Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

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**By E-mail**

Mr Scott Rogers
Manager, Competition Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

competition@treasury.gov.au

Your Ref
Our Ref ZM MDL
File No. 011833167

**Contact**
Zaven Mardirossian
Direct 61 3 9229 9635
Facsimile 61 3 9916 9343
zmardirossian@abl.com.au

**Partner**
Matthew Lees
Direct 61 3 9229 9684
mlees@abl.com.au



Dear Mr Rogers

**Discussion Paper: Options to strengthen the misuse of market power**

We refer to the Commonwealth's discussion paper 'Options to strengthen the misuse of market power,' dated December 2015 (**Discussion Paper**).

We welcome the opportunity to make a submission in response to the Discussion Paper, in which the Government seeks further public consultation on the recommendations of the Competition Policy Review (**Harper Review**) to amend the prohibition of misuse of market power in s 46 of the *Competition and Consumer Act 2010* (Cth).

We were extensively involved in the Harper Review. Many of our submissions were endorsed by the Harper Review, and subsequently by the Government. We addressed the proposed amendments to misuse of market power in our previous submissions (**Previous Submissions**):

- dated 17 November 2014 to the Harper Review on its Draft Report; and
- dated 26 May 2015 to Treasury on the Harper Review's Final Report.

This submission follows on from those submissions, copies of which are **enclosed**, and is divided into two parts: (a) general comments and (b) responses to the questions posed in the Discussion Paper.

As stated in our Previous Submissions, we do not support the proposed amendments to s 46. For the reasons set out below, the current section should be maintained (apart from s 46(1AA), which should be abolished).

## A. General comments

We do not support the proposed amendments to s 46 because:

- There is a lack of evidence of a need for change.

  The Harper Review's reasons for amending s 46 were based on a preference for a prohibition based on a general economic concept, rather than any identified practical situations not addressed appropriately

by the current law. It remains unclear what conduct the changes are trying to capture that is not already captured by the current law.

It is remarkable that the Discussion Paper proposes six options but does not define the problem those options are seeking to address. This prevents any serious cost-benefit analysis of those options, and means the debate must be conducted at the level of general principles around the drafting of competition laws.

- The arguments for change are inconsistent and reflect inconsistent objectives and expectations about what the amendments would achieve.

One line of argument, made by various lobby groups, is that the amendments would somehow protect small businesses and address the problem of oligopolies in certain industries (in particular, supermarkets).[1] However, those types of concerns were expressly rejected by the Harper Review, which instead took the conventional economic position that businesses should be allowed to compete vigorously, even if this would have an adverse effect on competitors. The same position is taken in the Discussion Paper, which states:[2]

> "*firms are entitled, and indeed encouraged, to succeed through competition, even if they put competitors out of business and achieve a position of market dominance through their success. This 'Darwinian' process of aggressive rivalry is what drives efficient outcomes and benefits to consumers.*"

The Harper Review proposed amending s 46 because it considered the law should be based on an economic test — whether there is a purpose, effect or likely effect of substantially lessening competition (**SLC test**). The SLC test would seemingly make it easier for the ACCC or other claimants to prove a misuse of market power, as they would no longer be required to prove the current "take advantage" and "purpose" elements, even though this would be at the expense of increased uncertainty for businesses.

However, the fact that the ACCC has not proved some s 46 cases is not in itself a valid reason to overhaul the provision. It has not been demonstrated that those cases should have, or would have been, decided differently under the proposed amendments. In two cases frequently referred to — *Rural Press*[3] and *Cement Australia*[4] — the Court held that the conduct in question was already prohibited by the Act, even though it was not a misuse of market of power.

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[1] Peter Strong, 'Why Australia's love affair with oligopolies needs to end,' *Smart Company,* 3 February 2016.
[2] Discussion Paper, p 3.
[3] (2003) 216 CLR 53.
[4] (2010) 187 FCR 261.

- The proposed changes would increase uncertainty for businesses, facilitate unmeritorious claims and inhibit legitimate competitive conduct.

  The proposed changes to s 46 do not correspond with the Harper Review's statement in its Final Report that a "fit for purpose" competition policy includes "competition laws and regulations that are clear, predictable and reliable."[5] While the proposed amendments may simplify drafting, they fail to simplify the process of applying the law to real-life situations.

  Currently, businesses can be confident that they will not breach the law provided they do not have one of the prohibited anti-competitive purposes listed in s 46. They also know they will not breach the law if they do not "take advantage" — that is, use — any market power they might be considered to have.

  Under the present law, the SLC test is confined to prohibitions on dealings between two or more parties (**bilateral conduct**) — a merger, acquisition, exclusive supply arrangement or some other contract, arrangement or understanding between two or more parties (ss 45, 47 and 50). When that test is applied in court, it requires (usually conflicting) expert evidence from economists. It is no simple thing to determine whether competition is likely to be substantially lessened.

  When the test is applied by the ACCC in merger clearance applications, the process can take several months of consideration, the provision of information, market consultations and sometimes the negotiation of enforceable undertakings before the ACCC is able to reach a decision. Even then, the ACCC's decisions are not always upheld on appeal, as shown by, for example, the Federal Court's decision in *Franklins v Metcash*.[6]

  The proposed s 46 would apply the SLC test to each and every aspect of a business' unilateral conduct — such as how it sets its prices, what products it decides to make (or not make), how it makes its products, and where it chooses to supply them. Such business decisions would be open to scrutiny by the ACCC, competitors, or other commercial players in an open-ended inquiry into the potential long-term effects in any market. While such scrutiny may be justifiable and workable for a major and infrequent business event like a substantial merger, it is completely unworkable in the context of routine, ordinary business decision-making.

  The Harper Review itself acknowledged that the proposed s 46 risked over-capture — prohibiting legitimate competitive conduct that should not be prohibited.[7] In its Draft Report, the Harper Review initially proposed a defence to try to address that concern. In its Final Report, problems with the proposed defence led to it being dropped.[8] The concerns with over-capture remained, but the Harper Review considered

[5] Harper Final Report, p 7.
[6] (2009) 264 ALR 15.
[7] Harper Draft Report, p 44.
[8] Harper Final Report, p 345.

those concerns were outweighed by the perceived benefits of the proposed s 46.[9] With respect, there is simply no evidence to support that assessment.

We strongly disagree with the Harper Review's assessment. As lawyers, we see clearly the potential for the proposed s 46 to facilitate unmeritorious claims that are designed to hinder, not protect, competitive conduct. It would be all too easy to allege that any vigorous competitive conduct that adversely affects competitors would be "likely" to have the effect of substantial lessening competition at some stage in the future.

