The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Australian Competition and Consumer Commission (“ACCC”). The Sections appreciate the opportunity to present their views with respect to the subjects raised in the ACCC’s Framework for Concerted Practices Guidelines (“Guidelines”). The Sections’ comments reflect the expertise and experience of their members with competition law in the United States, Australia, the European Union and other jurisdictions worldwide.

Introduction

The Sections understand that the Final Report of the Competition Policy Review (“Harper Report”) recommended the inclusion in Section 45 of Australia’s Competition and Consumer Act 2010 (“CCA”) of a prohibition against “a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.” This formulation was proposed as an alternative to the price signaling provisions that were introduced into the CCA in 2012 and which the Harper Report recommended be repealed. As proposed, the provision would impose civil liability, including the possibility of civil penalties, upon parties engaging in conduct falling short of Australian judicial interpretation of “contracts, arrangements or understandings” under Section 45 of the CCA. From the context of the Harper Report, the provision appears to be particularly aimed at anticompetitive disclosures of information, but is not expressed to be so limited.

As noted by the Harper Report, U.S. and Canadian law deal with anticompetitive information disclosure under general provisions prohibiting anticompetitive agreements, i.e., Section 1 of the Sherman Act and Sections 45(1) and 90.1 of the Canadian Competition Act. In these jurisdictions, agreements may be inferred from circumstantial evidence, which could include exchanges of information of the kind sought to be addressed in the proposed legislative amendment. Furthermore, monetary penalties are not imposed in the US unless

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2 Indeed, the examples of potentially problematic conduct described in the draft Guidelines would likely form a reasonable basis for a claim under Section 1 of the Sherman Act in the United States.
the conduct is unambiguously anticompetitive such that there is no concern that enhanced sanctions might suppress legitimate or procompetitive behavior.

Other jurisdictions, notably the European Union and the United Kingdom, have introduced the concept of “concerted practices.” Enforcement of prohibitions based on this concept has not always been straightforward. Initially, European courts were unsure whether there was any difference between concerted practices and anticompetitive agreements prohibited under Article 101 of the TFEU.3 The European Commission has noted that it might not be “feasible or realistic” to make a distinction between an agreement and a concerted practice, particularly in more complex cartel cases, and that subdividing a period of continuous conduct in this manner could be “artificial.”4 Since then, the enforcement history demonstrates numerous difficulties in delineating harmful and actionable conduct from conduct that is procompetitive or benign. For example, there are cases in which the European Commission concluded there was a concerted practice, but on appeal the decision was annulled because of a lack of evidence and the court found that there was another competitively neutral explanation for the conduct.5

Accordingly, the Sections are submitting comments to the Treasury of the Australian Government suggesting that the Treasury reconsider introducing the concept of “concerted practices” into Australia’s competition law.6 An alternative may be—as was apparently suggested by the ACCC to the Competition Policy Review Panel—to clarify and expand the scope of “contract, arrangement or understanding” under Section 45 so that the necessary agreement can be inferred from evidence of parallel behavior accompanied by other “plus factor” evidence.7 This would also ensure that businesses were not constrained from pursuing legitimate or procompetitive behavior due to the risk of civil penalties being imposed for conduct that does not reach the level of agreement and is not unambiguously anticompetitive.

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7 In the United States, mere parallel behavior cannot provide the basis for a conspiracy claim under Section 1 of the Sherman Act. See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553-54 (2007). However, parallel behavior accompanied by plus factors, i.e., “evidence that enables parallel conduct to be interpreted as collusive,” may give rise to an inference of conspiracy under Section 1. See, e.g., In re Text Messaging Antitrust Litig., 630 F.3d 622, 628 (7th Cir. 2010). Examples of traditional plus factors that U.S. courts recognize include: (1) facts that suggest the firms have motive to conspire; (2) facts that suggest the firms acted against self-interest; and (3) other evidence that implies the existence of a traditional conspiracy. See, e.g., VI Phillip E. Areeda et al., Antitrust Law ¶ 1434, at 263-67 (4th ed. 2013).
Nevertheless, if the proposed revision is adopted, the challenge facing enforcers and counselors alike is to have guidelines that sufficiently explain and clarify its enforcement policy with respect to the concept of “concerted practices” for the benefit of businesses seeking to comply with the law and those advising them. The Sections commend the ACCC’s early promulgation of guidelines to clarify its interpretation and proposed enforcement framework of the law on joint conduct falling short of a “contract arrangement or understanding” under the proposed amended Section 45, and appreciate the substantial thought and effort reflected in the Guidelines.

