COMPETITION POLICY REVIEW

Final Report

Submission

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1. This Submission

We welcome the opportunity to make this Submission to the Competition Policy Review (**CPR**) in response to its Final Report (March 2015). This submission complements our Submission dated 10 June 2014[1] and our Supplementary Submission dated 12 November 2014.[2]

This Submission is concerned with the recommendations in the CPR Final Report regarding anti-competitive agreements, arrangements and understandings (Part 4, section 20) and the associated provisions of the model legislation in Appendix A of the Report. In particular, the Submission relates to:

- recommendation 27 concerning the exemption for joint ventures (and s 45I of the model legislation); and
- recommendation 29 concerning the introduction of a prohibition on engaging in a concerted practice (and s 45M of the model legislation).

2. Exemption for joint ventures

Recommendation 27 in the Final Report recommends that there be a broad exemption for joint ventures:

> A broad exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited

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1 See http://competitionpolicyreview.gov.au/files/2014/06/BeatonWells_and_Fisse.pdf.
2 See http://competitionpolicyreview.gov.au/files/2014/11/Beaton.pdf.

by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.

The model legislative provisions in Appendix A of the Final Report set out the following proposed joint venture exception:

> **45I Joint ventures** [currently section 44ZZRO]
>
> (1) Sections 45C, 45D, 45G, and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision if:
>
> (a) the parties to the contract, arrangement or understanding are in a joint venture for the production, supply, acquisition or marketing of goods or services; and
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> (b) the cartel provision:
>
> (i) relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture;
>
> (ii) is reasonably necessary for undertaking the joint venture; or
>
> (iii) is for the purpose of the joint venture.
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> ...

Consistently with the view expressed in our previous submissions, we agree with the recommendation that the joint venture exceptions in ss 44ZZRO and 44ZZRP and the s 76C defence be repealed and replaced by a broadly defined simpler exemption. The joint venture exceptions under s 44ZZRO and 44ZZRP are unduly restrictive and tortuously defined. The undue restrictions include the requirement that the cartel provision be contained in a contract and that the exempted activity be a joint venture for the production or supply of goods and services (and not solely for the acquisition of goods or services).

We have several concerns regarding the proposed joint venture exemption as formulated in s 45I of the model legislative provisions. These concerns are:

- the failure to clarify the meaning of the concept of a 'joint venture' (see section 2.1 below);
- the grab-bag of conditions under s 45I(1)(b) (see section 2.2 below);
- the laxity of the condition in s 45I(1)(b)(i) that the cartel provision relate to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture (see section 2.3 below);
- the lack of guidance on the condition in s 45I(1)(b)(ii) that the cartel provision be reasonably necessary for undertaking the joint venture (see section 2.4 below);

- the obscurity of the condition in s 45I(1)(b)(iii) that the cartel provision be 'for the purpose' of the joint venture, and the failure squarely to address the issue of sham joint ventures (see section 2.5 below);

- the failure to differentiate between criminal and civil liability (see section 2.6 below); and

- the failure to define the joint venture exemption in terms that correspond directly to the definition of the cartel conduct prohibited by ss 45C, 45D, 45G, and 45H (see section 2.7 below).

For the reasons set out below, we recommend that:

- the proposed s 45I(1)(b)(i) and (iii) not be adopted;

- the proposed s 45I(1)(b)(ii) be reworded to read: 'is reasonably necessary for the collaborative activity and not for the dominant purpose of lessening competition between 2 or more parties to the activity' and the operation of these tests be assisted by guidelines similar to those developed by the NZ Commerce Commission;

- the collaborative activity exemption in the context of cartel offences be subject to a defence of genuine belief that the cartel provision is reasonably necessary for the collaborative activity (with an evidential burden of proof on the accused); and

- the proposed s 45I(1) be revised to provide that the prohibitions/offences do not apply to a corporation that makes a CAU containing a cartel provision or gives effect to a cartel provision in a CAU where the corporation and one or more of the other parties to the CAU participate in a collaborative activity and the cartel provision is reasonably necessary for the collaborative activity; the wording in s 45I(1)(a) should be deleted and replaced by a definition of 'collaborative activity' along the lines of Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31(2).