It has been asserted that it is inherent in the SLC test that the test does not prohibit competitive conduct. That view is incorrect. The Harper Review acknowledged that, in applying the SLC test to any conduct, the potential pro- and anti- competitive implications of the conduct would need to be weighed up.[10] That means businesses and their advisers would need to undertake the same exercise, and hope that their judgment about the likely impact on competition is not challenged by the ACCC, competitors or other private parties.

Even where a business considers its conduct would not breach the SLC test, the inherent uncertainty of that test means the business must take into consideration the risk of an ACCC investigation or legal claims. The consequence will be that, in many cases, it will be safer and easier for businesses not to pursue aggressive competitive strategies. That would be a poor outcome for competition and consumers.

Despite the desire of the Harper Review and the ACCC to make s 46 easier to prove, and focussed on an economic concept, a high threshold is necessary and appropriate given the serious nature of the prohibition, the significant penalties attached to it, and the fact that it applies to a wide range of unilateral, competitive business activities.

## B. Questions posed by the Discussion Paper

*1. What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?*

As noted above, the Harper Review did not identify examples of situations that were not appropriately addressed by the current law — including prohibitions other than misuse of market power.

The Act already prohibits, among other matters:

- cartel conduct (Div 1 of Part IV) — which the Court found in *Rural Press*,[11] even though there was no misuse of market power;
- contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition (s 45) —

[9] Harper Final Report, p 347.
[10] Harper Final Report p 345.
[11] (2003) 216 CLR 53.

which the Court found in *Cement Australia*,[12] even though there was no misuse of market power;
- exclusive dealing that has the purpose, effect or likely effect of substantially lessening competition (s 47);
- mergers and acquisitions that have the purpose, effect or likely effect of substantially lessening competition (s 50);
- unconscionable conduct (Part 2-2 of the *Australian Consumer Law*) — a key consideration of which is the the relative strengths of the bargaining positions of the parties; and
- unfair contract terms (Part 2-3 of the *Australian Consumer Law*) — when used against small businesses with no effective opportunity to negotiate those terms.

Unless and until clear examples of problematic situations are identified, the Government cannot sensibly weigh up the pros and cons of any proposed particular measures, or whether those measures will effectively address those identified problems.

*2. What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?*

As explained above, the proposed s 46 is extremely broad and it could be alleged that pro-competitive conduct has the purpose or likely effect of substantially lessening competition.

Examples of conduct that could be prohibited, on the basis that it has the purpose or likely effect of substantially lessening competition, include:

1. A computer/technology company launches a new and innovative product that takes substantial market share away from its competitors.

2. A petrol company with low petrol prices in the city offers the same prices in rural and regional areas, which other rural and regional petrol companies are not able to match.

3. A supermarket pays higher prices to farmers or other suppliers for their produce/products, but other competing retailers cannot afford to do so.

4. A bank branch in a country town offers extended trading hours, but it is not profitable for the local credit union branch to do so.

5. A hardware store promises to give consumers a discount if they find another store selling the same product for a lower price.

6. A supermarket promotes fresh local produce in its stores, at the expense of imported products.

7. A telecommunications company offers a free handset of the latest mobile phone to every new customer.

[12] (2013) 210 ALR 165.

8. As part of its service, an internet service provider offers free access to television programs (eg, international sports coverage) currently only available through pay television.

9. An online seller of school uniforms offers free delivery to regional and rural areas.

10. A manufacturer of power tools refuses to supply to a hardware store that has a bad credit rating and is suspected to be on the verge of insolvency.

11. A manufacturer of power tools stops manufacturing a product that has few competing products but is no longer selling well.

12. A petrol wholesaler refuses to supply petrol to a remote area in which it has no distribution arrangements in place.

13. A bank closes an unprofitable branch in a small town which has a couple of other bank branches.

14. A bank donates money to a local football club to pay for improved equipment and facilities — the club gains members from a neighbouring local football club, which struggles to keep going.

Many other similar examples could be given.

Each of the above examples involves pro-competitive and legitimate commercial conduct. However, under the proposed s 46, competent lawyers could, based on a possibility of significant harm to competitors (not competition), draft a Statement of Claim that would likely survive a preliminary strike out application, and expose the defendant to an expensive and wide-ranging exercise of producing relevant documents on discovery. Such an outcome is not good for competition or consumers.

*3. Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?*

The "take advantage" limb is fundamental to s 46 and it is essential that it be retained. In this context, "take advantage" means no more than use. To "take advantage" of a substantial degree of market power is to use that market power.

Without the "take advantage" limb, s 46 would no longer be a prohibition on misuse of market power. It would apply in situations where there was no use of market power at all and the existence of market power was wholly irrelevant to the conduct complained of.

In all of the debate over s 46, there has been no serious argument that s 46 should no longer be about misuse of market power, or that it should prohibit some other form of economically damaging conduct (which has not been identified).

In *Rural Press*,[13] the defendant used its financial strength to protect its market power, but there was no use (or "taking advantage") of market power. Financial strength is not the same as market power. In short, market power means not being constrained by competitors, and so being able to act like a monopolist. A firm may have significant financial resources but not have market power because it is constrained by competitors. Further, trying to protect existing market power is not one of the prohibited purposes in s 46. However, in any event, the Court held that there was cartel conduct in breach of the Act.

Following that decision, amendments were made to s 46. Section 46(6A) was inserted to make clear that, in assessing the "take advantage" limb, the Court could have regard to whether the market power:

- "materially facilitated" the relevant conduct;
- was relied on by the corporation in engaging in the conduct;
- made the conduct more "likely"; or
- was "otherwise related" to the conduct.

It is difficult to see how the concept of "taking advantage" or "using" market power could be made any broader.

It has been asserted, including in the Discussion Paper, that the Courts have narrowly interpreted "taking advantage" such that the limb cannot be satisfied if a corporation without market power *could* (not *would*) commercially have engaged in the same conduct.[14] That proposition is incorrect. As shown above, it is inconsistent with s 46(6A). The High Court itself used the words "materially facilitated" in the *Rural Press* decision.[15] Further, in the *Cement Australia* case, Greenwood J considered not only whether a corporation without market power could have engaged in the relevant conduct, but also whether the conduct was "materially facilitated" by market power.

For example, in *Cement Australia*, which involved conduct that occurred before the 2008 amendments following *Rural Press*, the Court said (emphasis added):

- *"[T]he use of market power … must be such that the method of use is made possible only by the corporation's market power, that is, only by the absence of competitive conditions: Queensland Wire, Dawson J and Mason CJ and Wilson J, or materially facilitated by the absence of competitive conditions"* (at [1908]).

- "*[T]he financial terms of the Millmerran contract, put to the Directors, were not so far beyond the bid of Transpacific as to lead to the conclusion that Pozzolanic's bid was either only made possible by its market power or that Pozzolanic's bid was necessarily materially facilitated by Pozzolanic's market power*" (at [2300]).

