



Law Council
OF AUSTRALIA

Business Law Section

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: competition@treasury.gov.au

26 May 2015

Dear Sir or Madam,

Competition Policy Review Final Report

I have pleasure in enclosing a submission which has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia in response to the Competition Policy Review Final Report.

If you have any questions regarding this submission, please contact the Committee Chair, Caroline Coops, by phone on (03) 9643 4097 or via email: caroline.coops@au.kwm.com

Yours faithfully,

John Keeves, Chairman
Business Law Section

Enc.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Competition Policy Review Final Report

**Submission by the Competition and
Consumer Committee of the Business Law
Section of the Law Council of Australia**

26 May 2015

1. Introduction

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

The Competition and Consumer Committee (**Committee**) of the Business Law Section of the Law Council of Australia provides this submission in response to the Government's consultation on the Competition Policy Review's Final Report, released by the Government on 31 March 2015 (**Final Report**).

2. Focus of this submission

The Committee considers the Final Report to be a well-balanced and thoughtful response to the complex issues presented by Australia's concentrated industry structures, increasing participation in global markets, ageing population and gradual transition to a more heavily services based economy.

The Competition Policy Review has generated healthy debate within the Committee and the community at large on key issues for Australia's competition policy, to shape Australia's economy and broader society into the future. The Government is to be congratulated for placing competition policy on the national agenda, with its associated benefits for greater productivity, innovation and investment.

The Committee lodged a detailed submission to the Competition Policy Review Panel on the Competition Policy Review's Draft Report on 20 November 2014 (**Draft Report Submission**), as well as a detailed submission on the earlier Issues Paper on 27 June 2014 (**Issues Paper Submission**). The Committee is pleased to see many of the proposals put forward by the Committee in its submissions adopted or supported in the Final Report.

To the extent that the Final Report has taken an approach that differs from that advocated by the Committee in its earlier submissions, the Committee does not propose to repeat its comments in detail in this submission.

Instead, this submission focuses on those recommendations in the Final Report in respect of which the Committee considers it can contribute practical suggestions as to the implementation of the recommendation, having regard to the Committee's particular focus on competition law and its enforcement.

Further, whilst the Committee appreciates that the model legislative provisions contained in Appendix A of the Final Report (**Model Legislative Provisions**) may not be adopted by Government, it considers the provisions to be well-crafted and a material improvement upon the drafting of the existing law (subject to the comments below). The Committee congratulates the Review Panel on the Model Legislative Provisions, and commends them to the Government for consideration, together with the suggestions made by the Committee in this submission.

3. Summary of submission

To assist the Government, set out below in summary form are the key points made by the Committee in this submission, and the recommendation of the Final Report to which they relate.

In addition, the Committee has also set out:

- a. a list of the recommendations of the Final Report that are supported by the Committee, but in respect which the Committee does not propose to make further comment (see Attachment 1 to this submission); and
- b. a list of the recommendations of the Final Report in respect of which the Committee has no further comment (see Attachment 2 to this submission).

Recommendation number and subject matter	Summary of key points
<p>25, 26 and 27 - Definition of market, extra-territorial reach and cartel conduct prohibitions</p>	<ul style="list-style-type: none"> • The Committee supports Recommendation 25 that the existing definition of market in s 4E be retained. • The recommended test for s 5 of the CCA (Recommendation 26 - extra-territorial reach) is wider than the tests adopted in other countries, and may apply to conduct outside Australia that is in some way related to trade or commerce, but which has little or no effect on competition or welfare in Australia. The Committee considers this to be undesirable. • The Committee agrees with Recommendation 27 that the existing definition of “likely” should be removed and the cartel provisions confined to conduct involving firms that are actual or likely competitors, where ‘likely’ means on the balance of probabilities”. • The Committee supports the use of the concept of a ‘collaborative activity’ instead of that of ‘joint venture’ for the purposes of the proposed exemption to cartel conduct, and commends the approach and definition adopted in the proposed cartel-related amendments to the Commerce Act 1986 (NZ). • The exemption should require that the relevant cartel provision is reasonably necessary for the collaborative activity and not for the dominant purpose of lessening competition between 2 or more parties to the activity. • The operation of a collaborative activity exemption in the context of cartel offences should 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).
<p>29 – Introduction of a new prohibition on concerted practices</p>	<ul style="list-style-type: none"> • Consistently with the view expressed in its previous submissions, the Committee agrees with the recommendation that Div 1A of Part IV be repealed. • Legislation giving effect to the recommendation to include a new prohibition on concerted practices should include an interpretive or ancillary provision capturing the essential meaning of the phrase. That meaning should be based on the anti-competitive harm inherent in a concerted practice as that term is understood and applied in EU competition law. • The concept of a ‘practice’ having a purpose (in this case, of substantially lessening competition) is likely to be problematic. There should be a requirement that the relevant purpose be the purpose of the corporation alleged to have engaged in the concerted practice, and that it be present at any time when the practice occurs. • The concerted practices prohibition should apply only to practices engaged in by competitors or likely competitors.
<p>30 - Misuse of market power</p>	<ul style="list-style-type: none"> • On balance, the Committee supports retention of s 46 in its current form. The new form of s 46 will have a significant and practical impact on the regulation of the conduct of firms with substantial market power in Australian markets, and the benefit of the