2.1 Meaning of 'joint venture'

The proposed joint venture exemption under s 45I of the model legislative provisions does not include a definition of the term 'joint venture'. It is unclear whether or not the definition of 'joint venture' in s 4J of the Competition and Consumer Act is to be retained.

Even as defined by s 4J, it is uncertain what the term 'joint venture' means. The precept of an activity 'carried on jointly' under s 4J is narrower than the requirement under the

proposed NZ collaborative activity exemption of an activity that is carried on 'in co-operation' (Commerce (Cartels and Other Matters) Amendment Bill 2011, proposed s 31). The wording 'carried on jointly' is less than clear and has often occasioned concern in practice:

- The piecemeal exceptions under s 44ZZZ(3A) and s 44ZZZ(5) for certain kinds of legitimate cooperation by competitors were enacted in 2011 because that conduct was not necessarily of a kind that would entail the joint carrying on of an activity as required for the exception under 44ZZZ(3).

- It is unclear whether the term 'joint venture' requires an efficiency-enhancing integration of business functions or whether merely joint activity is sufficient.[3] Some commentators have contended that an economic integration of functions is required but s 4J does not say that explicitly. The relevant Explanatory Memorandum does not answer the question.[4]

In our view the Government should follow world best practice and adopt the concept of a 'collaborative activity' instead of that of a 'joint venture'.

The concept of 'collaborative activity' is adopted in the Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31. That approach is consistent with US, EU and Canadian competition law under which the concept of a joint venture has been displaced by the far more commercially realistic concept of collaborative conduct:

- Under s 1 of the Sherman Act (US) efficiency enhancing collaborations between competitors are exempted and joint ventures are treated as merely one among many relevant kinds of competitor collaborations. See US Federal Trade Commission and the US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, April 2000, available at: https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf

- Horizontal co-operation agreements are regulated under Art 101(1) and (3) of the European Treaty. The concept of a horizontal co-operation agreement is broad and includes joint ventures and a wide range of other competitor collaborations. See European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (January 2011), available at: http://eur-

[3] See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 271-273.
[4] See Explanatory Memorandum, Trade Practices Amendment Bill 2006 (Cth), [5.283] – [5.284].

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

- In Canada, competitor collaborations are subject to a defence of ancillary restraint under s 45(4) of the Competition Act 1985. The defence of ancillary restraint applies to any kind of collaboration between competitors and is not limited to joint ventures. See Canada Bureau of Competition, *Competitor Collaboration Guidelines* (2009), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf.

2.2 Grab-bag of conditions under s 45I(1)(b)

The Final Report recommends that the proposed joint venture exemption apply to a cartel provision if:

(i) the provision relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture; or

(ii) the provision is reasonably necessary for undertaking the joint venture; or

(iii) the provision is for the purpose of the joint venture.

The need for such a grab-bag of alternative tests is not explained. There is no comparable approach in the US, the EU or other leading jurisdictions.

The trifurcated drafting in s 45I(1)(b) is difficult to reconcile with the recommendation in the Report that the cartel-related provisions of the Act be simplified.

As discussed below, the first and third of these alternative conditions are unsatisfactory (see sections 2.3, 2.5) and the second requires further explanation (see section 2.4).

2.3 Laxity of the s 45I(1)(b)(i) condition

The first alternative condition in s 45I(1)(b) is much too lax and should be deleted.

Even the most blatant cartel provision in a 'sham' joint venture will 'relate to' goods or services that are acquired, produced, supplied or marketed by or for the purposes of a joint venture.

The term 'relates to' is broad and requires merely a connection between the cartel provision and goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture.

A joint venture that is a 'sham' in the sense of being created predominantly for the purpose of lessening competition between the parties to the venture is still a 'joint venture'.

The wording of s 45I(1)(b)(i) is 'by or for the purposes of the joint venture', not 'by or for the purposes of a joint venture and not for the dominant purpose of lessening competition between parties to the joint venture'.

