

30 September 2016

Your ref: Market and Competition Policy Division

Our ref: MD/ WD / Comp &amp; Consumer

Manager  
Competition Unit  
Market and Competition Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By post and by email: [REDACTED]

Attention: Ms Rebecca McCallum

Dear Ms McCallum

**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

Thank you for the opportunity to provide comments on the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016. Queensland Law Society appreciates being consulted on this important legislative reform.

This response, to both the individual amendments and questions posed to QLS by the Treasury, has been compiled with the assistance of the Competition and Consumer Law Committee who have substantial expertise and practice in this area.

Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise. In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

As a general comment, the Society notes the short timeframe for consultation on the Exposure Draft. Consequently the response period has not allowed for a comprehensive or exhaustive review of the Exposure Draft. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified.



However our time has been focused on addressing those matters raised in the Response as of primary concern. Whilst there is nothing at this time the Society has of concern about Schedules 4 and 5, if there were matters in the future where we had concerns we would always raise them appreciating that the legislative program may have advanced in the meantime.

## **Responses to some of the individual amendments**

---

### **1. Schedule 2 - Cartels**

#### **Treasury Questions**

1. Joint ventures are exempt from per se liability for cartel conduct through sections 44ZZRO and 44ZZRP. In this context, is the definition of joint venture activity (in section 4J) appropriate or should such activity be more narrowly defined?

**The Society supports the retention of the existing definition in section 4J. In its view, the concept of a 'joint venture' in section 4J is well understood by practitioners and is appropriate having regard to the pro-competitive efficiency and innovation drivers which underpin joint venture activity.**

2. Does the proposed drafting of section 44ZZRS appropriately limit the exception to the cartels provisions to supply arrangements which are genuinely vertical, and exclude arrangements which are between actual or likely competitors?

**No, for the reasons given under heading 1.5 below.**

- a. If not, how could the exception be changed to ensure only vertical arrangements are captured?

**The exception should refer to section 47 or, if the preferred position is to reformulate the description of vertical arrangements, section 47 should also be amended. This is addressed further under heading 1.5 below.**

3. With the proposed repeal of the definition of 'likely' from section 44ZZRB, is the court's interpretation of 'likely' in relation to other parts of the Act sufficiently clear to inform expectations in relation to the cartels provisions?

**Yes, for the reasons given under heading 1.1 below.**

The Society's comments on the specific provisions appear below.

#### **1.1. Item 2 - repeal of the definition of 'likely' in section 44ZZRB**

The Society supports the repeal of the definition of 'likely' in section 44ZZRB.



**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

Currently, where not defined, the courts have treated the use of the word 'likely' in Part IV as meaning 'a real chance or possibility' (e.g. sections 45<sup>1</sup>, 45D<sup>2</sup> and 50<sup>3</sup>).

This is a higher threshold than the current definition of 'likely' in section 44ZZRB.

The Society considers that the common law meaning of the term 'likely' as used in Part IV is sufficiently clear to inform expectations in relation to how it will now operate in section 44ZZRB and provides a suitable standard against which to evaluate a party's conduct.

**1.2. Item 3 – addition to section 44ZZRD(3)(a)**

The Society supports this addition to section 44ZZRD(3)(a), as it brings this section into line with the previous prohibition on exclusionary provisions.

**1.3. Item 13 – amendment of section 44ZZRO(1)(a) and (b)**

The Society believes that section 44ZZRO(1)(b)(i) of the amendment should be drafted with the words 'production of goods or services' rather than merely 'production of goods'.

This amendment would bring the proposed section 44ZZRO(1)(b) into line with the existing joint venture defence to cartel conduct, and will also be consistent with the proposed section 44ZZRO(1)(b)(ii) and (iii), which refer to 'goods or services'.

**1.4. Item 20 – amendment to section 44ZZRP(1)(a) and (b)**

The Society repeats its comments in relation to Item 13.

**1.5. Item 24 – amendment to section 44ZZRS**

The Society submits that the defence proposed in section 44ZZRS should do no more than refer to section 47, as this is the intended scope of the defence.

If the preferred position is to simplify the law to better target anti-competitive conduct, the Society submits that this should be done by amending section 47. If section 44ZZRS is amended in the way proposed, this would create a risk that sections 44ZZRS and 47 will not be co-extensive, as is the case at present. Given the potential criminal consequences of engaging in cartel conduct, the breadth of the defence provided by section 44ZZRS is critical, and there should not be any risk of a 'gap' between sections 44ZZRS and 47.

