

# THE AUSTRALIAN COMPETITION POLICY REVIEW FINAL REPORT 2015

## SIRENS' CALL OR LYRE OF ORPHEUS?

### NZ Competition Law & Policy Institute

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## I Introduction

1. The *Competition Policy Review Final Report* (March 2015) (Harper Report)<sup>1</sup> makes many significant recommendations on Australian competition policy, law and institutions. Are they reasonably fit for purpose?<sup>2</sup>
2. The Competition Policy Review (Harper Review) is a major milestone in Australian competition law. It has been heralded by the Government as a so-called 'root and branch' review that will help to spur the economy.<sup>3</sup> The last comprehensive review was undertaken in 1993 (the Hilmer Review).<sup>4</sup> The Dawson Review in 2003 was selective.<sup>5</sup> Piecemeal amendments to the Competition and Consumer Act 2010 (CCA) have since proliferated.<sup>6</sup> Decisions of the High Court of Australia on the CCA are rare and some have raised more issues than they have resolved.<sup>7</sup>
3. Before the change in leadership of the Coalition Government in mid-September 2015, the Government's formal response to the Harper Report was expected in October

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<sup>1</sup> Available at <http://competitionpolicyreview.gov.au/>.

<sup>2</sup> The criterion of fitness for purpose is used in the Harper Report itself at 23.

<sup>3</sup> *The Coalition's Policy for Small Business* (August 2013) 2. A very short time frame was allowed for this broad review.

<sup>4</sup> *National Competition Policy* (1993), at <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf>

<sup>5</sup> *Review of the Competition Provisions of the Trade Practices Act* (2003), at <http://tpareview.treasury.gov.au/content/report.asp>. For largely critical commentaries see 'The Dawson Review' (2003) 9(1) UNSW LJ Forum.

<sup>6</sup> See eg Competition and Consumer Amendment Act (No 1) 2011 (No 2) 2011; Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009; Trade Practices Legislation Amendment Act (No 1) 2006.

<sup>7</sup> See eg *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563; *Rural Press Ltd v ACCC* (2003) 216 CLR 53; K McMahon, 'Competition Law, Adjudication and the High Court' (2006) 30 Melb Univ LR 782.

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2015.<sup>8</sup> Negotiations with the States and Territories were planned to start then (the intergovernmental Conduct Code Agreement 1995 obliges the Government to consult with, and seek the approval of, the States and Territories on proposed changes to Part IV of the CCA). The Harper Report recommends that exposure draft legislation be prepared within 12 months of accepting the recommendations in consultation with States and Territories and that finalised amendments be put to the States and Territories for their approval within two years.<sup>9</sup>

4. The future of the Harper Report recommendations is uncertain. First, the recommendation that an effects test be introduced in s 46 was attacked by the Business Council of Australia and others and initially the Government seemed to back away from that recommendation.<sup>10</sup> However, the new Prime Minister (Malcolm Turnbull) appears to support the introduction of an effects test.<sup>11</sup> Secondly, inducing the States and Territories to approve the Harper recommendations for changes to Part IV of the CCA is unlikely to be a fast or smooth process. Unlike the position at the time of the Hilmer Report in 1993, much work has yet to be done to induce the agreement of the States and Territories.<sup>12</sup>
5. The review to follow is limited to competition law issues and is selective. The areas discussed are:
  - Competition law simplification (Section II)
  - Misuse of market power (Section III)
  - The substantial lessening of competition test (SLC test) (Section IV)
  - Cartels (Section V)
  - Mergers (Section VI)
  - Intellectual property (IP) and competition law (Section VII)

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<sup>8</sup> See 'Bruce Billson strikes back at BCA over effects test backlash', AFR 4 August 2015. The new Treasurer, Scott Morrison, is reported as saying that the Government's response will now be provided 'hopefully before Christmas', AFT 17 Oct 2015.

<sup>9</sup> Harper Report, 29.3.

<sup>10</sup> 'Effects test debate is too theological, Abbott says', AFR 9 Sept 2015, 9; 'Cabinet split over business crackdown', AFR 1 Sept 2015, 1. Alan Fels, a former Chairman of the ACCC, believes the Harper reforms are likely to be dead if the effects test recommendation is rejected: 'Harper review blocked by government's incapacity for reform', AFR 4 Sept 2015, 39.

<sup>11</sup> 'Malcolm Turnbull woos nationals with competition backflip, up to \$4b deal', AFR 16 Sept 2015.

<sup>12</sup> See 'Harris wants action on Harper review', AFR 22 Sept 2015, 7; P Harris, 'Reviving Harper', Australian Competition Policy Summit 2015, Sydney, 22 Sept 2015, at: <http://www.pc.gov.au/news-media/speeches/competition-policy-summit-2015>.

- Remedies, sanctions and enforcement (Section VIII).
6. Other areas of competition law are addressed in the Harper Report. They include: exclusive dealing and third line forcing,<sup>13</sup> access,<sup>14</sup> crown liability<sup>15</sup> and authorisation.<sup>16</sup> Regrettably, the Report does not seek to review corporate liability or ancillary liability.<sup>17</sup>
7. Much of the Harper Report is concerned with competition policy.<sup>18</sup> The areas covered include:
- Regulatory restrictions
  - Infrastructure markets
  - Human services
  - Competitive neutrality
  - Government procurement and other commercial arrangements
  - Key retail markets (supermarkets, fuel retailing)
  - Informed choice.

The discussion of competition policy in the Harper Report is beyond the scope of the present review.

8. The Report also makes recommendations on institutions and governance. Competition and consumer functions should be retained within the single agency of the ACCC (Recommendation 49). Access and pricing functions should be transferred from the ACCC and the National Competition Council (NCC) and be undertaken within a single national Access and Pricing Regulator (Recommendation 50). The NCC should be dissolved and an Australian Council for Competition Policy (ACCP) established, with a mandate to provide leadership and drive implementation of the competition policy agenda (Recommendations 43-47). Two specific functions of the ACCP would be to undertake advocacy and to conduct market studies (Recommendations 44-45).

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<sup>13</sup> Recommendations 33, 32.

<sup>14</sup> Recommendation 42.

<sup>15</sup> Recommendation 24 (ss 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) in so far as they undertake activity in trade or commerce).

<sup>16</sup> Recommendation 38.

<sup>17</sup> See further C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) chs 6, 7.

<sup>18</sup> Part 3.

Many of these recommendations are controversial, several are opposed by the ACCC, and their acceptance by the Government is uncertain.

## II Competition Law Simplification

### Harper Report recommendations

9. Two main recommendations in the Harper Report address the need for simplification of the CCA:

#### **Recommendation 22 — Competition law concepts**

The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy.

#### **Recommendation 23 — Competition law simplification**

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.

The process of simplifying the CCA should involve public consultation.

Provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

10. Other recommendations also pursue simplification. These include the proposed changes to the CCA provisions relating to cartels (see Section V below), exclusive dealing (including third line forcing)<sup>19</sup> and authorisation.<sup>20</sup> The Model Legislative Provisions for Part IV of the CCA in Appendix A to the Report reflect the Review Panel's views on simplifying Part IV.

### **Comments - simplification**<sup>21</sup>

11. The Harper Report recommendations on simplification are welcome. The CCA has been widely criticised by lawyers and businesses for being complex, prolix, duplicative and over-prescriptive.<sup>22</sup> The schizophrenic drafting style of the CCA also

<sup>19</sup> Recommendations 33, 32.

<sup>20</sup> Recommendation 38.

<sup>21</sup> Some of the comments below are adapted from B Fisse, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 101.

<sup>22</sup> See eg Justice S Rares, 'Competition, Fairness and the Courts' (2014) 39 Australian Bar Rev 79.

stands out:<sup>23</sup> principles-based drafting is widely used in the Australian Consumer Law but rarely elsewhere in the Act (the core SLC test in ss 45, 47, 50 and 50A in Part IV is the most notable exception).

12. Undue complexity and over-prescription are to be avoided. These are the reasons given by Justice Rares of the Federal Court of Australia in his plea for simplification of the CCA:<sup>24</sup>

First, attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something, secondly, complexity can, and often is a handmaiden of incomprehensibility, thirdly, the unravelling of complexity requires time and effort, fourthly, the more detailed and complex legislation is, the harder it is for the ordinary person, including the scions of the business community, to grasp the point and comply, fifthly, complexity makes litigation more complex, lengthy and expensive for the parties and, sixthly, those factors create the need for the Courts to deal with more and more in judgments or summings up to juries leading to delay, the greater likelihood of appellate challenges and, of course, error.

13. Simplicity is an important criterion for assessing the effectiveness of competition legislation. Equal prominence should be given to other criteria, most notably the need to avoid legislative overreach, underreach and uncertainty. Overreach, underreach or uncertainty can and often does arise from complex, prescriptive legislation. However, these unwanted effects may also arise from simple legislative wording.

14. There are limits to the extent to which principles-based drafting can usefully be taken.<sup>25</sup> It may not be possible or desirable to avoid prescriptive drafting in some contexts. For example, prescriptive drafting may be appropriate in the setting of powers of investigation where principles-based drafting may give investigators too much rein or give their targets too little guidance about their rights. There are also contexts where bright-line rules may be more efficient than principles. For instance, the related corporation exceptions under s 44ZZRN and s 45(8) of the CCA turn on the prescriptive definition of a related corporation in s 4A.<sup>26</sup> As a result, these related corporation exceptions are clear-cut as compared with their counterparts under US

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<sup>23</sup> See D Heydon, 'Is the Competition and Consumer Act 2010 (Cth) in Competition with Itself?', Competition Law Conference, Sydney, 4 May 2013.

<sup>24</sup> 'Competition, Fairness and the Courts', 82.

<sup>25</sup> See further J Black, 'Forms and Paradoxes of Principles-Based Regulation', LSE Law, Society and Economy Working Papers 13/2008, at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1267722](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267722)

<sup>26</sup> Cf Commerce Act 1986 (NZ) s 7.

and EU competition law. The meaning and scope of the single economic enterprise principle under US and EU competition law is the subject of a large body of case law and ongoing contention.<sup>27</sup> Swapping s 44ZZRN or s 45(8) for the much less determinate US or EU single economic enterprise principle would have little attraction.

15. As a test of what principles-based drafting means and is capable of achieving, it is worth considering the state of the SLC test under s 45(2). That test is a prime example of principles-based drafting. Has it worked well? The test remains uncertain partly because the ACCC has not brought many SLC cases and Australian courts have not done much to explicate the concept of substantiality. See further Section IV below.
16. At the level of corporate compliance programs, the technicality of the CCA generally does not matter much because compliance programs set out basic rules, Dos and Don'ts, and Q&A at a relatively simple level suitable for use by non-lawyers. These instructions often seek also to cover in general terms the common elements or underlying principles of the competition laws in all countries where the corporation operates.<sup>28</sup> This is an example in the context of price fixing:

**Dos**

Do act independently of competitors at all times.