Recommendation number and subject matter	Summary of key points
	<p>proposed change is unclear.</p> <ul style="list-style-type: none"> • The new provision may be said to apply a "special lens" to the conduct of firms with substantial market power, as compared to the conduct of firms without such market power, whereas, to date, s46 has permitted a firm with substantial market power to behave in the same way as any firm in a competitive market might do, if the comparative analysis can be undertaken with "sufficient cogency". • If Recommendation 30 is to be adopted, the 'purpose' element of the proposed effects test should be removed. • The Committee also suggests that the criteria to which the Court must have regard, as set out in the Model Legislative Provisions ss 46(2), could be made more analytically useful and helpful for the Courts and Australian businesses or otherwise removed.
35 – Mergers	<ul style="list-style-type: none"> • The Review Panel's recommendations to improve the informal and formal merger review processes are desirable and necessary. • The proposed formal merger authorisation test in s 88(3) of the Model Legislative Provisions is appropriate. • Regulations should be enacted that provide for the information requirements to support a formal merger authorisation application. Completion of the relevant form should not be a pre-requisite to an application being accepted by the ACCC. • There should be a maximum of three months for the ACCC's decision and the ability to extend the timeframe by an additional month with the agreement of the parties. A further maximum limit of three months should apply to appeals to the Tribunal, with no possibility of extension. • The Tribunal should have discretion to allow parties to introduce further evidence and to call and question witnesses. • Post-merger evaluations should be undertaken by the ACCC in the ordinary course of its operations. The Committee does not oppose the recommendation that the ACCP conduct such evaluations, but notes that the cost and resource requirements involved may be significant. If the ACCC is instead to perform this function, the outcomes of its reviews should be made public.
38 and 39 – Authorisation, notification and block exemption powers	<ul style="list-style-type: none"> • The authorisation and notification provisions should be simplified, broadly in the manner contemplated in the Model Legislative Provisions. • The block exemption power should cover all Part IV conduct and be implemented as an administrative decision of the ACCC, without the need for a legislative instrument, subject to any constitutional requirement for parliamentary oversight. • The ACCC should be able to commence a block exemption inquiry of its own motion, and without having to satisfy any threshold statutory criteria. The ACCP should also be granted power to refer conduct to the ACCC to consider for a block exemption. • It is not necessary or desirable for third parties or industry

Recommendation number and subject matter	Summary of key points
	<p>participants to be able to trigger a block exemption process, given the potential administrative burden this would impose on the ACCC.</p> <ul style="list-style-type: none"> • It is important that the Tribunal have a full de novo power to reconsider a block exemption decision of the ACCC, on the same terms as the current review power in relation to authorisation. The current timeframe for Tribunal review of an individual authorisation is also sufficient for a block exemption.
45 and 46 – Market studies power	<ul style="list-style-type: none"> • The ACCP is the appropriate body to be assigned a market studies function. • If this function is to be provided to the ACCC, there should not be any associated mandatory information-gathering powers.
51 – ACCC governance and advocacy role	<ul style="list-style-type: none"> • The Committee is concerned about the recommendation that half of the ACCC Commissioners be appointed on a part-time basis. Part-time Commissioners are likely to face significant difficulties in keeping across the heavy volume and range of matters dealt with by the ACCC on a day-to-day basis, with the potential for associated delays in decision-making. • As an alternative, greater prominence could be afforded to the various Consultative Committees utilised by the ACCC, which could be enhanced so as represent a broader range of interest groups, and to provide regular review and feedback to the ACCC Commissioners (including potentially with respect to post-merger evaluations). • Notwithstanding the potential establishment of the ACCP, the ACCC has an ongoing and important role to play in formulating competition policy and acting as advocate for competition related matters.

4. Recommendations 25, 26 and 27: definition of market, extra-territorial reach and cartel conduct prohibitions

Markets and the competition condition

Recommendation 25 is that existing definition of market in s 4E be retained. The Committee agrees with this recommendation. The Review Panel also recommends that the definition of competition in s 4 be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into, or services rendered or capable of being rendered in, Australia.

The existing definition of competition in s 4 provides that “competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia.” It is not evident to the Committee that the expression “capable of being imported” or “capable of being rendered” adds anything to this definition.

In the Committee’s view, the section should be simplified as follows:

“competition includes competition from actual or potential imported goods or services by persons not resident or not carrying on business in Australia.”

Extra-territorial operation of cartel provisions

Recommendation 26 proposes that s 5 of the Competition and Consumer Act 2010 (CCA) be amended to remove the need to prove that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence. The Review Panel also recommends removal of the requirement that private parties seek ministerial consent before relying on extra-territorial conduct in private competition law actions.¹ The Committee supports these two recommendations.