The underlying problem is that the Final Report does not squarely address and resolve the known (indeed, notorious) problem of sham joint ventures.[5] In our view that problem should be resolved, as is in the NZ anti-cartel Bill, by an explicit requirement that the collaborative activity not be for the dominant purpose of lessening competition between any 2 or more of the parties (Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31(2)(b)).

2.4 Lack of guidance on the s 45I(1)(b)(ii) condition

The second alternative condition in s 45I(1)(b) is that the cartel provision is reasonably necessary for undertaking the joint venture. No guidance is given as to what is meant by the wording 'reasonably necessary'.

By contrast, the collaborative activity exemption proposed in NZ is the subject of instructive draft guidelines by the NZ Commerce Commission (2014, available at: http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/). These guidelines make it clear that the test of reasonable necessity is to be interpreted and applied in a commercially realistic way. For instance, they make it clear that the cartel provision in issue need not necessarily be the one and only way of pursuing the collaborative activity. The guidelines are commendable and lend themselves readily to adoption in Australia.

The wording 'reasonably necessary for undertaking the joint venture' is used in s 45I(1)(b)(ii) instead of the wording 'reasonably necessary for the purpose of the collaborative activity' in the proposed NZ exemption. The term 'undertaking' may raise a question of interpretation. The wording 'for the purpose of the collaborative activity' is far from clear (see section 2.5 below). In our view, preferable wording would be 'reasonably necessary for the collaborative activity' coupled with a requirement that the collaborative activity not be for the dominant purpose of lessening competition between 2 or more parties to the activity (see section 2.5 below).

[5] See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 269, 281-2, 285-7.

2.5 Obscurity of the s 45I(1)(b)(iii) condition

The third alternative condition in s 45I(1)(b) – whether or not the cartel provision is 'for the purpose of a joint venture' - is unnecessary and undesirable.

The test of whether or not the cartel provision is reasonably necessary for the joint venture, as sensibly interpreted and applied in the NZ Commerce Commission's draft guidelines (see section 2.4 above), is wide and flexible enough to cover commercially justified collaborative activities between competitors.

The wording 'for the purpose of a joint venture' is obscure. For instance, does it mean: solely for the purpose of a joint venture?; predominantly for the purpose of a joint venture'?; substantially for the purpose of a joint venture'? Is the relevant 'purpose' determined objectively or does it depend on the subjective intention of all or some of the parties to the joint venture? These uncertainties are well-known[6] but are left up in the air by the Final Report. In our view, the uncertainties should be resolved by deleting s 45I(1)(b)(iii).

The s 45I(1)(b)(iii) condition does not squarely address the issue of 'sham' joint ventures. By contrast, the proposed NZ collaborative activity exemption is subject to an explicit limitation that the collaborative activity not be carried on for the dominant purpose of lessening competition between any 2 or more of the parties to the collaboration. That limitation reflects the dominant purpose safeguard adopted by the US Supreme Court in *Timken Roller Bearing Co v United States*, 341 US 593, 597–8 (1951). In our view the same approach should be adopted in Australia.

2.6 Failure of s 45I to differentiate between civil and criminal liability

The conditions specified in s 45I(1)(b) do not differentiate between civil and criminal liability.

By contrast, a special defence – the defence of honest belief that the cartel provision is reasonably necessary for the purposes of the collaborative activity – applies to the proposed NZ collaborative activity exemption in relation to cartel offences (Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 82B(2)).

Criminal liability should require subjective blameworthiness on the part of the offender in relation to the elements of offences and the elements of exceptions or defences.[7]

Subjective blameworthiness should not be defined in terms of honesty or honest belief. Difficulties surround the concepts of dishonesty and honesty, including the danger of

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6 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.4.2.

7 See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 290.

unmeritorious reliance on a mistake of law. In Australia, the reasons for rejecting dishonesty as an element of the cartel offences[8] also mean that the concept of dishonesty or honesty should be avoided in the context of exemptions that apply to cartel offences.

We recommend that the collaborative activity exemption in the context of cartel offences be subject to a defence of genuine belief that the cartel provision is reasonably necessary for the collaborative activity (with an evidential burden of proof on the accused).