Do steer well clear of any discussion with a competitor about anything to do with prices.

Do get advice in advance from the Legal Team if you are ever in doubt about the legality of a discussion or proposed arrangement with a competitor.

Do get clearance in advance from the Legal Team for any proposed joint venture or other alliance with a competitor.

17. The Model Legislative Provisions are set out to show what the Review Panel intends by simplification but, in the opinion of this reviewer, are a let-down:

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<sup>27</sup> See PE Areeda and H Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2003) ¶1462–¶1478; J Joshua, 'Single Continuous Infringement of Article 81 EC: Has the Commission Stretched the Concept Beyond the Limit of its Logic?' (2009) 5(2) *European Competition Journal* 451; I Bailey, 'Single overall agreement in EU Competition Law' (2010) 2 *Common Market Law Review* 473.

<sup>28</sup> See eg ABB, Antitrust guidance note, Competitive intelligence gathering versus commercially sensitive information exchanges (2014) at: [http://www02.abb.com/global/abbzh/abbzh252.nsf/0/df9558e3445cf87ac12577e900589252/\\$file/Antitrust+Guidance+Note+Competitive+Intelligence+vs+Commercially+Sensitive+Information.pdf](http://www02.abb.com/global/abbzh/abbzh252.nsf/0/df9558e3445cf87ac12577e900589252/$file/Antitrust+Guidance+Note+Competitive+Intelligence+vs+Commercially+Sensitive+Information.pdf)

- The drafting style remains influenced by the recoco school that produced Part IV of the CCA;
- the proposed joint venture exemption preserves the obscure term ‘joint venture’ and introduces a tangle of conditions (see paragraphs 57-59 below);
- the proposed supply agreement exemption (s 45J in the Model Legislative Provisions) is unduly complicated<sup>29</sup> - compare the cleaner cut of the proposed s 32 exemption under the Commerce (Cartels and Other Matters) Amendment Bill:

**45J Restrictions in supply and acquisition agreements**

(1) Sections 45C, 45D, 45G and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision in so far as the cartel provision:

(a) is imposed by a person (the supplier) in connection with the supply of goods or services to another person (the acquirer) and relates to:

- (i) the supply of the goods or services by the acquirer to the acquirer [sic];
- (ii) the acquisition by the acquirer of goods or services that are substitutable for or otherwise competitive with the goods or services from others; or
- (iii) the supply by the acquirer of the goods or services or goods or services that are substitutable for or otherwise competitive with the goods or services;

(b) is imposed by a person (the acquirer) in connection with the acquisition of goods or services from another person (the supplier) and relates to:

- (i) the acquisition of the goods or services from the supplier; or
- (ii) the supply by the supplier of the goods or services, or goods or services that are substitutable for or otherwise competitive with the goods or services, to others.

- the proposed model provisions on exclusive dealing (s 47) do not reflect Recommendation 33 that there be no separate prohibition of exclusive dealing.

18. The Harper Report does not take up the possible use of filters to simplify and limit the scope of competition law as in the way proposed by Frank Easterbrook in ‘The Limits

<sup>29</sup>

Not all complication can be avoided, including the logically prior and sometimes difficult issue of whether or not the supplier and the acquirer are ‘competitors’ as required by the competition condition of cartel liability; see *Flight Centre v ACCC* [2015] FCAFC 104 (special leave has been granted to appeal to HCA); *ACCC v ANZ* [2015] FCAFC 103.

of Antitrust'.<sup>30</sup> Why such abstention? Is there any reason to assume that the current modes of assessment of anti-competitive effects are as straightforward, as efficient or as free from risk of error as they could be?

### III Misuse of Market Power

#### Harper Report recommendations

19. The most controversial recommendation of the Harper Report is that an effects test be adopted in s 46. This is the recommendation:

**Recommendation 30 — Misuse of market power**

The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

To mitigate concerns about inadvertently capturing pro-competitive conduct, the legislation should direct the court, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

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<sup>30</sup> (1984) 63 Texas LR 1. For critiques of Easterbrook's proposed filters see O Williamson, 'Delimiting Antitrust' (1987) 76 Georgetown LJ 274; R Markovits, 'The limits to simplifying the application of US antitrust law' (2010) 6 Journal of Competition Law & Economics 51. On risk of error see J Baker, 'Taking the error out of "error cost" analysis' (2015) 80 Antitrust LJ 1. On rules v standards see D Crane, 'Rules Versus Standards in Antitrust Adjudication' (2007) 64 Washington & Lee LR 49.



20. The ‘take advantage’ limb of s 46 would be repealed under Recommendation 30. The take advantage test has given rise to substantial difficulties of interpretation, thereby ‘undermining confidence in the effectiveness of the law’.<sup>31</sup> More significantly, the test is not well adapted to identifying a misuse of market power because it takes non-dominant firm conduct to be the benchmark for competitive behaviour.<sup>32</sup>

Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

21. The s 46 purpose test would also be repealed. The reason given echoes a long-standing criticism of s 46:<sup>33</sup>

.. the focus of the prohibition on showing the purpose of damaging a competitor is inconsistent with the overriding policy objective of the CCA to protect competition, and not individual competitors. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

22. The Harper Report questions the utility of s 46A (misuse of market power in a Trans-Tasman market).<sup>34</sup> The section has rarely been invoked and its original aim is implausible – predatory pricing in an Australian goods market by a firm with market power in New Zealand is unlikely unless the predating firm has market power in the Australian market. The Review Panel recommends that s 46A and the reciprocal s 36A of the Commerce Act should be reconsidered through consultations between Australia and NZ. Relevant questions include:<sup>35</sup>

- whether the reciprocal prohibitions in the CCA and New Zealand’s Commerce Act have any significant operative effect;
- if section 46 of the CCA is reformed in line with the Panel’s recommendation, whether the reciprocal prohibitions in both Acts ought to be reformed in like manner; and
- if the reciprocal provisions are retained, whether they should be extended to markets involving the supply of services.

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<sup>31</sup> Harper Report, 61. See further K Kemp, ‘Uncovering the roots of Australia’s misuse of market power provision: Is it time to reconsider?’ (2014) 42 ABLR 329.

<sup>32</sup> Harper Report, 61.

<sup>33</sup> Harper Report, 61.

<sup>34</sup> Harper Report, 19.2.

<sup>35</sup> Harper Report, 349.

## Comments – misuse of market power

23. The proposed effects test seeks to give the prohibition against misuse of market power a sound economic foundation and to bring Australian law more into line with effects-based approaches in other jurisdictions<sup>36</sup> apart from NZ.<sup>37</sup> However, the recommendation has had a volatile reception<sup>38</sup> and the degree of attention given to this ‘totem’ of competition reform has been described by the Chairman of the Productivity Commission as ‘absurd’.<sup>39</sup> The main objections that have been raised are canvassed below.
24. The other proposals in Recommendation 30 – repeal of the infamous Birdsville amendment,<sup>40</sup> extending authorisation to misuse of market power, introduction of ACCC guidelines on s 46, and reconsideration of s 46A – are salutary.<sup>41</sup>
25. Some contend that removal of the need for a causal connection between the market power and the alleged anti-competitive conduct would result in overreach. The standard example given is the dominant firm that hires an arsonist to burn down a competitor’s factory in order to prevent that competitor from competing effectively. The effects test proposed in the Harper Report would not catch such a case because, under the proposed s 46(8)(c) (as under the existing s 46(4)(c)), the conduct of the dominant firm would not be ‘as a supplier or as an acquirer of goods or services’. However, should liability for such conduct be precluded under s 46? Katharine Kemp has argued that the dominant firm’s act of arson is an example of ‘plain exclusion’, a key concern of competition law, and should fall squarely within the scope of s 46(1):<sup>42</sup>

The purpose of s 46(1) is to prevent harm to the competitive process and ultimately consumer welfare. If a dominant firm threatens the competitive process by engaging in non-efficient,

<sup>36</sup> For the view that the differences have been exaggerated see P Williams, ‘Should an effects test be added to section 46’, Competition Law Conference, Sydney, 24 May 2014.

<sup>37</sup> On s 36 of the Commerce Act see M Sumpter, *New Zealand Competition Law and Policy* ((2010) ch 10; L Hampton & PG Scott, *Guide to Competition Law* (2013) ch 6; R Ahdar, ‘The unfulfilled promise of New Zealand’s monopolisation law: Sources, symptoms and solutions’ (2009) 16 *Competition & Consumer LJ* 291; NZ Productivity Commission, *Boosting productivity in the services sector* (May 2014) 7.2.

<sup>38</sup> See ‘Effects test debate is too theological, Abbott says’, *AFR* 9 Sept 2015, 9; ‘Cabinet split over business crackdown’, *AFR* 1 Sept 2015, 1.

<sup>39</sup> P Harris, ‘Reviving Harper’, Australian Competition Policy Summit 2015, Sydney, 22 Sept 2015, 1 at: <http://www.pc.gov.au/news-media/speeches/competition-policy-summit-2015>.

<sup>40</sup> CCA, s 46 (IAA). See B Reid, ‘Section 46 – in search of a port in the storm’ (2010) 38 *ABLR* 41.

<sup>41</sup> Subject however to the question of whether or not the authorisation process is still justifiable in any context – see paragraph 35 below.

<sup>42</sup> ‘The case against “French J’s arsonist”’ (2015) 43 *ABLR* 228, 244.

intentionally exclusionary conduct that is profitable because of its market power, it falls foul of s 46(1), even if a non-dominant firm could, would, or does, engage in the same conduct.<sup>43</sup>

26. The US law on monopolisation and the EU law on abuse of a dominant position focus on exclusionary conduct that is not welfare enhancing.<sup>44</sup> In contrast, Recommendation 30 and the Model Legislative Provisions on misuse of market power require conduct that has the purpose, effect or likely effect of substantially lessening conduct in a market; they do not require *exclusionary conduct* that has the purpose, effect or likely effect of substantially lessening conduct in a market. That gap could be filled by adding a requirement of exclusionary conduct.<sup>45</sup> Such a requirement would preclude liability in cases where, for example, a dominant firm ceases production in Australia and thereby substantially lessens competition in a market.
27. Another objection to the effects test under Recommendation 30 is that it would make compliance with s 46 less certain.<sup>46</sup> Unlike the current purpose test, an effects test requires information that a corporation with market power does not readily have:<sup>47</sup>
- [An effects based prohibition] requires the firm to assess the likely effect of its conduct where it cannot have full information about the likely competitive options of other market participants. This can have the undesirable, and potentially chilling effect of uncertainty, leading to inaction.
- A firm's conduct can have effects in downstream or upstream markets it is not active in. Here, the firm has even less of the information required to undertake the necessary effects assessment.
28. There is some force in this concern but it should not be overstated. Corporations with market power are accustomed to making SLC assessments under s 45 and s 47, as Rod Sims, Chairman of the ACCC, has emphasised.<sup>48</sup>

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<sup>43</sup> However, the conduct of the dominant firm is not as a supplier or acquirer of goods or services and hence liability would now be excluded by s 46(4)(c).

