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Office of the President

Your ref: Root and Branch Review – Competition Policy Review - Issues Paper

Our ref: 857/4 – Competition and Consumer Law Committee

27 June 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Submission electronically uploaded: here

Dear Secretariat

Competition Policy Review - Issues Paper

Thank you for the opportunity to comment on the Competition Policy Review - Issues Paper and for providing the Society with an extension of time to lodge submissions. This submission has been prepared with the assistance of the Queensland Law Society's Competition and Consumer Law Committee and Planning and Environment Law Committee.

We provide our feedback in the ***attached*** submission, which is not intended to be an exhaustive review of competition law and the *Competition and Consumer Act* (CCA). We are happy for the submission to be published and would be pleased to be involved in any public forums, conferences and consultations with respect to the review.

If you have any further queries, please do not hesitate to contact our Policy Solicitor Ms Louise Pennisi on l.pennisi@qls.com.au or (07) 3842 5872.

Yours faithfully

Ian Brown
President

Queensland
Law Society

Submission

Competition Policy Review - Issues Paper

Competition Policy Secretariat
The Treasury

A Submission of the
Queensland Law Society

27 June 2014

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1. Chapter 1 – Competition policy

1.1. Key Question: what should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

Recommendation 1

The Society submits that the priority for a competition reform agenda should be to review and, where necessary, amend the competition laws to ensure they are consistent with the following principles:

1. Competition laws must either address a significant and ongoing market failure, or must result in a benefit to the Australian community as a whole that outweighs the costs of compliance with, and enforcement of, those laws;

2. Each competition law must represent the least restrictive way to address the relevant market failure, or achieve the relevant public benefit(s) to the Australian community;

3. Competition laws must be expressed in clear and concise language, and must not use terms that are defined to have a different meanings from their general usage;

4. The use of 'per se' prohibitions or offences should be confined to categories of conduct where the overwhelming majority of instances of that conduct would result in a clear and substantial lessening of competition in an Australian market, without any compensating public benefit;

5. Competition laws should promote the process of competition, rather than protecting individual competitors (or particular classes of competitors); and

6. Competition laws should impose requirements that apply across all sectors of the Australian economy, with industry-specific competition laws being maintained only as a last resort where imposing general competition laws would not be the leastrestrictive way to address the relevant market failures or achieve the relevant public benefits.

The Society believes that the principles set out above are commonly accepted as appropriate criteria for competition laws.

This submission provides details of particular provisions within current Australian competition laws that the Society believes fall short of these principles. For example:

(a) Section 5.3 recommends further consideration of whether to introduce an 'effects' test into section 46 of the CCA, and provides an outline of how this could be achieved, in order to better address the potential market failures at which section 46 is directed (though, as noted below, there are divergent views on this issue);

(b) Section 5.7 recommends changes to the way in which the cartel laws are drafted, in order to express these laws more clearly and concisely, and to avoid the use of terms that are defined to have different meanings from their general usage;

(c) Section 5.8 recommends the repeal of the price signalling provisions, as there is no market failure that is addressed by these provisions, nor do they result in a benefit to the Australian community as a whole that outweighs the costs of compliance with these laws;

(d) Section 5.9 recommends changes to the joint venture exceptions and defences in the CCA, as the current drafting of these provisions means that the cartel laws are not drafted in the least restrictive way possible;

(e) Section 5.10 addresses the third line forcing provisions, and notes that whilst differing views on the matter are held, these provisions should be amended to no longer impose a per se prohibition, as it cannot be said that the overwhelming majority of third line forcing cases result in a clear and substantial lessening of competition in an Australian market without any compensating public benefit;

(f) Section 5.11 addresses the resale price maintenance provisions, and notes that whilst differing views on the matter are held, these provisions should be amended to no longer impose a per se prohibition, for the same reason as for third line forcing; and

(g) Section 5.12 addresses the secondary boycott provisions, and raises an issue that some consider is an instance of market failure that is not presently addressed by the competition laws.

Whilst all of the principles outlined above are important, the Society wishes to emphasise principle 3 in particular. We note that the laws are intended to promote efficiency in the Australian economy, however some provisions are duplicative, and difficult to understand (which inexorably leads to difficulties in enforcement, increasing inefficiency and imposing unnecessary costs across the economy).

The Society believes that all competition law provisions should be reviewed from a drafting perspective, to ensure they are expressed in clear and concise language, and do not use terms that are defined to have a different meanings from their general usage.

2. Chapter 2 – Regulatory impediments to competition

2.9 Are there planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

In balancing the interests of all parties, the Society does not consider that the Queensland planning regulatory framework exerts an unduly adverse impact on competition. In particular, local councils have limited ability to reject an application because it may have an adverse impact on existing businesses and may only do so if the development may have an adverse impact upon the extent and adequacy of facilities available to the community generally.[1]

[1] *Kentucky Fried Chicken Proprietary Limited v Gantidis and Another* (1978) 140 CLR 675

It is accepted that the planning approvals processes and procedures are reasonably complex and can be costly. However the processes are necessary to ensure that the community is given an opportunity to have input into relevant developments.

5. Chapter 5 – Competition laws

5.1 Key Question: Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

Recommendation 2

The Society recommends amendments to Part IV of the CCA to:

(a) separate and give greater clarity to the prohibition in section 45 of the CCA on making and giving effect to agreements with an anti-competitive purpose;

(b) address the existing uncertainty about the extent to which there must be the prospect of an anti-competitive effect for there to be a "likely" effect.

Part IV of the CCA should have at least three aims.

First, and fundamentally, it should promote competition in Australia for the benefit of Australian consumers.