The Review Panel also recommends that:

“...the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.”²

Some members of the Committee are concerned about the potential breadth of this connection between overseas conduct and the application of the CCA. Overseas conduct may be “related” to trade or commerce without affecting either it or welfare in Australia.

The Sherman Act excludes conduct involving trade or commerce with foreign nations unless there is a “direct, substantial, and reasonably foreseeable effect” on domestic trade or commerce. In substance, the Sherman Act does not apply to export activities and other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.”³ A similar approach is taken in the proposed cartel-related amendments to the Commerce Act 1986 (NZ), which restrict the cartel conduct prohibition to conduct affecting the supply or acquisition of goods or services in New Zealand.

The Review Panel’s recommended test is wider than the tests adopted in these countries, and may apply to conduct outside Australia that is in some way related to trade or commerce, but which has little or no effect on competition or welfare in Australia. In the Committee’s view this is undesirable.

Further, the Panel recommends the residence or carrying on business test be removed from s 5, but it wishes to reintroduce these concepts through Recommendation 27, which relevantly states:

The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business in Australia.

The Committee questions the utility of reinserting these concepts into the cartel conduct provisions.⁴

The definition of “likely”

Recommendation 27 includes that the existing definition of “likely” in s 44ZZRB (that “likely” in relation to the supply, acquisition, production or capacity to supply goods or services “includes a possibility that is not remote”) should be removed. The Committee agrees with this recommendation.

The Review Panel also recommends that the provisions should be confined to conduct involving firms that are actual or likely competitors, where ‘likely’ means on the balance of probabilities”. The Committee is content with this recommendation, but notes that no definition of “likely” is provided in the Model Legislative Provisions in s 45B(2) or s 45M(2) and (4). The Committee suggests this

¹ Section 5 of the CCA presently requires a corporation be resident, incorporated or carrying on business in Australia before its extra-territorial conduct may be relied on under the Act.

² Final Report, p58.

³ As the Supreme Court observed in *F. Hoffman La Roche Ltd v Empagran SA*.

⁴ The Committee agrees with the view expressed in the Explanatory Memorandum to the existing Division 1 of Part IV that requiring litigants to establish a market in Australia may raise the bar too high.

omission be rectified to provide greater certainty and to guard against the possibility that the existing definition will cloud future consideration of the term.

Exemption for joint ventures

Recommendation 27 also provides that there be a broad exemption from the cartel provisions for joint ventures as follows:

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

The Model Legislative Provisions 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
 - (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.

...

Consistently with the view expressed in its previous submissions, the Committee agrees 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).

The Committee has two main concerns regarding the proposed joint venture exemption as formulated in s 45I of the model legislative provisions. These concerns are:

- a. the failure to clarify the meaning of the concept of a 'joint venture'; and
- b. the unsatisfactory purpose-based conditions for the proposed joint venture exemption.

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 retention of the definition of 'joint venture' in s 4J is proposed.

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'.⁵ The wording 'carried on jointly' is less than clear and has often occasioned concern in practice. For example, 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).

The Committee supports the use of the concept of a 'collaborative activity' instead of that of 'joint venture' and commends the approach and definition adopted in the proposed cartel-related amendments to the Commerce Act 1986 (NZ). That approach is consistent with US, EU and Canadian competition law where the concept of a joint venture has been displaced by the far more commercially realistic concept of collaborative conduct. The Government should follow world best practice and reject the unsatisfactory concept of a 'joint venture'.

Unsatisfactory purpose-based conditions

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.

As explained below, the first and third of these alternative conditions are unsatisfactory.

The first alternative condition is 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. 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'. There is no merit in exempting such conduct.

The second alternative condition – whether or not the provision is reasonably necessary for undertaking the joint venture – is similar to the approach taken for the proposed collaborative activity exemption in New Zealand. Two points should be made:

1. The wording 'reasonably necessary for undertaking the joint venture' is used instead of the wording 'reasonably necessary for the purpose of the collaborative activity' in the proposed NZ exemption. 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 below).
2. 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 are commendable and lend themselves readily to adoption in Australia.

The third alternative condition – whether or not the cartel provision is 'for the purpose of a joint venture' - is unnecessary and undesirable. This is because:

- a. 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 above), is wide and flexible enough to cover commercially justified collaborative activities between competitors;
- b. 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?;

⁵ Commerce (Cartels and Other Matters) Amendment Bill 2011, proposed s 31.

substantially for the purpose of a joint venture'? the relevant 'purpose' determined objectively or does it depend on the subjective intention of all or some of the parties to the joint venture?;

- c. the condition does not differentiate between civil and criminal liability. Under the cartel-related amendments to the NZ Commerce Act 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 collaborative activity exemption in relation to the cartel offences. Criminal liability should require subjective blameworthiness on the part of the offender in relation to the elements of offences and the elements of defences. Subjective blameworthiness should not be defined in terms of honesty or honest belief given the difficulties that surround the concepts of dishonesty and honesty and the rejection in Australia of dishonesty as an element of the cartel offences; and
- d. the 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).