<sup>44</sup> See ABA, *Antitrust Law Developments (Seventh)*, Vol , ch 2; J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 4; R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) ch 4.

<sup>45</sup> See eg Competition Act 1998 (South Africa) s 8(c)(d); as discussed in K Kemp, 'The South African Example: A Legislated Effects-Based Test and Efficiency Defence for Misuse of Market Power', Submission to the Competition Policy Review, 29 April 2014, at [http://competitionpolicyreview.gov.au/files/2014/06/Kemp\\_K.pdf](http://competitionpolicyreview.gov.au/files/2014/06/Kemp_K.pdf).

<sup>46</sup> See eg Allens, 'Misuse of Market Power' (2015) at : <https://www.allens.com.au/services/comp/pdf/HarperReviewSubmission.pdf>.

<sup>47</sup> Russell McVeagh, 'Final Report of Australian 'Root and Branch' competition review released: A blueprint for NZ's 'bonsai' review of the Commerce Act?' 1 April 2015, 1, at: <http://www.russellmcveagh.com/Publications/ViewPublication/tabid/176/Title/final-report-of-australian-root-and-branch-competition-review-released-a/pid/381/Default.aspx>

Firms large and small are subject to section 45 of the Act. This section prohibits a corporation from making a contract, arrangement or understanding that has the purpose or likely effect of substantially lessening competition.

This section can potentially capture conduct that is largely unilateral in nature. For example, contracts entered into by a firm to acquire all of an input necessary for the establishment of a major new competitor may have the purpose or effect of substantially lessening competition. Despite the contractual element of the conduct this conduct is unilateral in nature and could be captured by section 45. ...

The point is that firms, large and small, have for a long time been operating in an environment where they must assess whether their conduct is likely to substantially lessen competition.

There is little or no evidence that I am aware of that operating within this law is deterring firms, large or small, from competing aggressively.

That said, there are differences between the assessment of agreements and the assessment of unilateral conduct:<sup>49</sup>

... cases involving agreements are different in the sense that the firms can always choose not to make an agreement, or to make a different agreement, or amend some aspect of it to comply with objections under competition law. The firms are also more likely to have detailed knowledge of the effect of an agreement on their output and to be able to quantify the synergies created by cooperation. The same cannot generally be said of most unilateral conduct.

29. A further concern is that, although the SLC test is familiar and long-standing, the meaning of the core concept of 'substantial' is vague. For instance, it is unclear what degree of lessening of competitive rivalry is required or over what period of time the effect or likely effect on competition needs to be assessed. The Harper Report does not address this vagueness but would extend it to unilateral conduct. What can or might be done to extract more clarity from the fog of 'substantial' is taken up in Section IV below.
30. More fundamentally, the effects test proposed under Recommendation 30 recognises efficiencies to the extent that they promote competitive rivalry but does not carve out cases where efficiencies have the effect (or likely effect) of substantially lessening competition but promote consumer welfare.<sup>50</sup> Assume that a monopoly supplier of

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<sup>48</sup> 'Section 46: the Great Divide', Competition Law Conference, Sydney, 30 May 2015, 6-7, <https://www.accc.gov.au/speech/section-46-the-great-divide>.

<sup>49</sup> R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) 381.

<sup>50</sup> On the limited relevance of efficiencies under the SLC test see S Corones, *Competition Law in Australia* (2014, 7<sup>th</sup> ed) [1.175]; Gilbert + Tobin, 'Where to now for big business, small business and market power?' (2015) at: <http://ecomms.gtlaw.com.au/rv/ff001e946600b6f9cde38f2982459a1307b93802>. See also R

rare earth materials decides to cease supplying those materials because it has acquired a major technology manufacturer and wants to use all the rare earth materials in order efficiently to manufacture superior high-technology products with strong export as well as domestic potential. Assume further that the refusal to continue to supply rare earths is likely to raise downstream rivals' costs so considerably as to drive them out of business over the next 18-24 months. It is difficult to see why, under the current law on the SLC test or the mild 'tweaking' of that test under Harper Recommendation 30, that welfare-enhancing conduct would not entail a likely substantial lessening of competition in the downstream markets affected.<sup>51</sup> The process of rivalry test under the *QCM* canon is a test of competitive rivalry, not a test of consumer welfare.<sup>52</sup> 'Competition on the merits',<sup>53</sup> 'normal competition' and 'genuine undistorted competition' promote consumer welfare but in some circumstances consumer welfare may be promoted by conduct that lessens competition. The proposed ACCC guidelines on s 46 could hardly plug the gap between the SLC test and a consumer welfare test. Those seeking exemption in such cases would need to apply for authorisation, a solution that is cumbersome and bureaucratic.<sup>54</sup> By contrast, the Draft Report<sup>55</sup> proposed a defence requiring a corporation to prove that the conduct in question would be: (a) a rational business decision by a corporation that did not have a substantial degree of power in the market; and (b) likely to have the effect of advancing the long-term interests of consumers.<sup>56</sup> That defence was criticised in

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O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) 430-431. An effects test for misuse of market power has existed in the telecommunications sector under s 151AJ of the CCA since 1997 with little apparent protest about neglect of efficiencies considerations.

<sup>51</sup> Perhaps the monopolist's new plan might *increase* competitive rivalry in the market(s) for the high-technology products and that increase might offset the reduction in competitive rivalry in the market for the rare earth materials. However, the SLC test as currently interpreted does not support such an offset between competition effects in one market with those in another. Nor does the Harper proposal for amending s 46: the revised s 46 refers to SLC 'in that or any other market'. Thanks are due to Katharine Kemp for these comments on the example given in the text.

<sup>52</sup> Re *Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169 at 188-189.

<sup>53</sup> See eg R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) 361-362.

<sup>54</sup> Note that, as is the position in the EU, the proposed block exemption mechanism would not apply to misuse of market power.

<sup>55</sup> Competition Policy Review Draft Report September 2014, at: <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>.

<sup>56</sup> Draft Report, Draft Recommendation 25. Compare NZ Productivity Commission, *Boosting productivity in the services sector*, Report 133 (May 2014), 134.

submissions on various grounds including impracticality<sup>57</sup> and was rejected in the Final Report.

31. US antitrust law and EU competition law do not yield off-the-shelf solutions. However, there are core principles that could be extracted and reflected in a revised s 46. Two core principles are: (a) conduct is exclusionary only if it limits production, marketing or technical development by competitors; and (b) a dominant firm may limit rival's possibilities if no prejudice to consumers results.<sup>58</sup> The resulting legislative provisions would be high-level and their application to different particular types of exclusionary conduct would need to be mapped out in detailed guidelines.<sup>59</sup> The guidelines need to be drafted, debated and settled as part of the legislative revision process. The outcome of proposed legislative reform in a difficult area inevitably will be uncertainty and deep concern unless people can know in some detail how the proposed legislation is likely to work in practice. This is a large task but what is the point of proposing changes to s 46 unless the likely consequences are understood? One reason why the Harper Report proposals on s 46 are controversial is that no adequate proof of concept has been given. No set of worked examples has been provided to demonstrate exactly how the SLC test is meant to work under the proposed revised s 46 and thereby to refute the objections that have been raised.
32. The difficulty of establishing liability under s 46 has led to increased reliance on the prohibition against unconscionable conduct (s 21 of the Australian Consumer Law) at least in the context of dealings between supermarkets and suppliers. In proceedings successfully brought by the ACCC against Coles Supermarkets Australia Pty Ltd in 2014,<sup>60</sup> the Federal Court by consent made declarations that Coles engaged in unconscionable conduct in 2011 in its dealings with suppliers. The Court also ordered Coles to pay pecuniary penalties of \$10 million. Coles also entered into a court

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<sup>57</sup> See eg Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia, 20 November 2014, 17-19, at: [http://competitionpolicyreview.gov.au/files/2014/12/LCA\\_Competition.pdf](http://competitionpolicyreview.gov.au/files/2014/12/LCA_Competition.pdf). On the consumer welfare defence under Article 102 of the TFEU see R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) 5.4.3.

<sup>58</sup> See R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) 4.2. Compare PE Areeda and H Hovenkamp, *Antitrust Law* (2<sup>nd</sup> ed, 2002) ¶651a (exclusionary conduct = acts that (1) are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (a) do not benefit consumers at all, or (b) are unnecessary for the particular consumer benefits that the acts produce, or (c) produce harms disproportionate to the resulting benefits).

<sup>59</sup> See R O'Donoghue & AJ Padilla, *The Law and Economics of Article 102 TFEU* (2<sup>nd</sup> ed, 2013) chs 4-13 for a principled and detailed analysis as one very useful input.

<sup>60</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405.

enforceable undertaking with the ACCC to provide redress to more than 200 suppliers (payments totalling \$12.3 million resulted).<sup>61</sup> The Harper Report states that such cases ‘indicate that the current unconscionable conduct provisions are working as intended to meet their policy goals’ and that ‘[i]f deficiencies in the operation of the provisions become evident, they should be remedied promptly.’<sup>62</sup>

33. The meaning of ‘unconscionable’ in the context of dealings with consumers has been clarified by the Full Court of the Federal Court of Australia. In *ACCC v Lux Distributors Pty Ltd*,<sup>63</sup> a case relating to the sale of vacuum cleaners to elderly people in their homes, it was held that a ‘normative standard of conscience’ is to be applied. This standard does not require a high level of obloquy<sup>64</sup> but is ‘permeated with accepted and acceptable community values’.<sup>65</sup> In some contexts, such values are contestable. In this case, however, they were ‘honesty and fairness in the dealing with consumers.’<sup>66</sup> It remains unclear exactly what values are relevant in business to business transactions where the prohibition against unconscionable conduct is invoked instead of the prohibition against misuse of market power. Query whether light on that question will be shone by the forthcoming review of the Australian Consumer Law.<sup>67</sup> What is needed is a review of the nature and limits of fairness as a potential goal of, or constraint on, competition law.<sup>68</sup>

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<sup>61</sup> AFR, ‘Coles to pay suppliers \$12m’, 1 July 2015, 1.

<sup>62</sup> Harper Report, 357.

<sup>63</sup> [2013] FCAFC 90.

<sup>64</sup> Contrast *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261 at [124].

<sup>65</sup> [2013] FCAFC 90 at [23].

<sup>66</sup> [2013] FCAFC 90 at [23].

<sup>67</sup> Review of the Australian Consumer Law, 12 June 2015, at:

[http://www.consumerlaw.gov.au/content/Content.aspx?doc=review\\_of\\_the\\_acl.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=review_of_the_acl.htm) .