Second, except to the extent that there are particular issues facing a small economy such as Australia, it should be consistent with competition laws from Europe and the United States of America. That is both to reflect the most current economic thought on promoting effective and competitive markets and also to achieve international comity in relation to competition laws, which are fundamental to the global economy.

Third, where it prohibits conduct, those prohibitions should be expressed in a manner that achieves conceptual clarity and precision both in economic and legal terms.

The two amendments which are recommended for consideration will improve the extent to which Part IV of the CCA satisfies one or more of these aims.

A separate prohibition on making and giving effect to agreements with an anti-competitive purpose

At present, section 45 of the CCA addresses both purpose and effect in relation to anti-competitive agreements. That is not itself a departure from other jurisdictions[2] though the focus on a provision of an agreement, rather than the agreement itself, is unusual. However, the prescriptive drafting style of the CCA has led to two problems with section 45 of the CCA in relation to purpose.

First, focusing on the purpose of a provision is misleading. Section 45(2) of the CCA prohibits

[2] See, for example, Article 101 *Treaty on the Functioning of the European Union* which prohibits, among other things, "all agreements ... which have as their object or effect the prevention, restriction or distortion of competition within the internal market..."

the making of an agreement containing a provision that "has the purpose...of substantially lessening competition". Section 4F of the CCA provides that a provision has a purpose if "the provision was included [in the agreement] ... for that purpose". The two sections have together directed attention to a factual inquiry as to which party to an agreement sought to have the provision included in the agreement[3] and whether any of the parties that sought the provisions' inclusion had a substantial purpose for including that provision of substantially lessening competition. That is unsatisfactory in terms of legal clarity for two reasons:

1. it establishes a cumbersome inquiry rather than directly prohibiting a corporation from entering into an agreement where its substantial purpose for doing so is to substantially lessen competition. As presently drafted it, it is possible for a party to an agreement to contravene section 45 of the CCA because, unbeknown to that party, another party had a subjective purpose for seeking the inclusion of a provision in the agreement of substantially lessening competition.

2., Section 45 of the CCA prohibits giving effect to a provision with an anti-competitive purpose but focuses on the purpose of the provision (which is determined at the time that the contract was made[4]) rather than the purpose of the corporation in giving effect to the provision. That can be contrasted with the prohibition on giving effect to a provision with an anti-competitive effect or likely effect, where the effect or likely effect is judged at the time at which the provision is given effect.[5] We consider the CCA should prohibit a corporation giving effect to a provision of an agreement where the corporation's purpose for doing so was to substantially lessen competition.

These two problems could be addressed by:

- omitting the references to purpose in section 45(2) of the CCA; and
- inserting a separate sub-section into section 45 of the CCA that provides:

> "A corporation shall not:
> (a) make a contract or arrangement, or arrive at an understanding;
> (b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section;
> for a purpose of substantially lessening competition."

Such a prohibition has the virtue of legal clarity.

It may also be the ideal prohibition for addressing predatory pricing, if there is such conduct occurring in the Australian economy. In order to engage in predatory pricing, a corporation will need to sell something to a customer at a price below cost. The dealing between the corporation and the customer will be a contract, arrangement or understanding within the meaning of section 45 of the CCA. If a substantial purpose of the corporation for entering into a below cost contract is as part of a larger plan to engage in predatory pricing, the corporation will have contravened this prohibition on each occasion on which the corporation enters into such a contract. [6]

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[3] *ASX Pont Data*; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160.
[4] *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 134 per Lockhart J.
[5] *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 ([751]) per Dowsett and Lander JJ.
[6] Posner RA, *Antitrust Law* (2nd Ed.) (2001), 260 raises a similar possibility in relation to use of section 1 of the *Sherman Act* to catch predatory pricing.

The meaning of likely effect

The words "likely effect" appear throughout Part IV of the CCA. They are applied in "with and without" tests, meaning, for example, what is the likely effect on competition without this merger or this agreement. It is well-established that the meaning of "likely" in Part IV of the CCA is "real chance or possibility".[7]

The difficult question that arises is how the standard of proof on the balance of probabilities interacts with a requirement that there need only have been a real chance or possibility of a hypothetical event. This situation arose for consideration in *ACCC v Metcash Trading Limited*, but was left unresolved by the Full Court of the Federal Court of Australia.[8]

There are two problematic aspects of the interaction.

First, if it is necessary to be satisfied on the balance of probabilities that there is a real chance of something occurring, the result is nonsensical. If, for example, a real chance means a 10% chance of a hypothetical outcome occurring without a merger, then, by the laws of probability, being satisfied on the balance of probabilities that there would be a 10% chance of this hypothetical outcome occurring effectively means finding that there is an at least 5% chance of the hypothetical outcome without the merger.

Second, it leads to an absurd outcome if what is necessitated is a two-stage inquiry,[9] where the first stage is being satisfied on the balance of probabilities that a hypothetical outcome would have occurred absent the merger or agreement, and the second stage is to ask whether there is a real chance that the merger or agreement would lead to substantially less competition when compared with that hypothetical outcome.

The absurdity can be illustrated by this example. Assume that absent a merger there are three possible outcomes, each with an equal probability of occurring, and that with the merger there would be substantially less competition when compared with any of those three possible outcomes. In this situation, there is a 100% chance that the merger would lead to a substantial lessening of competition but because no single hypothetical outcome has a more than 50% chance of occurring, the two-stage inquiry would answer that there is no likely effect of substantially lessening competition.

The Full Court of the Federal Court of Australia has left open this possible interpretation.[10] The problem could be addressed by inserting an interpretative section at the beginning of Part IV of the CCA that provides:

> "For this Part, the determination of whether something would be likely to occur or to have an effect does not require a finding on the balance of probabilities that such a thing would be likely to occur or to have the effect."