Accordingly, the Committee recommends that:

- the proposed s 45I(1)(b)(i) and (iii) not be adopted;
- the proposed s 45I(1)(b)(ii) be reworded '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 a 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).

Drafting of the cartel conduct provisions

As the Committee has previously submitted, the cartel conduct provisions should be expressed in clear, easily understood and succinct language.

Although the cartel conduct provisions in the Model Legislative Provisions considerably improve upon the existing Division 1, scope for greater simplification exists. For example, s 45B(2) and (3) contain separate competition definitions for the supply and acquisition of goods or services. In the Committee's view, these should be condensed into one provision dealing with both the supply and acquisition of goods and services.

Further, the repeated references to "or any of their respective related bodies corporate" in s 45B(2) and (3) should be replaced by a definition of "party" for the purposes of the provision that includes related bodies corporate. Several other cartel provisions use more words than are necessary to identify and regulate the relevant cartel conduct. This detracts from the clarity and intelligibility of the law. Reference should be had to the proposed cartel-related amendments to the Commerce Act 1986 (NZ) for an example of a style that succeeds in achieving these needs.

5. Recommendation 29: concerted practices prohibition

Recommendation 29 is in two parts:

1. 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. Consistently with the view expressed in its

previous submissions, the Committee agrees with the recommendation that Div 1A of Part IV be repealed.

2. 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 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]

A corporation shall not:

...

(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.

...

*(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.*

In its previous submissions, the Committee expressed the view that there needs to be further consultation on the definition and application of any concerted practice prohibition and, for that purpose, close attention should be given to the laws concerning concerted practices in other jurisdictions (the EU particularly). The Committee recommended that any such prohibition should “focus on the purpose or likely effects of conduct on competition in Australian markets, rather than per se treatment.”⁶

The Committee has three principal concerns regarding the proposed concerted practice prohibition, as formulated in s 45M of the Model Legislative Provisions. These concerns relate to:

- a. the absence of any definition of ‘concerted practice’;
- b. the attachment of the purpose element of liability to the alleged concerted practice;
- c. the competition condition in s 45M(4).

Definition of concerted practice

The Review Panel states that:

“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.”⁷

⁶ See the Issues Paper Submission, p54 and Draft Report Submission, p10.

⁷ Final Report, pp371-2.

The phrase 'concerted practice' has a distinctive meaning in competition law. Hence it would aid businesses, advisers, the ACCC and judges if the legislation included an interpretive or ancillary provision directing attention to the essential meaning of the phrase. That meaning should be based on the anti-competitive harm inherent in a concerted practice as that term is understood and applied in EU competition law.

The anti-competitive harm inherent in a concerted practice is the harm associated with a form of conduct (as distinct from a provision in a contract, arrangement or understanding, as those terms are defined in Australian case law) intended or likely to result in competitors acting in a coordinated way in relation to the terms or conditions of supply or acquisition. Such conduct need not be conduct that is jointly arranged or carried out or that is 'in concert'.

That said, the legislation need and should not provide, either exhaustively or otherwise, a list of specific types of conduct that constitute a concerted practice. 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.

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 can also include price protection or 'most favoured customer' clauses, uniform delivery pricing methods, basing-point pricing and product standardisation and benchmarking.

Purpose

Under the proposed s 45M(1)(c), liability arises if the concerted practice has the purpose of substantially lessening competition. 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 substantially lessening competition).

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.

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' 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. 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 occurs.

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 substantially lessening competition).

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.

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 substantially lessening competition in a market.

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'.

6. Recommendation 30: misuse of market power

Impact of the changes

In the Committee's view, the new form of s 46 will have a significant and practical impact on the regulation of the conduct of firms with substantial market power in Australian markets. In the Committee's view, the benefits of changing to the new form of prohibition are unclear.

To date, under the current form of s 46, a firm with substantial market power is prohibited from engaging in conduct which is rational or available to it only by virtue of the substantial market power it holds – this is the "taking advantage" of market power required by s 46. Put another way, however, a powerful firm is not prevented from conducting itself (no matter how vigorously) in the same way as any firm without market power might, in the relevant market context.

This is the impact of the "take advantage" element in the current form of s46.

However, the new provision proposed in the Final Report extends further. It provides that the conduct of a firm with substantial market power should be constrained wherever its conduct has, or would be likely to have, a substantially anticompetitive effect (not purpose, as submitted above). This is the case, irrespective of whether a firm without substantial market power might engage in the same conduct in the same context.

The new provision may be said to apply a "special lens" to the conduct of firms with substantial market power, as compared to the conduct of firms without such market power,⁸ whereas, to date, s 46 has permitted a firm with substantial market power to behave in the same way as any firm in a competitive market might do, if the comparative analysis can be undertaken with "sufficient cogency".⁹

This real shift in the scope of s 46 will, in the Committee's expectation, have consequences such as the following:

- a. Firms with market power in Australian markets ought to reassess their conduct, against a new yardstick – whether their conduct has, or would be likely to have, the requisite anticompetitive effect, irrespective of whether other firms, without substantial market power, do, or would, engage in similar conduct.
- b. There will be some uncertainty as a result of the new provision. Although the concepts of "substantial market power" and "substantially lessening competition" are clear, the new provision in its entirety will have an uncertain application in the particular context of regulating unilateral, dominant-firm conduct in Australia.
- c. The two consequences above point to adding cost, direct and indirect, for major firms in Australian markets.