**1.6. Items 49 & 50 – renumbering**

The Society supports these amendments.

---

<sup>1</sup> See e.g. *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* [2002] FCAFC 197

<sup>2</sup> See e.g. *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367

<sup>3</sup> See e.g. *Australian Gas Light Company (CAN 052 167 405) v. Australian Competition & Consumer Commission (No 3)* [2003] FCA 1525



## **2. Schedule 3 - Price signalling and concerted practices**

### **2.1. Item 2 – amendment to section 45(1) to (3)**

The Society recommends including a definition of 'concerted practice' in the amendment of section 45(1) to (3).

The Explanatory Materials note that the term 'concerted practice' is well established internationally and is introduced here to refer to lesser forms of co-ordination than what has been judicially interpreted as required for a 'contract, arrangement or understanding'. The Society notes that the phrase 'concerted practice' is the subject of particular judicial analysis in the European Union context in relation to the term as used in Article 101 of the Treaty on the Functioning of the European Union. In that context it has been defined as meaning:

*"a form of coordination between undertakings that, without reaching the level at which a proper agreement would have been concluded, knowingly substitutes the practical cooperation to the risks of competition."<sup>4</sup>*

The Society is concerned that the introduction of the prohibition on concerted practices, without defining what conduct is intended to be captured by that phrase, will create uncertainty. In recent years, Australian courts have emphasised the importance of giving meaning to the words used. In the absence of a definition, it is unclear what meaning the courts will give 'concerted practice', what indicia they will apply to determine whether a 'concerted practice' has occurred and whether international jurisprudence will be followed and if so, which will be preferred.

Although not a criminal provision, the ramifications of non-compliance with section 45 are significant, and the Society recommends that a definition of the phrase 'concerted practice' be included. The Society would support the adoption of the definition from the Treaty on the Functioning of the European Union above.

## **3. Schedule 6 – Secondary boycotts**

The Society supports the proposed amendments.

## **4. Schedule 7 – Misuse of market power**

The Society generally supported the revision of section 46 in accordance with the Harper Panel's Report. However, there are two matters with respect to the drafting of section 46 in the Exposure Draft that the Society considers requires further attention.

*First*, the proposed section 46(1) would prohibit a corporation with a substantial degree of power in one market from engaging in unilateral conduct that substantially lessened competition in an entirely unrelated market. It is not apparent what logical justification there could be for prohibiting conduct in an unrelated market although the Society acknowledges that, in practical terms, it may be unlikely that a corporation would be able to unilaterally

---

<sup>4</sup> Joined cases C- 48-49 and 57/69 I.C.I. vs. Commission (Dyestuffs), Decision CJCE of 14 July 1972.



**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

substantially lessen competition in a market unrelated to the market in which it possesses substantial market power.

A further concern is that a corporation might substantially lessen competition in a market related to the market in which it has substantial market power but in which neither it nor any person related to it competes. It is difficult to see the justification for prohibiting a corporation from engaging in such conduct if neither the corporation nor any related entity would benefit from the conduct; that is, there is no risk that the corporation is seeking to monopolise a market for itself or leverage its monopoly into a different market.

This concern could be addressed by replacing the words "in that or any other market" with the words "in that or any market in which the corporation, or a related entity of the corporation, competes or is likely to compete".

The term "related entity" should be defined by reference to the meaning of "related entity" in the *Corporations Act 2001* (Cth), which is wider than the meaning of the expression a "body corporate that is related to the corporation", which is used in the existing section 46.

*Secondly*, proposed section 46(2) creates the possibility that the expression "substantially lessening competition in a market" will be interpreted differently in section 46 than it is interpreted when it appears in other sections of Part IV of the Act. It would be preferable if section 46(2) was used either as the model for a section of general application to the provisions of Part IV that rely upon the concept of a substantial lessening of competition or as the model for a specific sub-section in sections 45 and 47 (the Society notes that section 50 already contains a list of factors to be considered in determining whether an acquisition will substantially lessen competition).

The Society also suggests clarifying the intended use of the factors specified in section 46(2), for example, clarifying whether it is intended that a contravention will not arise if the factors in paragraph (a) outweigh those in paragraph (b).