2.7 Failure of s 45I joint venture exemption to correspond directly to the definition of the cartel conduct prohibited by ss 45C, 45D, 45G, and 45H

The proposed s 45I exception provides that the prohibitions/offences do not apply to a CAU containing a cartel provision if the parties are in a joint venture and the cartel provision meets one of the relevant conditions. However, the prohibitions and offences in Div 1 in Part IV of the Act do not apply to a CAU containing a cartel provision as such. They apply to making a CAU containing a cartel provision and to giving effect to a cartel provision contained in a CAU.

It would be conceptually clearer and more technically correct for s 45I to provide that the prohibitions/offences do not apply to a corporation that makes a CAU containing a cartel provision or gives effect to a cartel provision in a CAU where the corporation and one or more of the other parties to the CAU participate in a collaborative activity and the cartel provision is reasonably necessary for the collaborative activity.

3. Prohibition on engaging in a concerted practice

Recommendation 29 is in two parts:

> The 'price signalling' provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.
>
> Section 45 should be extended to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

The model legislative provisions in Appendix A of the report reflect this recommendation insofar as they include a new prohibition on engaging in a concerted practice in a proposed s 45M as follows:

> **45M Prohibited conduct** [currently section 45]
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> A corporation shall not:
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> …
>
> (c) engage in a concerted practice with one or more other persons if the concerted practice has the purpose, or has or is likely to have the effect, of substantially lessening competition.

[8] See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 2.4.1.

…

> (4) For the purposes of paragraph (1)(c), ***competition*** means competition in any market in which a corporation that is a party to the concerted practice, or any body corporate related to the corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire, or be likely to supply or acquire, goods or services.

Consistently with the view expressed in our previous submissions, we agree with the recommendation that Div 1A of Part IV be repealed.

However in our view the recommendation in the CPR Final Report relating to the proposed prohibition on engaging in a concerted practice, and the proposed formulation of that prohibition in s 45M, raises several issues that require further consideration:

- the absence of any definition of a 'concerted practice' in the model legislation (see section 3.1 below);
- the requirement that 'the concerted practice has the purpose … of substantially lessening competition' (**SLC**) (see section 3.2 below);
- the imposition of liability on engaging in a concerted practice subject to a competition test (see section 3.3 below); and
- the terms of the competition condition applicable to the concerted practices prohibition (see section 3.4 below).

3.1 Definition of a 'concerted practice'

The Final Report states:

> The word 'concerted' means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression 'concerted practice with one or more other persons' conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price). .. The Panel considers that the word 'concerted' has a clear and practical meaning and no further definition is required for the purposes of a legal enactment (pp371-2).

In our view, a legislative definition is necessary in order to give adequate guidance to the courts, the ACCC, businesses and their advisors when they interpret and apply the proposed prohibition on engaging in a concerted practice.

In the absence of legislative guidance there is a risk that courts will draw on and may attempt to adapt the EU concept of a concerted practice in interpreting the new prohibition. However, while aspects of EU jurisprudence may be helpful in indicating the types of conduct that may constitute a concerted practice, the relevance of that jurisprudence as an aid to applying the Australian prohibition is much reduced by virtue

of the CPR's proposal that concerted practices be prohibited subject to a SLC test (see further section 3.3 below).

In the EU, concerted practices are prohibited per se, under the 'object' limb of Article 101(1) of the EU Treaty, and the jurisprudence relating to the EU prohibition has developed accordingly. Thus, for example, in the EU, liability for a concerted practice arises on the basis of a presumed effect of the practice on the conduct of the persons engaged in it. It is questionable as to whether any such presumption should be applied by Australian courts in the absence of a specific legislative direction to that effect. But in any event the presumption would be inappropriate in relation to the proposed new prohibition given that the prohibition requires that an effect or likely effect (or purpose) of SLC be shown.