[13] (2003) 216 CLR 53.
[14] Discussion Paper, p 5. See also: Lucy Barbour, "Competition watchdog ACCC head Rod Sims denies claims an 'effects test' would be 'economically dangerous'", *ABC Rural*, 19 August 2015, http://www.abc.net.au/news/2014-08-18/accc-effects-test/5678036.
[15] (2003) 216 CLR 53.

As noted above, the Court held that, in any event, a contractual term was for the purpose of substantially lessening competition and therefore in breach of s 45 of the Act.

*4. Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?*

As noted above under question 3, if the "take advantage" limb is removed, s 46 would prohibit conduct that is not a misuse of market power — and, in fact, conduct to which market power is entirely irrelevant. No case has been made that s 46 should prohibit some form of unspecified exclusionary conduct that is not a misuse of market power.

An example of what might be considered exclusionary conduct that does not involve a use of market power is the current prohibition on predatory pricing in s 46(1AA). For the reasons given in our Previous Submissions,[16] we agree with the Harper Review's recommendation that that prohibition should be abolished.

The "take advantage" limb should not be removed.

*5. Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?*

As explained above, "taking advantage" means a "use" of market power. The meaning of "taking advantage" is broad: s 46(6A). No case has been made that s 46 should prohibit something other than misuse of market power.

It is not clear what economically damaging behaviour is sought to be restricted. In those circumstances, it is not sensible to try to formulate any alternative amendments to restrict such behaviour.

*6. Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?*

The current law applies only where the corporation has one of the specific purposes prohibited in s 46. Adding "effect" or "likely effect" would mean the section could apply to conduct that did not have the prohibited purpose. However, simply because more conduct might be prohibited does not mean the law would be better targeted.

It might seem desirable, in theory, to prohibit all conduct that has an anti-competitive purpose, effect or likely effect but, for the reasons given above, this would, in reality, increase uncertainty for businesses, facilitate unmeritorious claims and inhibit legitimate competitive conduct. Ultimately, this would be bad for competition and consumers.

The current requirement of purpose assists businesses to distinguish between what is prohibited and what is not. It provides an important measure of certainty

[16] See paragraphs 12–24 ABL Submission to Competition Policy Review Final Report, 26 May 2015, See paragraphs 16–31 ABL Submission to Draft Report, 17 November 2014.

for business. It also helps maintain the rule of law. It is far from ideal for compliance with such a serious law, which can apply to such a wide range of unilateral conduct, to depend on an economic concept open to great contention.

*7. Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?*

No. As noted above, the Harper Review's policy objective in amending s 46 was to base the prohibition solely on the economic concept of whether there was a purpose, effect or likely effect of lessening competition. Whether that objective is desirable or not, it cannot be achieved by retaining 'purpose' alone.

Further, for the reasons given above, any prohibition on misuse of market power must involve a "use" of market power. Therefore it is essential that the "take advantage" limb be retained.

*8. Given the understanding of the term 'substantially lessening competition' that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?*

No. There is no developed understanding in the case law about when unilateral conduct — such as discounting, launching new products, and otherwise competing vigorously — has the effect or likely effect of substantially lessening competition. As explained above, the existing prohibitions in the Act that involve a test of substantially lessening competition apply only to forms of bilateral conduct.

Further, it is an inherent problem with using a test of "substantially lessening competition" for unilateral conduct that vigorous pro-competitive conduct may ultimately lead to the elimination of rivals and therefore reduced competition. This means that pro-competitive conduct is restricted and inhibited by the prohibition itself and by the risk of an ACCC investigation and/or claims of breach by competitors or other parties.

Critics of the current purpose test have stated that it focuses inappropriately on harm to individual consumers rather than competition. While the words of s 46 may give such an impression, the High Court has firmly established in decisions such as *Queensland Wire*,[17] *Melway*[18] and *Boral*[19] that the section is ultimately concerned with competition and consumers.

As Mason CJ and Wilson J explained in *Queensland Wire*:[20]

> *"The object of s 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost*

[17] (1989) 167 CLR 177.
[18] (2001) 205 CLR 1.
[19] (2003) 215 CLR 374.
[20] (1989) 167 CLR 177 at [24].

> *always try to 'injure' each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition s 46 is designed to foster."*

This passage shows that the current s 46 is aligned with the philosophy of competition contained in the Discussion Paper, and there is no need for the proposed amendments.

*9. Should specific examples of prohibited behaviours or conduct be retained or included?*

We are not aware of any proposals to prohibit specific behaviours or conduct. Certainly, that was not part of the Harper Review's recommendations.

In our view, the current s 46 (apart from s 46(1AA), which should be abolished) is workable and addresses specific conduct that may be exclusionary — predatory pricing (see s 46(1AAA)) and refusals to supply. This has been shown by cases in which the ACCC has successfully enforced s 46, such as against Cabcharge[21] and Ticketek.[22]

*10. An alternative to applying a 'purpose, effect or likely effect' test could be to limit the test to 'purpose of substantial lessening competition'. What would be the advantages and disadvantages of such an approach?*

The advantage of a test based on purpose, but not effect or likely effect, is that the prohibition would not capture conduct where the corporation did not intend to reduce competition substantially. This would make it easier for business to comply with the law, because business would know there would be no contravention unless it had an anticompetitive purpose.

However, the problem with a test based on purpose is that the prohibition would still apply where there was no actual or likely adverse impact on competition. This is excessive, and would not address the issue of misuse of market power, which is what s 46 is all about.

Accordingly, even if a test of purpose alone was used (instead of the SLC test), the "take advantage" limb should still be retained.

*11. Would establishing mandatory factors the courts must consider (such as the pro- and anti- competitive effects of the conduct) reduce uncertainty for business?*

The Harper Review considered that s 46 should include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct. The Harper Review's Final Report attempted to address the broad nature of their proposed s 46(1) by including legislative guidance in s 46(2) "with respect to the section's intended operation."

The proposed guidance would direct Courts to address numerous complex matters (which are expressed not to be exhaustive) including efficiency,

[21] [2010] FCAFC 111.
[22] [2011] FCA 1489.

innovation, product quality and price competitiveness. Furthermore, the inclusion of those factors makes it unclear whether the test for determining whether there has been a substantial lessening of competition under s 46(1) is somehow different to the same test where it appears in other sections of the Act (ss 45, 47 and 50) where the guidance is not present.

Mandatory factors for consideration may be of some assistance at trial to the extent that they indicate that the prohibition is not intended to capture pro-competitive conduct. However, being only matters for consideration by the court, mandatory factors would not:

- reduce the uncertainty created by the SLC test;
- prevent ACCC investigations or unmeritorious claims;
- avoid the inherent problem that the SLC test captures pro-competitive conduct that is ultimately likely to substantially lessen competition.