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[7] *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 at 140 per Heerey J with whom Black CJ and Tamberlin J agreed on this issue; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 per Dowsett and Lander JJ. Cf *Metcash* per Buchanan.
[8] [2011] FCAFC 15.
[9] As suggested by *Metcash* at first instance.
[10] [2011] FCAFC 151.

5.3 Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

Recommendation 3

The Society recommends amendments to section 46 of the CCA to more closely align it with its European and American counterparts. The amendments should prohibit a corporation with a substantial degree of market power from engaging in conduct that has a purpose or effect of substantially lessening competition in any market, unless the corporation establishes an available defence.

There is a range of views as to whether section 46 of the CCA should be amended. However, the Society notes that criticisms and concerns have been raised with respect to the section as it stands. The Society recommends that if the Panel considers that amendments to section 46 are warranted, and particularly if an "effects" test is contemplated, those amendments omit the existing section 46 in its entirety and replace it with a simpler regime. A simpler regime could prohibit a corporation with substantial market power from engaging in conduct with the purpose or effect of substantially lessening competition in any market, unless the corporation establishes an available defence. The form of such a regime is expanded below.

The current section 46 prohibits a corporation with substantial market power from engaging in conduct that is only, or is more likely to be, economically profitable because of the existence of that substantial power, if that conduct is for an anti-competitive purpose.

In theory, that is an economically elegant formulation of a prohibition of abuse of market power because it only prohibits conduct that has an economic link to the power. In practice, it is difficult to apply for three reasons:

First, because the ACCC (or any person alleging a contravention) is effectively required to prove a negative by establishing that no corporation without substantial market power would see a business justification for the conduct,

Second, because it requires a Court to enter into a messy inquiry into the business analysis and justifications of a corporation in relation to decisions in respect of which the analysis or record of the reasons for the decisions may have been limited, and

Third, because the Court is then required to judge what conclusions it can draw from that messy inquiry against a standard that is difficult to apply in practice because it is not possible to make absolute judgments about the economic profitability of conduct.

Section 46 differs from its American and European counterparts in requiring such a strong connection between the existence of the substantial market power and the economic capacity to engage in the conduct.

Article 102 of the *Treaty on the Functioning of the European Union* prohibits abuse of a dominant position. The effect of this prohibition is that an entity with substantial market power is prohibited "from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the merits".[11] The "competition on the merits" standard does not require that the conduct is only economically

[11] *AstraZeneca AB and AstraZeneca plc v European Commission*, Judgment of the Court (First Chamber) of 6 December 2012, [75].

profitable, or is more likely to be economically profitable, because of substantial market power. For example, conduct of a monopolist of deliberately attempting to mislead the patent offices and judicial authorities of European States "in order to keep for as long as possible its monopoly ... fell outside the scope of competition on the merits."[12]

Section 2 of the *Sherman Act* has been interpreted as involving shifting burdens. The plaintiff must first establish that a monopolist's conduct had an anticompetitive effect by harming the competitive process (as distinct from harming consumers). The monopolist then has the burden of establishing a 'procompetitive justification' (meaning a form of "competition on the merits"). If the monopolist establishes such a justification, the burden shifts back to the plaintiff to prove, among other possibilities, that the anticompetitive harm outweighs the precompetitive benefits.[13] As with the European test, the connection between power and economic capacity is not as strong as under the Australian test. The American approach also avoids the practical difficulties that arise with section 46 by placing the burden on the monopolist to establish the justification for its conduct.

The extent to which a connection between the market power and the profitability of the conduct is required raises two issues.

First, over inclusiveness versus under inclusiveness. All conduct that is only profitable because of substantial market power will not be competition on the merits. However, the reverse is not true. Not all conduct that a corporation with substantial market might engage in that is *not* competition on the merits, and that harms the competitive process, will be profitable only because of existing substantial market power. In particular, a difficult issue under Australian law is that if the conduct is profitable for a monopolist corporation because the corporation will have market power in the future, there is the possibility such conduct will not be caught. For example, predatory pricing is a type of anti-competitive conduct that depends, if it is to be rational, on having a future monopoly that will allow supra-competitive prices to be charged.

Second, the extent to which a special rule is imposed on corporations with substantial market power. The present section only prohibits corporations with substantial market power from engaging in conduct that they could not, or would be unlikely to, engage in without that market power. However, if a connection between the market power and the profitability of the conduct is not required, the consequence is that a corporation with substantial market power is prohibited from engaging in conduct, that would not be prohibited if it was engaged by a corporation without substantial market power. That is not necessarily a problem. It may reflect a judgment about the increased risk to the competitive process of monopolist engaging in unilateral anticompetitive conduct as compared with a competitor without substantial market power.

A further criticism of the current section 46 is that it does not prohibit conduct with an anti-competitive effect. In this way, it differs from both European and American law. There are divergent views as to whether an "effects" test is needed. A reason for not imposing an "effects" test is that it would impose a burden on corporations with substantial market power to be vigilant about the unintended consequences of their conduct. On the other hand, section 45 of the CCA has always prohibited corporations from making agreements with anti-competitive effects, even if those effects were unintended and, in determining the best way to protect the competitive process against the dangers of a monopolist, the judgment might be

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[12] *AstraZeneca AB and AstraZeneca plc v European Commission*, Judgment of the Court (First Chamber) of 6 December 2012, [93].
[13] *United States v. Microsoft Corp.*, 253 F.3d 34, 58-59.

made that monopolists should be required to be attentive to the consequences of their conduct for the competitive process.

