



Australian
Competition &
Consumer
Commission

EXECUTIVE OFFICE

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Dear Paul

Re: ACCC Submission to Exposure Draft Consultation on Competition Law Amendments

The ACCC would like to thank the Treasury for the opportunity to comment on the Exposure Draft legislation: the Competition and Consumer Amendment (Competition Policy Review) Bill 2016.

This letter addresses only those aspects of the Exposure Draft Bill where the ACCC believes further consideration is necessary. In particular, this letter outlines the ACCC's significant concerns with the Exposure Draft Bill's cartel conduct provisions.

In addition to outlining the ACCC's summary positions and responding to Treasury's specific consultation questions, the ACCC provides an **Attachment** to this letter that focuses on more detailed drafting considerations.

Cartel conduct prohibition

Cartel conduct is widely regarded as the most serious and harmful violation of competition law. The potential for large consumer losses and the low likelihood of detection underpinned criminalisation of cartel conduct in 2009. It is very important that the proposed amendments do not have the unintended consequence of watering down Australia's cartel prohibitions.

The ACCC has fundamental concerns about aspects of the drafting of some of the key amendments proposed to the cartel provisions. In addition, we consider the amendments would be inconsistent with the Government's response to the Harper Review's recommendations relating to the cartel provisions, which did not intend to undermine the effectiveness of those provisions.

The ACCC believes the amended joint venture exemption is likely to allow harmful collusive conduct (falling within the OECD's definition of 'hard core' cartel conduct) to escape prosecution because the conduct would no longer be regarded as 'prohibited cartel conduct'. The ACCC is also concerned that the amendments will introduce evidentiary hurdles that will make it more difficult to proceed with criminal prosecutions and notes that the Commonwealth Director of Public Prosecutions (CDPP) has previously raised these concerns in a confidential submission responding to the Harper Review's recommendation. As a result, the CDPP may no longer accept referrals of a cases that would currently be regarded as suitable for prosecution under the *Prosecution Policy of the Commonwealth*.

The likely combined effect of these amendments will be to weaken Australia's existing prohibitions against cartel conduct. It is not sufficient to argue that relevant conduct will continue to be caught by the general 'substantially lessening of competition' (SLC) provisions of the Act given the seriousness of the conduct. It is internationally accepted that cartels should be illegal 'per se'. Indeed, this is the strong recommendation of the OECD.¹

The ACCC's strong view is that the full implications and apparent unintended consequences of the Exposure Draft Bill, which only partially implements the intended reforms to the cartel provisions, need further detailed examination. The ACCC suggests that amendments to the cartel provisions not proceed at this point, and instead be progressed as part of the government's intended simplification of the competition provisions of the *Competition and Consumer Act 2010* (CCA). All changes to the cartel provisions are most sensibly implemented as a single exercise, particularly given the interdependencies and risk of unintended outcomes from piecemeal consideration.

ACCC supports simplification of the law and better targeting the joint venture exemption

In response to the Harper Review's recommendation on cartels the Government announced that it had decided to:

- simplify definitions for cartel conduct to improve clarity and certainty, '*while retaining their specificity and meaning*', and
- better target the legislation to avoid unnecessarily impeding efficient cooperation between competitors, including by amending the joint venture defence to provide appropriate exemptions for '*demonstrable and deliberative*' joint venture activity.

The government's conditional support of the Harper Review recommendation recognised the trade-off between the principal objective of maintaining effective criminal and civil prohibitions against serious cartel conduct and the additional objective of not unnecessarily impeding genuine joint venture activity that is pro-competitive.

While further amendments are anticipated to address the aim of simplification, aspects of the proposed amendments do not seem to be consistent with the Government's policy directions and appear to broaden the scope of exemptions beyond '*demonstrable and deliberative*' joint venture activity. Specifically, the ACCC is concerned that the amendments may inadvertently allow some forms of collusive conduct to be regarded as a joint venture or a supply relationship, and to be taken out of the cartel conduct prohibitions. The specific concerns of the ACCC are explained in more detail below.

Risk that cartels could be disguised as a joint venture

The ACCC agrees that legitimate joint ventures should not be susceptible to prosecution as a cartel.

However, the ACCC is concerned that cartelists who are not in a legitimate joint venture, and are in fact actual or likely competitors, could avoid prosecution for prohibited cartel conduct if the proposed amendments to the joint venture defence proceed. For example, cartelists may be able to disguise serious cartel conduct, to evade the law by setting up a joint venture to 'acquire' products, given effect through a non-legally binding 'understanding'.

In addition, the ACCC is concerned that the proposed changes will impede the ability to successfully prosecute cartel conduct in the public interest, as it will be more difficult for the

¹ OECD (1998), Recommendation of the Council concerning Effective Action against Hard Core Cartels.

ACCC and, as noted above, the Commonwealth Director of Public Prosecutions to disprove a joint venture defence claim than is currently the case.

The proposed amendments extend protection for joint ventures from the cartel conduct prohibitions — the joint venture exception — in three unintended ways.

- First, the amendment would apply the exception to parties to a joint venture set out in a contract, arrangement or understanding. The breadth of the proposed amendments to the joint venture defence creates a real risk that parties can shield illegitimate joint activities from the cartel provisions. By way of example, parties could assert they were part of a joint venture established under an oral arrangement or understanding, and that the cartel provision was reasonably necessary for undertaking that (ill-defined) joint venture. In a criminal trial, all that is required is that such evidence of joint activity be sufficiently cogent to discharge the evidential burden. Once that burden has been discharged, the prosecutor is then obliged to disprove the existence of the joint venture beyond reasonable doubt. Evidence positively proving the joint venture did not exist will usually be difficult for the prosecution to adduce.
 - A better option is for the law to make it clear that joint venture activity can only be protected by the joint venture defence if the joint venture is established with an appropriate degree of formality in a contract or deed, even if the cartel provision itself is in a separate contract, arrangement or understanding. The ACCC understands this is in keeping with typical commercial conduct for legitimate joint ventures. The certainty and clarity about both the existence of the joint venture and the scope of the joint venture is particularly important given the definition of 'joint venture' in section 4J merely requires 'joint activity', which is a broad definition that can also characterise cartel conduct.
 - Canada's 'ancillary restraints defence' operates in this manner, and provides a practical example of an approach that could be adopted in Australia.
 - Consistent with the intent of the Harper Panel, Canada's laws recognise that some desirable business collaborations require explicit ancillary restraints (cartel provisions contained in an agreement that is 'truly subordinate and collateral to a broader agreement' between businesses). The laws exempt such agreements from criminal cartel prosecution where an ancillary restraint is 'directly related to, and reasonably necessary for giving effect to' the broader pursuit of a legitimate and lawful collaboration.
 - In order to avoid permitting cartel conduct to escape prosecution too readily in Canada, the parties to the agreement must establish these elements on the 'balance of probabilities' (rather than having to introduce only a reasonable doubt as to the existence of such elements).
- Secondly, the amendments extend protection to cartel provisions 'reasonably necessary for undertaking the joint venture'. It is not clear what legitimate activities are sought to be covered by this new limb that would not be covered by the current 'for the purposes of the joint venture' limb. Courts will properly interpret the new limb as covering something additional to, and distinct from, the existing 'for the purposes of' limb. The ACCC therefore considers this limb should be clarified.
- Finally, the law currently only protects joint ventures that relate to the production or supply of goods or services, but under the proposed amendment joint ventures in relation to the acquisition of goods or services will also be protected. The ACCC considers this is unnecessary. Collective acquisitions are already appropriately provided for under the current section 44ZZRV (Collective acquisition of goods or

services by the parties to a contract, arrangement or understanding), and as Parliament has made clear, section 44ZZRV is available to joint ventures.²

