

# COMPETITION POLICY REVIEW

## Supplementary Submission

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### 1. This Supplementary Submission

We welcome the opportunity to make this Supplementary Submission to the Competition Policy Review (**CPR**). It complements our Submission to the Review Panel on 10 June 2014 on the cartel-related provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**).<sup>1</sup>

This Supplementary Submission is concerned with the recommendation of the CPR Draft Report regarding the concept of ‘concerted practice’ (pp 6, 42, 229). We agree with the position expressed in the CPR Draft Report that the provisions relating to unilateral disclosure of competitively sensitive information in Division 1A of the CCA are unsatisfactory and should be repealed (p 230). However in our view the recommendation in the CPR Draft Report relating to the concept of concerted practice raises several issues that require further consideration:

- The definition of a ‘concerted practice’ in the CPR Draft Report is both under-inclusive and over-inclusive. It does not accord with the interpretation of ‘concerted practice’ in Article 101 of the EU Treaty. An alternative definition is proposed in Section 2 below. Such a definition is needed in order to give adequate guidance to the courts, the ACCC and parties when they interpret and apply the redrafted provisions of Division 1 of Part IV of the CCA.
- It is questionable to limit the application of the concept of concerted practice to cases of alleged substantial lessening of competition (**SLC**) under s 45 of the CCA (see Draft Report at pp 229-230). Under EU competition law, the concept

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<sup>1</sup> Available at: [http://competitionpolicyreview.gov.au/files/2014/06/BeatonWells\\_and\\_Fisse.pdf](http://competitionpolicyreview.gov.au/files/2014/06/BeatonWells_and_Fisse.pdf)

applies to per se civil liability for cartel conduct under the ‘object’ limb of Article 101(1). Consideration should be given to extending the application of the concept to per se civil cartel prohibitions (currently under ss 44ZZRJ and 44ZZRK of the CCA) subject to the provisions of adequate safeguards against over-reach (see Section 3 below)

## **2. Definition of ‘concerted practice’**

The CPR Draft Report recommends that the price signalling provisions in Division 1A of Part IV of the CCA removed and replaced by extending s 45 to concerted practices that have the purpose, effect or likely effect of substantially lessening competition (pp 6, 42, 229-230). The recommendation as regards the adoption of the concept of ‘concerted practice’ is supported and explained by these observations in the Draft Report:

The Panel considers that anti-competitive price signalling does not need its own separate Division in the CCA; rather, price signalling can be addressed by extending section 45 to cover concerted practices that have the purpose, or would have or be likely to have the effect, of substantially lessening competition. A concerted practice is a regular practice undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange. (p 42) ...

The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an ‘understanding’ within the meaning of section 45, and thereby not be regulated by section 45. Whether that concern is realistic might be debated (as it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis). Nevertheless, that concern can be readily addressed by expanding section 45 so that it applies to contracts, arrangements, understandings and concerted practices, where a concerted practice is a regular and deliberate activity undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange. (p 229)

The definition above of a ‘concerted practice’ as a ‘regular and deliberate activity undertaken by two or more firms’ is both under-inclusive and over-inclusive. It does not accord with the interpretation of ‘concerted practice’ in Article 101 of the EU Treaty. In our view another definition is needed.

Under-reach arises because, under Article 101, an activity may be a concerted practice without necessarily being a ‘regular’ activity. For instance, a one-off episode of coordination by competitors can be sufficient to amount to a concerted practice. A leading

example is *T-Mobile Netherlands and Others* [2009] 5 CMLR 11. Representatives of the five mobile telephone networks held a meeting on 13 June 2001. At that meeting they discussed the reduction of their standard dealer commissions for postpaid subscriptions. The Court of Justice held that a meeting on a single occasion between competitors may, in principle, be a sufficient basis for a concerted practice. It is difficult to see a compelling policy justification for excluding liability in a case such as *T-Mobile*.

Over-reach arises because the definition of a ‘concerted practice’ given in the Draft Report refers merely to a regular and deliberate activity and fails to specify that the activity must be one of coordinated conduct geared to avoiding competition. The fundamental precept that needs to be recognised is *anti-competitive coordination* of conduct by competitors. Unless that precept is clearly expressed by the law, ‘mere’ parallel or interdependent conduct by competitors is likely to be caught.