In balancing these issues, if the Panel is minded to consider amendments to section 46, the Society recommends that consideration be given to omitting the existing section 46 and inserting a new section 46 to the following effect:

> "(1) A corporation that has a substantial degree of power in a market shall not engage in conduct that has the purpose of substantially lessening competition in any market.
>
> (2) A corporation that has a substantial degree of power in a market shall not engage in conduct that has the effect or likely effect of substantially lessening competition in any market.
>
> (3) In proceedings against a person in relation to an alleged contravention of subsections (1) or (2), it is a defence if the person establishes that the conduct has, or is likely to result in, a benefit to the public, except if that benefit to the public is outweighed or would be outweighed by the detriment to the public of the substantial lessening of competition that was the effect, likely effect or purpose of the conduct.
>
> (4) In a proceeding against a person in relation to an alleged contravention of subsection (2), it is a defence if the person establishes that neither the corporation nor a body corporate that is related to the corporation competes, is likely to compete, or intends to compete, in the affected, or likely to be affected, market."

This proposal incorporates a form of the shifting onuses seen in American jurisprudence. The reference to "public benefit" would capture pro-competitive benefits of competition on the merits.

An alternative to (3), above, could be:

> "(3) In proceedings against a person in relation to an alleged contravention of subsections (1) or (2), it is a defence if the person establishes that the conduct of the corporation was not materially facilitated by the corporation's substantial degree of power in a market."

This alternative provides for a defence if the conduct was not made economically profitable, or more likely to be economically profitable, by the market power.

5.7 Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?

Recommendation 4
The Society recommends the following amendments to the current provisions of the CCA regarding cartel, horizontal agreements and primary boycotts, in order to ensure that they operate effectively and further the objectives of the CCA to the greatest extent possible:

1. The amendment of the definition of "cartel provision" in section 44ZZRD, to significantly simplify the extreme prolixity with which it is presently expressed, and to remove the present overreach of these provisions;

2. The removal of the duplicative concept of primary boycotts in sections 4D and 45, as this unnecessarily duplicates the more recently-inserted cartel provisions in Division 1 of Part IV; and

3. The amendment of the definition of "likely" in section 44ZZRB to a formulation of "a real chance or possibility", which more closely aligns the definition of this term with its general usage (increasing the clarity of the definition is particularly important given the use of jury trials in criminal cartel proceedings).

The Society submits that the current provisions of the CCA regarding cartels, horizontal agreements and primary boycotts do not operate effectively and do not further the objectives of the CCA of Australian competition policy to the greatest extent possible. In particular, the cartel laws are not drafted as clearly and concisely as they could be, and there is duplication within the CCA in relation to cartel conduct.

As an example of the prolixity with which the cartel laws are expressed, the central provision of the cartel laws (section 44ZZRD, which defines a 'cartel provision' for the purposes of the CCA) defines cartel provisions in four categories, including a total of 16 sub-categories each of which has multiple permutations (one sub-category has at least 16 possible permutations). This style of drafting leads to very broad prohibitions on cartel conduct, and also requires a number of exceptions to exclude normal and economically efficient conduct (leading to even more complexity, and increasing compliance costs to Australian businesses).

Given the economic importance of compliance with the cartel laws, as well as the serious and potentially criminal consequences for any breach, drafting of this complexity and density should be avoided. Accordingly, the Society recommends the amendment of the definition of "cartel provision" in section 44ZZRD, to significantly simplify the extreme prolixity with which it is presently expressed, and to remove the present overreach of these provisions.

For similar reasons, the present duplication between Division 1 of Part IV, and the concept of primary boycotts in sections 4D and 45, is unnecessary. The Society recommends the removal of the primary boycott provisions in the CCA.

Another example of unnecessary complexity is that the word "likely" is defined in section 44ZZRB in a way that bears no relation to the meaning of that word in ordinary English usage. The word "likely" is defined under the cartel laws to include "a possibility that is not remote". For the reasons set out above regarding simplicity and easing compliance costs, as well as the reality that criminal cartel trials will require juries to grapple with the meaning of the cartel provisions, the Society recommends that the word "likely" be defined by reference to a formulation of "a real chance or possibility". This definition would more closely align the meaning of this term under the cartel laws with its meaning in general usage.

5.8 Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?

Recommendation 5

The Society submits that the price signalling provisions of the CCA should be repealed. These provisions neither address a market failure nor result in a public benefit, and unnecessarily raise compliance costs for entities to which these provisions apply.

The price signalling provisions were introduced as a response to concerns in some quarters regarding public statements made by participants in the banking industry.

The provisions themselves, however, are drafted in prolix and complicated language, and their application is left to the goods and services specified in the relevant Regulation, which the Society believes is an inappropriate legislative drafting method for provisions intended to address competition issues.

The Society notes that these provisions do not appear to have been used, and have certainly not been used extensively (as might be expected of provisions that addressed a present market failure). Price signalling laws do not address a market failure, and therefore are unnecessary and should be repealed.

The Society is also conscious that prohibiting the mere disclosure of information, without any concomitant anti-competitive purpose or motive on the part of the discloser, is an approach that has placed Australian competition laws out of step with other major jurisdictions and should be noted.

5.9 Do the joint venture provisions of the CCA operate effectively, and do they work to further the objectives of the CCA?

Recommendation 6

The Society recommends amendments to the joint venture defences in the CCA to:

1. align the relevant tests across both the cartel joint venture defences and section 76C by introducing a competition test to the cartel joint venture defences; and

2. remove the limitation on the type of joint ventures to which the cartel joint venture defences apply to those which produce and/or supply goods or services as their sole or dominant function.