We recommend that a legislative definition of 'concerted practice' reflect the fundamental danger recognised as inherent in practices or conduct involving competitors that falls short of an agreement or, in the Australian context, an arrangement or understanding. That danger is the high likelihood of such practices facilitating anti-competitive coordination between competitors in relation to terms or conditions of supply or acquisition of the goods or services in respect of which they compete.

To take a well-known example, it is widely recognised that the private disclosure of specific future prices amongst competitors is likely to result in coordinated pricing by the competitors involved, notwithstanding that they have not reached any 'understanding' (as that term is defined in Australian law, with its requirement of commitment) to that effect.

It is increasingly recognised that competitors engage in such practices with a view deliberately to avoiding anti-cartel laws that fasten only on collusion, as traditionally and more narrowly conceived. However, as far as competition is concerned, the effect is the same as if the competitors had colluded – competitors are able through their coordination to avoid the uncertainty of a competitive market place in which they would be forced to make decisions independently. As the ACCC has pointed out in its submission:

> Currently, firms may lawfully engage in conduct ('concerted practices') which eliminates strategic uncertainty between competitors and which facilitates coordination. Such conduct can lead to less competitive markets to the detriment of consumers. (See ACCC Submission on the Draft Report, 26 November 2014, p43)

The CPR's statement set out above reflects the Review Panel's appreciation of the significance of coordination in framing any understanding of concerted practices. However, the statement suggests that, in the CPR's view, there may be alternative meanings such as a practice that is 'jointly arranged' or a practice that is 'jointly... carried out'. In our view, an interpretation of a concerted practice that required it to be jointly arranged or carried out would be unduly restrictive and would not broaden the law much if at all beyond the existing concepts of 'arrangement' or 'understanding'.

The apparent confusion in the meaning given to the phrase 'concerted practice' in the Final Report underscores the need to provide legislative definition or interpretive guidance of some kind. We do not agree with the Panel's view that, in the context of competition law, a concerted practice has a 'clear and practical meaning'.

The suggestion has been made by some commentators that the concept of 'acting in concert' as used in s 45D(1) of the CCA would be preferable to that of 'concerted practice'. That suggestion lacks force. One difficulty is that the concept of acting in concert is not well defined[9] and could be interpreted to require an element of commitment that is the same or much the same as the element of commitment that has been read into the concept of an 'understanding'. It would be futile to go back to square one.

It has also been suggested that one approach to providing legislative guidance would be to provide a 'black list' of practices that constitute concerted practices. We reject this suggestion. This was the approach taken in Div 1A of Part IV which, as the CPR has acknowledged, was ill-conceived. Moreover, such an approach would introduce unwarranted and undesirable inflexibility into the law. The law should be sufficiently flexible to accommodate the full range of ways in which competitors currently and might in the future use facilitating devices to coordinate their conduct.[10]

The focus in the Australian debate to date has been on information disclosure or exchange between competitors. However, as recognised in the EU and US jurisprudence, and the academic literature, facilitating or concerted practices are as potentially infinite as the creativity of commerce itself. Such practices can include price protection or 'most favoured customer' clauses, uniform delivery pricing methods, basing-point pricing and product standardisation and benchmarking.

In our previous submissions we proposed the following legislative definition of a 'concerted practice:

> A concerted practice is conduct engaged in by a corporation for the purpose of:

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[9] See *Australasian Meat Industry Employees' Union v Meat & Allied Trades Federation of Australia* (1991) 32 FCR 318; *J-Corp Pty Ltd v Australasian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264; *Qantas Airways Ltd v Transport Workers' Union of Australia* [2011] FCA 470. See also C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) p. 62 where the view is expressed that the concept of 'acting in concert' is narrower than that of an 'understanding'. It may also be argued that to export the concept of 'acting in concert' from s 45D and similar provisions to the cartel prohibitions would be to wrench the concept out of its industrial relations context.

[10] To similar effect see the ACCC's Submission: '… where laws are overly prescriptive, sophisticated firms will more readily be able to innovate to find ways to collude in a way which circumvents the law. It is therefore important that the law is sufficiently adaptable to the myriad ways in which forms can coordinate their conduct to the detriment of consumers. The ACCC therefore recommends that the Review Panel not recommend amendments which attempt to prescriptively or exhaustively define the conduct which falls within the concept of a "concerted practice"'. (See ACCC Submission on the Draft Report, 26 November 2014, p43).