*12. If mandatory factors were adopted, what should those factors be?*

Although they would be inadequate for the reasons given above, any mandatory factors should make as clear as possible that the prohibition is not intended to capture pro-competitive conduct, and that the Court should have regard to the undesirability of inhibiting vigorous competitive conduct, even if this causes competitors to exit the market and thereby substantially lessen competition.

*13. Should authorisation be available for conduct that might otherwise be captured by section 46?*

On balance, authorisation should be available for conduct that would otherwise breach s 46 but that procedure is by no means an answer to the problems with the proposed amendments to the section. It is unrealistic to expect a business to divulge to the ACCC its commercially-sensitive strategies to engage in vigorous competition, and then have those strategies subject to scrutiny and critique by its competitors and other market participants over a period of months, as occurs under the ACCC's informal merger clearance process. Authorisation as a process is far more workable for one-off major transactions that must be public in any event, such as mergers.

The availability of authorisation also carries a risk that the ACCC will try to pressure a business to seek authorisation, and thereby exercise an inappropriate degree of control over the business' competitive strategies. We do not consider that level of regulatory intervention and interference with business to be generally appropriate.

*14. If quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) can be provided.*

None.

*15. Are there any other alternative amendments to the Harper Panel's proposed provision that would be more effective than those canvassed in the Panel's proposal?*

For the reasons set out, we strongly support retaining the current s 46 (apart from s 46(1AA)).

*16. Which of options A through F below is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?*

For the reasons given above, we strongly recommend Option A (no change) and do not support any of the other Options (B-F). Apart from Option A, all of the other Options involve removing the "take advantage" limb and would apply to conduct that is not a misuse of market power.

*17. Are there any other options (not outlined below) that should be considered?*

If the Government were to consider seriously any other option, the Government should provide interested parties with an opportunity to make comment on that proposed option.

Yours sincerely

**Zavèn Mardirossian**
Partner

**Matthew Lees**
Partner

Enc

Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

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By online submission

Competition Policy Review Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600

Your Ref
Our Ref MDL ZM
File No. 011105082

**Contact**
Matthew Lees
Direct 61 3 9229 9684
Facsimile 61 3 9916 9311
mlees@abl.com.au

**Partner**
Zaven Mardirossian
Direct 61 3 9229 9635
zmardirossian@abl.com.au



Dear Sir / Madam

**Competition Policy Review - Draft Report**

1 We refer to the Competition Policy Review Draft Report dated 22 September 2014.

2 We welcome the opportunity to make this submission in response to the Draft Report.

3 This submission follows on from our previous submission dated 10 June 2014 in response to the Review's Issues Paper. As with our previous submission, this submission focuses on issues relating to competition law.

**Recommendations supported**

4 We agree with the following recommendations made in the Draft Report, which reflect our previous submission:

(a) Simplify the cartel laws: The current cartel laws are too complex. This undermines the ability of businesses to comply with those laws, and the ability of regulators to enforce them. We agree that the cartel prohibitions should be confined to conduct involving firms that are actual or likely competitors and not merely firms who might possibly compete with each other.

(b) Extend the joint venture defence for cartel conduct: Our previous submission highlighted the limitations of the current joint venture defence. The extension of that defence to protect other forms of business collaborations between competitors can enhance competition.

(c) Repeal the prohibitions on price signalling, predatory pricing and *per se* third line forcing: The general prohibitions in ss 45 and 46 of the *Competition and Consumer Act 2010* (Cth) (**the Act**) are sufficiently broad to address anti-competitive price signalling and predatory pricing. We agree that third line forcing should only be unlawful if it has a substantial anti-competitive effect.

(d) Reasonable limits on s 155 notices: As explained in our previous submission, compliance with s 155 notices can be extremely burdensome and costly and can be abused by the regulator. We agree with making it clear that it is only necessary to undertake a reasonable search for relevant documents, but for the reasons set out below we do not consider the recommendation in the Draft Report goes far enough.

5 We also agree with the following recommendations in the Draft Report:

(a) Extra-territorial application: The Act should be extended to cover conduct that damages competition in markets in Australia regardless of whether the contravening firm is resident, incorporated or 'carrying on business' in Australia. That extension should also apply to the *Australian Consumer Law*. We consider this falls within the Review's Terms of Reference because of the significant impact on small businesses, who face unfair competition from low-cost unsafe or non-compliant goods from overseas. The issue has become particularly acute with the ability of overseas firms to use internet advertisements, Facebook and social media to directly target and ship to Australian consumers.

(b) Application to the Crown: The Act should also apply to the Crown insofar as it undertakes activity "in trade or commerce". The Crown has the potential to harm competition in the same manner as private companies. This is particularly important in government procurement (for example, construction).

(c) Merger approval process: We agree with the Review's suggestion that the formal merger authorisation process, which is currently rarely used, be re-designed so that:

(i) the ACCC is the first instance decision-maker, as it is already for informal merger clearances, with the Australian Competition Tribunal as a Review body;

(ii) there are no prescriptive up-front information requirements; and

(iii) to the extent possible, there are time limits on the process.

However, for the reasons set out in our previous submission and below, we do not agree with the proposal that the ACCC have the power to require the production of business and market information. It is not appropriate for the draconian measure of a s 155 notice to be issued to parties who have approached the ACCC voluntarily, or indeed non-parties. If the ACCC does not have sufficient information to make a decision, it would be preferable for the authorisation process to be suspended.

(d) Block exemptions: We agree a block exemption process may be efficient and effective for businesses, including for small business, in achieving regulatory compliance and certainty.

**Recommendations not supported**

6 The balance of this submission addresses issues on which we disagree with the recommendations in the Draft Report. We request that the Panel give further consideration to these issues, for the following reasons.

*ACCC Cartel Immunity Policy*

7 As explained in our previous submission on the Issues Paper, it is critical that the cartel immunity regime provide certainty for applicants that immunity will be granted if the relevant criteria are satisfied. Without this certainty, an applicant faces the risk of incriminating itself with no protection from prosecution.

8 The Draft Report states that the current immunity regime provides an "adequate level" of certainty. We strongly disagree. In our experience advising many clients over the years that the policy has been in operation, potential immunity applicants are naturally very concerned about the risks of the ACCC and/or the CDPP refusing their application. We have had significant disagreement in the past with the ACCC regarding the application of the criteria for immunity in the ACCC's policy and its own guidelines. For potential applicants, those concerns are heightened by the high stakes involved — potential criminal prosecution — and the lack of natural justice in the application process: the ACCC and CDPP are enforcement and prosecution agencies, not impartial arbiters of immunity applications; an applicant has no right to a hearing; and there is no established process for reviewing the ACCC and CDPP's decisions.