<sup>68</sup> See C Beaton-Wells, ‘Substance and Process in Competition Law and Enforcement: Why We Should Care If It’s Not Fair’; 9<sup>th</sup> ASCOLA conference, at: [http://www.ascola-conference-2014.wz.uw.edu.pl/conference\\_papers/Beaton-Wells.pdf](http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Beaton-Wells.pdf); now in P Nihoul and T Skoczny (eds), *Procedural Fairness in Competition Proceedings* (2015) ; A Ayal, *Fairness in Antitrust* (2014). The Harper Report does not examine the need to revise the statement of ‘object in s 2 of the CCA; see I Wylie, ‘Roots, branches and other objects: One step beyond the Harper Review’ (2014) 42 ABLR 436; C Beaton-Wells, ‘The Harper Review: Qualified Hope for Australian Competition Law’ 48(4) (2015) Australian Economic Review (forthcoming).

## IV The SLC Test

### Harper Report extends operation of SLC test without introducing rule of reason

34. The Harper Report recommendations would extend the application of the SLC test in two important ways, namely the introduction of an effects test in s 46 (see Section II above), and the repeal of the exemption under s 51(3) for intellectual property licensing conditions (see Section VII below). However, little is said about the SLC test itself.<sup>69</sup>
35. Several submissions were made for the adoption of a rule of reason test.<sup>70</sup> Those submissions have been rejected for reasons that are not discussed expressly in the Harper Report. One implicit reason is that the rule of reason test is not ‘justiciable’,<sup>71</sup> an issue that has been resolved in Australia by making the task of assessing efficiencies a task mainly for the ACCC in the authorisation process or the Australian Competition Tribunal. The claim that a rule of reason is not justiciable is contestable given the extensive US experience in applying a rule of reason. Another consideration is the artificiality of the current limits on the extent to which efficiencies can be taken into account when assessing anti-competitive effect.<sup>72</sup> A related question is whether the authorisation process should exist in a modern competition law. No equivalent process exists in the US, the EU, the UK or Canada.<sup>73</sup>

### What does ‘substantial’ mean?

36. An immediately practical question is the meaning of ‘substantial’ in the SLC test.<sup>74</sup> The case law offers limited guidance beyond telling us that ‘substantial’ does not

<sup>69</sup> See Harper Report, 61, 341.

<sup>70</sup> See eg Law Council of Australia, Submission on the Competition Policy Review Draft Report, November 2014, 25, at: [http://competitionpolicyreview.gov.au/files/2014/12/LCA\\_Competition.pdf](http://competitionpolicyreview.gov.au/files/2014/12/LCA_Competition.pdf); ABA, Joint Comments, Nov 2014, at: <http://competitionpolicyreview.gov.au/files/2014/12/ABA.pdf>.

<sup>71</sup> See S Corones, D Merrett & D Round, ‘Building an Effective Trade Practices Commission’ (2009) 49 *Australian Economic History Rev* 138 at citing RB Stevens and BS Yamey, *Restrictive Practices Court* (1965) 23–138, esp 41.

<sup>72</sup> See eg P Williams & G Woodbridge, ‘The Relation of Efficiencies to the Substantial Lessening of Competition Test for Mergers: Substitutes or Complements?’ (2002) 30 *ABLR* 435. Contrast the attempt made in the Draft Report, Draft Recommendation 25, to introduce a type of rule of reason test as a defence to misuse of market power; that proposal was rejected in the Final Report.

<sup>73</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 8.13.3.

<sup>74</sup> See B Fisse, ‘Competition, Fairness and the Courts’ (2014) 39 *Australian Bar Rev* 101 at 108; C Coops, ‘Substantial lessening of competition test’, Competition Law Workshop, Adelaide, 10-11 October 2014. On the further question of ‘purpose’ see D Robertson, ‘The Primacy of Purpose in Competition Law – Pt 2’ (2002) 10 *CCLJ* 11; P Scott, ‘The Purpose of Substantially Lessening Competition: The Divergence of New Zealand and Australian Law (2011) 19 *Waikato Law Rev* 168.



mean ‘large’ or ‘big’.<sup>75</sup> The opportunity to clarify the law was not taken by the High Court in *Rural Press Ltd v ACCC* (2003) where it was stated that ‘substantial’ means ‘meaningful or relevant to the competitive process’.<sup>76</sup> A values-based judgment is required.<sup>77</sup>

Economic laws .. embody evaluative concepts with normative dimensions. They require more for their interpretation and application than the mere discovery of pre-existing meaning. Indeed, their application in particular cases almost approaches a legislative function. They require characterisation of facts under some generic designation informed by a values-based judgment.

37. As a result, the assessment of evidence on the issue of substantiality depends much on impression and unstated assumptions. Many illustrations can be given. They include the decisions in *McHugh v The Australian Jockey Club*<sup>78</sup> and *ACCC v Cement Australia Pty Ltd*.<sup>79</sup> Current guidelines do not assist much on this issue.<sup>80</sup>
38. Headway will not be made by writing off the SLC test as a ‘category of indeterminate reference’<sup>81</sup> or by consulting a dictionary. Progress will require practical elucidation

<sup>75</sup> *Re Queensland Independent Wholesalers Ltd* [1995] ATPR 41-438 at 40,926. See also *Global Radio Holdings Limited v Competition Commission* [2013] CAT 26. Cf Malaysian Communications and Multimedia Commission, Guideline on Substantial Lessening of Competition (2014) [3.5] (‘considerable or big’).

<sup>76</sup> (2003) 216 CLR 53 at 71 per Gummow, Hayne and Heydon JJ. Compare Commerce Act 1986 (NZ) s 2(1A) (‘substantial’ means ‘real or of substance’); Commerce Commission, Decision 638, *DFS Group Limited/The Nuance Group* (28 March 2008) (lessening must be ‘considerable and sustainable’); M Sumpter, *New Zealand Competition Law and Policy* ((2010) 192-196; L Hampton & PG Scott, *Guide to Competition Law* (2013) 3.8-3.9; D Carlton & D Goddard, ‘Contracts and Lessening Competition: What is Section 27 for And How Has it Been Used?’ in M Berry & L Evans, *Competition at the Turn of the Century* (2003) 137; J Land, J Owens & L Cejnar, ‘The Meaning of “Competition”’ (2010) 24 NZULR 98.

<sup>77</sup> Justice RS French, ‘The Role of the Court in Competition Law’ (2005) 2 at: <http://www.austlii.edu.au/au/journals/FedJSchol/2005/4.html>.

<sup>78</sup> [2012] FCA 1441. For a rule of reason analysis of this case, see S Quo, ‘“Flogging a dead horse”: Artificial insemination, breeding standards and antitrust’ (2014) 42 ABLR 367.

<sup>79</sup> [2013] FCA 909.

<sup>80</sup> See eg ACCC, *Merger Guidelines* (2008) [3.5] (The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will always depend on the particular facts of the merger under investigation. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices) at:

<https://www.accc.gov.au/publications/merger-guidelines>; Commerce Commission, *Agreements that Substantially Lessen Competition* (2012) (‘[i]f the difference between the level of competition in the market with and without the agreement is considered to be substantial, the agreement will be illegal’ ) at: <http://www.comcom.govt.nz/business-competition/fact-sheets-3/slc-agreements/>.

<sup>81</sup> Compare J Stone, *Legal System and Lawyers’ Reasonings* (1964) 263-7.

of the test. An instructive start has been made by Tom Leuner.<sup>82</sup> Leuner's analysis is animated by this premise:<sup>83</sup>

.. it is better to understand and debate the fundamentals of the effects will meet that standard, than to rely upon the vagaries of instinctual responses to competition law. Although many commentators debate the possible causes of competition effects and the factors that play a role in assessing the likelihood of competition effects, there is a need to focus on what will ultimately be indicative of a breach.

39. The following basic issues arise:<sup>84</sup>

- does the SSNIP hypothetical monopolist test for market definition have any bearing on the test for substantiality?
- what is the necessary duration of competition effects required under the SLC test?
- is the SLC test to be applied by reference to the competitive process and/or outcomes such as price effects?<sup>85</sup>
- if measured by price effects, what is the threshold? 5%?<sup>86</sup>
- is the type of product in itself a dimension of substantiality?
- is the size of the industry affected (or the amount of commerce affected) relevant to the assessment of substantiality?
- is the proportion of customers affected in the market a relevant dimension?
- are changes to margins or profitability relevant?
- is the standard of substantiality lower where the conduct is deliberately anti-competitive?
- does the standard of substantiality vary in accordance with the probability of the competition lessening effects?

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<sup>82</sup> T Leuner, 'Time and the dimensions of substantiality' (2008) 36 ABLR 327.

<sup>83</sup> Leuner, 365-366.

<sup>84</sup> Leuner, 348-359.

<sup>85</sup> For the argument that the SLC test under s 27 of the Commerce Act is concerned with the process of competition and not the effects of competition see J Land, J Owens & L Cejnar, 'The Meaning of "Competition"' (2010) 24 NZULR 98, 106-109 (an increase in prices may be an indication that competition has been lessened in a market but it is not itself an aspect of lessening of competition; a lessening of competition is determined by whether there is a lessening of the level of constraints on market power).

<sup>86</sup> In *Commerce Commission v Woolworths Ltd & Ors* (2008) 12 TCLR 194 (CA) at [191] the Court of Appeal said that there is no precise metric.

40. Leuner advocates guideline thresholds on: (a) the degree of harm to competition; (b) the critical duration of harm to competition; and (c) the probability of harm to competition.<sup>87</sup> The thresholds suggested as a starting point are: (a) a price increase threshold of 5%; (b) a critical duration threshold of 18 months; and (c) a probability threshold of 30%. Leuner concedes the difficulty of trying to measure any of the dimensions of substantiality precisely but contends that an approximate framework of the kind suggested is ‘a roadmap of what a substantial lessening of competition looks like’ and ‘will assist the development of more consistent decision-making and hopefully lead to more debate in relation to the underlying policy issues.’<sup>88</sup>
41. ‘Truncated’ rule of reason analysis is sometimes used in the US as an alternative to full-blown analysis of competition effects and off-setting efficiencies.<sup>89</sup> Much more commonly, rules of thumb are used to map out safe harbours.<sup>90</sup> For instance, exclusive dealing is not unlawful in the US unless a ‘substantial’ part of the market is affected and rules of thumb are often used to help gauge what is meant by ‘substantial’:<sup>91</sup>

In general, exclusive dealing will not be found illegal under U.S. antitrust law if it does not foreclose more than 30% of all effective distribution channels. However, exclusive dealing affecting more than 30% of all effective distribution channels is neither automatically nor even presumptively illegal. Indeed, in most instances, foreclosure must be above 50% in order to raise any competitive concern.

Such an approach is a boon for those who want an expedient navigational aid to guide compliance.<sup>92</sup>

42. Market share thresholds are a feature of the safe harbours provided under several EU block exemptions, including those relating to technology transfer agreements, vertical restraints and horizontal cooperation agreements. For example, under the technology

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<sup>87</sup> Leuner, 359-365.