Background

The CCA contains three joint venture defences:
1. a defence to the criminal cartel provisions;
2. a defence to the civil cartel provisions; and
3. a defence to the prohibition on making or giving effect to contracts, arrangements or understandings containing an exclusionary provision.[14]

The defences do not work as effectively as they could to further the objectives of the CCA for two reasons:

[14] Competition and Consumer Act 2010, sections 44ZZRO, 44ZZRP and 76C.

- by restricting the application of the defences to the cartel provisions to joint ventures which produce and/or supply goods or services, the defences arguably limit the growth of pro-competitive joint ventures; and
- by requiring business to meet two different legal tests to ensure protection from the application of the CCA the defences require businesses to incur additional cost and increase their regulatory burden.

Broadening the application of the cartel conduct joint venture defences

In contrast to the joint venture defence to exclusionary provisions, the cartel joint venture defences only apply where the joint venture produces and/or supplies goods or services.

It is submitted that limiting the types of joint ventures which can rely on the cartel defences is 'arbitrary and unprincipled'[15] and may have the unintentional effect of stifling innovation particularly in highly dynamic industries such as energy, health, information technology and financial services.

As emphasised by the Law Council of Australia in its submission to the Senate Economics Committee in 2008, there are legitimate joint ventures that conduct activities other than producing goods or supplying services as their sole or dominant function. It is submitted that the requirement was *'likely to prejudice innovation in a range of sectors...including financial services, information technology and resource extraction'*.[16]

In response to the concerns raised before the Senate Economics Committee about the types of joint ventures which fall within the cartel defences, Note 2 was inserted in section 44ZZRO and section 44ZZRP which states:

> "For example, if a joint venture formed for the purpose of research and development provides the results of its research and development to participants in the joint venture, it may be a joint venture for the supply of services."

The Supplementary Explanatory Memorandum states that Note 2 was included:

> "to clarify that, to the extent that a research and development joint venture is formed and proceeds to produce and supply the fruits of the relevant research and development to the parties to the joint venture, it may be producing a "service" as defined under section 4 of the TP Act, and therefore qualify under the relevant joint venture exception."[17]

While a Note will provide guidance to the proper construction of a statute, the primary focus of a Court undertaking this task (and lawyers advising parties) will be the actual wording of the provision. · Statements in a Note that certain arrangements 'may be a joint venture for the supply of services' or in the Supplementary Explanatory Memorandum are unlikely to be accorded much weight.

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[15] Brent Fisse, 'Avoidance and Denial of Liability for Cartel Conduct: Proactive Lawful Escape Routes Left Open by the Cartel Legislation', Paper presented at the Competition Law Conference, 23 May 2009, 6-7.
[16] Law Council of Australia, Correspondence to Treasury dated 21 November 2008, 4.
[17] Supplementary Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, 10.

As driving efficiency in markets is a particular focus of the Review, it is timely for this restriction to be reviewed and removed.

Alignment of joint venture defences

The joint venture defences in the CCA contain substantively different elements. In practice, this means that businesses which are involved in (or intend to become involved in) a joint venture must satisfy two independent and different defences, or have their arrangements authorised by the ACCC, if they wish to ensure that they are not in breach of the CCA.

This duplication increases uncertainty in relation to the legality of particular arrangements and may add unnecessary complexity to the structure of business transactions. It is both intellectually unsatisfactory and economically unprincipled.

The main area of inconsistency between the cartel joint venture defences and section 76C is that section 76C applies a competition test in determining whether the parties' arrangements are unlawful. The rationale advanced in the Supplementary Explanatory Memorandum for excluding a competition test from the cartel defences was that a competition test would be extremely problematic to prove before a jury and would potentially diminish the deterrent effect of the new provisions.[18] Although this may be a sound basis for removing the competition test as an element of the criminal cartel defence, it is not a legitimate basis for removing the test from the civil cartel defence. The consequence of the omission of a competition test means that the cartel defences apply even if the joint venture arrangements have the purpose, effect or likely effect of substantially lessening competition. The problem can be addressed by removing the proscriptive elements of the defence and replacing those with an SLC test.

The statements made by representatives of Treasury and the ACCC and other interested parties to the Senate Economics Committee and the Senate Economics Committee Report suggest a more relaxed approach may have been taken to the content and structure of the cartel defences because of the possibility of authorisation by the ACCC.[19] However, authorisation is a process that proceeds on the basis that the proposed arrangements contain competitive detriment and looks to public benefit to balance that detriment. It is not a substitute for an appropriately scoped and well-constructed cartel defence.

It is also inappropriate to require parties to undertake the authorisation process as a matter of course.[20] Although streamlined in the last few years, the authorisation process remains time consuming and expensive with the risk of potential publication of commercially sensitive information which a company would not otherwise place in the public domain. Importantly the ACCC has the power to impose conditions on any authorisation so parties that approach the ACCC need to be willing to negotiate the structure and content of their proposed arrangements. Further, any authorisation is granted for a limited time and can be revoked if circumstances change.

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[18] Supplementary Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, 5.
[19] Senate Economics Committee, *Inquiry into Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008*, 26 February 2009.
[20] Carolyn Oddie and Leah McKeown, 'Joint ventures and exclusionary provisions: Anti-competitive purpose or unintended effects?' (2002) 10 *Competition and Consumer Law Journal* 192, 194. See discussion of limitations of authorisation at Brent Fisse, 'Avoidance and Denial of Liability for Cartel Conduct: Proactive Lawful Escape Routes Left Open by the Cartel Legislation', Paper presented at the Competition Law Conference, 23 May 2009, 6-7.