One possible approach would be to leave the concept of ‘concerted practice’ undefined and to provide guidance in the Explanatory Memorandum to the effect that the term ‘concerted practice’ is to be interpreted by taking into account EU law and practice. In our view, such an approach would be nebulous and should be rejected for that reason alone. Another possible concern is that the concept of concerted practice in the EU entails casting a persuasive burden of proof in the defendant. In order to establish a ‘concerted practice’ the plaintiff needs to show the following three elements:<sup>2</sup>

- (1) some form of contact between competitors (which may be indirect or weak as, for example, contact via a publicly announced price increase)
- (2) a meeting of minds or consensus in relation to cooperation which may be inferred from mere receipt of information and
- (3) a relationship of cause and effect between the concertation and the subsequent market conduct.

In ‘hard-core horizontal cases’, the causal relationship is generally presumed once contact and consensus are established and rebuttal of the presumption is allowed only where the firm in question proves that the concertation did not have ‘any influence whatsoever on its own conduct on the market’.<sup>3</sup> On one view, casting a persuasive burden of proof on a defendant in Australia should be the subject of a specific legislative mandate, not common law creation.

A preferable approach, it is submitted, would be to add an additional specific prohibition in s 44ZZRJ (or the equivalent under a redrafted CCA) against a corporation engaging in a

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<sup>2</sup> See J Faull & A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014), [3.131]-[3.135].

<sup>3</sup> *Huls AG v Commission of the European Communities* (C-199/92) [1999] ECR I-4287, [167].

concerted practice and to define the concept of ‘concerted practice’ along lines comparable to those suggested in our Submission of 10 June 2014:

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

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

This proposal seeks to adapt the EU concept of a concerted practice under Art 101(1) of the EU Treaty. The following explanatory notes amplify what is proposed:

- The additional prohibition proposed is a civil per se prohibition defined in terms of a corporation engaging in a concerted practice. It would not make sense to amend the existing prohibitions under s 44ZZRJ or s 45(2) by inserting the wording ‘or engage in a concerted practice’ after the wording that refers to making a contract or arrangement or arriving at an understanding. A concerted practice is a form of conduct, not a ‘provision’ in a contract, arrangement or understanding. For the same reason it would not make sense to extend the prohibitions against giving effect to a provision under s 44ZZRK and s 45(2) to concerted practices.
- On one possible view it would be unnecessary to extend s 45 to include the concept of a concerted practice given that it is sufficient under the proposed definition of a concerted practice that the defendant corporation acted for *the purpose of substantially lessening competition between the defendant and another competitor*. Another approach would be to include a new prohibition in s 45 against concerted practices that have *the purpose, effect or likely effect of substantially lessening competition in a market*. That approach would be consistent with the SLC prohibition in s 45(2). It would also be consistent with Article 101(1) of the EU Treaty.
- The concept of a ‘cartel provision’ is not used in the approach proposed. As mentioned above, a concerted practice is a form of conduct and does not necessarily contain any ‘provision’ in the sense in which that concept is used in the CCA. It is unnecessary in our view to specify and define various particular kinds of cartel conduct such as price fixing, market allocation or bid rigging; the basic harm of anti-competitive coordination of the terms or conditions of acquisition or supply is covered by the indicative wording set out above. This approach avoids the complexity and arbitrary scope of the definition of different

particular kinds of cartel conduct in s 44ZZRD.<sup>4</sup> If it is considered desirable to define particular kinds of cartel conduct then the provisions set out above could be expanded by means of inclusive definitions.<sup>5</sup> A competition condition is incorporated in those provisions.

- The indicative wording above seeks to define the concept of concerted practice more closely than Art 101(1) while incorporating the familiar CCA concepts of 'purpose', 'substantial', 'lessening' and 'competition'.
- The competition test in the proposed definition is not a SLC test but focuses on whether or not there is a purpose of coordinating terms or conditions and thereby reducing competition between two or more competitors.
- The concept of 'coordination' is new to the CCA but is a commonplace term that has been used and applied in numerous cases on the meaning and application of the term 'concerted practice' in Art 101(1).<sup>6</sup>
- The purpose element proposed relates to the purpose of the corporate defendant, not the purpose of a provision; the aim is to avoid the difficulties of interpretation and application that infect the concept of 'purpose of a provision'.<sup>7</sup>
- The reference to a 'person' in the wording suggested above includes the plural (*Acts Interpretation Act 1901* (Cth) s 23), which means that the definition of a concerted practice will apply to conduct that involves more than one competitor, consistent with the competition condition in Division 1 and s 45(2).
- An applicant or plaintiff would carry both the evidentiary burden of proof and the persuasive burden of proof when seeking to establish a concerted practice.
- The prohibition against engaging in a concerted practice should be subject to the same exceptions and exemptions that apply to ss 44ZZRJ and 45(2). The exceptions or exemptions should include exceptions for collaborative activities and supply agreements between competitors as discussed below. The avenue of authorisation by the ACCC should also be available.
- It is debatable whether or not cartel-related prohibitions should be limited to restrictions on the acquisition or supply of goods or services in a market in

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<sup>4</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011), ch 4.