Exemptions for vertical supply or acquisition arrangements (proposed s44ZZRS)

The Exposure Draft Bill broadens the current exception for vertical trading restrictions beyond the existing exemption for exclusive dealing. Such vertical restrictions will not be considered to fall within the scope of the cartel provisions and will instead be considered under a substantial lessening of competition test (under section 45, the proposed section 46 or section 47).

It is critical to confine the scope of the exemption to the agreement between the parties in a supply or acquisition relationship, rather than allow a cartel to impose a cartel provision upon their customer. Any collusion that is *primarily referable* to the competitive relationship between businesses³ should be dealt with under the hard-core cartel prohibitions. The ACCC is concerned the scope of the proposed section 44ZZRS exemption is unclear and risks causing unintended consequences.

In particular, the proposed section 44ZZRS increases the complexity and uncertainty around the application of the anti-overlap provision in three ways.

- Firstly, whilst a criticism of section 47 (and accordingly, the current section 44ZZRS) may be that it overly prescribes the types of conduct of concern, the proposed provision has the potential to introduce inappropriately complex assessments into the application of the anti-overlap provision.
 - A number of the subsections in proposed section 44ZZRS include the words ‘goods or services that are substitutable for, or otherwise competitive with, the goods or services’ the subject of the supply/acquisition relationship. This will introduce a de-facto ‘product market’ type test. This is particularly concerning for the ability to criminally prosecute cartel conduct.
 - The Harper Committee agreed that it would be inappropriate to require a jury to adjudicate upon market issues. However, if a defendant seeks to rely upon that part of the exemption which contains these ‘substitutability/competitive with’ elements, this would potentially require a jury to consider such issues (and be convinced beyond reasonable doubt whether particular goods or services are, or are not, substitutable with or competitive with other goods or services).
 - The ACCC strongly cautions against the introduction of this type of test into the cartel prohibitions for the reasons set out in the ACCC’s 26 November 2014 submission to the Competition Policy Review.
- Secondly, a significant difference between the existing and proposed section 44ZZRS is that the existing provision is specifically tied to section 47, which sets out with some particularity the types of conduct intended to be covered by the Act. It is only where conduct “*contravenes, or would but for the operation of section 47(10)...*, *contravene section 47*” that the anti-overlap provision applies. This provides some distinct boundaries to the operation of the “anti-overlap” provision, and the courts have interpreted provisions cast in this form in an appropriately restrictive way such that the cartel prohibitions continue to apply to the balance of the agreement that does not fall

² Supplementary Explanatory Memorandum and Correction to the Explanatory Memorandum, *Trade Practices Amendment (Cartel Conduct and Other Measures Bill)*, p.7

³ This is the concept advocated by Justice Kirby in *Visy Paper Pty Limited v Australian Competition and Consumer Commission* [2003] HCA 59at [72], albeit this was not supported by the rest of the Court.

within the anti-overlap provision.⁴ The proposed provision is not so restricted in its operation. Rather, it provides only that to the extent that a provision (which would otherwise be dealt with as a cartel provision) in a supply or acquisition relationship “imposes ...obligations that relate to” that supply or acquisition, it is exempt from the operation of the cartel provisions. Given the fact that many firms in supply or acquisition relationships are increasingly also direct competitors (for example, as a result of direct supply channels through the internet), the breadth of the proposed provision and the lack of specificity around how such conduct might otherwise be addressed in the CCA is of significant concern.

- Finally, the ACCC has concerns that the terms of the proposed section 44ZZRS are unclear and complex. This is likely to make it difficult to understand and apply, and raises the risk that it will be interpreted in ways which have unintended consequences.

Defer amendment of section 44ZZRS until simplification proposals are further developed

The Government has announced that it will develop a proposal to further simplify the competition law, including whether to simplify section 47. As noted above, the ACCC considers that the most effective course would be to consider amendments of the cartel provisions as part of this process. If the government wishes to proceed with some amendments of the cartel provisions ahead of simplification, the ACCC strongly believes that amendment of section 44ZZRS dealing with vertical supply or acquisition restrictions should not proceed independent of any detailed consideration of amendments of section 47. To do so risks inappropriately narrowing the coverage of Australia’s cartel prohibitions.

Power to obtain information, documents and evidence

The ACCC considers that the inclusion of the ‘reasonable search’ factors in determining the application of the proposed reasonable search defence is inappropriate and risks significantly undermining the ACCC’s ability to compel the production of documents, a power which, as acknowledged by the Harper Committee, is crucial to the ACCC’s ability to carry out its investigation and enforcement role.

The ‘reasonable search’ factors included in the exposure draft have been taken directly from the Federal Court Rules for discovery. However, there are key differences between the discovery process in a litigation context, and a regulator compelling production of documents as a part of its investigation of conduct, which may be clandestine and potentially criminal.

First, it has been recognised that the interpretation of the ‘reasonable search’ factors in the discovery process of litigation can require a complex balancing exercise of broad, often competing, factors. It is inappropriate for this assessment to be placed in the hands of the *recipient* of a mandatory notice from the regulator, without any transparency over the assessments made by the recipient. For example, what does the ‘nature and complexity of the matters’ mean to the recipient of a notice in the context of an *investigation*? How does the recipient know the ‘significance of any document likely to be found’ to the regulator? Is it appropriate for the recipient to determine what would constitute ‘any other relevant matter’?

- In the discovery context, the producing party is likely to be well placed to assess, for example, ‘the significance of any document likely to be found’, given that the nature of the dispute will have been detailed in the pleadings and will be well understood by both parties. The party to whom production is made is also likely to have a good basis for

⁴ *Visy Paper Pty Limited v Australian Competition and Consumer Commission* [2003] HCA 59. See also *S.A. Brewing Holdings Ltd v Baxt* (1989) 23 FCR 357 and *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235.

assessing the sufficiency of the discovered response. This is not the case in a regulatory investigation.

Second, Courts have ready oversight of the application of the 'reasonable search' factors in discovery disputes. In contrast, the ACCC's ability to assess the reasonableness of searches undertaken by a recipient of a notice will be extremely limited and the question of whether a recipient has undertaken adequate searches would only be able to be ventilated before a court if the CDPP instituted criminal proceedings for non-compliance with a s. 155 notice.