9 We remain of the view that the Immunity Policy should be set out in legislation, and the decision to refuse or revoke immunity subject to independent judicial oversight. This would:

(a) address concerns regarding the legitimacy of the immunity policy, the lack of natural justice and the separation of legislative, executive and judicial power;

(b) avoid concerns regarding the dual administration of the policy by the ACCC and CDPP, which is inherently problematic; and

(c) encourage potential applicants to come forward voluntarily under the policy, thus increasing the effectiveness of the policy as a detection and enforcement tool.

*Concerted Practices*

10 We do not support the proposed prohibition of "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition.

11 The proposal would effectively remove the requirement, in order for conduct to be prohibited by s 45, that there be some form of meeting of the minds or consensus that gives rise to a "contract, arrangement or understanding". That requirement plays an important role in assisting businesses to understand what is prohibited and what is not.

12 The proposal would create an unwarranted level of uncertainty for businesses by introducing inherently uncertain concepts such as "regular practice" and "regular disclosure". This has the potential to create significant confusion, compliance costs and the stifling of legitimate competition in relation to conduct decided upon and carried out by a firm independently of any other firm.

13 The fact that the ACCC has failed to prove a meeting of the minds or consensus in particular cases of information sharing does not mean that the law is defective, or that those cases should have been decided differently.

14 Further, the disclosure of price information is not, in itself, anti-competitive and can in fact promote effective and informed competition. Indeed, the ACCC recently recognised the value of information sharing between competitors when it authorised the Jewellers Association of Australia's Retail Tenancy Database, an online service which allows jewellery retailers to share information pertaining to their retail leases in order to facilitate more informed bargaining with landlords.

15 Moreover, anti-competitive information sharing arrangements are already prohibited by s 45. For example, the ACCC has recently initiated proceedings in respect of an alleged anti-competitive information sharing arrangement in the petrol industry.

*Misuse of market power*

16 We do not support the proposed amendments to s 46 of the Act for the following reasons.

17 First, the fact that s 46 cases have been difficult to prove is not in itself a reason to overhaul the prohibition. It has not been established that those cases should have been decided differently, or would have been decided differently under the proposed changes to s 46. A high threshold is appropriate given the serious nature of the prohibition, as well the risk that the provision might be applied to a wide range of often pro-competitive and legitimate commercial activities. Further, the fact that different judges have had different views in particular cases, does not in itself justify revising the prohibition. The issues raised by misuse of market power are complex, and permit legitimate differences of opinion. In our view, that would continue to be the case under the version of s 46 proposed in the Draft Report.

18 Second, we do not agree that the current s 46 focuses inappropriately on the protection of competitors, rather than competition itself. High Court

decisions such as *Queensland Wire*,[1] *Melway*[2] and *Boral*[3] have made clear that s 46 is concerned with competition, and ultimately consumers. For example, in *Queensland Wire*, Mason CJ and Wilson J explained:

> *"the object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort (see Keeble v. Hickeringill [1809] EngR 7; (1809) 11 East 574 (103 ER 1127)) and these injuries are the inevitable consequence of the competition s.46 is designed to foster."*[4]

19 Third, the current requirement of "purpose" assists businesses to distinguish between what is prohibited and what is not. This is important not only for business certainty but also for the rule of law. In theory, it may be desirable for there to be no unilateral conduct that harms competition but, in formulating a law, it is necessary to consider the practical implications of such a broad prohibition.

20 Fourth, it is unclear what conduct the proposal is intended to capture that is not captured under the current prohibition. The proposed prohibition is in extremely general terms. This makes it impossible to tell whether the benefits of preventing the targeted conduct outweigh the potential detriments of the proposal.

21 Fifth, although it may be difficult to prove in court that unilateral conduct has the effect or likely effect of substantially lessening competition, it is a relatively easy thing to claim or allege. The Review itself has received numerous complaints about so-called "predatory capacity" and other behaviour that is alleged to be anti-competitive because of its adverse effect on competitors but, in the Panel's view, is legitimate competition on the merits. We are therefore concerned that the proposed "effects test" will give rise to a flood of unmeritorious claims and this in itself may have a chilling effect on pro-competitive conduct.

22 Sixth, s 46 regulates companies with a "substantial degree of market power". The courts have interpreted "substantial" to mean "a greater rather than less" degree of power,[5] and s 46(3D) makes clear that more than one firm may have a "substantial degree" of market power in the same market. As such, it is clear that s 46 may apply to a range of businesses, including relatively small businesses in niche markets.

23 In recognition of the potential for the proposed changes to adversely impact pro-competitive conduct, the Draft Report suggests a defence that would apply if:

[1] (1989) 167 CLR 177
[2] (2001) 205 CLR 1.
[3] (2003) 215 CLR 374
[4] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at [24].
[5] *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 DLR 238, at 260.

(a) the conduct would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and

(b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

24 As a preliminary point, it is inappropriate for the onus to be on the defendant to establish such a defence. Misuse of market power is a serious allegation and a person making such an allegation should, at minimum, have a proper factual and legal basis for that person's case in relation to the types of matters referred to in any such defence.

25 In our view, the first limb of the proposed defence would raise many of the same difficult questions that have arisen under the current requirement of "taking advantage". If anything, those issues would be more complex given that the inquiry would shift from actual purpose (a matter of fact) to hypothetical rational purpose (a matter of significant conjecture).

26 Further, the first limb does not, in our view, properly capture exclusionary conduct. For example, predatory pricing might be "rational" for a firm with sufficient financial strength to outlast its competitors in a price war, whether or not the firm had market power before engaging in the predatory pricing.[6]

27 The second limb of the proposed defence is far too broad and uncertain to be a criterion for such a serious legal prohibition. It could also give rise to an extremely long list of issues in dispute and extremely onerous discovery obligations.

28 If, contrary to our views, an "effects test" is to be included with a defence, then we would propose that the defence apply if the conduct in question was:

(a) for a legitimate business purpose that was not anti-competitive; or

(b) competition on the merits of the relevant goods or services being supplied or acquired.

29 The language of "legitimate business purpose" would pick up the test laid down by the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, where the conduct was held not to breach s 46 if it had a "legitimate business purpose". Such a defence would provide businesses with greater clarity in the form of established precedent, and be consistent with the underlying rationale of the provision and the Act as a whole. The two limbs should operate as alternatives, so that a firm alleged to have engaged in misuse of market power need only prove one.

[6] Financial strength does not equate to market power: *NT Power Generation Pty Ltd v Power & Water Authority* (2004) 219 CLR 90.

30 For the reasons given above however, it would be better to include the elements of the defence as part of the substantive prohibition, with both limbs needing to be alleged by the applicant, rather than as a defence.