<sup>5</sup> See, for example, the approach taken in Art 101(1) of the EU Treaty which refers non-exhaustively but 'in particular' to conduct falling within the established categories of 'hard core' cartels.

<sup>6</sup> See eg *Imperial Chemical Industries Ltd* [1972] ECR 619 at [64].

<sup>7</sup> See *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, 347–52 [859]–[887] (Dowsett & Lander JJ), (2009) 262 ALR 160, 169–71 [18]–[26] (Mansfield J); C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) pp. 91-92.

Australia.<sup>8</sup> If the recommendation in the Draft Report (at p. 223) that such a territorial limitation should apply is adopted then the indicative wording set out above could be amended to add the term ‘in a market in Australia’ at the end of clause (b) of the proposed definition of a concerted practice.

The proposed broadening of the definition of collusion in this way in the CCA would not have the benefit of the efficiencies defence under Art 101(3) or the rule of reason test in the US which prevents the over-reach of the cartel prohibitions in those jurisdictions. However, other proposed exceptions discussed in the Draft Report would guard against over-reach, namely a new collaborative activity exception (see at p 224),<sup>9</sup> a new supply agreements exception (see at pp 224-5), and ultimately the avenue of authorisation (see at p 249).

The suggestion has been made by some commentators that the concept of ‘acting in concert’ as used in s 45D(1) of the CCA would be preferable to that of ‘concerted practice’. That suggestion lacks force. One difficulty is that the concept of acting in concert is not well defined<sup>10</sup> and could be interpreted to require an element of commitment that is the same or much the same as the element of commitment that has been read into the concept of an ‘understanding’. It would be futile to go back to square one.

### **3. Should the concept of ‘concerted practice be limited to SLC cases under s 45?’**

The Draft Report proposes that s 45 of the CCA be amended to apply to concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market. The Draft Report states that:

Ensuring that section 45 of the CCA can apply to instances of ‘concerted practices’ that substantially lessen competition will meet the policy intent of the price signalling provisions. This would remove the need for a separate division on price signalling within the CCA and is

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<sup>8</sup> As illustrated by the implications of *Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157.

<sup>9</sup> See Commerce (Cartels and Other Matters) Amendment Bill 2011, proposed s 31, available at: See <http://www.med.govt.nz/business/competition-policy/cartel-criminalisation>. See also the revised draft proposed guidelines prepared by the Commerce Commission, at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaborationguidelines/>.

<sup>10</sup> See *Australasian Meat Industry Employees’ Union v Meat & Allied Trades Federation of Australia* (1991) 32 FCR 318; *J-Corp Pty Ltd v Australasian Builders Labourers Federated Union of Workers (WA Branch)* (1992) 44 IR 264; *Qantas Airways Ltd v Transport Workers’ Union of Australia* [2011] FCA 470. See also C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) p. 62 where the view is expressed that the concept of ‘acting in concert’ is narrower than that of an ‘understanding’. It may also be argued that to export the concept of ‘acting in concert’ from s 45D and similar provisions to the cartel prohibitions would be to wrench the concept out of its industrial relations context.

consistent with simplifying the CCA and ensuring that its provisions apply generally throughout the economy. (p 229)

However, the statement above is questionable given the following considerations:

- Under EU competition law, the concept of ‘concerted practice’ applies not only where the practice has an anti-competitive effect under the effect limb of Article 101(1) but also where per se civil liability arises under the ‘object’ limb of Article 101(1). See the discussion below.
- A SLC test does not apply to the prohibition under s 44ZZW of the CCA against unilateral private disclosure to a competitor of pricing or other competitively sensitive information. It is therefore not true to say that extending s 45 to concerted practices that substantially lessen competition ‘will meet the policy intent of the price signalling provisions’.
- The debate about the commitment element of the concept of understanding under the CCA has arisen primarily in the context of alleged per se liability for price fixing and other cartel conduct. The problem that arose in a price fixing case such as *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 will remain unaddressed under ss 44ZZRJ and 44ZZRK if liability requires proof of a contract, arrangement or understanding and if the concept of concerted practice applies only under s 45. The cases that led to the enactment of Division 1A and to the proposed introduction of the concept of concerted practice were not SLC cases.