Finally, the ACCC relies on information obtained in response to s. 155 notices in order to investigate potentially serious contraventions of the CCA, in the public interest. The potential implications of imposing factors which may materially reduce the sufficiency of the production of documents in this context are serious.

Accordingly, there is a real risk that the 'reasonable search' factors will undermine the efficacy of section 155 powers to compel the production of documents and run counter to other Harper Review recommendations aimed at strengthening compliance with section 155 notices (e.g. increasing fines for non-compliance, and allowing section 155 notices to be used to investigate compliance with undertakings). Proving non-compliance with a notice will be significantly more difficult where the notice recipient is entitled to make an assessment of the broad, open-ended factors proposed.

The proposed inclusion of the factors in the statute is also a notable departure from the approach taken to similar 'reasonable search/reasonable excuse' type defences in other legislation governing regulatory information gathering powers. As table 1 on p.6 of the Attachment shows, the general approach does not include factors for the notice recipient to assess in deciding what effort it will go to when responding to a mandatory request for information. In the case of ASIC and the ATO, the regulator has provided some guidance on its approach to the relevant defences.

The ACCC is required to and has regard to the burden of the section 155 notice on the recipient before exercising its section 155 powers, in particular, the time and cost burden it imposes on the recipient including having regard to digital technology. However, it considers that, rather than including statutory factors in the form proposed, the better approach would be for the ACCC to issue guidelines outlining its view of the meaning of 'reasonable search' in the context of responding to a mandatory notice as part of an ACCC investigation. These guidelines would build on the ACCC's recently updated section 155 guidelines which, among other things, encourage consultation between recipients of a notice and the ACCC to reduce the burden on recipients of a section 155 notice.

If the 'reasonable search' factors are retained, the factors should at least be expressed as considerations *the court* may take into account in determining whether the reasonable search defence is made out rather than factors left to the discretion of the recipient of a notice.

Misuse of market power

The ACCC strongly endorses the proposed, simplified reformulation of section 46(1) to prohibit anti-competitive conduct by a firm with substantial market power where that conduct has the purpose, effect or likely effect of substantially lessening competition in any market (SLC test).

The introduction of an SLC test into section 46 ensures greater consistency across the CCA. The SLC test already applies to other provisions within the CCA addressing anti-competitive conduct and businesses are already familiar with this test.

The ACCC, however, does have serious concerns about the proposed inclusion of mandatory factors as set out in the proposed section 46(2). These factors require the Court to consider whether the alleged conduct will increase or decrease competition in particular respects when determining whether there is a SLC.

The ACCC considers that the proposed mandatory factors are unnecessary and unworkable as:

- sections 45 and 47 currently function effectively without the need for consideration of mandatory factors, yet each has the same SLC test
- inserting mandatory factors in section 46 will lead to legal arguments that the test is to be construed differently to the SLC test in sections 45 and 47
- the inclusion of the proposed mandatory factors would significantly increase the complexity of section 46, contrary to the simplification recommendation of the Harper Review
- the mandatory factors would impose a heavy and unrealistic evidentiary burden upon an applicant to disprove matters which will often be within the respondent's knowledge (such as any efficiency enhancements or changes in product quality)
- the mandatory factors would require some quantification or weighing of anti-competitive purposes or effects as well as efficiencies and innovation, and a netting off exercise to determine whether there is a substantial lessening of competition.

The concern as to the burden of proof is a critical consideration in whether or not the revised section 46 will achieve its objective of constraining a misuse of substantial market power.

If an applicant has to enquire into how conduct observed in the market place may have enhanced the internal operations and cost structure of the company engaging in the conduct, the increased complexity of investigating and litigating cases will reduce the effectiveness of the section.

National Access Regime

The Government's proposed drafting changes to Part IIIA seek to capture the recommendations from the Productivity Commission's 2013 Inquiry into the National Access Regime. However, parts of the proposed drafting changes and the Explanatory Memorandum are ambiguous and may introduce additional uncertainty in the application of Part IIIA. Given the history of contentious Part IIIA declaration proceedings, even relatively minor ambiguities within the drafting or explanatory material may lead to controversy in future proceedings, undermining the operation of the regime as a whole. The ACCC is keen to ensure that the amendments to Part IIIA achieve the stated objectives, and our specific drafting concerns are outlined in the Attachment to this letter.

With regard to the specific amendments to declaration criterion (a), the ACCC understands that the intention is to change the emphasis in criterion (a) from assessing the effects of access, to assessing the effects of declaration. This has been referred to as supporting a 'with and without declaration' test, rather than a 'with and without access' test, in considering a material increase in competition. The ACCC considers that there remains some ambiguity in the drafting of the proposed amendment and that it may not necessarily achieve this objective, as outlined at the Attachment to this submission.

However, aside from this drafting ambiguity, the ACCC notes that the likely effect of adopting the 'with and without declaration' test rather than a 'with and without access' test is to raise the threshold for declaration. This is chiefly because in comparing the situation without declaration (where access may nevertheless be provided in some form, such as via a private

contractual agreement) and the situation with declaration, the difference in competitive outcomes between the two scenarios is likely to be narrower than the difference between a future without access and a future with access. Adopting the test as intended by the draft legislation may make declaration under Part IIIA less likely in a situation where a bottleneck facility owner is already providing some level of access. Absent declaration, access seekers may be able to access the service and compete in related markets but it is open to the facility owner to unilaterally determine the terms and conditions of access it provides. Whether access seekers would be able to rely on declaration in this case would then depend on how the promotion of 'a material increase in competition in at least one market... other than the market for the service' is considered under each scenario.

If the likely effect of adopting the 'with and without declaration' test is to raise the threshold for declaration, it is then especially important that the 'material increase in competition' part of criterion (a) is properly considered. A proper consideration of whether declaration 'would promote ... competition' in a dependent market requires a forward-looking analysis. It also involves consideration and comparison of the competitive conditions and environment likely to arise in the future with and without declaration. This should consider the likely behaviour of a monopoly service provider, given its incentives to exercise its market power to maximise profits. It would therefore go beyond, for example, just considering the level of production likely to arise in the dependent market in the future with and without declaration. The threshold for declaration may be raised even further than intended, if narrowly focussing on the level of services offered (rather than the terms) does not give appropriate consideration to the possible economic and competitive outcomes where the service provider has the ability and incentive to exercise market power.

The effects of raising the threshold are likely to include making Part IIIA less available to access seekers and reducing the perceived threat of declaration for infrastructure owners. This may in turn reduce infrastructure owners' incentive to negotiate in good faith and provide access on reasonable terms and conditions to avoid declaration.

Raising the threshold for declaration may also lead to increased need for alternative industry specific regimes to address specific instances of market failure, rather than relying on declaration under Part IIIA. Governments have previously legislated for industry-specific access regimes for various reasons in a range of industries, such as electricity, gas, telecommunications and wheat ports. The declaration criteria (or other coverage provisions that affect the scope of the regulation) under such alternative regimes would be able to be appropriately tailored to specific circumstances. For example, the ACCC has recently proposed an alternative set of coverage criteria that should apply in the case of gas pipelines.⁵ This may be increasingly considered necessary if the threshold for a service to be declared under Part IIIA is increased and the scope of Part IIIA is thereby reduced.