31 Further, if there is any significant expansion of s 46, the authorisation regime should be extended so that it also covers s 46.

*Resale price maintenance*

32 For the reasons set out in our previous submission, we remain of the view that resale price maintenance should only be prohibited only if it has a substantial anti-competitive effect (i.e. the *per se* prohibition should be removed). The ACCC has recently accepted those reasons in a draft authorisation determination for power tool company Tooltechnic. However, if our proposal is not adopted, we agree with the recommendation in the Draft Report to extend the notification process to include resale price maintenance.

*ACCC's coercive powers*

33 In our previous submission we described the significant financial and operational burden that s 155 notices can place on businesses, including businesses not suspected of any prohibited conduct, and noted our concern that these notices can be very difficult to challenge. We also raised particular concern with regard to s 155 notices that are issued after parties have voluntarily approached the ACCC to seek merger clearance.

34 The Draft Report recognises these problems, and recommends that, either by law or guidelines, the requirement to produce documents in response to a s 155 notice should be qualified by an obligation to undertake a "reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents".

35 In our opinion, this does not go far enough. Rather, we propose that the issuing of a s 155 notice should be subject to a legislative requirement of reasonableness and proportionality. This requirement should apply to the scope of documents sought, the action required to comply with the notice and the time afforded to do so. Those matters ought to be proportionate to, among other things, the seriousness of the suspected contravention, the urgency of the situation and the amount of resources available to the recipient to comply with the notice.

36 Further, in the merger approval context, s 155 notices should be a measure of last resort and only appropriate where a party is unable to, or has failed to, provide information in response to a voluntary request, or where necessary to protect the recipient from any claims that the disclosure of specific information or documents to the ACCC would breach confidentiality or similar obligations.

*Use of admissions in subsequent proceedings*

37 In order to facilitate private actions, the Draft Report recommends that s 83 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). The effect of this recommendation would be that admissions made by a business in one proceeding (typically brought by the ACCC) could be used as prima facie evidence in separate proceedings (typically brought by a private litigant).

38 The proposed change would create a significant obstacle to parties reaching settlements with the ACCC. The importance of such settlements has been recognised by the courts on numerous occasions. They result in a substantial saving of resources for the ACCC, and for the community as a whole. One study determined that 83% of ACCC cartel proceedings were resolved consensually.[7]

39 Similarly, parties may choose to make admissions for various reasons that do not reflect actual culpability. These include the cost, time and inconvenience of protracted litigation. Others may not wish to take the risk of an adverse court finding. Moreover, very often a company may not know what its potential exposure is for breaching the Act. This is because the relevant conduct was engaged in by employees or agents without the knowledge of senior management.

40 It is for all these reasons that the courts encourage settlement, as they do in all litigation. This is also why the ACCC removed the requirement of compensating victims from its cartel immunity policy, particularly when class action investors increasingly look for cartel cases to fund.

41 Please do not hesitate to contact us if you have any queries. We look forward to receiving the Panel's Final Report.

Yours faithfully

Ziaven **Mardirossian**
Partner

**Matthew Lees**
Partner

[7] Centre for Competition and Consumer Policy, Working Paper, *ACCC Enforcement and Compliance Project: The Impact of ACCC Enforcement Activity in Cartel Cases* (May 2004), 20, 83.

Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

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By online submission

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

Your Ref
Our Ref MDL ZM
File No. 011833167

**Contact**
Matthew Lees
Direct 61 3 9229 9684
Facsimile 61 3 9916 9311
mlees@abl.com.au

Zaven Mardirossian
Direct 61 3 9229 9635
zmardirossian@abl.com.au



Dear Sir / Madam

**Competition Policy Review – Final Report**

1 We refer to the Competition Policy Review Final Report released on 31 March 2015.

2 We welcome the opportunity to make this submission in response to the Final Report.

3 This submission follows on from our previous submissions (copies **enclosed**) in response to the Review's Draft Report and the Review's Issues Paper. As with our previous submissions, this submission focuses on issues relating to competition law. It outlines:

(a) the recommendations in the Final Report that we support, and have supported in our previous submissions;

(b) the recommendations that we do not support, or do not think go far enough;

(c) an additional issue regarding civil penalty settlements, which has arisen since the date of the Final Report, and which we consider should be addressed by urgent legislation; and

(d) some issues we have identified with the drafting of the proposed legislation to give effect to the Report's recommendations.

**Recommendations supported**

4 For the reasons set out in our previous submissions, we agree with the following recommendations advocated in our submissions and made in the Final Report:

(a) Simplify the cartel laws and confine the cartel conduct prohibitions to conduct involving firms that are actual or likely competitors. Given those amendments, we also agree with the proposed removal of the prohibition on exclusionary provisions on the basis set out in the draft report.

(b) Extend the joint venture defence for cartel conduct. In particular, we support:

(i) the proposed removal of the requirement for a joint venture agreement to be in writing; and

(ii) the extension of the defence to include joint ventures for the acquisition or marketing of goods and services (in addition to production or supply joint ventures), as the current exception for joint ventures is too narrow and pro-competitive joint ventures can be caught by the cartel prohibitions.

In our view, however, there should be further clarification of what is meant by a cartel provision being "for the purpose of the joint venture". This is addressed below.

(c) Expand the exception to the cartel laws relating to vertical trading.

(d) Repeal the prohibitions on price signalling, predatory pricing and *per se* third line forcing.

(e) Put reasonable limits on the obligation of parties to comply with excessively onerous s 155 notices, although we also consider the ACCC should be required to act reasonably and proportionately in issuing such notices (discussed below).

(f) Extend the extra-territorial application of the Act so that it covers conduct that damages competition in markets in Australia regardless of whether the contravening firm is resident, incorporated or "carrying on business" in Australia.

(g) Apply the Act to the Crown insofar as it undertakes activity "in trade or commerce".

(h) Improve the merger approval process.

(i) Introduce a block exemption process.

**Recommendations not supported**

*ACCC Cartel Immunity Policy*

5 As explained in our previous submissions, it is critical that the cartel immunity regime provide certainty for applicants that immunity will be granted if the relevant criteria are satisfied. Without that certainty, an applicant faces the risk of incriminating itself with no protection from prosecution.

6 Despite the concerns raised about the current immunity regime in our previous submissions, the Final Report maintains the view expressed in

the Draft Report that the current immunity regime provides an "adequate level" of certainty. For the reasons set out in our previous submissions, we strongly disagree and recommend that further consideration be given to issues relating to the immunity regime.