⁸ See *Eastman Kodak v Image Technical Services* 504 US 451 (1992) at 488 (Scalia J, O'Connor & Thomas JJ, in dissent) that: "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."

⁹ See *Melway Publishing v Robert Hicks* [2001] HCA 13, at para 52.

- d. It will take years for useful guidance to emerge from the Courts in relation to the new provision. Indicative of this are the time frames for significant ACCC prosecutions to be determined (with appeals exhausted) in the past; commonly more than 5 years.

It is for others to determine whether the trade-off between shifting the regulatory dial in this area, on the one hand, and consequences of doing so such as those set out above, on the other, is acceptable. The Committee wishes only to draw out these points as clearly as possible.

If Recommendation 30 is to be adopted, the Committee believes that the proposed amended s 46 provision requires fine-tuning in the manner set out below.

Purpose

The reference to "purpose" must be deleted. Currently, the proposed provision reads:

(1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.¹⁰

A firm with substantial market power will contravene this provision if it is found to have engaged in conduct that has only "the purpose ... of substantially lessening competition" in a market. The conduct need have no anti-competitive effect at all.

The "purpose" of conduct under the CCA:

- is the subjective purpose of the person/corporation engaging in that conduct;¹¹
- may be established by inference from the conduct or "other relevant circumstances";¹²
- can be any one of several "purposes" that a person or corporation may have in relation to that conduct, as long as it "was or is a substantial purpose";¹³ and
- is to be ascertained by reference to direct and indirect evidence of the intentions of the person/corporation (such as internal correspondence, emails, etc).

In this context, there will be sufficient evidence for a contravention of the proposed new s46 where a senior executive of a firm with substantial market power writes an email which states that conduct of the firm is intended to have the purpose (among several other purposes, potentially) of substantially lessening competition in a market.

This is not a sound basis on which to regulate dominant firm conduct, for the following reasons:

First, the s 46 prohibition should target only conduct which has, or is likely to have, an anticompetitive impact in a market. Purpose is largely irrelevant, other than as a pointer to whether the conduct has that impact or effect.¹⁴ The proposed provision over-reaches in this regard.

Secondly, the Courts have recognised that, both in competitive markets and in those including firm(s) with substantial market power, business executives will commonly express themselves in vigorous and aggressive terms.¹⁵ The Australian law should not condemn the articulation of aggressive intent

¹⁰ See p62 of the Final Report and Model legislative provisions at p513.

¹¹ *Queensland Wire v Broken Hill Pty Limited* [1989] HCA 6, and many cases following.

¹² Currently ss46(7). This is not included in the Model legislation, but is an open approach under the suggested provision, notwithstanding.

¹³ See s4F(b).

¹⁴ See *Dowling v Dalgety* [1992] FCA 35

¹⁵ The US Court of Appeal, Third Circuit in *Advo Inc v Philadelphia Newspapers* 51 F 3d 1191 (3rd Cir 1995) at p1199, as it cited the advice by Ray Kroc (the founder of McDonalds) that "when you see the competition drowning, stick a water hose down their throats", stated that:

"The antitrust statutes do not condemn, without more, such colourful, vigorous hyperbole; there is nothing to gain by using the law to mandate "commercially correct" speech within corporate memoranda and business plans.

(no matter how competitor and competition unfriendly), even by executives within firms with substantial market power, unless it points to a discernible anticompetitive outcome in a market.

Thirdly, where a contravention may be established by reference to "purpose" alone, both private plaintiffs and the ACCC will have powerful incentives to trawl the corporate records of the dominant firm, looking for the "smoking gun" document(s) in which an anticompetitive "purpose" may be found. This incentive will:

- make investigations and litigation more expensive for all concerned with extensive discovery and document production;
- distract the parties from a focus on evidence of whether the conduct has an anticompetitive effect; and
- divert the Court's attention from the true objective of s 46 investigations and litigation – to sanction the conduct of a powerful firm which has an anticompetitive impact in a market.

To address these concerns, the Committee suggests that the ss 46(1) be amended to read:

(1) A corporation that has a substantial degree of power in a market shall not engage in conduct which would have, or would be likely to have, the effect of substantially lessening competition in that or any other market.

Consequential changes to ss 46(2) are also required.

Criteria for the Court

The Committee suggests that the criteria to which the Court must have regard, as set out in the Model Legislative Provisions ss 46(2), could be made more analytically useful and helpful for the Courts and Australian businesses.