<sup>88</sup> Leuner, 363.

<sup>89</sup> See further T Muris & B Cummins, ‘Tools of Reason: Truncation Through Judicial Experience and Economic Learning’ (2014) (Summer) *Antitrust* 46.

<sup>90</sup> Bright-line rules may be appropriate when used as safe harbours rather than as prohibitions: see D Crane, ‘Rules Versus Standards in Antitrust Adjudication’ (2007) 64 *Washington & Lee LR* 49, 84.

<sup>91</sup> US Department of Justice and US Federal Trade Commission, *Exclusive Dealing/Single Branding* (response to ICN questionnaire), at: <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20pp/us%20response%20exclusive%20dealing.pdf>. See further ABA, *Antitrust Law Developments (Seventh)* (2012) Vol 1 211-220. In practice such rules of thumb are often used notwithstanding the much purer ‘qualitative substantiality’ test laid down in *Tampa Electric Co v Nashville Coal Co*, 365 US 320 at 329 (1961).

<sup>92</sup> Contrast the very different perspective in R Trindade, A Merrett & R Smith, ‘2014 – The Year of SLC’ (2014) 21(2) *The State of Competition*.

transfer block exemption, a market share threshold of 20% applies in the case of agreements between competitors and a market share threshold of 30% in the case of agreements between non-competitors.<sup>93</sup> Case by case rule of reason assessment is required outside the safe harbours. The fact that market shares exceed a threshold does not give rise to any presumption of liability.<sup>94</sup>

43. The market share rules of thumb approach illustrated above does not seem legitimate under the SLC test in Australia given that the test is not cast in terms relative to the total competition in a market. In *Dandy Power Equipment v Mercury Marine*<sup>95</sup> Smithers J adopted this restrictive interpretation:

Although the words ‘substantially lessened in a market’ refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus, a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to circumstances, be a substantial lessening of competition in a market.

44. The Harper Report does not discuss the possibility of recasting the SLC test in ways that clarify what amounts to anti-competitive conduct. As a result we are left with a SLC test that is vague and conducive to potential overreach. The proposed block exemption mechanism (Recommendation 39) could well be used to provide safe harbours<sup>96</sup> in some contexts but their intended nature and scope is far from clear. This is unfortunate in several respects including the possibility of sector-specific rules that violate the Hilmer principle that competition laws should apply across the board without fear of or favour to lobbying or other sectoral interests.

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<sup>93</sup> Commission Regulation (EC) No 772/2004 on the application of Article 101(3) of the Treaty to categories of technology transfer agreements, OJ 2004 L123/11 (TTBER). See further J Faull and A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014) ch 10C. Market share thresholds are also used in European Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)(2014/C 291/01).

<sup>94</sup> See further J Faull and A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014) 10.119-10.122.

<sup>95</sup> [1982] ATPR 40,315 at 43,888.

<sup>96</sup> As used in the EU for technology transfer agreements; see J Faull and A Nikpay, *The EU Law of Competition* (3<sup>rd</sup> ed, 2014) 10.119-10.123. The Harper Report suggests the possible creation of safe harbours by means of a block exemption in the context of IP licensing (at 100).

## V Cartels

### Harper Report recommendations – cartels

45. Five main recommendations are made about cartel conduct:

#### **Recommendation 27 — Cartel conduct prohibition**

The prohibitions against cartel conduct in Part IV, Division 1 of the CCA should be simplified and the following specific changes made:

- 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 within Australia.<sup>97</sup>
- The provisions should be confined to conduct involving firms that are actual or likely competitors, where ‘likely’ means on the balance of probabilities.
- 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.
- An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

#### **Recommendation 28 — Exclusionary provisions**

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i), with an amendment to the definition of cartel conduct to address any resulting gap in the law.

#### **Recommendation 29 — Price signalling**

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.

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<sup>97</sup> As Caron Beaton-Wells has drawn to my attention, the key question should be whether the conduct affects or relates to economic activity in Australia, not where relevant persons are geographically located. The term ‘carrying on business’ is not always easy to apply and the tests for jurisdiction in s 5 and for the competition condition relating to the cartel prohibitions should be consistent. The test for the competition condition should thus require the parties to be in competition (likely competition, or competition or likely competition but for the cartel provision) in relation to the supply or acquisition of goods or services in trade or commerce within, to or from Australia (as suggested by the Harper Report itself, at 362).

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.

#### **Recommendation 4 — Liner shipping**

Part X of the CCA should be repealed.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Recommendation 39). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers, their representative bodies and the liner shipping industry.

Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation, as needed, by the ACCC.

Repeal of Part X will mean that existing agreements are no longer exempt from the competition provisions of the CCA. Transitional arrangements are therefore warranted.

A transitional period of two years should allow for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption.

#### **Recommendation 54 — Collective bargaining**

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;
- the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- different timeframes for different collective bargaining notifications, based on the circumstances of each application.

Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited ‘stop power’ to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions.

The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.

46. The implications of other recommendations may also be noted. The Harper Report recommends the repeal of the prohibition of exclusive dealing conduct (s 47) (Recommendation 33). That would entail repeal of the exemption of exclusive dealing conduct from per se liability for cartel conduct<sup>98</sup> (cartel cases that fall within this exemption are subject to SLC-based liability under s 47). This exemption now provides a useful escape route from cartel liability in situations where no other exemption is readily available. The Report also recommends that the exemption for IP licensing conditions under s 51(3) be repealed (see Section VII below). That is another exemption that now provides a useful avenue of escape where no other exemption may be readily available.
47. Passing reference only is made to the criminal prosecution of cartel conduct (there has yet to be a prosecution) and the immunity policies of the ACCC and Commonwealth Director of Public Prosecutions<sup>99</sup> – see paragraph 79 below.

### Comments – cartels

48. The proposed simplification (Recommendation 27) generally has been well received. Few amendments to the CCA have been as mazy as the 2009 amendments relating to cartels. These have been described as ‘a twenty page long labyrinth’ of ‘byzantine complexity’.<sup>100</sup> By contrast, the Commerce (Cartels and Other Matters) Amendments Bill 2014 covers similar ground but in a shorter and simpler form.<sup>101</sup> The Harper

<sup>98</sup> CCA ss 44ZZRS, 45(6).

<sup>99</sup> Harper Report, 366-7.

<sup>100</sup> Justice S Rares, ‘Competition, Fairness and the Courts’ (2014) 39 Australian Bar Rev 79 at 79, 80.

<sup>101</sup> See B Fisse, ‘The Proposed NZ Anti-Cartel Law: A Key-Point Comparison’ (2013) at: [http://www.brentfisse.com/images/Fisse\\_Proposed\\_NZ\\_Anti-Cartel\\_Law\\_Key\\_Point\\_Comparison\\_Competition\\_and\\_Consumer\\_Law\\_News\\_June\\_2013.pdf](http://www.brentfisse.com/images/Fisse_Proposed_NZ_Anti-Cartel_Law_Key_Point_Comparison_Competition_and_Consumer_Law_News_June_2013.pdf).

Report describes the NZ approach as ‘a useful illustration of how the law might be simplified in Australia’.<sup>102</sup>

49. The Harper proposals differ in various respects from those in the Commerce (Cartels and Other Matters) Amendments Bill 2014:
- They appear to retain bid-rigging as a type of cartel provision.
  - The exemptions for joint ventures and supply agreements between competitors bear no resemblance to the NZ provisions and, as defined in the Model Legislative Provisions are unsatisfactory (see paragraphs 57-59 below).
  - No attempt is made to differentiate criminal exemptions from civil exemptions.<sup>103</sup>
  - The collective bargaining exemption is a uniquely Australian species.
  - No clearance procedure is proposed.
  - A new block exemption procedure is recommended (Recommendation 39).
50. The amendments to the CCA proposed in the Harper Report would preserve:
- the filigree concept of a ‘contract, arrangement or understanding’;
  - the atomistic precept of a ‘provision’ in a CAU; and
  - the term ‘purpose of a provision’ – this creates undue complication (the phrase as currently interpreted in Australia relates to the subjective intention of the party or parties who happen to be ‘responsible for introducing the provision’<sup>104</sup>) and, if interpreted as a test of subjective intentionality,<sup>105</sup> lacks economic grip.<sup>106</sup>
51. The Report does not examine the relevance or otherwise of a counterfactual analysis of what the price to be charged would be without the price fixing provision.<sup>107</sup> If a

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<sup>102</sup> Harper Report, 360.

<sup>103</sup> See C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) 289.

<sup>104</sup> *Seven Network Ltd v News Ltd* (2009) 262 ALR 160, 347–52 [859]–[887] per Dowsett and Lander JJ.  
<sup>105</sup> As it was in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ), 581 [46] (McHugh J, but with reservations), 587 [65] (Gummow J), 638 [216] (Callinan J). Cf. Kirby J: at 605 [127], 606 [130].

<sup>106</sup> See further D Robertson, ‘The Primacy of Purpose in Competition Law – Pt 2’ (2002) 10 CCLJ 11.

<sup>107</sup> Contrast *ACCC v CC (NSW) Pty Ltd* (1999) 92 FCR 375, 413 [168] (Lindgren J) with *ACCC v Pauls Ltd* [2003] ATPR ¶41-911 46 624–46 626 [117]–[128] (O’Loughlin J); *ACCC v Australian Abalone Pty Ltd* (2007) ATPR 42-199 (where it was argued that the relevant prices were controlled by international market forces); N Hutley, ‘Challenging the Australian Competition and Consumer



counterfactual analysis is relevant when determining whether or not a cartel provision controls a price the practical effect would be to make the prohibition against price fixing next to useless.

52. Recommendation 27 tightens up the meaning of ‘likely’ for the competition condition under s 44ZZRD(4) that applies to the definition of a ‘cartel provision’. This responds to the concern expressed that the test applied by the Federal Court in *Norcast v Bradken*<sup>108</sup> imposed too low a threshold, especially given the potential exposure to criminal liability. The test applied in *Norcast v Bradken* asked merely if there was a possibility (other than a remote possibility) that the two relevant parties to the CAU would be in competition with each other.
53. The repeal of the prohibitions relating to an ‘exclusionary provision’ as defined by s 4D is overdue. This repeal should have occurred in 2009 as part of the cartel amendments to the CCA. Instead, the definition of a cartel provision under s 4ZZRD(3) was hobbled by excluding restrictions on the acquisition of goods or services, and created a messy overlap between a cartel provision and an exclusionary provision (both apply to restrictions on the supply of goods or services).
54. The proposed repeal of the prohibitions against price signalling and other types of unilateral disclosure of competitively sensitive information<sup>109</sup> has been widely applauded. Division 1A of Part IV was drafted hastily and with little regard to principle. It also introduced a bevy of complex provisions. Ultimately these prohibitions have been applied only to the financial services sector, an ad hoc approach that violates the Hilmer Review principle that prohibitions against anti-competitive conduct should apply across all sectors of the Australian economy.<sup>110</sup>

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Commission's Pleadings in Cartel Cases’ in M Legg (ed), *Regulation, Litigation and Enforcement* (2011) ch 7. NB *United States v Socony Vacuum Oil Co.*, 310 US 150, 220 (1940) (‘Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale, and protects that vital part of our economy against any degree of interference.’).