7 We have addressed this issue further in an opinion piece in *The Australian* newspaper (copy **enclosed**).

*Joint venture defence*

8 As noted above, we support the extension of the joint venture defence for cartel conduct.

9 In our view, however, there should be further clarification of what is meant by a cartel provision being "for the purpose of the joint venture". This concept is difficult to apply in practice, as the cartel provision itself may affect what the purpose(s) of the joint venture may be considered to be. We therefore propose the following additional s 45I(2) be included in the draft legislation in the Report, with the proposed s 45I(2) renumbered as s 45I(3):

> *Without limiting the meaning of paragraph (1)(b)(iii), for the purposes of that paragraph, a cartel provision is for the purpose of a joint venture to the extent that the cartel provision has the purpose, or would have or be likely to have the effect, of:*
>
> *(a) assisting any one or more of the parties (or any of its related bodies corporate) to conduct the joint venture more efficiently, more conveniently or more profitably; or*
>
> *(b) preventing, restricting or limiting any one or more of the parties (or any of its related bodies corporate) from supplying or acquiring goods or services in competition with the joint venture, or in competition with a party (or any of its related bodies corporate) carrying out the joint venture.*

*Concerted Practices*

10 As set out in our submission on the Draft Report, we do not support the proposed prohibition of "concerted practices" that have the purpose, effect or likely effect of substantially lessening competition. The further explanation of the proposed prohibition in the Final Report has not altered our view that the proposal would create an unwarranted level of uncertainty for businesses.

11 If a prohibition on concerted practices is nevertheless introduced, we agree with the recommendation in the Final Report that the prohibition should not be part of the cartel laws.

*Misuse of market power*

12 We do not support the proposed amendments to s 46 of the Act for the following reasons.

13 Lack of evidence of need for change - It remains unclear what conduct the proposed reform is intended to capture that is not already captured under the existing law. The proposed reform seems to be based on conceptual or theoretical arguments, rather than any identified problem to be addressed.

14 The current section is not unduly focussed on protecting competitors – The Review Panel has said that the current purpose test *"focuses on harm to individual competitors"* as opposed to competition. This is contrary to several landmark High Court decisions regarding the application of the current s 46, which make clear that the current section is concerned with competition, and ultimately consumers, rather than individual competitors. For example, in the *Queensland Wire* case, Chief Justice Mason and Justice Wilson explained that the objective of s 46 is to protect the interests of consumers, and competition is by its very nature "deliberate and ruthless".

15 Increased uncertainty and protracted litigation - The Final Report states that a competition policy that is "fit for purpose" *"includes competition laws and regulations that are clear, predictable and reliable"*. The proposed amendments fail to meet those criteria. The proposed amendments may simplify the drafting of s 46, but they will not simplify the process of applying that section to real-life situations.

16 The proposed s 46(1) is extremely broad and provides little guidance to courts or businesses on how matters are to be decided. It cannot be assumed that there is a simple answer to the question of whether competition is likely to be substantially lessened by unilateral conduct such as, for example, low pricing, increasing production capacity or deleting a product line. Cases would require extensive debate regarding economic theory, in each and every case on a case-by-case basis. This will lead to lengthy and protracted litigation, and consume significant public and private resources.

17 The Final Report attempts to address this issue by including legislative guidance in s 46(2) *"with respect to the section's intended operation"*. That guidance directs that the court must consider numerous complex matters (which are expressed not to be exhaustive), including "efficiency", "innovation", "product quality", "price competitiveness" and "preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market". As well as revealing the significant complexity of applying the proposed s 46(1), the proposed s 46(2) makes it unclear whether the test for determining whether there has been a substantial lessening of competition under the proposed s 46(1) is the same as under other sections of the Act (ss 45, 47 and 50), where the same guidance is not present.

18 Inefficient delegation of law-making to the courts – Whilst the broadness and generality of the proposed section gives it a superficial attraction, it is effectively a delegation to the courts of the power to decide what conduct is prohibited and what is not. By virtue of our court hierarchy and case law system, it will ultimately be necessary for the High Court to establish new principles to provide guidance to lower courts. That process will take years if not decades as suitable cases work their way through the court system. There is then no guarantee that the principles developed will be preferable to principles that could already be laid down in the legislation. Further, until those principles are settled, there will be an additional and unnecessary chilling effect on business, as businesses try to anticipate the potential future effects of their conduct, as well as the significance of those effects on the level of competition in any market, possibly including markets in which they do not operate.

19 Misuse of market power that does not substantially lessen competition – Despite its title, the proposed s 46(1) is not a prohibition against misuse of market power; it is a prohibition against substantially lessening competition. However, whilst it may be difficult to substantially lessen competition unilaterally without misusing market power, not every misuse of market power results in a substantial lessening of competition.

20 The Final Report seems to assume that s 46 need only prohibit a reduction in competition, but this overlooks the fact that, if a firm already has a substantial degree of power in a market, the existing level of competition may be insufficient to prevent that firm from misusing its market power to engage in anticompetitive conduct. That conduct might involve, for example, eliminating a much smaller rival provided that, because of the rival's small size, its elimination will not result in a substantial lessening of competition. Another example would be misusing market power to deter a much smaller rival from engaging in competitive conduct.

21 The problem is illustrated by the following fictional case study:

**Case Study**

Tap Power is a large wholesale supplier of domestic water taps. It has approximately 80% market share and a substantial degree of power in the market for the wholesale supply of domestic water taps. It supplies a very wide range of products. Other suppliers sell various taps with different designs to Tap Power, but no other supplier in the market is able to match Tap Power's range. As a result, tap retailers are heavily dependent on supply from Tap Power.

One of Tap Power's former employees leaves and starts a rival supplier, Tiny Taps. Tiny Tap has less than 1% market share. Out of spite, Tap Power decides to eliminate Tiny Tap. It tells retailers they will no longer be supplied by Tap Power unless they cease ordering from Tiny Tap. Tiny Tap loses all its customers and goes out of business.

Tap Power has contravened the current s 46 because it has misused its market for the purpose of eliminating a competitor. However, under the proposed s 46, it would need to be proved that Tap Power's conduct had resulted in a substantial lessening of competition in the market. This would be hard to establish, given that Tiny Tap had such a small market share and, quite likely, its elimination had a negligible impact on the level of competition in the market, which was already dominated by Tap Power. Nevertheless, it is difficult to see why the law should be amended to permit this type of conduct.

22 Increased unmeritorious and intrusive claims and investigations – The Harper Review received and dismissed various claims of "predatory pricing" (above cost), "predatory capacity" and other allegedly anticompetitive conduct, in particular in relation to the grocery sector. The proposed s 46(1) is so broad and general that it would allow claims of that type to be made as allegations of breach, even if a court was ultimately to decide that the conduct did not have the purpose, effect or likely effect of substantially lessening competition. Large businesses would therefore be likely to face a proliferation of unmeritorious claims.

23 The proposed amendments would also give the ACCC power to conduct extensive and intrusive investigations of a business' conduct and decisions, in the search for some aspect that might be likely to result in a substantial lessening of competition.