Further, the references in paragraph 46(2)(b) to preventing, restricting or deterring competition are, to some extent, unnecessary, as some of these elements are already implicit in the meaning of the expression "substantially lessening competition" – see s4G.¹⁶

By way of a constructive suggestion, the long-established and analytically helpful "matters which must be taken into account" (set out in ss 50(3)) to determine whether an acquisition of shares or assets has the effect, or likely effect, of substantially lessening competition in a market, may be drawn upon.

If so, ss 46(2) in the Model Legislative Provisions might be amended to provide along the following lines:

Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct would have, or would be likely to have, the effect of substantially lessening competition in a market, the court must have regard to:

Isolated and unrelated snippets of such language provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition."

The Australian High Court has adopted the view of Easterbrook J in *AA Poultry Farms v Rose Acre Farms* (1989) USCA7 592, that "to fix upon intent does not assist in separating beneficial aggressive competition (where prices are set by reference to the market) from attempted monopolisation, that it invites juries to penalise hard competition, and that a "greed-driven desire to succeed" over rival firms is neither a basis of liability nor a ground for the inferring of the existence of such a basis" – see *Boral Besser Masonry v ACCC* (2003) 215 CLR 374 at para 195, per Gaudron, Gummow and Hayne JJ. See also the often cited passage from *Queensland Wire* as follows:

"... the object of s46 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."

¹⁶ Arguably, the elements of "restricting" or "detering" competition are already implicit in the extent to which conduct has the effect or likely effect of "preventing or hindering" competition.

- (a) *the actual and potential level of import competition in the market;*
- (b) *the height of barriers to entry to the market;*
- (c) *the level of concentration in the market;*
- (d) *the degree of countervailing power in the market;*
- (e) *the likelihood that the conduct would result in prices or profit margins increasing above competitive levels;*
- (f) *the dynamic characteristics of the market, including growth, innovation and product differentiation;*
- (g) *whether the conduct will constrain or remove one or more vigorous and effective competitors in the market; and*
- (h) *the nature and extent of vertical integration in the market.*

As an alternative, the Committee is, on balance, comfortable with the deletion of the proposed ss 46(2) altogether, such that a similar position to that under s 45 of the CCA prevails (with no additional guidance given in relation to whether a contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition).

Response to other concerns

Removing the "take advantage" element of the current form of s 46 has raised concerns that powerful firms' conduct will be much more broadly regulated by s 46 than is appropriate.

This is a significant issue, in the Committee's view. Particularly, conduct of a firm with substantial market power which has the effect, or likely effect, (but not the purpose, for the reasons submitted above) of substantially lessening competition will contravene the new provision, irrespective of whether the conduct drew upon (ie took advantage) of the firm's market power.

A yardstick of this issue has long been the rhetorical test of whether a firm with substantial market power would contravene s 46 if it burned down the factory of its only rival.¹⁷ Under the current provision, it would not – there has been no "taking advantage" or "use" of the firm's substantial market power. This is, at best, far less clear under the proposed provision.

However, the Committee points to ss 46(8) in the new provision (adopted from ss 46(7) in the current law), which provides that:

"In this section:

- (a) *a reference to power is a reference to market power;*
- (b) *a reference to a market is a reference to a market for goods or services; and*
- (c) *a reference to power, or to conduct, in a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market."*

Arguably, it is the conduct of the firm "as a supplier or as an acquirer of goods or services in [the] market" which is to be assessed under the new provision – rather than conduct which falls outside that scope of activity. There is, to the Committee's knowledge, no judicial consideration of the point. However, there is, at least, a prospect that the conduct which might have the effect, or likely effect, of

¹⁷ French J, *Natwest Australia Bank Ltd v Boral Gerrard Staffing Systems Pty Ltd* (1992) 111 ALR 631-1 at 637

substantially lessening competition, is to be limited to conduct as a supplier or acquirer of goods or services.

7. Recommendation 35: mergers

While the mechanisms in Australia to veto or impose conditions on mergers and acquisitions that are anti-competitive are, by and large, appropriate and effective, the Committee believes that the recommendations in the Final Report to improve the informal and formal merger review processes are desirable and necessary.

The Committee agrees in principle with the recommendations in the Final Report to reform the formal merger review processes. The Committee considers that the key objectives of the proposed new formal merger authorisation process must be (i) to avoid protracted or unpredictable decision-making by the ACCC or the Tribunal; and (ii) to ensure that the timing and process of merger reviews do not unnecessarily undermine commercial certainty, and thus the efficacy of a new process.

Proposed formal process

To this end, the Committee considers that the proposed authorisation test contained in s 88(3) of the Model Legislative Provisions is appropriate, and an improvement on the current position. The proposed test enables the ACCC to clear mergers on the basis that they do not substantially lessen competition, without having to direct any inquiry as to the existence or otherwise of public benefits. Under the current test contained in s 95AZH of the CCA, a merger or acquisition must only be authorised if it would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

Whilst there are differing views, the Committee considers that the ACCC as the decision maker at first instance for formal merger authorisation applications is also appropriate, provided that the process for formal merger authorisations is clearly set out in legislative regulations (rather than ACCC guidelines) to ensure that decisions are made in a timely fashion, and such relevant material as is needed to enable the ACCC to make its decision within the prescribed timeframe is provided to the ACCC upfront.