## **5. Schedule 8 – Third line forcing**

The Society supports the proposed amendments.

## **6. Schedule 9 – Resale price maintenance**

The Society supports the proposed amendments.

## **7. Schedule 10 - Authorisation, notifications and class exemptions**

The Society does not support the amendment to subsection 93(3). The proposed new subsection 93(3) seeks to broaden the grounds on which the ACCC can object to a notification of exclusive dealing to circumstances in which the ACCC forms the view that the conduct or proposed conduct would substantially lessen competition, is not likely to result in public benefits or is not likely to result in public benefits which outweigh any public detriment.

This amendment will, in the Society's view, undermine the efficacy of the current subsection.



The current subsection permits the ACCC to object to a notification of exclusive dealing if it forms the view that the conduct or proposed conduct would substantially lessen competition **and** is not likely to result in public benefits which outweigh any public detriment. It provides a relatively quick and inexpensive process for parties to obtain protection from legal proceedings under section 47, where they have formed the view that there is no substantial lessening of competition associated with the proposed conduct and there are public benefits arising from it, without needing to engage in the lengthier and more expensive authorisation process.

The Society believes the proposed new subsection 93(3) will undermine the efficacy of the current subsection by creating a lower threshold for the ACCC to object to a notification because it will be able to object on the basis that the notified conduct will substantially lessen competition without forming a view as to its likely public benefits. In the Society's view, this will increase the risk associated with a notification and is likely to encourage parties to apply for authorisation to minimise that risk, and to take the benefit of the procedural steps required to be undertaken in the formal authorisation process rather than rely on a single conference to address any concerns about the notified conduct raised by the ACCC.

Whilst the Society supported the recommendation made by the Harper Report, the Society believes that the wording in the draft Bill is such that it does not give effect to the Recommendation contained in the Report, for the reasons stated.

## **8. Schedule 11 - Admissions of fact**

The Society objects to this amendment on the basis that it represents an unreasonable intrusion of the rights of individuals and litigants more broadly, will hamper the administration of justice, and may negatively affect the ability of the ACCC to prosecute proceedings regarding suspected anti-competitive behaviour.

Currently, section 83 departs from common law principles<sup>5</sup> by creating an exception to the general rule that findings of fact do not bind non-parties. Arguably, the effect of this section was limited to matters in which there had been a finding of fact on the basis of evidence presented to court during a hearing.<sup>6</sup> It also operates as an exception to section 91(1) of the *Evidence Act 1995* (Cth)<sup>7</sup> and the rule against hearsay.<sup>8</sup>

---

<sup>5</sup> See e.g. *ACCC v ABB Transmission & Distribution Ltd (No 2 – Distribution Transformers)* [2002] FCA 559; *Forstaff Adelaide Pty Ltd v Hills Industries Ltd* [2006] SASFC 88, [13].

<sup>6</sup> See *ACCC v Monza Imports Pty Ltd* [2001] FCA 1455 in which the court declined to make findings of fact pursuant to the precursor of s83 in the *Trade Practices Act 1974* (Cth) on the basis that the admissions had been made as part of a consent resolution of the matter.

<sup>7</sup> Which provides that "Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding." Though note s92(2).

<sup>8</sup> See e.g. *R v Van Beelen* [2016] SASFC 71, [109]; *Hollington v F Hewthorn Co Ltd* [1943] KB 587; though note s92(3) of the *Evidence Act 1995* (Cth).



**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

The amendment extends this exception beyond final determinations by a court, to include 'an admission of any fact made by the person'. This is a much broader concept not requiring any hearing to have ever taken place, nor any finding to have been made. All that is required is for a proceeding to have commenced (in relation to one of the listed sections) and for an admission to have been made in that proceeding.

'Proceeding' is not defined in the Act. The Society notes however that, pursuant to rule 8.01 Federal Court Rules 2011 (Cth), proceedings commence with the filing of an application. Therefore, it appears that any admission made after that time in relation to the proceeding (including in pleadings, correspondence or cross-examination)<sup>9</sup> will be prima facie evidence of the fact admitted in subsequent proceedings, including if a settlement is reached.