Conversely, setting the threshold for declaration too low is also likely to have detrimental effects on investment and efficiency. The ACCC considers that as a generic access regime that can be applied across a wide range of industries, it is important to have an appropriate threshold for declaration under Part IIIA that adequately balances competing interests. Setting the correct threshold is ultimately a policy decision for Government.

Authorisations, notifications and class exemptions

Subject to resolution of the issues the ACCC identifies in the Attachment, the ACCC supports the provisions in the exposure draft legislation for merger and non-merger authorisation, notification and class exemptions.

⁵ ACCC, East Coast Gas Inquiry – final report, April 2016, pp. 129-134.

Merger authorisations

Table 2 of the Attachment responds to question 6 of the specific questions raised by Treasury as part of the consultation, and identifies a number of issues arising from the repeal of existing provisions relating to merger clearances and authorisations and their consolidation into Part VII of the CCA.

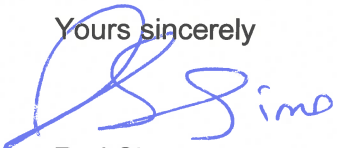
Non-merger authorisations, notifications and class exemptions

Table 3 of the Attachment focusses on issues raised by the non-merger authorisation, notification and class exemption provisions.

In response to question 5 of the specific question raised by Treasury, the ACCC considers that it is appropriate that a decision to issue a stop notice for notified collective boycott conduct not be reviewable by the Tribunal, taking into account: the interim nature of the stop notice; any final objection or conditions notice must be issued by the ACCC within 90 days of the stop notice (unless formally extended); and the final notice is subject to review by the Tribunal.

If you have any questions regarding any aspect of this letter, please do not hesitate to contact me on (02) 6243 1129. Alternatively, you can contact Bruce Cooper on (02) 6243 1256, or Bruce.Cooper@accc.gov.au.

Yours sincerely



Rod Sims
Chairman

Attachment

Further comments on matters addressed by this letter
Power to obtain information, documents and evidence

Table 1 – Defences to statutory information gathering powers held by other Government agencies

Note: The below incorporates the defences to statutory information gathering powers held by other Government agencies extracted in full with key parts highlighted in yellow.

Agency	Act	Defence
ASIC	<u>Australian Securities and Investments Commission Act 2001 (Cth)</u>	Section 63 - Non-compliance with requirements made under this Part 1) A person must not intentionally or recklessly fail to comply with a requirement made under: a) section 19; or b) subsection 21(3); or c) section 30, 30A, 31, 32A, 33 or 34; or d) subsection 37(9); or e) section 38; or f) section 39. Penalty: 100 penalty units or imprisonment for 2 years, or both. 2) A person must not fail to comply with a requirement made under section 41, 42, 43 or 44. Penalty: 50 penalty units or imprisonment for 12 months, or both. 3) A person must not fail to comply with a requirement made under subsection 21(1) or 29(2), paragraph 24(2)(a) or subsection 49(3) or 58(1), (2) or (4). Penalty: 10 penalty units or imprisonment for 3 months, or both. 4) A person must comply with a requirement made under subsection 23(2) or 48(2).

Penalty: 5 penalty units.

- 5) Subsections (1), (1A), (2) and (3) do not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the Criminal Code .

- 6) Paragraph (1)(d) does not apply to the extent that the person has explained the matter to the best of his or her knowledge or belief.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the Criminal Code .

- 7) Paragraph (1)(e) does not apply to the extent that the person has stated the matter to the best of his or her knowledge or belief.

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the Criminal Code .

- 8) Paragraph (1)(f) does not apply to the extent that the person has, to the extent that the person is capable of doing so, performed the acts referred to in paragraphs 39(a) and (b).

Note: A defendant bears an evidential burden in relation to the matter in this subsection, see subsection 13.3(3) of the Criminal Code .

Insurance
Contracts Act
1984 (Cth)

11C Supervisory powers—ASIC may obtain insurance documents

- 1) ASIC may, for any purpose connected with the general administration of the relevant legislation, by notice in writing given to an insurer, require the insurer to give to ASIC, within 30 days of receipt of the notice, or such longer period as is specified in the notice, copies of:
 - a) documents specified in the notice relating to insurance cover provided, or proposed to be provided, by the insurer; or
 - b) documents relating to insurance cover of a kind specified in the notice provided, or proposed to be provided, by the insurer.
- 2) An insurer must not fail, without reasonable excuse, to comply with the requirements of a notice under subsection (1).

Penalty: 150 penalty units.

Note: For the liability of a director, employee or agent of an insurer, see section 11DA.

2A) An offence against subsection (2) is a strict liability offence.

Note: For strict liability, see section 6.1 of the Criminal Code.

3) Subsection (1) does not require an insurer to give to ASIC any document dealing with the insurance cover provided to a particular person unless:

- a) that person, or another person having an entitlement to claim under that insurance cover, has given a written authorisation to ASIC permitting ASIC to require the giving of that document; and
- b) ASIC has given a copy of the authorisation to the insurer with the notice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3), see subsection 13.3(3) of the Criminal Code.

4) It is a reasonable excuse for an insurer to refuse or fail to comply with the requirements of a notice under subsection (1) if to do so would tend to incriminate the insurer.

Section 11D Supervisory Powers – ASIC may review administrative arrangements

1) ASIC may, for any purpose connected with the general administration of the relevant legislation, by notice in writing given to an insurer, require the insurer to give to ASIC, within 30 days of receipt of the notice or such longer period as is specified in the notice:

- a) written particulars of the organisational structure and administrative arrangements of the insurer either generally or in a particular area of insurance; or
- b) statistics relating to the nature and volume of the insurance business of the insurer either generally or in a particular area of insurance; or
- c) copies of any training guides, work manuals or other materials of a similar nature used by an insurer in instructing its employees or any insurance intermediaries dealing with persons who have, or may be likely to seek, insurance cover from the insurer.

2) An insurer must not, intentionally or recklessly, give ASIC, in purported compliance with a requirement under subsection (1), particulars or statistics that are false or misleading in a material particular.

Penalty: 150 penalty units.

Note: For the liability of a director, employee or agent of an insurer, see section 11DA.

- 3) An insurer must not fail, without reasonable excuse, to comply with the requirements of a notice under subsection (1).

Penalty: 150 penalty units.

Note: For the liability of a director, employee or agent of an insurer, see section 11DA.

3A) An offence against subsection (3) is a strict liability offence.

Note: For strict liability, see section 6.1 of the Criminal Code.

- 4) Subsection (1) does not require an insurer to give ASIC a copy of any document or any information:
 - a) that reveals the identity of a particular insured or third party claimant; or
 - b) from which the identity of a particular insured or third party claimant can be deduced.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4), see subsection 13.3(3) of the Criminal Code.