To this end, regulations should be enacted that set out the:

- a. *information requirements to support a formal merger authorisation application.* The Committee suggests that the current Form S for Application to the Tribunal for Merger Authorisation could be adapted for this purpose, and refined so as to remove any requirement to provide information that is unlikely to be relevant to the particular matter. The Committee also considers that completion of all information contained in the relevant form should not be a prerequisite for the application to be accepted by the ACCC (that is, the ACCC should not be required to accept the form as validly completed before it commences a formal review). There should be discretion as between the ACCC and the merger parties to allow for certain information or aspects of the form not be completed on the basis that it is not relevant to the matter in question; and
- b. *timeframes to apply to review by the ACCC and the Tribunal.* The Committee considers that there should be:
 - (i) a maximum of three months for the ACCC's decision, that can be extended by an additional month with the agreement of the parties. In the absence of a decision within that timeframe, the merger should be deemed not to be authorised; and
 - (ii) a further maximum limit of three months for any appeal to the Tribunal, which cannot be extended.

The Committee considers that this achieves an appropriate balance between enabling the ACCC and the parties to agree to an extension so as to enable the ACCC to consider information before it, and ensuring that there is a maximum overall timeframe for the combined ACCC and Tribunal process. To

this end, the Committee believes that the ability to agree an extension with the ACCC should be limited so as to prevent the overall timeframe being significantly increased.

The Committee supports the introduction of a confidentiality regime (via regulation) that would apply to both the ACCC and the Tribunal review. The regime should seek to balance the principle of transparency with the need to protect the confidential information of all parties, and could be based on the processes currently adopted by the Tribunal in relation to authorisation matters, with refinements to improve the effectiveness and efficiency of the regime.

Appeals to the Tribunal

In relation to an appeal to the Tribunal, the Committee:

- a. supports the recommendation that the Tribunal have discretion to allow parties to introduce further evidence and to call and question witnesses. The Committee does not consider that specific guidance needs to be provided to the Tribunal to assist when making a decision on further or new evidence. The Committee considers this discretion will act as an incentive for merger and other parties to ensure that all relevant materials are provided to the ACCC for review at first instance, whilst also allowing the ACCC, the merger parties or others the opportunity to request that this discretion be exercised where information was not available or disclosed sufficiently during the ACCC's initial review; and
- b. believes that the ACCC's role in the appeal process should be clarified, so that it is clear that it is able to argue its case in support of its decision at first instance (rather than be a 'friend' of the Tribunal).

Post-merger evaluations

The Committee supports post-merger evaluations as a matter of principle, and considers they should be undertaken by the ACCC in the ordinary course of its operations. The Committee does not oppose the recommendation that the ACCP conduct such evaluations, however, the Committee notes that the cost and resource requirements involved may be significant, given that the ACCP will need to obtain relevant information from outside sources.

If the ACCC is instead to perform this function, the Committee considers that the outcomes of its reviews should be made public so as to support and enhance the quality of its decision making, as well as the continuous improvement of its processes.

8. Recommendations 38 and 39 – authorisation, notification and block exemption powers

The Committee supports the recommendation to simplify the existing authorisation and notification provisions, broadly in the manner contemplated in the Model Legislative Provisions.

The Committee also supports the introduction of a block exemption power that would cover all existing Part IV conduct, as an efficient means through which to deal with common and less controversial issues (rather than being directed at substantial market issues). The Committee believes that the block exemption power should be implemented as an administrative decision of the ACCC, and without the need for a legislative instrument, subject to any constitutional requirement for parliamentary oversight.

In terms of the ability to trigger a block exemption application process, the Committee considers that the ACCC should be able to commence a block exemption inquiry of its own motion, and without having to satisfy any threshold statutory criteria. The ACCP should also be granted power to refer conduct to the ACCC to consider for a block exemption, for example, as an output from market studies (although this referral would not dictate the outcome of the ACCC process). However, the Committee does not consider it necessary or desirable for third parties or industry participants to be

able to trigger a block exemption process, given the potential administrative burden this would impose on the ACCC.

The Committee also considers that:

- a. the threshold for enabling the ACCC to consider revocation of a block exemption should be the same as the current test for revocation of an individual authorisation (namely, a “material change in circumstances”)¹⁸; and
- b. the mechanism contained in s 152ASA of the CCA (class exemptions from Standard Access Obligations) that provides for the ACCC to specify elements of the class exemptions that cannot be varied should be replicated as part of the block exemption regime.

It is important that the Tribunal have a full de novo power to reconsider a block exemption decision of the ACCC, on the same terms as the current review power in relation to authorisation. This power also enables the Tribunal to vary an authorisation made by the ACCC or to impose conditions. Third parties should have an ability to bring an application for a review, provided that they meet the current test of standing under s 101(1AA) of the CCA (being a person with “sufficient interest”).

