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 Treasury of the Australian Government in relation to the Exposure Draft of the Competition and Consumer Amendment (Competition Policy Review) Bill 2016 (the “Bill”). 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.

The Sections commend the Treasury on the extensive and thoughtful effort in implementing the recommendations of the Final Report of the Competition Policy Review (“Harper Report”).\(^1\) The changes proposed by the Bill would go a long way towards making Australian competition law more effective, as well as bringing Australian competition law closer to international norms. The Sections appreciate the opportunity to present their views on the Bill to the Treasury. These comments are limited to the proposed introduction of a “concerted practices” prohibition to Section 45 of Australia’s Competition and Consumer Act 2010 (“CCA”).

The Sections understand that the Harper Report recommended the inclusion in Section 45 of a prohibition against “a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition” as an alternative to the price signaling provisions that were introduced into the CCA in 2012 (and which the Harper Report recommended be repealed). The Bill implements these recommendations.

As proposed, the new provision would impose civil liability upon parties engaging in conduct falling short of current Australian judicial interpretation of “contracts, arrangements or understandings” under Section 45 of the CCA. From the context described in the Harper Report, the provision appears to be particularly aimed at anticompetitive disclosures of information, but its terms are not limited to such conduct.

As discussed in 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 U.S. unless the conduct is unambiguously anticompetitive such that there is no concern that enhanced sanctions might suppress legitimate or procompetitive behavior.

In the United States, mere parallel behavior cannot provide the basis for a conspiracy claim under Section 1 of the Sherman Act; 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. 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.

Other jurisdictions, notably the European Union and the United Kingdom, have introduced the concept of “concerted practices” to reach conduct falling short of an express agreement. Although the explanatory material to the Bill suggests that “[t]he concept of a concerted practice is well established in competition law internationally,” 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. The European Commission has noted that it might not be “feasible or realistic” to distinguish 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.” In reviewing the body of EC case law on the subject, commentators have concluded that that the legal test is a “mental consensus whereby practical cooperation is knowingly substituted for

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2 The Sections discussed the extent to which evidence of parallel conduct can support a finding of illegal conspiracy in their 2009 comments to the Treasury concerning an earlier proposal to amend Section 45 of the (then) Trade Practices Act to extend the concept of “understanding” to include “the conscious or intentional creation of an ‘expectation’ of future conduct.” Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Meaning of “Understanding” in the Australian Trade Practices Act 1974, March 26, 2009, available at http://archive.treasury.gov.au/documents/1511/PDF/American_Bar_Association.pdf.


competition.” But “mental consensus” itself suggests that there is agreement between the actors in question.8

Since then, European enforcement history demonstrates numerous difficulties in distinguishing 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 explanation for the conduct.9 Today, most enforcement under the “concerted practices” provision results in settlements (under which no formal finding of infringement is made), often preventing activities that might pass muster under U.S. and Canadian competition laws.10

Given the complex international enforcement history, as well as the potentially vague standards for deciding which practices to attack, the Sections respectfully suggest that the Treasury reconsider introducing the concept of “concerted practices” into Australia’s competition law. Instead—as was apparently suggested by the ACCC to the Competition Policy Review Panel—the Sections recommend that the legislation be amended 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. As described above, such an approach would be consistent with a structure successfully followed in the United States and other jurisdictions. Such an approach also would 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.

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 Treasury.


8 This formulation sounds very like the “meeting of the minds” test required for a finding of the existence of an agreement under Section 1 of the Sherman Act. See American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) (defining agreement as “a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement”); accord Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).


10 See, e.g., Case AT.39850 – Container Shipping, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39850 (Shipping companies announced intended future general rate increases several weeks before implementation, announced price increases tended to be of similar magnitude, for the same route, and with a similar implementation date. The European Commission made no conclusion as to whether there was an infringement. The Parties offered commitments lasting 3 years and no fine was issued).