- 5) It is a reasonable excuse for an insurer to refuse or fail to comply with the requirements of a notice under subsection (1) if to do so would tend to incriminate the insurer.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5), see subsection 13.3(3) of the Criminal Code.

**Australian
Criminal
Intelligence
Commission**

[Australian Crime
Commission Act
2002 \(Cth\)](#)

Section 21D - Notices- legal practitioner not required to disclose privileged communications

- 1) A legal practitioner may refuse to produce a document or thing, when served with a notice to do so under section 21A, if the document contains a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner.
- 2) Subsection (1) does not apply if the person to or by whom the communication was made agrees to the legal practitioner producing the document or thing.

- 3) If the legal practitioner refuses to produce the document or thing, he or she must, if required by the examiner who issued the notice, give the examiner the name and address of the person to or by whom the communication was made.
- 4) If a legal practitioner gets agreement, as mentioned in subsection (2):
 - a) the fact that he or she produces a document or thing does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that document or thing; and
 - b) the document does not cease to be the subject of legal professional privilege merely because it is produced or referred to.

**Australian
Federal
Police**

[Proceeds of
Crime Act 2002
\(Cth\)](#)

Section 218 - Failing to comply with a notice

- 1) A person commits an offence if:
 - a) the person is given a notice under section 213; and
 - b) the person fails to comply with the notice:

Penalty: Imprisonment for 2 years or 100 penalty units, or both.

Note: Sections 137.1 and 137.2 of the Criminal Code also create offences for providing false or misleading information or documents.

- 2) It is a defence to an offence against subsection (1) if:
 - a) the person fails to comply with the notice only because the person does not provide the information or a document within the period specified in the notice; and
 - b) the person took all reasonable steps to provide the information or document within that period; and
 - c) the person provides the information or document as soon as practicable after the end of that period.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the Criminal Code).

Section 269 - Suspect to assist Official Trustee

The suspect in relation to the restraining order covering the controlled property must, unless excused by the Official Trustee or prevented by illness or other sufficient cause:

- a) give to the Official Trustee such * books (including books of an associated entity (within the meaning of the Bankruptcy Act 1966) of the person) that:
 - i) are in the person's possession; and
 - ii) relate to any of the person's * affairs;
 - as the Official Trustee requires; and
- b) attend the Official Trustee whenever the Official Trustee reasonably requires; and
- c) give to the Official Trustee such information about any of the person's conduct and examinable affairs as the Official Trustee requires; and
- d) give to the Official Trustee such assistance as the Official Trustee reasonably requires, in connection with the exercise of the Official Trustee's powers or the performance of the Official Trustee's duties under this Part in relation to the controlled property.

**Australian
Financial
Security
Authority**

**[Bankruptcy Act
1966](#)**

Section 267B - Failure of person to provide information

- 1) A person must not refuse or fail to comply with a notice given to the person under subsection 6A(3), subsection 77C(1) or section 77CA or 139V.

Penalty: Imprisonment for 12 months.

- 2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

Section 81G - Effect of non-compliance with notice

- 1) In this section: 'relevant proceeding ' means a proceeding:
 - a) for the recovery of an amount payable by a bankrupt under section 139ZG; or
 - b) for the recovery of an amount payable by a person under section 139ZL; or
 - c) involving the question whether a transaction is void against the trustee under Division 3 of Part VI.
- 2) Subject to subsection (3), where a person refuses or fails to comply with a request or requirement set out in a notice given to the person under Division 1 or 2 to give any information or produce any books:

- a) if the request or requirement applies to information--the information is not admissible in a relevant proceeding; or
 - b) if the request or requirement applies to books--neither the books, nor any secondary evidence of the books, is admissible in a relevant proceeding.
- 3) Subsection (2) does not apply to information or a book if the person proves that:
 - a) the information or book was not in the possession of the person when the notice was given; and
 - b) there were no reasonable steps that the person could have taken to obtain the information or book.
 - 4) A notice given to a person under Division 1 or 2 must set out the effect of subsections (2) and (3).
 - 5) A failure to comply with subsection (4) does not affect the validity of the notice.

Centrelink

[Social Security \(Administration\) Act 1999 \(Cth\)](#)

Section 197 – Offence- failure to comply with requirement

- 1) A person must not refuse or fail to comply with a requirement under this Division to give information or produce a document. Penalty: Imprisonment for a term not exceeding 12 months.
- 2) Subsection (1) applies only to the extent to which the person is capable of complying with the requirement. (3) Subsection (1) does not apply if the person has a reasonable excuse.

Comcare

[Safety, Rehabilitation and Compensation Act 1988 \(Cth\)](#)

Section 58 (3) – power to request the provision of information

Where a claimant refuses or fails, without reasonable excuse, to comply with a notice under subsection (1), the relevant authority may refuse to deal with the claim until the claimant gives the relevant authority the information, or a copy of the document, specified in the notice.

Access to services (National Access Regime)

The ACCC considers that, overall, most of the proposed amendments appear to capture the recommendations from the Productivity Commission's 2013 Inquiry into the National Access Regime. However, the ACCC notes that some of the proposed drafting changes to Part IIIA and the drafting of the explanatory material relating to those changes in the Explanatory Memorandum (EM), could create ambiguity and uncertainty.

Given the history of contentious Part IIIA declaration proceedings, the ACCC considers that even relatively minor ambiguities with the proposed drafting and explanatory material may lead to controversy in future proceedings, undermining the operation of the regime as a whole. Consequently, the ACCC considers that the drafting ideally should be clarified to ensure that the amendments to Part IIIA have the intended effect.

In summary, the ACCC's key points on drafting are that:

- it is not clear that the drafting of the new criterion (a) will necessarily achieve the objective as outlined in the draft EM
- the revised criterion (b) arguably does not properly implement a natural monopoly test, as it does not clearly set out a comparison of the costs of the service being provided by one facility and by two or more facilities.
- the matters required to be considered under criterion (d) include a reference to the effect on investment in 'infrastructure services', which may be interpreted more broadly than what was intended by the Productivity Commission.
- in respect of the arbitration provisions, the proposed drafting unnecessarily ties the concept of an 'expansion' to being a subset of an 'extension' of a facility.
- the draft EM includes statements that may create ambiguity in the interpretation of the declaration criteria, along with other issues as outlined below.

Proposed amendment to criterion (a)

The EM states that the amendments to criterion (a) 'are intended to restore the pre-2006 interpretation of how the criterion was applied'. That is, the amendments are intended to undo the precedent set by the Sydney Airport case. However, it is not clear that the drafting of the proposed amendment to criterion (a) will necessarily achieve this objective.

The EM states that the amendments to criterion (a) will require:

...a comparison of two future scenarios: one in which access (or increased access) is available, and one in which no additional access is granted. In comparing these two scenarios, the granting of access (or increased access) must promote the material increase in competition.