<sup>108</sup> *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235.

<sup>109</sup> For one critique see C Beaton-Wells and B Fisse, ‘Australia’s Proposed Information Disclosure Legislation: International Worst Practice’, *Competition Policy International*, *Antitrust Chronicle*, 30 August 2011.

<sup>110</sup> The proposed block exemption procedure (Recommendation 39) is potentially prone to the same objection.

55. The recommendation that concerted practices be prohibited if they have the purpose, effect or likely effect of substantially lessening competition is problematic.<sup>111</sup> One concern is the absence of definition of ‘concerted practice’. Another is that there is no requirement 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). More fundamentally, the Harper recommendation derives the concept from EU competition law but, unlike the position there, fails to apply per se liability. In the EU, the concept of ‘concerted practice’ applies not only where the practice has an anti-competitive effect under the effect limb of Art 101(1) but also where per se civil liability arises under the ‘object’ limb of Art 101(1).<sup>112</sup> The EU approach recognises that concerted practices (properly defined and understood) are by their nature highly likely to restrict, distort or prevent competition, just as conduct involving price fixing, output restriction, market allocation and bid rigging is likely to have such effects. So-called ‘facilitating practices’ are prevalent and exemplify one type of conduct that may give rise to a concerted practice in circumstances where there is no provable ‘understanding’ between competitors.<sup>113</sup> Remarkably, it is unlikely that the Harper recommendation would rectify the problem that arose in *Apco Service Stations Pty Ltd v ACCC*,<sup>114</sup> where the ACCC was unable to prove that the frequent communication of price information by one competitor to another amounted to an understanding. A concerted practice would be easier to establish than an understanding in such a case but the SLC test under the proposed s 45M(1)(c) would present a considerable hurdle that would not apply in the EU.
56. Recommendation 32 proposes that there be an exemption comparable to the exemption of supply agreements between competitors under the proposed s 32 in the NZ anti-cartel Bill. However, as discussed in paragraph 17 above, the drafting set out in the Model Legislative Provisions (proposed s 45J) is unwieldy and difficult to reconcile with Recommendation 23 on simplification.

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<sup>111</sup> See further C Beaton-Wells & B Fisse, Submission on the Competition Policy Review Final Report, 22 May 2015, 8-15, at: [http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-Submission\\_Final%20Report\\_250515\\_FINAL.pdf](http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-Submission_Final%20Report_250515_FINAL.pdf).

<sup>112</sup> See J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) 3.184.

<sup>113</sup> See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 48-51.

<sup>114</sup> (2005) 159 FCR 452.

**Joint ventures/collaborative ventures**<sup>115</sup>

57. Recommendation 27 would much improve the law on the exemption of joint venture conduct from the cartel prohibitions. The joint venture exceptions under s 44ZZRO and 44ZZRP are unduly restrictive and complex. 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).<sup>116</sup> However, the joint venture provisions in the Model Legislative Provisions are not satisfactory. This is the new section proposed:

**45I Joint ventures**

- (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.

58. The approach taken in s 45I is problematic:

- the concept of a ‘joint venture’ is not defined (and is unclear as to whether or not the concept as now inadequately defined in s 4J of the CCA is to be retained);
- the trifurcated drafting of the conditions under s 45I(1)(b) is difficult to reconcile with Recommendation 23 that the cartel-related provisions of the Act be simplified;

<sup>115</sup> See further C Beaton-Wells & B Fisse, Submission on the Competition Policy Review Final Report, 22 May 2015, 1-8, at: [http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-Submission\\_Final%20Report\\_250515\\_FINAL.pdf](http://www.brentfisse.com/images/Beaton-Wells-and-Fisse-Submission_Final%20Report_250515_FINAL.pdf).

<sup>116</sup> See B Fisse, “New Zealand Government Proposes New Anti-Cartel Law with Collaborative Activity Exemption that Highlights Flaws in Australian Joint Venture Exceptions” at: [http://www.brentfisse.com/images/Fisse\\_Proposed\\_NZ\\_collaborative\\_activity\\_exemption\\_01072013.pdf](http://www.brentfisse.com/images/Fisse_Proposed_NZ_collaborative_activity_exemption_01072013.pdf); C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.

- the condition in s 45I(1)(b)(i) that the cartel provision relate to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture is absurdly lax;<sup>117</sup>
- guidance needs to be given on the condition in s 45I(1)(b)(ii) that the cartel provision be reasonably necessary for undertaking the joint venture;
- the condition in s 45I(1)(b)(iii) that the cartel provision be ‘for the purpose’ of the joint venture is obscure;<sup>118</sup>
- the issue of sham joint ventures is not squarely addressed; and
- the definition of the exemption does not differentiate between criminal and civil liability.

59. Back to the drawing board – recommendations:

- the concept of ‘joint venture’ be replaced with the concept of ‘collaborative activity’;
- the proposed s 45I(1)(b)(i) and (iii) not be adopted;
- the proposed s 45I(1)(b)(ii) be reworded to read: ‘is reasonably necessary for the collaborative activity and not for the dominant purpose of lessening competition between 2 or more parties to the activity’ and the operation of these tests be assisted by guidelines similar to those developed by the NZ Commerce Commission;<sup>119</sup>

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<sup>117</sup>

Because:

- (1) 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.
- (2) The term ‘relates to’ is broad and requires merely a connection between the cartel provision and goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture.
- (3) 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’.

<sup>118</sup>

See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 8.3.4.

<sup>119</sup>

Revised draft of August 2014 at: <http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/> See further J Land, ‘Joint Ventures and the Collaborative Activity Exemption’, 24th Annual Workshop of the Competition Law and Policy Institute of New Zealand, 2 August 2013; J Land, ‘Joint Ventures and the collaborative activity exemption’ [2014] New Zealand Law Journal 190; J Land and A Schiff, ‘Analysing Collaborative Activities’ [2014] New

- the collaborative activity exemption in the context of cartel offences be subject to a defence of genuine belief that the cartel provision is reasonably necessary for the collaborative activity (with an evidential burden of proof on the accused);<sup>120</sup> and
- the proposed s 45I(1) be revised to provide that the prohibitions/offences do not apply to a corporation that makes a CAU containing a cartel provision or gives effect to a cartel provision in a CAU where the corporation and one or more of the other parties to the CAU participate in a collaborative activity and the cartel provision is reasonably necessary for the collaborative activity; the wording in s 45I(1)(a) should be deleted and replaced by a definition of ‘collaborative activity’ along the lines of Commerce (Cartels and Other Matters) Amendment Bill 2011 (NZ), proposed s 31(2).

## VI Mergers

### Harper Report recommendations

60. Two Recommendations are made:

#### **Recommendation 25 — Definition of market and competition**

The current definition of ‘market’ in section 4E of the CCA should be retained but the current definition of ‘competition’ in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.<sup>121</sup>

#### **Recommendation 35 — Mergers**

There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process.

The formal merger exemption processes (that is, the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the

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Zealand Law Journal 230; J Land, ‘The Case for Pro-Competitive Collaborations’, NZ Productive Markets Forum - Developments in Competition Law, Policy and Regulation, Nov 2014.

<sup>120</sup> This avoids the concept of ‘honest belief’ as used in the proposed Commerce Act s 82B(2)(a) under the NZ anti-cartel Bill. ‘Honesty’ like ‘dishonesty’ is a populist term that admits spurious defences; see C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 2.4.1.

<sup>121</sup> The need for this change has been questioned on the ground that the current definition of ‘competition’ in the CCA includes competition from actual and potential imports into Australia.

review process should be settled in consultation with business, competition law practitioners and the ACCC.

However, the general framework should contain the following elements:

- The ACCC should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.
- The review by the Australian Competition Tribunal should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason.

Merger review processes and analysis would also be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the Australian Council for Competition Policy (see Recommendation 44).

61. There are also various findings on issues raised in submissions:

- The case for amending the law to cover creeping acquisitions is not sufficiently strong.<sup>122</sup>
- It would be inappropriate to co-ordinate the timing of the different merger approval processes that exist under Australian law (eg foreign investment, media diversity and financial regulator approvals).<sup>123</sup>
- Private parties should not be immunised from the risk of an adverse costs order in connection with merger proceedings, but consumer perspectives are important to decisions about mergers and the proposed new merger

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<sup>122</sup> Harper Report, 18.2.  
<sup>123</sup> Harper Report, 18.3.

authorisation process will provide improved opportunities for third parties, including consumers and their representatives, to be heard.<sup>124</sup>

- The clearance application form published by the Commerce Commission in June 2014 is a ‘useful illustration’ of the approach proposed for changing the formal merger approval process.<sup>125</sup>

### Comments – mergers

62. The Harper Report preserves the existing informal review process without doing much about the issues of transparency and timeliness that arise in complex cases. The informal clearance process appears to be a sacred cow in Australia. There seems to be little prospect of moving away from a dual informal/formal system in favour of the formal system of the kind that operates in NZ.<sup>126</sup> The formal review process has been a dead letter in Australia since its inception in 2007 but the changes proposed in the Report are significant and would make formal review more attractive. For those who take the informal route the price paid will continue to be limited transparency or non-transparency of submissions opposing a merger or concerns of the ACCC that warrant further submissions by the parties seeking clearance.
63. The Review Panel considered that ‘overall the merger provisions of the CCA are working effectively’<sup>127</sup> and did not recommend changes to the substantive law apart from Recommendation 25 (purported need to clarify that ‘competition’ includes import competition).<sup>128</sup> However, there are some loose ends. In particular:
- The meaning of ‘substantial’ in the SLC test is vague and the ACCC *Merger Guidelines* (2008) offer limited guidance;<sup>129</sup> see Section IV above.

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<sup>124</sup> Harper Report, 18.4.

<sup>125</sup> Harper Report, 331.

<sup>126</sup> Contrast the proposal advanced in Herbert Smith Freehills, Competition Policy Review Submission, 17 June 2014, at: <http://competitionpolicyreview.gov.au/files/2014/06/HSF.pdf>

<sup>127</sup> Harper Report, 332.

<sup>128</sup> A far simpler approach, if clarification be needed, would be to define competition as including actual and potential import competition.

<sup>129</sup> See ACCC, *Merger Guidelines* (2008) [3.5] (The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgement and will always depend on the particular facts of the merger under investigation. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices) at: <https://www.accc.gov.au/publications/merger-guidelines>.