The current timeframe for Tribunal review of an individual authorisation under s 102(1) is also sufficient for a block exemption (i.e. a default timeframe of 60 days, but open to unlimited extension). Given the significance of the power and wide effect of any block exemption, the Committee does not consider it appropriate to impose hard deadlines on a review by the Tribunal.

9. Recommendations 45 and 46 - market studies power

The Committee agrees with the recommendation that, if the ACCP is established, it is the appropriate body to be assigned a market studies function, as part of its broader competition policy recommendations.

If this function is to be provided instead to the ACCC, the Committee does not support the introduction of associated mandatory information-gathering powers. The Committee is concerned that mandatory information-gathering powers would cause substantial cost and inconvenience for market participants (and, in turn, consumers), as well as give rise to the potential for conflicts between the ACCC’s investigative and enforcement functions.

As noted in the Committee’s previous submissions, experience demonstrates that there is no need for the exercise of mandatory information-gathering powers to conduct effective policy reviews and produce sound reform recommendations. There is no indication that the absence of the exercise of mandatory information-gathering powers by the Productivity Commission has hindered or reduced the effectiveness of that Commission in its review of the efficiency of various markets. There is also no basis for concluding that the ACCC would be deprived of information and arguments reflecting a wide range of perspectives and approaches if it did not have mandatory powers.

10. Recommendation 51 - ACCC governance and advocacy

The Committee has concerns with the recommendation that half of the ACCC Commissioners be appointed on a part-time basis. Part-time Commissioners are likely to face significant difficulties in keeping across the heavy volume and range of matters dealt with by the ACCC on a day-to-day basis, with the potential for associated delays in decision-making. Members of the Committee are familiar with the extremely heavy workload of the ACCC Commissioners, and the need for the Commissioners to be readily available and well-acquainted with a very wide range of Commission matters.

Further, the Committee notes that significant conflict issues are likely to arise in the context of part-time Commissioners, particularly in light of the Review Panel’s recommendation that they be people

¹⁸ Section 91C of the CCA.

who hold “*other roles in business, consumer advocacy and academia*”¹⁹, leading to a potential loss of the ACCC’s status as an independent body appropriately accountable to the Courts in many areas.

As an alternative, and to address the Review Panel’s concerns with respect to ‘group think’ and perceived strong internal focus of the ACCC, the Committee considers that greater prominence and responsibility could be afforded to the various Consultative Committees utilised by the ACCC. These Committees could be enhanced so as represent a broader range of interest groups, and to provide regular review and feedback to the ACCC Commissioners (including potentially with respect to post-merger evaluations).

Finally, the Committee believes that, notwithstanding the potential establishment of the ACCP, the ACCC has an ongoing and important role to play in formulating competition policy and acting as advocate for competition related matters. This is consistent with the approach in most other jurisdictions, and by the International Competition Network, which support a competition policy advocacy role for competition authorities.

¹⁹ Final Report, p465.

Attachment 1: Recommendations supported by the Committee with no further comment

To assist the Government, set out below a list of the recommendations of the Final Report that are supported by the Committee, but in respect which the Committee does not propose to make further comment.

#	Recommendation and subject matter
1	Competition principles
4	Repeal of Part X (international shipping liners)
6	Intellectual property review by the Productivity Committee ²⁰
8	Regular regulation review by all Australian governments to remove unnecessary restrictions on competition
15, 16, 17	Competitive neutrality policy, complaints and reporting
19, 20, 21	Electricity, gas and water reform, informed choice
22, 23	Competition law concepts, competition law simplification
28, 29 [part]	Removal of exclusionary provisions prohibition, repeal of Part IV, Division 1A of the CCA
31, 32, 33, 34	No reintroduction of price discrimination, introduction of effects test for third line forcing, simplification of section 47, introduction of notification process and RBC exception for RPM
40	Section 155 powers limited to reasonable search, ACCC guidelines to be reviewed
43, 44, 47	Establishment, role and analysis of ACCP
49, 50	Retention of competition and consumer functions within ACCC, access and pricing regulation function given to single national regulator
54	Greater flexibility introduced into collective bargaining process, ACCC to enhance awareness of process

²⁰ The Committee maintains its view that it is premature for recommendation 7 (repeal of section 51(3)) to be adopted prior to this review.

Attachment 2: Recommendations with no further comment

To assist the Government, set out below is a list of the recommendations of the Final Report in respect of which the Committee has no further comment.

#	Recommendation
2, 3, 5	Human services, road transport, coastal shipping and aviation
9, 10, 11, 12, 13, 14	Planning and zoning, priorities for regulation review, standards review, retail trading hours, parallel imports, pharmacy
18	Government procurement and other commercial arrangements
24	Application of the law to Government activities
36	Secondary boycotts enforcement and complaints reporting by ACCC
37	Trading restrictions in industrial agreements
41	Facilitating private actions by amending section 83 so that it extends to admissions of fact
42	National Access Regime
48	Use of competition payments
52	ACCC to develop Media Code of Conduct
53	Small business access to remedies
55, 56	Implementation of Final Report, economic modelling