The Sections make the following comments in the hope that they may assist the ACCC as it works on more detailed guidelines, with a view to facilitate clearer interpretation of the law, as well as to provide more insight into the ACCC’s enforcement framework. The following comments suggest several areas in which additional guidance would be helpful: in expanding the explanation of the meaning of “concerted practices”; in addressing how conduct that may be neutral or procompetitive—for example, “conscious parallelism” or information exchanges—can be distinguished from potentially illegal conduct; and by clarifying the application of “purpose, effect or likely effect of substantially lessening competition” in the context of the revised Section 45.

1. **Meaning of “Concerted Practices”**

The Guidelines currently provide only a very brief, high-level discussion of what constitutes a concerted practice—“a form of coordination between competing businesses by which … practical cooperation between them is substituted for the risks of competition.” The Guidelines apparently seek to communicate the relevant factors that the ACCC regards as important in making enforcement decisions through several examples. The Sections respectfully suggest that additional guidance as to both the meaning of the term “concerted practices” and the key features of conduct most likely to be targeted for enforcement is desirable.

The Harper Report seeks to define the term “concerted” as “jointly arranged or carried out or coordinated.”

The Report goes on to note that the expression “conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (e.g., suppliers selling products at the same price).”

The European Commission defines “concerted practices” as “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”

This includes “any direct or indirect contact” between firms that has “object or effect” of “either influenc[ing] the conduct on the market of an actual or potential competitor” or

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9 Id.

“disclos[ing] to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”

All the examples of concerted practices identified in the Guidelines concern information exchanges (including, but not limited to, price signaling). Although the Sections appreciate that the ACCC will not wish to unnecessarily restrict the application of the provision, if other types of conduct are anticipated to be subject to enforcement action as concerted practices, the ACCC should issue supplemental guidance. For example, to the extent the ACCC anticipates using section 45 to target parallel behavior accompanied by “plus factors,” the Sections would recommend that the ACCC identify which “plus factors” would tend to show a concerted practice.

Additional relevant factors that the ACCC may wish to identify include that:

- The target conduct is between horizontal competitors – i.e., between firms that: (a) compete horizontally; (b) are not related; and (c) are in the same market.
- The contact between competitors needs to be meaningful – i.e., where there is evidence of substantive exchange of information, not just incidental or social contact.
- Enforcement will focus on the exchange of private information rather than public data (unless one of the parties has made the information public).
- The information exchanged needs to be competitively sensitive (for example, specific, nonpublic forward-looking information regarding pricing, quantities, or capacity).
- Target conduct requires active participation by at least two parties, so that a rejected (or ignored) invitation to collude is unlikely to be the subject of enforcement under this provision.

2. Procompetitive Conduct Potentially Captured by the Revised Section 45

The Sections note that certain conduct that is both lawful and procompetitive may nonetheless be actionable under the revised Section 45. The Sections recommend that the

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12 See supra, note 7.

13 The Sections note that in the U.S., the Federal Trade Commission utilizes Section 5 of the Federal Trade Commission Act—which prohibits “unfair methods of competition”—to prosecute invitations to collude. But this provision does not require any form of joint conduct unlike the “concerted practices” prohibition here and there are no monetary penalties or private damages claims for violations of Section 5.
ACCC recognize the potential procompetitive benefits of this conduct where applicable, and clarify that such conduct will not be targeted for enforcement.

Conscious parallelism. Through the “airlines” example, the Guidelines indicate that conscious parallelism, without more, is not likely to constitute a concerted practice. This is largely consistent with U.S. law, which holds that allegations of parallel behavior, without more, “are equally consistent with an inference that the defendants are conspiring and an inference that the conditions of their market have enabled them to avoid competing without having to agree not to compete.” However, the Sections understand that distinguishing parallel conduct from “concerted practices” may be a particular challenge in Australia, where many sectors are characterized by having two or three major players with homogeneous business models (often created by regulation), so that the risk of misinterpretation of conduct is high. In particular, the ACCC may wish to clarify how, at the investigative stage, it would distinguish the conduct at issue in the “pearl cultivator” example from the conduct at issue in the “airlines” example.