24 Authorisation – If the amendments proposed to s 46 are made, we agree with the recommendation in the Final Report that authorisation should be available in relation to s 46.

*Resale price maintenance*

25 For the reasons set out in our previous submissions, we remain of the view that resale price maintenance should be prohibited only if it has a substantial anti-competitive effect (i.e. the *per se* prohibition should be removed). We recommend that further consideration be given to this proposal.

26 However, if our proposal is not adopted, we agree with the recommendation in the Final Report to extend the notification process to include resale price maintenance.

*ACCC's coercive powers*

27 In our previous submissions, we described the significant financial and operational burden that s 155 notices can place on businesses, including businesses not suspected of any prohibited conduct. We also noted our concern that these notices can be very difficult to challenge.

28 The Final Report recognises these problems, and recommends that:

(a) the ACCC review its guidelines on s 155 notices, having regard to the increasing burden imposed by notices in the digital age; and

(b) s 155 be amended so that it is a defence to a "refusal or failure to comply with a notice" that a recipient can demonstrate that a reasonable search was undertaken in order to comply with the notice.

29 We support the inclusion of the proposed defence referred to in paragraph (b) above.

30 However, we consider that the proposal for the ACCC to review its guidelines does not go far enough. As previously submitted, we consider that the issuing of a s 155 notice should be subject to a legislative requirement of reasonableness and proportionality.

31 Further, in the merger approval context, s 155 notices should be a measure of last resort and only appropriate where a party is unable to, or has failed to, provide information in response to a voluntary request, or where necessary to protect the recipient from any claims that the disclosure of specific information or documents to the ACCC would breach confidentiality or similar obligations.

*Use of admissions in subsequent proceedings*

32 In order to facilitate private actions, the Final Report recommends that s 83 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). For the reasons set out in our submission on the Draft Report, we do not agree with this proposed change.

33 We remain of the view that the proposed change would create a significant obstacle to parties reaching settlements with the ACCC, which has already become much harder as a result of the recent decision of the Full Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59.

**Civil penalty settlements**

34 As noted above, the Full Federal Court has, since the date of the Final Report, handed down its decision in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59. The decision makes it extremely difficult to resolve civil penalty proceedings by agreement.

35 The courts had previously given an agreed penalty figure considerable weight in assessing penalties. This was considered to be in the interests

of resolving proceedings expeditiously, and avoiding the expenditure of significant public resources by the regulator. The court retained the power to depart from the agreed figure if the agreed figure was considered inappropriate. However, the recent decision means that the court must now disregard an agreed penalty figure, save that the fact of the agreed penalty figure may be relevant to questions such as contrition or cooperation.

36 We propose that the effect of this decision be overturned urgently by legislation, and the following section be inserted to permit the previous practice, which had operated well for many years:

*(1) In deciding to order any penalty or remedy under this Act in any proceeding other than in a criminal proceeding, the Court may take into account the following matters, in addition to any other matters that the Court may take into account:*

*(a) the views of any party as to what the appropriate penalties or remedies should be;*

*(b) any agreement reached between the parties as to what the appropriate penalties or remedies should be;*

*(c) the desirability of resolving matters by agreement, in order to reduce the cost and expense of contested matters; and*

*(d) a party's cooperation and contrition as evidenced by the party's agreement to penalties or remedies being awarded against the party.*

*(2) Nothing in this section requires a Court to order or not to order a particular penalty or remedy as agreed by the parties if the Court considers that it would not be just to do so.*

**Drafting issues**

37 We welcome the proposed drafting in Appendix A of the Final Report, which is a major improvement on the current legislation. We propose the following amendments to that proposed drafting:

(a) Sections 45D(1)(a) and 45H(1)(a): replace those paragraphs with "*if the corporation (or any of its related bodies corporate) is party to a contract, arrangement or understanding that contains a cartel provision*". There should be no contravention of giving effect to a cartel provision unless the corporation is party to the contract, arrangement or understanding that contains the cartel provision.

(b) Section 45J(1)(a)(i): change "by the acquirer to the acquirer" to "by the supplier to the acquirer". This is a typographical error.

(c) Section 45J(1)(a)(i)–(iii) and (b)(i)–(ii): after each reference to the "acquirer" or "supplier" add "or any of its related bodies corporate". This reflects the scope of the current s 44ZZRS, under the wording of the current s 47.

(d) Section 45J(1)(a)(iii) and (b)(ii): after the first words "the supply" add "or re-supply". This is to capture the definition of "re-supply" in s 4C, which covers the situation where goods are altered in their form or condition, or incorporated into other goods. This reflects the scope of the current s 44ZZRS, under the wording of the current s 47.

(e) Section 45J(1)(b): We suggest there should be a further sub-paragraph (a counterpart to s 45J(1)(a)(iii)) as follows:

> *(iii) the acquisition by the supplier of the goods or services, or goods or services to be re-supplied as the goods or services.*

This would apply where there is a vertical supply relationship and the acquirer stipulates the goods or services to be used as the raw materials or ingredients for the goods or services to be supplied by the supplier to the acquirer. Such an arrangement would be exempted from the cartel laws, but still prohibited under the proposed s 45M if it would have the purpose, effect or likely effect of substantially lessening competition.

(f) Section 47(2)(a) and (b), 3(a) and (b), 4(a) and (b) and 5(a) and (b): after each reference to the "acquirer" or "supplier" add "or any of its related bodies corporate". This reflects the scope of the current s 47.

(g) Section 47(2)(b)(ii) and (4)(b): after the words "the supply" add "or re-supply". As above, this is to capture the definition of "re-supply" in s 4C, and reflects the scope of the current s 47.

(h) Section 47(4)(b): We suggest that, similar to s 47(2)(b), this should be replaced with:

> *(b) preventing, restricting or limiting:*
>
> *(i) the supply or re-supply by the supplier of goods or services to others.*
>
> *(ii) the acquisition by the supplier of the goods or services, or goods or services to be re-supplied as the goods or services.*

As above with s 45J(1)(b), this would apply where the acquirer stipulates the goods or services to be used as the raw materials or ingredients for the goods or services to be supplied by the

supplier to the acquirer. Such conduct could then be notified to the ACCC under the proposed s 93.

(i) Section 93(4): This subsection provides that the ACCC may give a notice that the public benefit of certain conduct (amounting to exclusive dealing or resale price maintenance) does not outweigh its public detriment. However, it is not clear what is the effect of a notice under s 93(4). It is not, for example, referred to in s 93(2), which provides for the effect of a notice under s 93(3).

38 Please do not hesitate to contact us if you have any queries.

Yours faithfully

**Zaven Mardirossian**
Partner

**Matthew Lees**
Partner

Enc