5.10 Do the provisions of the CCA on third line forcing operate effectively and do they work to further the objectives of the CCA?

Recommendation 7

The Society considers that these provisions should be amended to remove the *per se* prohibition, as it cannot be said that the overwhelming majority of third line forcing cases result in a clear and substantial lessening of competition in an Australian market, without any compensating public benefit. Hence a competition test should apply.

The arguments for removing the 'per se' prohibition upon third line forcing

Third line forcing is constituted by breaches of sections 47(6) and (7) of the CCA.

It involves a scenario by which A forces C to buy the goods or services of B.

In the words of the Swanson Committee in 1976 said as follows:

> *" in the opinion of the Committee the practice of forcing another person's product may be justifiable in certain cases. However, the Committee is of the opinion that the practice will, in virtually all cases, have an anti-competitive effect and that it should, accordingly, continue to be capable of justification upon the ground only of public benefit."*

Other writers have expressed different views.[21] [22]

The Hilmer Report[23] recommended that the per se prohibition on third line forcing should be removed and that it should instead be subject to the "substantial lessening of competition" test.[24] The Hilmer Report was not accepted, but the addition of section 47(10A) allowed the commission to clear the conduct through the Notification process in Part VII Division 2.

For more than 20 years, contemporary economic theory has recognised that third line forcing conduct is often pro-competitive, and that the situations in which it is anti-competitive are relatively rare.

In 1993, the Hilmer Review recommended that third line forcing be subject to a competition test, rather than being prohibited per se. The Hilmer Report noted that "the basis for a

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[21] A Hurley "The Castlemaine Tooheys Case and the Interpretation of the "Third Line Forcing" provisions (1987) 61 ALJR 415

[22] RI McEwin, Third Line Forcing in Australia (1994) 22 ABLR 114; J Lipton, "Third Line Forcing in Australia : Current Problems and Future Directions (1996) 4 TPLJ .Lipton comments (at 78) that "many instances of third line forcing lead to no damage to competition in a market and that such conduct may occasionally lead to benefits in a market."

[23] Report by the Independent Committee of Inquiry (Chair: FG Hilmer) National Competition Policy Review (1993) AGPS, Canberra.

[24] See pxxiii and p 52 and 53.

distinction between third-line forcing and other forms of tying is not clear",[25] and concluded that "the variety of problems and anomalies arising from the divergent treatment of third-line forcing and other forms of tying" meant that third-line forcing should only be prohibited if it substantially lessens competition.[26]

This recommendation was repeated in the 2003 Dawson Report. In echoing the reasoning of the Hilmer Report, the Dawson Report noted that since the introduction of a prohibition on third-line forcing in 1976, "extensive reforms have increased competition pressures in Australian markets",[27] negating the need for a per se prohibition on third-line forcing. In addition, while there is a notification process for third-line forcing, the Dawson Report considered that it imposed a "mostly unnecessary" expense for both the party notifying the conduct and the ACCC, given that notifications are rarely opposed.[28]

These long-standing recommendations represent the clear consensus of both lawyers and economists. The Dawson Report itself noted that, of the 212 submissions made to the review, not a single submission supported the retention of a per se prohibition upon third line forcing.[29]

Whilst some contrary views were expressed, the Society considers that an amendment to remove the per se prohibition on third-line forcing remains appropriate, and is long overdue.

There is no analogous per se prohibition on third-line forcing in the competition laws of the USA, Europe, New Zealand, or the competition laws of any other country to our knowledge.

The Society considers that third-line forcing should not be prohibited per se as it cannot be said that the overwhelming majority of third line forcing cases result in a clear and substantial lessening of competition in an Australian market (without any compensating public benefit).

5.11 Do the provisions of the CCA on resale price maintenance operate effectively, and do they work to further the objectives of the CCA?

Recommendation 8

The Society considers that sections 48 and 96 do not require amendment.

Resale Price Maintenance

Resale price maintenance is constituted by breaches of Part IV and Part VIII of the CCA , notably sections 48 in Part IV and section 96 in Part VIII.

Section 48: A corporation or other person shall not engage in the practice of resale price maintenance.

Section 96: explains how the offence is committed.

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[25] Report of the National Competition Policy Review (the Hilmer Report), 25 August 1993, at page 51.
[26] The Hilmer Report, at page 52.
[27] Review of the Competition Provisions of the Trade Practices Act (the Dawson Report), January 2003, at page 129.
[28] The Dawson Report, at page 129.
[29] The Dawson Report, at page 125.

Dr Warren Pengilley, in his article " Resale Price Maintenance: An Overview of the Per Se ban in light of recent Court Observations" writes a compelling article distinguishing the relevant principles in the United States, and summarises, his thoughts at the conclusion as follows:

1. "The US Supreme Court decision in *Leegin* is hardly an earthshaking victory for those wishing to make resale price maintenance subject to a competition test. It is a 5:4 decision. United States Supreme Court Justices, like all other commentators in relation to resale price maintenance, are people whose individual views can reasonably differ.

   The story may have been different if the Supreme Court decision in *Leegin* had been the result of a resounding 9:0 verdict.

   The law has changed in the United States. But elsewhere the decision is not a conclusion reached by the blast of the umpire's whistles but merely one heralding in further debate.