(a) coordinating the terms or conditions on which goods or services are supplied or acquired, to be supplied or acquired or likely to be supplied or acquired with a person who competes, is likely to compete or would, but for the concerted practice, compete with the corporation in relation to the supply or acquisition of those goods or services; and

(b) thereby substantially lessening competition between the corporation and that person in relation to the supply or acquisition of those goods or services .

This proposal seeks to adapt the EU concept of a concerted practice under Art 101(1) of the EU Treaty. However, it seeks to define the concept of concerted practice more closely than Art 101(1) and also incorporates the familiar CCA concepts of 'purpose', 'substantial', ' 'lessening' and 'competition'. The concept of 'coordination' is new to the CCA but, as explained above, is central to the meaning of a 'concerted practice' in the context of competition law and is a term that has been used and applied in numerous cases in Art 101(1).[11]

The proposed definition is also consistent with the recommendation of the ACCC that:

> The proposed prohibition should focus on conduct which facilitates coordination and eliminates strategic uncertainty between competitors – by "substituting coordination between them for the risks of competition." (See ACCC Submission on the Draft Report, 26 November 2014, p43).

Further, for the reasons set out in section 3.2 below, the purpose element of the proposed definition relates to the purpose of the corporate defendant, rather than the purpose of the concerted practice. For the reasons set out in section 3.3 below, the competition test in the proposed definition is not a SLC test but focuses on the purpose of the coordination.

3.2 Requirement that 'the concerted practice has the purpose … of substantially lessening competition'

Under the proposed s 45M(1)(c) liability arises if the concerted practice has the purpose of SLC. This form of drafting is consistent with the formulation of the other cartel prohibitions, currently and as proposed, in that those prohibitions require that the impugned provision has a relevant purpose (for example, the purpose of fixing prices, reducing supply or the purpose of SLC).

The concept of a 'practice' having a purpose is problematic. The concept has created interpretive difficulties in its application to a provision and is likely to do so in the context of a concerted practice.[12] Those difficulties include uncertainty as to whether the relevant purpose is to be subjectively or objectively ascertained, whether it need only be a substantial purpose as distinct from a sole or primary purpose (and what 'substantial'

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[11] See eg *Imperial Chemical Industries Ltd* [1972] ECR 619 at [64].

[12] See *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, 347–52 [859]–[887] (Dowsett & Lander JJ), (2009) 262 ALR 160, 169–71 [18]–[26] (Mansfield J); C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) pp. 91-92.

means in this context), and whether it need be a purpose shared by all parties to the contract, arrangement or understanding, or persons engaged in the concerted practice.

Such difficulties can and should be avoided by requiring that the relevant purpose be the purpose of the corporation alleged to have engaged in the concerted practice. This is the approach taken in our proposed definition, as set out above. If this approach is adopted, it would be useful to indicate the time at which the relevant purpose needs to have existed. On one view it should be sufficient for the purpose to be present at any time when the practice has occurred.

3.3 Prohibition subject to a competition test

The Final Report states:

> The Panel does not consider that the cartel conduct prohibitions should be expanded to include concerted practices. The Panel considers that imposing criminal sanctions for cartel conduct should require proof of a contract, arrangement or understanding between competitors (p372).

We agree that criminal liability should not extend to concerted practices.

However, we remain of the view that concerted practices should be subject to per se liability on a civil basis. The Panel does not adequately explain why it has reached the conclusion that the new prohibition should be subject to a SLC test.

Imposing liability on concerted practices subject to a SLC standard is inconsistent with the approach taken under EU competition law. In the EU, the concept of 'concerted practice' applies not only where the practice has an anti-competitive effect under the effect limb of Art 101(1) but also where per se civil liability arises under the 'object' limb of Art 101(1).

The EU approach reflects the recognition that concerted practices (properly defined and understood) are by their nature highly likely to restrict, distort or prevent competition, just as conduct involving price fixing, output restriction, market allocation and bid rigging is likely to have such effects.

