on cartel conduct may also be enforced by private actions. A Court would be in a difficult position if, for example, a competitor sought an injunction or damages.

84 The new provisions are complex and untested by the Courts. It is possible that a Court might be able to find a way to interpret the legislation to avoid the results reached above. However, businesses who must comply with the new law should be afforded certainty about how the law will operate, particularly given the criminal penalties that now apply. The complexity of the new provisions has the potential to undermine confidence in the Australian competition legal regime.

85 In our view, the appropriate course is for the definition of a cartel provision in section 44ZZRD to be amended to clarify its operation. We suggest that a "cartel provision" should be defined as either a "price fixing provision", an "output restriction provision", a "market allocation provision" or a "bid-rigging provision". There should then be clear and separate definitions for each of those four different types of cartel provision. The definition of a "price-fixing provision" should be based on the former section 45A.

86 Further amendments are also needed to ensure that a provision of a contract, arrangement or understanding is not a cartel provision unless at least two of the parties <u>who are not bodies corporate related to each other</u> are in competition with each other.

87 In our view, these amendments would clarify and enhance the legislation for the benefit of businesses, the ACCC, the Courts and all other interested parties.

Please do not hesitate to contact us if you have any queries.

We look forward to hearing the ACCC's response.

Yours sincerely
Arnold Bloch Leibler

Zavén Mardirossian
Partner

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Harper Review leaves cartel immunity uncertain

ZAVEN MARDIROSSIAN AND MATTHEW LEES THE AUSTRALIAN APRIL 20, 2015 12:00AM

Ian Harper's Competition Policy Review is a missed opportunity to tackle a thorny issue. Picture: Nicole Cleary Source: News Corp Australia

Amid the furious public debate over misuse of market power and the conduct of big businesses in some sectors of the economy, last week's report by Professor Ian Harper's Competition Policy Review is a missed opportunity to tackle a thorny issue that can affect any business in any industry, and one that can land businesspeople in jail: the ACCC's immunity policy for cartel conduct.

The immunity policy is the main cartel detection tool for the ACCC.

While we have seen no prosecutions under the criminal cartel laws introduced in 2009 along with maximum jail terms of 10 years, the ACCC has recently claimed to have about a dozen in-depth cartel investigations under way.

The policy offers immunity from criminal and civil prosecution for the first cartel member who approaches the ACCC and agrees to co-operate in the prosecution of the other cartel members.

The lure of automatic immunity is unique to cartels, despite the importance of detecting and prosecuting many other types of serious crimes. The policy does not offer protection from civil claims or class actions, but the thinking is that executives will approve their companies making compensation payments, so long as the executives themselves can avoid doing time.

However, as previously reported in The Australian, we argued in our submissions to the review that the policy fails to deliver the single most important feature of any effective immunity regime: certainty for applicants.

A business that learns it is involved in cartel conduct must have complete confidence that, if it applies for immunity, immunity will be granted. Without such certainty, the business faces the risk that, by applying for immunity, all it will do is expose itself to prosecution. That risk strongly deters any application for immunity and undermines the entire immunity regime.

The Harper Review Panel has concluded that the current immunity regime provides an "adequate level" of certainty. We strongly disagree. It is our experience, from advising many clients over the years that the policy has been in operation, that potential immunity applicants are naturally very concerned about the risk of their immunity application being rejected. We have also had significant disagreement with the ACCC regarding the application of the criteria for immunity in the ACCC's policy and its own guidelines.

The immunity regime is subject to dual administration by both the ACCC and the Commonwealth Director of Public Prosecutions. As a result, an immunity application is only successful if it is accepted by both these government bodies, with each applying its own judgment on its policy document. This is unwieldy, creates administrative duplication and delays, and invites disagreement between the two bodies, while jeopardising the effectiveness and certainty of the entire regime — to say nothing of the nervous wait endured by applicants.

Prospective immunity applicants are also concerned by the lack of natural justice in the application process. Although criminal punishment is at stake, the immunity application process is not administered by an impartial arbiter, but by the ACCC and DPP.

These are enforcement and prosecution agencies, who also write and can rewrite the rules about who is entitled to immunity.

This situation raises concerns, not only about a conflict of interest, but about the required separation of legislative, executive and judicial power under the Australian Constitution.

To add to these concerns, an applicant has no right to a hearing and there is no established process for reviewing or appealing a decision to grant, refuse or revoke immunity. Rather, the immunity regime operates in secret with confidential communications between the applicant and the relevant government agencies, away from the gaze of public scrutiny.

This is not a recipe for good governance and effective public administration.

Although it has not gone far enough, the ACCC has recently made some tentative steps towards reducing the uncertainty of its immunity policy. Previously, immunity was not available to a party that was the "ringleader" of the cartel. However, disqualification based on that vague and highly-contested criterion was scrapped in September last year, when the ACCC reissued its cartel immunity policy. This policy could, and should, be made more certain by abolishing other uncertain criteria, such as the disqualification for cartel parties who have "coerced" another.

Such issues are better taken into account in sentencing or, conceivably, as a defence of duress. As it stands, immunity applicants are discouraged from coming forward in the first place, because of

the fear that any immunity granted may be revoked down the track, just because another cartel member starts pointing the finger at them.

More fundamental changes are required to address the lack of impartiality and procedural safeguards in the immunity application process. Despite its importance, the dark secret of the immunity regime is that it has no proper legal basis.

Even though decisions under the immunity policy have a significant impact on parties' rights and liberty, the regime itself rests on nothing more than public policy statements by the ACCC and the DPP and the breadth of their prosecutorial discretion.

The current regime urgently requires legislative backing, with decisions to grant, refuse or revoke immunity made subject to proper judicial oversight and appropriate procedural safeguards.

Zaven Mardirossian and Matthew Lees are competition partners at Arnold Bloch Leibler.

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