However, the amended criterion (a) still refers to 'access (or increased access)' following declaration and does not specify the comparison scenario. Even with the further clarification provided in the EM, the ACCC considers that interpreting the criterion could mean comparing the situation of 'access (or increased access) following declaration' to a number of different counterfactuals, including:

- assumed continuation of the status quo, where some parties may already have access despite the service not being declared, or
- a hypothetical future state, where the threat of declaration will be removed (following a decision not to declare the service) and parties may not continue to have access, or may have access on less favourable terms, or

- the status quo for a new entrant, who does not yet have access or certainty regarding the terms of access.

The ACCC considers that it may be preferable to reduce uncertainty and provide further clarity about the scenarios that are to be compared in determining whether there will be a material increase in competition as required by criterion (a).

Proposed amendment to criterion (b)

The interpretation of criterion (b) has been subject to competing views during previous Part IIIA declaration proceedings. The PC's 2013 report considered that an approach based on a 'natural monopoly' test was preferable to a 'private profitability' test. This is what is sought to be implemented with the proposed amendments. While this proposed drafting does alter the criterion, the ACCC considers that it may not effectively implement a natural monopoly test.

A key feature of a natural monopoly is that one facility can meet total market demand more efficiently than two or more facilities. While the proposed drafting captures the need for the facility to meet total foreseeable demand at least cost, it does not capture the comparison that is required between the costs of demand being met by one facility and by two or more facilities.

The ACCC considers that as currently drafted, criterion (b) could instead be interpreted to test the productive efficiency of the facility itself – for example, whether the facility is a low cost operator, or whether another facility could meet demand 'at the least cost' – rather than the question of whether or not there is a natural monopoly.

The ACCC considers that the drafting should more explicitly address the need for a comparison between the costs incurred by the facility subject to the declaration application meeting reasonably foreseeable demand, and the costs incurred by two or more facilities meeting reasonably foreseeable demand. This approach would also reflect the Productivity Commission's recommendation and explanation of how it considered the criterion should apply.⁶

Impact on investment in infrastructure services

The proposed amendments to criterion (d) (previously criterion (f)) provide that a service cannot be declared unless access (or increased access) to the service, on reasonable terms and conditions, following a declaration of the service would promote the public interest.

In considering whether criterion (d) is satisfied, proposed subsection 44CA(3) requires the National Competition Council (NCC) and the Minister to have regard to:

- a) *the effect that declaring the service would have on investment in:*
 - i) *infrastructure services; and*
 - ii) *markets that depend on access to the service; and*
- b) *the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.*

The ACCC considers that the reference to 'infrastructure services' could be interpreted broadly, requiring the NCC and the Minister to consider the effect of declaring the service on investment in infrastructure services generally.

For example, if the NCC was considering the declaration of a port service in South Australia, the reference to infrastructure services could be interpreted as to require the consideration of the effect of declaring that port service on levels of investment in other ports around Australia.

⁶ Productivity Commission Inquiry Report No. 66 – National Access Regime, October 2013, pp. 160-167.

The ACCC considers this would go beyond its understanding of the intent of the criterion, being that regard should be had to the effects of declaration on investment in the market for the service which is being declared, and investment in the markets that are dependent on the service.⁷

Consequently, the ACCC considers that the reference to 'infrastructure services' should be qualified. Using the port example above, qualifying the reference to infrastructure services could direct the NCC and the Minister to consider the effect of declaration on investment in the facility which is subject to the declaration application – in that case the particular port service in South Australia. Examples of such investment may include further dredging at that port or any capacity expansions required.

Expansions and extensions under arbitration determinations

The exposure draft bill proposes to amend Part IIIA to clarify the ability of the ACCC to order an expansion of a facility as part of an arbitration determination.

The ACCC may make an arbitral determination dealing with any matter relating to access by the third party to the service. Section 44V(2) lists, by way of example, matters that may be dealt with in an arbitration determination. A requirement that the provider extend the facility is one of the examples (subsection 44V(2)(d)). The exposure draft inserts an additional subsection 44V(2A) as follows:

Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:

(a) require the provider to expand the capacity of the facility;

(b) require the provider to expand the geographical reach of the facility.

It is clear from the PC's report that it intended for the ACCC to be able to direct extensions, expansions or both.⁸ In its recommendation, the PC sought to confirm the prevailing interpretation by the Australian Competition Tribunal, which has interpreted 'extend' to include both geographic extensions of a facility and expansions of a facility's capacity. However, the proposed subsection 44V(2A) appears to suggest that 'expansions' are a subset of 'extensions', rather than a distinct possibility in and of themselves.

There is some risk that this drafting approach could be interpreted to mean that the ACCC can only make a determination about an 'expansion' if it is also making a determination about an 'extension'. That is, rather than the matters in subsections 44V(2A)(a) and (b) being seen as examples of the types of extensions the ACCC can require, those matters could be seen as additional things that the ACCC could require when (already) requiring an extension. This could mean that if, for instance, an expansion to a facility was the subject of a dispute but an extension was not, a party may seek to argue that the ACCC would not be able to make a determination about the expansion.

The ACCC considers that the drafting should make clear that the ACCC has the power to order a geographical extension and/or a capacity expansion independently of each other. The ACCC considers that this could be achieved by an alternative approach, such as including 'expand' or 'expand the capacity of' a facility in the list of examples of what may be considered in an arbitration determination. This would clarify that an 'expansion' is within the scope of power of an arbitral determination (irrespective of whether there is any 'extension'). Similar amendments

⁷ Productivity Commission Inquiry Report No. 66 – National Access Regime, October 2013, pp. 227-35, 252.

⁸ The Productivity Commission's inquiry report states that 'the intent of this amendment is that when making an access determination, the [ACCC] can require a service provider to expand the capacity of a facility (in addition to being able to require a geographical extension)'. See recommendation 8.10 on p. 35.

could also be made to sections 44W and 44X, which deal with restrictions on access determinations and matters the ACCC must take into account, respectively.

The ACCC considers that clarifying the drafting will reduce the instances of parties unnecessarily seeking to test the alternative interpretation in the courts.

Explanatory memorandum

The ACCC considers that, as currently drafted, the EM may introduce additional uncertainty and ambiguity regarding the operation of Part IIIA. In particular, the ACCC notes potentially conflicting statements regarding the overall purpose and objectives of Part IIIA. The ACCC also notes that aspects of the analytical approach proposed for consideration of the declaration criteria are ambiguous and may not be consistent with the intent of the criteria.

It is important that the EM accurately reflect the scope and purpose of Part IIIA. In several places the EM is closely aligned to the wording of the existing objects of Part IIIA, referring to 'promoting effective competition in dependent markets'.⁹ The ACCC considers that this wording is consistent with the original (and still current) intent of Part IIIA. Accordingly, the ACCC would recommend that the EM adopt this language consistently. In a number of places, however, the EM cites the key purpose of Part IIIA as being to address the 'economic problem of an enduring lack of effective competition' in markets for nationally significant infrastructure services.¹⁰ While this language reflects how the PC chose to characterise the National Access Regime in its most recent review, it reflects an alternative, broader interpretation of the purpose and scope of Part IIIA, which the ACCC considers is not consistent with the original intent of the regime.