Procompetitive Information Exchanges. As noted above, the revised Section 45 is not expressly limited to exchanges of information between horizontal competitors. Accordingly, it may capture perfectly legal information exchanges, including disclosures among joint venture participants or disclosures that help consumers make more informed choices. The potential procompetitive effects of such exchanges are well recognized. Under the revised section 45, a firm may also be liable for providing information to a third-party market research firm or subscribing to market research from a third-party firm. Accordingly, the ACCC may wish to clarify that such information exchanges are not likely to be deemed concerted practices. Finally, the Sections recommend that the ACCC clarify that information exchanges between horizontal competitors that incorporate safeguards to prevent anticompetitive uses are not subject to enforcement under the revised Section 45.

3. “Purpose, Effect or Likely Effect”

Finally, the ACCC should consider clarifying the meaning of the phrase “purpose, effect or likely effect” in the context of concerted practices. Though the Sections understand that this phrase is used repeatedly in the Competition and Consumer Act of 2010, the phrase

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14 Text Messaging, supra note 7, at 637.

15 See, e.g., Harper Report at 60; Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 54 (7th Cir. 1992) (announcements “served important purpose in the industry” because customers “bid on building contracts well in advance of starting construction and, therefore, required sixty days’ or more advance notice of price increases”).

is not defined in the Act or any of its guidelines. Clarification in this area would be helpful, particularly with respect to the following three points:

- First, the ACCC may wish to clarify whether the inclusion of the word “purpose” means that a purely subjective intent to limit competition would be actionable even if it does not have that effect and is unlikely to have that effect. The Sections note that evidence of intent has very limited economic value, and so is a poor indicator of the competitive effect of conduct. Intent evidence may also be misleading, particularly in concentrated markets where an increase in a firm’s sales is likely to come at the expense of one of its competitors. The Sections respectfully suggest that the ACCC consider limiting section 45 enforcement to cases involving conduct that has an effect or is likely to have an effect on competition.

- Second, the Sections note the difficulties inherent in proving subjective anticompetitive intent. Where there is sufficient evidence to prove subjective anticompetitive intent (such as evidence of collusive meetings or correspondence), the Sections query whether this conduct would already be actionable under the cartel conduct provisions or the existing section 45 prohibition. For instance, the first example of a likely concerted practice—involving pearl cultivators—provides that the cultivators expressly told competitors they would restrict output for “the purpose of artificially increasing the price of Australian pearls.” (This appears to be the only example that addresses an anticompetitive purpose.) Wouldn’t these cultivators be subject to prosecution under the cartel enforcement provisions? Further, the ACCC should make clear that only clearly expressed intentions—as in the pearl cultivator example—will be sufficient to ground a violation of the concerted practice provision.

- Third, the ACCC may wish to clarify what level of probability and what kind of evidence is required to prove that a concerted practice is “likely” to

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17 See, e.g., Areeda, supra note 7, ¶ 113, at 144-47. For example, a firm may act with the intent to harm a rival, but in a highly competitive market, the action of a single firm is unlikely to harm competition. Id. at 144-45.

18 Id. at 145-46.

19 In the United States, Section 1 has been held to apply only to “unreasonable” restraints; this inquiry is confined to a consideration of impact on competitive conditions. See e.g., Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679,690 (1978). Generally, an unreasonable restraint is one that raises price, reduces output, diminishes quality, limits choice, or creates, maintains, or enhances market power. NCAA v. Board of Regents, 468 U.S. 85 at 113 (1984)(raising prices or reducing output); FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 459 (1986)(agreement limiting consumer choice).

20 The Sections recognize that the revisions to section 45 were motivated in part by Federal Court decisions such as ACCC v. Leahy Petroleum, F.C.A. 794 (2007). However, given the difficulties in distinguishing competitive parallel behavior from concerted conduct, the Sections have reservations about whether the evidentiary challenges faced by the ACCC would be alleviated by the introduction of the concerted practices provision and the Guidelines.
substantially lessen competition. Australian case law provides that the term “likely” in section 45 means that there is a real chance or possibility, rather than “more likely than not.” It would be helpful for the ACCC Guidelines to confirm that this interpretation also will apply to the concept of concerted practices under its enforcement Guidelines.

Conclusion

The Sections appreciate the opportunity to provide these comments and are available to provide additional comments or to participate in any further consultations that may be helpful to the ACCC.

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