2. "The impact of the decision in the United States is not as great as those observers in other jurisdictions might be inclined to believe. Resale price maintenance, as Australians would understand it, has been legal in America since 1919 under the *Colgate doctrine* which permits pre-announced terms of dealing with "cut-off" penalties for dealer non-compliance. The *Leegin* decision merely extends this basic legality to agreements between suppliers and dealers. The step is not all that great. On one view, *Leegin* can be justified in that it equates all forms of resale price maintenance and illegalizes not just some, as was previously the position. The writer believes that it is the *Colgate doctrine* which should be changed and not the *Dr Miles doctrine.* Be that as it may, the circumstances in which resale price maintenance was evaluated in the United States in *Leegin* are quite different from the circumstances of any Australian evaluation. It is simply wrong to conclude, as the writer has heard a number of Australians conclude, that : ' Resale price maintenance has been illegal in the United States. It is now legal' and ask 'Why should not we do the same?"

3. "The goods and services in relation to which resale price maintenance impacts in Australia are all encompassing. Most are consumer goods. Although statistics are not reliably available, it seems that resale price maintenance, if legalized would have a significant impact on the economy and that its use would be widespread.

4. "The concentration of Australian industry is such that this gives rise to those potential detriments which those opposing liberalization of resale price maintenance laws fear. The concentration of Australian industry is greater than official statistics would indicate because market division and market segmentation make real concentration greater than apparent concentration. Australian industry structure makes it highly likely that a liberalisation of resale price maintenance laws would lead to increased prices, reduced competition and increased cartelisation, (at lease in tacit oligopolistic coordination sense). The potential wrongful use of market power in particular areas is significant.

5. "The most consistently used argument to justify resale price maintenance is the 'free rider' argument. This argument has many shortcomings, these primarily being that resale price maintenance cannot guarantee the provision of services and, in any event, there are other ways of doing this. In the only empirical 'before' and 'after' study of which the writer is aware, the conclusion reached was that service overall improved with the illegalization of resale prince maintenance because of the additional competition that such illegalisation brought.

6. "It is believe that the appropriate test for *per se* banning a practice is the Kaysen and Turner third test, this being:

"The practice is sometimes harmful, sometimes neutral and sometimes beneficial, but the aggregate of harm in the situations in which it is harmful far outweighs the aggregate of benefit in situations in which it makes a beneficial contribution to the working of the market".

The conclusion of this article is that a *per se* ban on resale price maintenance is justified under this test.

7. "Authorisation is available for resale price maintenance if public benefit can be demonstrated. This is a safety valve for those who assert the benefits of resale price maintenance although it's not anticipated that many applications, if made, are likely to be successful.

8. "There is no indication that consumer organisations advocate a liberalisation of resale price maintenance laws. Commerce has accepted, and readily adapted to the per se ban. There is no pressure, therefore, from any of the usual sources for a change to the legislation.

9. "Simply because it is *per se* banned, resale price maintenance does not deserve 'sin weighting' in pecuniary penalty assessments. The *per se* ban is a rule of evidence, not a 'sin' classification for penalty purposes. It is justified on this basis on grounds of litigation simplicity.

10. "Questions of the effect of conduct, and market assessments, necessarily relevant when competition issues are involved, would make the law very hard indeed for a wronged retailer to enforce by private action. Though a practice should not be banned on the grounds of administrative convenience or litigation efficiency, these are commendable virtues when there are no strong countervailing arguments for liberalising the ban on a practice. "

5.12 Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?

Recommendation 9

The Society makes the following recommendations:

1.To amend the CCA so that persons or bodies, whose conduct has the purpose of making an arrangement or understanding pursuant to which the conduct of one or more corporations who are or could be competitors in economic activity, by itself or in conjunction with other conduct, infringes the provisions of CCA, are deemed participants to whom the CCA applies. Specifically, it expands "participants" beyond traditional horizontal and vertical relationships to include those who make arrangements or understandings with corporations to engage in conduct which would breach the CCA. Our recommendation is to extend the secondary boycott provisions under the CCA to make that conduct unlawful.

2. To ensure that the ACCC is adequately funded so that it is able to effectively acquire adequate resources to investigate and where appropriate, prosecute and seek after remedies available under the CCA to stamp out such conduct.

Background

The Society acknowledges that there may be a view that these proposed amendments may be considered as industrial law issues. However, the Society considers that the better view is that the proposed amendments are naturally aligned with, and should sit alongside, the secondary boycott provisions under the CCA. The background directly affects the ability of Australian businesses to operate competitively due to arrangements that impact on their cost base for labour and the need to protect against such practices.

The recommendation seeks to extend the operation of secondary boycotts to participation of registered organisations. The extension already occurs in respect of registered organisations of employees in the boycott provisions of sections 45D, 45DA(1) and 45DB(1) of the CCA. For example, to include the circumstance under which an employer organisation enters into an arrangement with a head contractor to dictate the terms between the head contractor and the subcontractor or to include conduct in which a trade union seeks to gain coverage for all employees by whomever employed, for a building site or for a project.

This proposal recognises that there is a fundamental right of employees to negotiate wages and conditions with their employers and to form and be members of a trade union to represent them in that process.

However when trade unions seek to effectively control sites or projects under threat (expressed or implied) of industrial action, the resultant "arrangement or understanding" between the trade union and relevant corporation creates an anti-competitive position where a subcontractor wishing to bid for work on that site or for that project cannot do so without paying its employees higher salaries or wages than it might otherwise be paying thus increasing costs for the site or project. These arrangements have an adverse impact on the Australian economy. The Australian Government has announced $125 billion in projects relevant to infrastructure in its recent budget and if these are not to be adversely affected by cost structures driven by such arrangements or understandings then they should be treated in the same way as other forms of boycotts.

The proposal would have the effect of extending the operation of this section to cover employer organisations and to other organisations who or which are part of an arrangement or understanding pursuant to which conduct occurs which, by itself or in conjunction with other conduct, infringes the boycott provisions or the exclusive dealing provisions of CCA.