In addition, the EM states that Part IIIA 'seeks to ensure that facility owners achieve a commercial investment return so as not to impair investment incentives'.¹¹ While this notion is reflected in Part IIIA, including as one of the pricing principles that needs to be considered (amongst a number of other factors), the stated objectives of Part IIIA in section 44AA are not in these terms. If retained, this reference to investment returns in the EM could be balanced with discussion of the other factors and interests that are recognised in Part IIIA, including the other pricing principles.

The EM uses examples to guide the decision maker through the analytical approach and matters to be considered when stepping through the declaration criteria. However, some aspects of the analytical approach and the matters listed for consideration are potentially ambiguous and do not appear to be consistent with the intent of the criteria.

As noted above, the ACCC considers it important that the drafting of the legislation itself be clear, and that the discussion of the declaration criteria in the EM does not introduce any ambiguities in their interpretation. Below are some examples of where the ACCC considers there could be greater clarity in the drafting of the EM:

- The EM provides conflicting guidance regarding the scenarios to be considered in interpreting criterion (a). Paragraph 13.19 states that the amendments focus the test on 'the effect of declaration, rather than just assessing whether access (or increased access) would promote competition' while paragraph 13.20 refers to 'a comparison of two future scenarios, one in which access (or increased access) is available, and one in which no additional access is granted'.
- Paragraph 13.24 states that assessing whether a facility could meet total foreseeable market demand 'calls for a consideration of whether what could be expected to be peak demand could be supported by the facility'. This reference to 'peak demand' is ambiguous. It could

⁹ See paragraphs 13.6 and 13.11 of the Explanatory Memorandum.

¹⁰ See paragraphs 13.1, 13.4 and 13.10 of the Explanatory Memorandum.

¹¹ See paragraph 13.6 of the Explanatory Memorandum.

refer to a point in time under a long term forecast at which total market demand is expected to be at its highest, or it could refer to more short term peaks of demand that for instance occur in seasonal markets, such as agriculture. For example, it may be problematic to require an assessment of whether a grain port terminal had capacity to handle the volume of an entire harvest within a few months (the length of the 'peak' demand period). In practice it is likely to be more efficient for a single grain port terminal to handle the harvest over a longer period, rather than to have two terminals operating for only a few months of the year, and the grain port terminal may therefore still be a natural monopoly which should satisfy criterion (b).

- Paragraph 13.30 notes that 'administrative and compliance costs that may be imposed once a service is declared' would be considered under criterion (d), relating to the public interest, rather than criterion (b) as they are 'the costs of access regulation and are social costs'. It is not clear from the EM what is meant by 'social costs', and how it is a relevant consideration. The ACCC would recommend removing the reference to 'social costs' as the inclusion may increase ambiguity regarding the application of the two criteria and provide for unnecessary controversy in the declaration process.
- Paragraph 13.21 states that the inclusion of a reference to 'reasonable terms and conditions' in declaration criterion (a) 'is intended to minimise the disruption in dependent markets that may otherwise be caused by the exploitation of monopoly power'. As drafted, criterion (a) requires consideration of whether there will be a promotion of a material increase in competition in related markets, and does not refer to disruption in dependent markets. In some cases an increase in competition may itself be viewed as disruptive. It is unclear what minimising 'disruption' is intended to mean in this context.

Authorisations (merger and non-merger), notifications and class exemptions

Table 1 responds to question 6 of the exposure draft questions (and focusses on merger authorisation). Table 2 provides additional suggestions (and focusses on non-merger authorisation, notification and class exemptions).

Table 2: Merger authorisation provisions

Q6. With the proposed repeal of Division 3 of Part VII of the Act (merger clearances and authorisations) and the consolidation of the various clearance and authorisation processes have all the appropriate considerations for authorisations been included or is there a need for some of the repealed provisions to be reintroduced elsewhere?

Section	Issue	Suggested drafting instructions
1(a) Draft determination and conference requirement for merger authorisations; ability to seek information from applicants and third parties	The exposure draft applies s 90A to ACCC merger authorisations (i.e., no amendment to s 90(5)). This has the consequence that the ACCC is required to issue a draft determination and hold a conference for a merger authorisation. As the ACCC has only 90 days to consider an application for merger authorisation, issuing a draft determination (i.e., requiring a draft decision document) and holding a conference (including with the timeframes outlined in s 90A) is not practical.	Propose: <ul style="list-style-type: none"> amending s 90(5) to exclude merger authorisations from complying with the requirements of s 90A. inserting new provisions in s 90 similar to current ss 95AJ and AK that expressly provide for the ACCC to seek additional information from and consult with the applicant and from third parties.
No schedule		<ul style="list-style-type: none"> inserting similar provisions for determination of an application for minor variation, or revocation and substitution (ss 95AR(11), 95AS(13)).
Current s 90(5) s 95AJ s 95AK s 95AR(11)	The existing merger clearance and merger authorisation provisions in Division 3 (proposed to be repealed) do not require the ACCC or the Tribunal to issue a draft determination or hold a conference. This is reflective of the tight timetable that applies to merger clearances/authorisations (relative to non-merger authorisations). In order for the ACCC to form a view on the application for authorisation the ACCC would consult with the applicants and interested parties.	As currently provided for in the ACCC's formal merger process guidelines, the ACCC would consult publicly and may decide to issue a statement of concerns (if applicable) after public consultation and assessing the relevant market information. The ACCC may also

s 95AS(13)

decide to hold a conference (at its discretion).

1(b) Requirement to issue a draft determination

s 90A(1)

If s 90A is to apply to merger authorisations, the ACCC considers that an amendment would be necessary to s 90A(1) to exclude the requirement to issue a draft determination (which similarly applies for overseas merger authorisation in the exposure draft) given the tight timetable.

If s 90A is to apply to merger authorisations, the ACCC suggests amending s 90A(1) to exclude the requirement for the ACCC to issue a draft determination in the context of a merger authorisation.

[Note: If s 90A is not to apply to merger authorisations as suggested above, this amendment is not necessary]

1(c) Extension of period due to conference request

Current s 90(14)

Schedule 10

Part 2

Item 74

New s 90(10B)

If s 90A is to apply to merger authorisations, then the extension of the period due to a conference request in s 90(14) should also apply.

Amend s 90(14) to include subsection (10B).

[Note: If s 90A is not to apply to merger authorisations as suggested above, this amendment is not necessary]

2 Who can seek review of a merger authorisation

Current ss 101(1), 111(1) & (2)

and

Schedule 10, Part 1,

s 101(1) provides for a person dissatisfied with a determination by the ACCC under Division 1 of Part VII to seek review of the determination by the Tribunal. The Tribunal must review the determination if review is sought by the applicant or the Tribunal is satisfied that the person has a sufficient interest.

The ACCC will liaise with Treasury further on this issue as necessary.

As merger authorisations fall under new s 88(1), s 101(1) would apply for merger authorisation determinations by the ACCC. This would represent a change from the existing

item 1, s 88(1)
[Note also a reference to 'a person' in Schedule 10, Part 2, Item 104, s 102(1AA)]

merger clearance provisions, whereby only the applicant who sought clearance (or whose clearance was revoked or revoked and substituted) and who was dissatisfied with the ACCC's determination could seek review by the Tribunal (ss 111(1) and (2)).