- When is a substantial lessening of competition ‘likely’? Three different tests emerged from the Metcash cases in 2011 and it is uncertain which should apply.<sup>130</sup>
- The ACCC Merger Guidelines take a narrow approach to behavioural undertakings.<sup>131</sup> Is that approach unduly restrictive?
- What framework should apply to the analysis of unilateral and coordinated effects in the case of acquisition of minority shareholdings?<sup>132</sup>
- What is a ‘maverick firm’ and what is the significance of a maverick firm when applying the SLC test?<sup>133</sup>
- The concept of a provision that provides ‘indirectly’ for the acquisition of shares or assets in s 44ZZRU and s 45(7) is opaque and, unlike US antitrust law, does not indicate the extent to which the parties to a proposed merger may coordinate their conduct before closing.<sup>134</sup>
- Unscrambling a consummated merger that breaches s 50 may be difficult or impossible. What lessons are there to learn about the use of timing agreements, commitments not to close, and ‘hold-separate’ agreements in order to reduce or avoid the need later to seek divestiture?<sup>135</sup>
- The relationship between s 50 and the proposed s 46 may need to be clarified. A number of creeping acquisitions may be ‘conduct’ within the meaning of the proposed prohibition against misuse of market power. Is that intended?

<sup>130</sup> See D McCracken-Hewson, ‘How likely is “likely”? Metcash, counterfactuals and proof under s 50’ (2012) 40 ABLR 363.

<sup>131</sup> See *Merger Guidelines* (2008) [20] (‘Generally, behavioural undertakings are only likely to address the ACCC’s competition concerns if they foster the development or maintenance of enduring and effective competitive constraints within a short and pre-specified period of time. It is particularly rare for the ACCC to accept behavioural remedies that apply on a permanent basis due to the inherent risk to competition combined with the monitoring and enforcement burden such remedies create.’). Compare US DOJ, *Antitrust Division Policy Guide to Merger Remedies* (2011) IIB, at: <http://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> ; S Waller, ‘Access and Information Remedies in High Tech Antitrust’ (2012) 8 Jnl of Competition Law & Economics 575.

<sup>132</sup> See C Arnott, ‘Analysing the competition impact of partial acquisitions — Sky/ITV as a case study’ (2010) 18 Competition & Consumer Law J 1. A current example is the proposed acquisition by Foxtel of a 15% interest in Network Ten, a free-to-air TV rival.

<sup>133</sup> See Ben Morawetz, ‘Identifying and evaluating mavericks in Australian and US merger analysis’ (2014) 42 ABLR 292.

<sup>134</sup> See C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 301-302.

<sup>135</sup> See K Fenton, ‘Review of Consummated Transactions: Perspectives from Recent U.S. Experience’, Competition Matters 2015: Competition and Regulation Conference, Wellington, 24 July 2015.



## VII IP and Competition Law

### Harper Report recommendations

64. There are three Recommendations of note:

#### **Recommendation 6 — Intellectual property review**

The Australian Government should task the Productivity Commission to undertake an overarching review of intellectual property. The Review should be a 12-month inquiry.

The review should focus on: competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements.

A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.

#### **Recommendation 7 — Intellectual property exception**

Subsection 51(3) of the CCA should be repealed.

#### **Recommendation 13 — Parallel imports**

Restrictions on parallel imports should be removed unless it can be shown that:

- the benefits of the restrictions to the community as a whole outweigh the costs ; and
- the objectives of the restrictions can only be achieved by restricting competition.

Consistent with the recommendations of recent Productivity Commission reviews, parallel import restrictions on books and second-hand cars should be removed, subject to transitional arrangements as recommended by the Productivity Commission.

Remaining provisions of the *Copyright Act 1968* that restrict parallel imports, and the parallel importation defence under the *Trade Marks Act 1995*, should be reviewed by an independent body, such as the Productivity Commission.

65. Recommendation 6 has been acted upon. A review by the Productivity Commission was announced on 18 August 2015.<sup>136</sup>

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<sup>136</sup> See IP Australia, 'Productivity Commission Inquiry into Australia's IP arrangements' 25 August 2015, at: <http://www.ipaustralia.gov.au/about-us/news-media-and-events/latest-news-listing/Productivity-Commission-Inquiry-into-Australias-IP-arrangements>.

### Comments on Recommendation 7

66. Section 51(3) now exempts certain types of transactions involving IP from the cartel prohibitions and the prohibitions against anti-competitive agreements and exclusive dealing. The exemption covers certain conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts. The exemption does not apply to the prohibitions relating to misuse of market power and resale price maintenance. Nor does it cover the transfer of IP rights, whether by licence or assignment.
67. In recommending the repeal of s 51(3), the Review Panel took the position that commercial transactions involving IP rights, including the assignment and licensing of such rights, should be subject to the CCA in the same manner as transactions involving other property and assets. Equation of IP rights with other types of property rights strikes a now familiar chord.<sup>137</sup>
68. The Harper Report claims that Recommendation 7 is consistent with the approach adopted in other major jurisdictions:<sup>138</sup>

Most comparable jurisdictions have no equivalent to subsection 51(3). None of the US, Canada or Europe provide an exemption from competition laws for conditions of IP transactions. In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions. The courts in those jurisdictions distinguish between competitively benign and harmful IP transactions, taking account of all relevant circumstances of the transaction and the conditions imposed. There is no evidence that this has diminished the value of IP rights in those countries.

However, under US law and EU law, ‘the relevant circumstances of the transaction’ include the efficiencies served by the transaction and not merely the lessening or increasing of competition.<sup>139</sup> The operation of the rule of reason in those jurisdictions

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<sup>137</sup> See I Eagles and L Longdin, ‘Competition in Information and Computer Technology Markets: Intellectual Property Licensing and s 51(3) of the Trade Practices Act’ (2003) 3 Queensland University of Technology LJ 31. For the view that it is misleading to equate IP with other types of property see I Lianos, ‘A Regulatory Theory of IP: Implications for Competition Law’ (2008) at: <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-1-2008>.

<sup>138</sup> Harper Report, 109.

<sup>139</sup> See Federal Trade Commission and the US Department of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) at: <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>; Federal Trade Commission and the US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000) at: [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-)

is not examined. Yet it is the rule of reason that largely explains why the value of IP rights has not been diminished for example in the US by the general application of competition prohibitions to IP-related conduct.<sup>140</sup>

69. The Report states that IP licences should be exempt from the per se cartel prohibitions ‘insofar as they impose restrictions on goods or services produced through application of the licensed IP’.<sup>141</sup> However, they should contravene the Act if ‘they have the purpose, effect or likely effect of substantially lessening competition’.<sup>142</sup> The Model Legislative Provisions do not provide any specific carve-out for IP licences. The intention is that IP licences would come within the proposed exemption for vertical supply agreements (proposed s 45J) (Recommendation 27).

70. The repeal of s 51(3) would get rid of a cartel-related loophole:<sup>143</sup>

Consider the cross-licensing escape route created by s 51(3). Assume that A and B are competitors and that each owns commercially significant patents. A licenses its patents to B for exclusive use in territory X. B licenses its patents to A for exclusive use in territory Y. An effect of this cross-licensing is that A and B do not compete against each other in territory X or territory Y but there is no non-compete clause in the licensing agreements. If carefully structured, this kind of arrangement can attract the exemption under s 51(3). A territorial restriction of the kind envisaged comes within the likely meaning of the requirement that the licensing condition must ‘relate to’ ‘the invention to which the patent . . . relates or articles made by the use of that invention’. The exemption under s 51(3) is not precluded by the fact that A and B are competitors or likely competitors. In the example given, there is no non-compete clause: the only cartel provision is that embodied in the licensing condition that each party has imposed on the other.

71. Two safeguards against overreach by Recommendation 7 are envisaged. The first is exemption via authorisation or notification:<sup>144</sup>

IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA (which covers anti-competitive practices), but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the notification or authorisation processes.

The second safeguard is the block exemption mechanism:<sup>145</sup>

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[hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](#); J Faull and A Nikpay, *The EU Law of Competition* (3rd ed, 2014) ch 10, C.

<sup>140</sup> See eg Federal Trade Commission and the US Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) at: <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

<sup>141</sup> Harper Report, 110.

<sup>142</sup> Harper Report, 110

<sup>143</sup> C Beaton-Wells & B Fisse, *Australian Cartel Regulation* (2011) 313.

<sup>144</sup> Harper Report, 110.

.. the block exemption power recommended by the Panel (see Recommendation 39) could be used to specify ‘safe harbour’ licensing restrictions for IP owners. As the ACCC notes:

Should a block exemption provision be introduced, it could be used to clarify the scope of permissible conduct relating to the exercise of intellectual property rights, thereby providing additional certainty for businesses.<sup>146</sup>

72. Submissions about compliance costs in the event of repeal of s 51(3) receive little sympathy:<sup>147</sup>

Concerns expressed in submissions about business uncertainty and increased compliance cost likely to arise from repeal .. do not weigh heavily with the Panel. The competition law, and competition policy generally, are of fundamental importance to the welfare of Australians. All sectors of the economy should be exposed to and disciplined by the competition law, despite the necessary compliance cost that entails. The economic benefits of increased competition almost always outweigh the compliance costs.

73. ACCC guidelines are recommended in the context of misuse of market power (Recommendation 30) and those should canvas refusals to license IP. However, there is no recommendation that ACCC guidelines be developed to explain and clarify the application of competition law to other IP-related conduct, including the licensing and cross-licensing of patents.<sup>148</sup> Contrast the useful IP guidelines issued by the FTC and DOJ in the US<sup>149</sup> and those underway in Canada.<sup>150</sup>

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<sup>145</sup> Harper Report, 110.

<sup>146</sup> ACCC, Submission to the Competition Policy Review – Response to the Draft Report, 24 Nov 2014, 22.

<sup>147</sup> Harper Report, 110.

<sup>148</sup> Consider the then useful but now outdated guidance in TPC, *Application of the Trade Practices Act to Intellectual Property*, July 1991.

<sup>149</sup> See Federal Trade Commission and the US Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) at: <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>; Federal Trade Commission and the US Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, 2000, at: [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

<sup>150</sup> Canada, Competition Bureau, *Intellectual Property Enforcement Guidelines*, Draft June 2015, at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03935.html>.

## VIII Remedies, Sanctions and Enforcement

### Harper Report recommendations

74. There are several key recommendations:

#### **Recommendation 41 — Private actions**

Section 83 of the CCA should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.

#### **Recommendation 53 — Small business access to remedies**

The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;
- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and

- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.

#### **Recommendation 26 — Extra-territorial reach of the law**

Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, 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.

The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

#### **Recommendation 40 — Section 155 notices**

The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a ‘refusal or failure to comply with a notice’ under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.