Example

A company engages an employer organisation to prepare terms and conditions for subcontractors. Although the terms and conditions may be expressed to be guiding documents, they are, in fact, compulsory to the extent that a person who does not abide by those terms and conditions in a tender or other process will not be capable of being awarded a particular contract. To ensure this requirement is properly understood, the employer organisation may hold clandestine meetings with the sub-contractors to make it clear that unless they adhere to the terms and conditions the contract will not be awarded. The document may be titled "Indicative Key Terms of Employment", but are understood to be, and are in fact, binding for an entire project.

This conduct would have the effect of limiting small business, which may otherwise pay lower rates than set under the indicative terms and conditions document, and creates a barrier to entry into the market for goods or services offered by that small business. This conduct also locks in pay rates for a site or a project higher than might apply where small business provides goods or services at a lesser cost to the head contractor. Higher rates make the project more

costly and require a higher cost to goods, services or materials produced from the project to gain a return on investment and therefore add to inflationary pressures in Australia and render Australia less competitive in international markets.

It is noted that in April 2014 the Australian Building and Construction Commission (ABCC) published an advance release of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014*, which specifically provides for (among other things):

- code covered entities must comply with the CCA to the extent that it relates to tendering for or undertaking building work (for example, a code covered entity must not breach the cartel and anti-competitive provisions of that CCA: section 9(2)); and

- a code covered entity must, in relation to building work, report to the ABCC any request or demand by a building association that the code covered entity engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the CCA. The report must be made as soon as practicable, but not later than 24 hours after the relevant request or demand is made (section 16(4)). A note to the subsection further highlights that subsection 9(2) of the code of practice requires code covered entities to comply with the CCA.

A code-covered entity is defined as a contract or building industry participant who submits an expression of interest or tender for Commonwealth funded building work on or after the date the code of practice commences.

It is submitted that this is a positive start to requiring entities to adhere to the CCA where they may not otherwise be caught by the CCA. However, it is our submission that "participant" under the CCA must be varied so that these obligations extend to all "participants" including those seeking or being awarded building contracts (whether by way of tender process or other appointment process) for State government and private sector building work, and employer and employee organisations if their conduct would have the effect of imposing boycott conduct on other entities.

The point follows on from the Cole Commission of Inquiry findings where it stated:

> Cole Commission: from Final Report 2003, Volume 1, Summary
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> Third, there needs to be an attitudinal change of participants regarding management of building and construction projects. It is the function of head contractors and major subcontractors to manage their businesses and to assume control of the processes necessary to achieve productive and successful outcomes for the benefit, not only of their companies and employees but also for the industry and the Australian economy as a whole. Head contractors, to a significant extent, and in critical areas have surrendered management control to the unions. It is the function of unions to represent, advance and protect the interests of their members in a variety of ways. It is not a function of unions to manage or control the operation of building and construction projects. The benefits to the industry and the Australian economy from improved productivity flowing from this cultural change are very significant.
>
> ...
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> The unwillingness and incapacity of head contractors to respond to unlawful industrial conduct causing them loss is due, principally, to two structural factors. The first relates to their desire to be long-term participants in the industry. To be so, having regard to the competitive nature of the industry and the low profit outcomes, requires them not only to address the short-term focus on profitability of a given project, but to consider the long-term relationship with union participants. They know that unless there is significant acceptance of union demands, there will

> be continuous industrial disruption on other and future projects. Clients, including governments, who are major participants in the industry, will not select contractors who are unable to deliver projects on time and within budget. The prospect of industrial disruption is a disqualifying feature for the attaining of future work, and thus being a long-term participant in the industry. This is well understood both by the contractors, and by the unions. It places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise. Each of the unions and the contractors know this and factors this circumstance into their relationships.

The difficulty with these points is that they assumes large construction companies or resource companies act in the national interest. This may not always occur hence our recommendations for reform.

6. Chapter 6 – Administration of competition policy

6.1 Key Question: Are competition related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

Recommendation 10

The Society recommends that:

1. Additional funds should be provided to the ACCC, specifically for the purpose of additional enforcement activities. Given the recent reduction in the ACCC's operating budget, without any reduction in the 'mandatory' statutory activities that the ACCC must complete, the Society is concerned that the ACCC's enforcement activities will naturally be reduced, which is not conducive to encouraging competition in the Australian economy; and

2. For consistency and reducing red tape, the ACCC should have the power over enforcement in all aspects of the Australian Consumer Law.

The Society has been and continues to be concerned about the reduction of the ACCC's operating budget. The Society is concerned this may have an adverse effect for the industry and may limit the ACCC's ability to enforce competition laws.

Despite reductions in the ACCC's budget, the Society is conscious that the ACCC's functions (including a variety of monitoring, reporting and inquiry functions under various pieces of legislation) remain unchanged. In these circumstances, the Society is concerned that the activities of the ACCC that may be regarded as 'discretionary', in the sense of not being required to be conducted under legislation, will be curtailed. The Society is particularly concerned by the prospect of reduced enforcement activities, which the Society believes is counterproductive to encouraging competition in the Australian economy.

The Society submits that additional funds should be provided to the ACCC specifically for the purpose of additional enforcement activities.

The Society also considers that the ACCC should have the power over enforcement in all aspects of the Australian Consumer Law. The present approach requires two Government authorities to be involved with the Australian Securities and Investments Commission

enforcing consumer laws with respect to financial services and the ACCC for all other areas. The Society considers this is duplicative and inefficient. We note that the ACCC, as a single regulator for consumer laws, will reduce red tape, increase efficiency and reduce costs by removing unnecessary duplication of resources and expertise.