It is important to understand that the concept of concerted practice applies to per se liability for cartel conduct under the restriction by object limb of Article 101(1) of the EU Treaty. Restrictions by object are those that ‘by their very nature have the potential to restrict competition within the meaning of Article 10 (1)’.<sup>11</sup> Examples of restrictions by object include price fixing and market allocation. Once a restriction by object has been shown, there is no need to show an anticompetitive effect.<sup>12</sup>

The main concern about extending cartel prohibitions under the CCA to cover concerted practices is that no provision is made for an efficiencies or rule of reason exception of the kind that exists under Article 101(3) of the EU Treaty and s 1 of the Sherman Act. However, the risk of over-reach would be low if:

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<sup>11</sup> See J Faull & A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014), [3.184].

<sup>12</sup> See J Faull & A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014), [3.184], [3.209].

- the cartel offences under ss 44ZZRF and 44ZZRG continue to require a contract, arrangement or understanding and the additional prohibition of concerted practices attracts civil liability only;
- the concept of ‘concerted practice’ is defined as suggested above to require that the conduct be engaged in by a corporation for the purpose of coordinating the terms or conditions of supply or acquisition with a competitor in order to substantially lessen competition between them — that purpose element limits liability to a greater extent than the object element under Article 101(1) ( ‘object’ does not mean ‘objective’, ‘purpose’, ‘intent’, or ‘goal’ but relates to the propensity of the conduct);
- there are new exceptions or defences for collaborative activities and supply agreements between competitors and the new exceptions are drafted along the same lines as under the amendments to the *Commerce Act 1986* (NZ) now before the NZ Parliament; and
- if further protection against over-reach is considered necessary, provision can be made for the use of block exemptions of kind used in the EU (see Draft Report at pp. 251-252).

A further question is whether or not the concepts of ‘contract, arrangement or understanding’ should be repealed in the context of civil liability under ss 44ZZRJ, 44ZZRK and 45(2). The relevant spectrum of collusive or coordinated conduct could be covered by the concepts of ‘agreement’ and ‘concerted practice’, consistent with the approach taken in the EU and US.<sup>13</sup> If the concepts of ‘agreement’ and ‘concerted practice’ are used it would seem redundant and prolix to retain the filigree concepts of ‘contract, arrangement or understanding’ (especially as the concepts of arrangement and understanding are poorly distinguished). Retention of those concepts would also seem out of step with the position taken in the Draft Report that the cartel related provisions of the CCA should be simplified (see at p. 6). Consequential amendments to ss 44ZZRJ, 44ZZRK and 45(2) would be needed (including adaptation of the provisions relating to the SLC test in s 45(2) where necessary to accommodate the prohibition of concerted practices that have the purpose, effect or likely effect of substantially lessening

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<sup>13</sup> In the EU, Art 101(1) refers to ‘agreements between undertakings, decisions by associations of undertakings and concerted practices’. In the US the concepts of ‘contract, combination in the form of a trust or otherwise or conspiracy’ in s 1 of the *Sherman Act* are all equated in practice with an agreement. See R Posner, *Antitrust Law* (2<sup>nd</sup> ed, 2001) p. 262; P Areeda & H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2<sup>nd</sup> ed, 2001) [1403]. Traditional formulations of an ‘agreement’ for this purpose are principally a ‘unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement’ (*Interstate Circuit Inc v US* 306 US 208, 810 (1939)) and a ‘conscious commitment to a common scheme’ (*Monsanto Co v Spray-Rite Service Corp* 465 US 752, 768 (1984)).

competition). Those amendments could readily be made by the Expert Legal Panel when redrafting the CCA.

As indicated in Section 2 above, the concept of a concerted practice should be deployed in the context of civil liability, not criminal liability. For the cartel offences under ss 44ZZRF and 44ZZRG consideration should be given to replacing the unholy trinity of ‘contract, arrangement or understanding’ with the concept of an ‘agreement’ in the sense in which that concept is used in the US and EU.<sup>14</sup> That approach would be simpler and would help to differentiate criminal from civil cartel liability to a greater extent than under Division 1 of Part IV of the CCA at present.<sup>15</sup>

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<sup>14</sup> See n. 13 above.

<sup>15</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) section 2.4.3.2.