The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

### **Comments – remedies, sanctions and enforcement<sup>151</sup>**

75. The proposed amendment to s 83 of the CCA<sup>152</sup> would remove doubt about its operation in the context of factual admissions and help to reduce the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contraventions. Several Federal Court decisions suggest that s 83 is confined to findings of fact made by the court after a contested hearing.<sup>153</sup> The Review Panel

<sup>151</sup> For a critique of the Harper Report on private enforcement see C Beaton-Wells, ‘Private Enforcement of Competition Law in Australia: Inching Forwards?’ 39(3) (2015) Melbourne University Law Review (submitted).

<sup>152</sup> The same recommendation was made 12 years ago in Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2003) Report 95, Recommendation 30-5.

<sup>153</sup> *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 588 at [51]; *ACCC v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265 at [118]; *ACCC v Dataline.net.au Pty Ltd* [2006] FCA 1427 at [107]. On one view this does

did not accept that settlements would be discouraged by making factual admissions admissible.<sup>154</sup>

.. The decision to resolve an ACCC matter by admissions is a significant one that would usually subject the respondent company to a financial sanction and adverse publicity. Having taken that decision, it is unlikely that the respondent company would subsequently contest the admitted facts in a follow-on proceeding.

.. Section 83 merely makes the admitted fact prima facie evidence of that fact in the follow-on proceeding. The respondent company remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to the admitted fact. Furthermore, admissions of fact in an ACCC proceeding will rarely, if ever, address the question of loss and damage suffered by market participants as a result of the contravening conduct. Accordingly, a plaintiff in a follow-on proceeding would need to prove loss and damage against the respondent company in order to recover compensation.

76. The improvements to small business access to remedies proposed under Recommendation 53 further an important cause. However, the reception has not been entirely favourable. The Law Council of Australia SME Committee has registered its dissatisfaction:

While the SME Committee supports any efforts to improve access to justice for small businesses, the Harper Review's recommendation in this regard is very disappointing. This recommendation does not provide small businesses with any tangible legal rights.<sup>155</sup>

77. Recommendation 26 (extraterritoriality) is sensible. It removes the nexus of 'carrying on business', which does not focus as it should on whether or not the conduct in issue affects or relates to economic activity in Australia. It also removes the anachronistic requirement of Ministerial consent.<sup>156</sup>
78. Recommendation 40 (on the s 155 power of investigation) would limit the extent to which s 155 notice can be used in the context of emails and electronic data. The Review Panel recognised that the compliance burden can be considerable:<sup>157</sup>

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not matter very much given that such admissions will often be admissible under the uniform Evidence Act s 81 (see Harper Report, 408).

<sup>154</sup> Harper Report, 408. The ACCC changed its position to concede this.

<sup>155</sup> Submission, 29 May 2015, 3 at [http://www.lawcouncil.asn.au/lawcouncil/images/3002\\_-\\_Competition\\_Policy\\_Review\\_Final\\_Report\\_SME.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/3002_-_Competition_Policy_Review_Final_Report_SME.pdf):

<sup>156</sup> This requirement was introduced in 1986, at a time when there was concern over the extra-territorial reach of US competition law (the Westinghouse case) and many other countries did not have competition laws. See Harper Report, 414.

<sup>157</sup> Harper Report, 419.

The Panel understands the concerns expressed by business over the cost of compliance with section 155 notices that require the production of documents. In the digital age, businesses retain many more documents, such as emails, than was the case 20 years ago. As a consequence, compliance with a section 155 notice may require electronic searches of tens of thousands of documents, which can occasion very large expense.

The courts have recognised the cost of documentary searches and, over the last 10 years, have modified the rights of discovery. For example, the Federal Court Rules 2011 (20.14) now require a party to undertake a reasonable search for documents. In determining what is a reasonable search, the party may take into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

The safeguard proposed is a defence to a ‘refusal or failure to comply with a notice’ under s 155(5)(a) that would be available to a recipient of a notice issued under s 155(1)(b) who can demonstrate that a reasonable search was undertaken in order to comply with the notice.<sup>158</sup> The ACCC guidelines on s 155<sup>159</sup> need to be revised in this and other respects including the nature and limits of the s 155 procedure in the context of informal merger reviews.<sup>160</sup>

79. The Harper Report does not try to address the question of why the introduction of cartel offences in 2009 has yet to lead to a prosecution.<sup>161</sup> Nor does it address the criticisms that have been made of the ACCC Immunity Policy and the complementary policy of the Commonwealth Director of Public Prosecutions.<sup>162</sup>
80. Effective enforcement depends on effective sanctions.<sup>163</sup> The capacity of monetary penalties to deter corporations from contravening the Act is open to doubt. The threat of million or even billion dollar fines seems to have a limited deterrent effect, as is suggested by the widespread manipulation of LIBOR and other rates by major

<sup>158</sup> Harper Report, 420.

<sup>159</sup> *Section 155 of the Trade Practices Act*, March 2008, currently under review, at: <https://www.accc.gov.au/publications/section-155-of-the-trade-practices-act>:

<sup>160</sup> See P Strickland, ‘Do we need a better way for reviewing mergers?’ (2012) 40 ABLR 143 at 158-160.  
<sup>161</sup> See the passing reference in Harper Report, 366-7. To date the cartel offences have been in hibernation. The criminal prosecution of serious cartel conduct is said to be one of the ACCC’s top enforcement priorities. There are many obstacles. One is the challenge of joint trial of a corporation and the employees alleged to have participated in cartel conduct, partly because evidence obtained by reliance on s 155 may be admissible against the corporation but not individuals.

<sup>162</sup> See eg C Beaton-Wells, ‘Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study’ (2014) 2 *Journal of Antitrust Enforcement* 126. See further C Beaton-Wells & C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015).

<sup>163</sup> This is a large subject. For one convenient point of entry see C Beaton-Wells and B Fisse, *Australian Cartel Regulation* (2011) ch 11. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) Report 103, 2006; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2003) Report 95; B Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (2014).



financial institutions. Individual officers and employees often escape enforcement action. These deficits are notorious but are not adverted to in the current ‘root and branch’ review.

81. The Harper Report was published before the Full Federal Court decision in the CFMEU case.<sup>164</sup> The CFMEU decision means that a court should have no regard to an agreed penalty figure put forward by the parties. The determination of penalty is a judicial function and not a matter for settlement by the parties. On one possible view, the implication is dire given that the vast majority of civil enforcement cases in the past have been expedited through penalty settlements. However, on another possible view, the decision is principled and may well be upheld by the High Court of Australia on appeal.<sup>165</sup> In the recent case of *ACCC v Visa Worldwide Pte Ltd*,<sup>166</sup> where Visa was penalised \$18 million for unlawful exclusive dealing and ordered to pay costs of \$2 million, the hearing on penalty proceeded smoothly on the basis of agreed facts and submissions on penalty that avoided specifying the particular quantum.<sup>167</sup> It remains to be seen whether this experience is likely to be typical.<sup>168</sup>

<sup>164</sup> *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59. See also *Barbaro v R; Zirilli v R* (2014) 253 CLR 58 (approach to be taken to submissions on penalty in criminal proceedings). For a useful discussion see P Renehan & P Stevenson, ‘Purity but at what price? The application of *Barbaro* principles to pecuniary penalty proceedings’, Competition Law Conference, Sydney, 24 May 2015. Compare NZ Law Commission, *Pecuniary Penalties*, Report 133 (2014) 13.12-13.35.

<sup>165</sup> There is an appeal: ‘Penalty deals issue headed for High Court’, AFR 17 July 2015, 32.

<sup>166</sup> [2015] FCA 1020. See also *ACCC v Chopra* [2015] FCA 539.

<sup>167</sup> Based on observation of the FCA penalty hearing in Sydney, 3-4 September 2015.

<sup>168</sup> Compare the optimism expressed in *ACCC v Visa Worldwide Pte Ltd* [2015] FCA 1020 at [122] (‘It should also perhaps be noted in this context that the sensible and reasonable settlement reached in this matter puts paid to the somewhat dire warnings that followed the decision of the Full Court in *Director, Fair Work Building Industry Inspectorate v CFMEU* to the effect that the inability of the parties to put an agreed penalty figure or range to the Court would stifle settlement of matters such as this.’) with the caution issued in Gilbert+Tobin, ‘Strange currencies: looking for meaning in the *ACCC v Visa* settlement’ at: <http://ecomms.gtlaw.com.au/rv/ff0022125115a7a3a1557b47d047b7679fab480d> (‘However, many cases will throw up considerably greater difficulties than this one under the approach dictated by *Director v CFMEU*, particularly where the turnover of the defendant is much larger or where, as is common in cartel cases, there are multiple contraventions. In such cases, the theoretical maximum penalty could be much higher than in this case, and even if parties could agree that the penalty should be in the lower, mid or upper range this could still leave considerable uncertainty as to the actual monetary penalty to be imposed by the Court.’).

## IX Conclusion

82. The Harper Report is a major landmark that should lead to many worthwhile changes in Australian competition law. The review of competition policy in the Report should also invigorate debate and spur action on other fronts including statutory barriers to competition and competitive neutrality.
83. The Harper Report is much more lyre of Orpheus than sirens' call. However, some competition law recommendations are questionable. One sirens' call is the proposal on misuse of market power.<sup>169</sup> Another is the latter-day legislative model advanced for a new Australian joint venture exemption to cartel prohibitions.<sup>170</sup> The Report also proclaims the need for simplification without offering a good chart.<sup>171</sup>
84. Orpheus' songs are said to have allured the trees, the savage animals, and even the insensate rocks. Many of the Harper Report recommendations on Part IV allure. However, there are gaps. These include silence on the meaning of 'substantial' in the SLC test and drop out on what might be done in Australia to develop a rule of reason test.<sup>172</sup>
85. Doubtless, NZ competition lawyers and law-makers will apply their own tests for possible harmonies. They will see that the Harper Report does not fully correspond to the political description of it as a 'root and branch review'. They will compare the proposals on cartels and mergers with what already has been achieved in NZ. They will keep looking for workable possible alternatives to s 36 of the Commerce Act. They will also ask whether 'bonsai'<sup>173</sup> reviews of the Commerce Act are likely to be less time-pressured,<sup>174</sup> more thorough and more productive of workable legislation and useful guidelines.

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<sup>169</sup> See Section III above.

<sup>170</sup> See paragraphs 57-59 above. Even after the Harper Review, Australia remains far behind NZ in modernising the law in this area.

<sup>171</sup> See Section II above.

<sup>172</sup> See Section IV above.

<sup>173</sup> The description in Russell McVeagh, 'Final Report of Australian 'Root and Branch' competition review released: A blueprint for NZ's 'bonsai' review of the Commerce Act?' 1 April 2015, at: <http://www.russellmcveagh.com/Publications/ViewPublication/tabid/176/Title/final-report-of-australian-root-and-branch-competition-review-released-a/pid/381/Default.aspx> .

<sup>174</sup> The time-frame imposed for the Harper Review was very short given the far-reaching scope of the review. Compare eg the US Antitrust Modernization Commission, *Final Report* (2007) (3 year review for less extensive subject matter).