This was borne out by the conduct that was litigated unsuccessfully as a price fixing case in *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452. Such conduct, involving the exchange of future pricing information between competitors, should be litigated as a concerted practices case and it should not be necessary for that purpose to establish that the defendant/s (or the practice) had the purpose, effect or likely effect of SLC.

In its Submission on the Draft Report, the ACCC states:

> Where conduct comprising a concerted practice leads to cartel-like outcomes, the ACCC considers that it should be prohibited on a per se basis, consistent with other cartel offences. As was outlined in the ACCC's Initial Submission, conduct such as anti-competitive information disclosures can be just as harmful as hard core cartels and are recognised as such in international best practice. (See ACCC Submission on the Draft Report, 26 November 2014, p47).

We agree. However, we do not share the ACCC's view that a 'sub-set of ostensibly egregious concerted practices' should be prohibited on a per se basis, supported with a SLC prohibition to cover any practices that do not fall within the sub-set (ACCC Submission, p47). This approach harks back to the unsatisfactory and discredited approach taken in Div 1A of Part IV.

Some commentators have expressed concern about applying per se liability to concerted practices on the grounds that to do so would be over-inclusive and capture conduct that is competitively benign, pro-competitive or in some other respect, welfare-enhancing. This concern is dealt with in the EU by the efficiencies exception that exists under Art 101(3) of the EU Treaty (and in the US, by the rule of reason that applies under s 1 of the Sherman Act).

In Australia, the risk of over-reach will be low if:

- the concept of 'concerted practice' is defined as suggested above to require that the conduct be engaged in by a corporation for the purpose of coordinating the terms or conditions of supply or acquisition with a competitor in order to substantially lessen competition between them ─ that purpose element limits liability to a greater extent than the object element under Art 101(1) ('object' in the EU context does not mean 'objective', 'purpose', 'intent', or 'goal' but relates to the propensity of the conduct);

- there are exceptions for collaborative activities and supply agreements between competitors and the exceptions are drafted along the same lines as under the amendments to the *Commerce Act 1986* (NZ) now before the NZ Parliament (see section 2 of this Submission above re joint ventures and Part 4.4 of our submission of 10 June 2014 re supply agreements between competitors);

- the avenue of authorisation is available to concerted practices (this is not addressed in the Final Report but will presumably be the case); and

- if further protection against over-reach is considered necessary, the proposed block exemption power is exercised by the ACCC (see Final Report, recommendation 39, at p405).

3.4 Competition condition

The competition condition under the proposed s 45M(4) mirrors the competition condition under the proposed s 45M(2) which applies to prohibitions under s 45(1)(a)-(b) (the prohibitions on making or giving effect to a contract, arrangement or understanding that contains a provision that has the purpose or would have or be likely to have the effect of SLC).

The condition does not require that any of the persons engaged in the concerted practice be in competition with each other (or likely competition or competition or likely competition but for the concerted practice). This may be an unintended extension of the proposed prohibition. Consistently with the concept of competitive harm associated with concerted practices, the prohibition should apply only to practices engaged in by competitors or likely competitors or persons who would be in competition or would be likely to be in competition but for the practice.

To this end, the relevant competition condition should reflect the approach taken in the drafting of the condition applicable to the Div 1 prohibitions (see s 45B(2)). This would be achieved by amending the proposed prohibition in s 45M(1)(c) to provide that a corporation shall not engage in a concerted practice with one or more persons who competes, is likely to compete or would, but for the concerted practice, compete or be likely to compete with the corporation if the concerted practice has the purpose, or has or is likely to have the effect of SLC in a market.

This would be consistent with our proposed definition of a concerted practice, as set out above. According to that definition, the corporate defendant must have the purpose of coordinating the terms or conditions of supply or acquisition ‘with a person who competes, is likely to compete or would, but for the concerted practice, compete with the corporation in relation to the supply or acquisition.’

Subs (4) should also be amended to remove the reference to a ‘party to the concerted practice’ and refer instead to a ‘person engaged in the concerted practice’.