The amended section appears to be premised on the belief that an admitted fact has been admitted either because it is true or because it is believed to be true. However, the Society notes that there are a variety of reasons for a party to admit facts, most commonly as a strategic decision to limit the issues and reduce the length and cost of proceedings. The effective administration of justice relies on issues being narrowed to those that are genuinely in dispute, and this is part of the reason for requiring pleadings.<sup>10</sup>

By making admissions prima facie evidence in future proceedings, the section exposes parties to an unknown degree of potential liability to future claimants. This is particularly true in cases capable of leading to class action suits. From the perspective of the party, the making of an admission to the ACCC represents an unquantifiable risk of becoming liable for an unknown amount in subsequent proceedings brought by an unknown number of persons.

As such, the Society believes that the section creates a strong disincentive for a party to admit anything in a proceeding, and creates an incentive to maximise the facts not admitted and put the plaintiff (commonly, the ACCC) to proof.

The effect of this will be to significantly slow and hamper proceedings, and, in particular, increase the burden on the ACCC when it brings proceedings for suspected contraventions of the CCA. In such conditions, we would expect the ACCC to be able to engage in less matters, which is not an optimal regulatory outcome.

The Society therefore recommends that the section should not be amended as proposed. Instead, noting the uncertainty that currently exists, the Society recommends that the section should be amended to clarify that it does not apply to admissions (in whatever form they take) made by a party.

## **9. Schedule 12 - Power to obtain information, documents and evidence**

Recommendation 40 of the Harper Report stated that:

---

<sup>9</sup> To the extent that admissions made by the person cross-examined can be said to bind the party.

<sup>10</sup> See e.g. *Banque Commerciale SA (en liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, 287-288.



**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

*The ACCC should review its guidelines under 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 a notice.*

The proposed new section 155(5B) provides:

Paragraph (5)(a) does not apply to the extent that:

- (a) the notice relates to producing documents; and
- (b) after a reasonable search, the person is not aware of the documents.

The problem with this is that the test is one of awareness.

Paragraph 155(6) provides:

For the purposes of paragraph (5B)(b), in making a reasonable search, the person may take into account the following:

- (a) the nature and complexity of the matter to which the notice relates;
- (b) the number of documents involved;
- (c) the ease and cost of retrieving a document;
- (d) the significance of any document likely to be found;
- (e) any other relevant matter.

In our submission, the obvious intent of subsection (6) is that a person may make a reasonable search but, taking into account a number of factors including the number of documents involved, the ease and cost of retrieving a document or the significance of any document likely to be found, may not pursue the recovery of a document and therefore not produce it.

For the section to make the test of a person's innocence or otherwise of an offence under subsection (5)(a) one of **awareness** of a document or documents, is contradictory to what may well be required to be taken into account by that person pursuant to subsection (6). For example, the fact that the significance of a document likely to be found is one of the factors a person may take into account, must involve some awareness of the nature and/or content of such a document, and on that basis it makes awareness problematic as the test of culpability for not producing such a document.

It may well be the case that a person is "aware" that a document exists or that a class of documents exists which could well contain a document, yet for a reason or reasons stipulated in subclause (6), the person decides not to produce it. In this case, the question should not be whether the person was "aware" of the document, but rather whether the search was



**Submission from the Competition and Consumer Law Committee to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 released by the Commonwealth Government**

reasonable, taking account of the factors specified in subclause (6). For example, where a document was known to exist, but for technical reasons the cost of retrieving it was substantial and in any event the significance of the document was not great, and such was found by a court to be the case, then those findings should serve to exculpate the person from any culpability, regardless of his or her "awareness" of the existence or potential existence of the document.

The current drafting sets out reasons why a person might not produce a document, but makes the defence for not doing so based on a test other than whether or not one or more of those factors applied.

The fact that the failure to produce a document unless excused by the defence is a criminal offence underpins the seriousness of the matter. The existence of the defence does not alter the seriousness of the need to comply with the Notice to Produce and the ACCC's Section 155 Guidelines as varied September 2016 indicates potential liaison between the ACCC and the person who will be required to produce a document. It exculpates a person who makes reasonable attempts to produce but, for one or more valid reasons stated in the defence provision, the person cannot do so or it is unreasonable for him or her to do so.

In the circumstances, the provision of 155(5B)(b) should say:

"after a reasonable search, the person does not produce the documents, or one or more of them."

**10. Schedule 13 – Access to services**

The Society makes no comment in relation to the proposed amendments set out in Schedule 13.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Wendy Devine on [REDACTED]

Yours faithfully

[REDACTED]

Bill Potts  
**President**