The ACCC notes that without further amendments to the exposure draft, the proposed appeal rights may potentially facilitate gaming opportunities for third parties. For example, a rival bidder or other interested party may wish to obtain a competitive or other advantage over the applicant acquirer given that an application to the Tribunal for review of a merger authorisation may cause significant delay for the applicants being able to complete their acquisition.

3 ACCC to be able to disregard information received after a specified period

No schedule

Current

s 95AM(2A)

s 95AR(5B)

s 95AS(7B)

The existing provisions for merger clearance before the ACCC in Division 3 (s 95AM(2A)) (proposed to be repealed) allow the ACCC in making its determination to disregard information and submissions received after the specified period for which submissions are invited, or after the requested period.

Insert a provision similar to current ss 95AM(2A), 95AR(5B), and 95AS(7B)

The ACCC considers that similar provisions to current ss 95AM(2A), 95AR(5B) and 95AS(7B) should be reintroduced to apply to merger authorisations before the ACCC.

This is necessary given the tight timetable that applies to merger authorisation applications before the ACCC and to ensure information is provided by the applicant and other interested parties in a timely manner and to provide certainty for all parties as to the applicable time limit for considering such applications, as currently occurs.

4 No Tribunal decision equivalent to

There is no provision dealing with the situation where the Tribunal has not made its decision within the 90 days as

Insert a provision similar to s 118(3A) whereby if the Tribunal has not made a decision on a

<p>affirming ACCC's decision</p>	<p>required by new s 101(1AA). Currently s 118(3A) provides that if the Tribunal has not made a decision on review within the required time frame, the Tribunal is taken to have affirmed the ACCC's determination.</p>	<p>merger authorisation within the required timeframe, the Tribunal is taken to have affirmed the ACCC's determination.</p>
<p>No schedule Current s 118(3A)</p>		
<p>5 Merger authorisation subject to conditions</p>	<p><i>Not complying with a condition before during or after the acquisition</i></p>	<p>Insert a new provision in s 88 (similar to the current s 95AX(3)) dealing with failure to comply with conditions of a merger authorisation.</p>
<p>Schedule 10 Part 1</p>	<p>New s 88(3) provides that authorisation may be subject to conditions and that s 88(2) does not apply if any of the conditions are contravened.</p>	<p>Amend s 88(3) to refer to if any of the conditions are not complied with rather than conditions that are contravened.</p>
<p>Item 1 Section 88(3)</p>	<p>However in contrast to non-merger authorisations, for a merger/acquisition, the conduct is the acquisition of the shares or assets. It may be that the ACCC imposes conditions on the authorisation but once the acquisition has occurred, then there would be little incentive for the applicant to continue to comply with the conditions (unlike in non-merger authorisations).</p>	<p>Insert a new provision in s 88 (similar to the current s 95AP(2)) that provides for the ACCC to grant authorisation subject to the condition that the person make and comply with an undertaking under s 87B.</p>
<p>Current s 95AX(3) s 95AP(2) s 91B(3)</p>	<p>Current s 95AC(3) expressly provides for an acquisition not to be in accordance with the relevant provision if any of the conditions are not <u>complied with</u> <i>'before, during or after the acquisition'</i>.</p>	<p>For example: <i>Conditions</i></p>
	<p><i>Not complying with a condition</i></p>	<p>(3) The ACCC may specify conditions in the authorisation. Subsection (2) does not apply if any of the conditions are <u>not complied with</u> <i>(whether, for merger authorisations, the conditions are to be complied with before, during or after the acquisition)</i>.</p>
	<p>New s 88(3) refers to conditions of the authorisation being 'contravened'. The ACCC considers that it is more appropriate to refer to conditions being 'complied with' and therefore suggests that the language in this provision be made consistent with s 91B(3) which gives the ACCC the power to commence a process to revoke the authorisation where 'a condition to which the authorisation was expressed</p>	<p>(3A) Without limiting subsection (3), the ACCC may grant authorisation subject to the condition that the person to whom authorisation is granted must make, and</p>

to be subject has not been complied with'.

comply with, an undertaking to the ACCC under section 87B.

Condition to make and comply with a s87B undertaking

In addition, the ACCC considers that to avoid any doubt, the existing merger clearance provision in s 95AP(2) should be reinstated in s 88(3) to expressly provide for the ACCC to grant a merger clearance (in this case, authorisation) subject to the condition that the person make and comply with an undertaking under s 87B. The Tribunal also has this power when reviewing an ACCC merger authorisation so this amendment would make it consistent.

6 Cannot grant clearance for an acquisition that has occurred

Schedule 10

Part 1

Item 1

New ss 88(5)

Current

s 4(2)

s 95AN(2)

s 95AZH(3)

Currently the ACCC cannot grant clearance and the Tribunal cannot grant authorisation to an acquisition that has already occurred: ss 95AN(2); 95AZH(3).

When clearance must not be granted

95AN(2) To avoid doubt, a clearance cannot be granted for an acquisition that has occurred.

When authorisation must not be granted

95AZH(3) To avoid doubt, a clearance cannot be granted for an acquisition that has occurred.

The new s 88(5) only deals with 'conduct engaged in' before the ACCC's determination.

Past conduct

88(5) The Commission does not have power to grant an authorisation for conduct engaged in before the Commission decides the application for the authorisation.

The new s 88(5) could be amended to make it clear that the ACCC also does not have the power to grant authorisation

Amend s 88(5) to make it clear that the ACCC also does not have the power to grant authorisation for an acquisition that has occurred, similar to the language in current ss 95AN(2) and 95AZH(3).

For example, s 88(5) may read something like:

Past conduct

88(5) The Commission does not have power to grant an authorisation for conduct engaged in **or for an acquisition that has occurred** before the Commission decides the application for the authorisation.

for an acquisition that has occurred. We consider this is necessary as the definition of 'conduct' as per s4(2) does not include an acquisition of assets or shares.

7 **Section 87B undertaking not to make acquisition while under consideration by ACCC**
No schedule
Current ss 95AE(2), 95AV(2), & 111(2A)
and
Schedule 10, Part 2, Item 100, s 101(1B)

The existing provisions for merger clearance before the ACCC in Division 3 (s 95AE(2)), merger authorisation before the Tribunal (s 95AV(2), and review of merger clearances before the Tribunal (s 111(2A)) (proposed to be repealed) provide that the applicant acquirer provide an s 87B undertaking that it will not make the acquisition while the ACCC or the Tribunal (as applicable) is considering the application. The provisions should be consistent for the ACCC and review by the Tribunal.

The exposure draft includes only a provision for a s 87B in the case of review by the Tribunal and not when the ACCC is considering an application for merger authorisation.

It is important that the ACCC be provided with an undertaking by the applicant not to complete an acquisition while the application is being determined by the ACCC. This is because, as contemplated by s 88(5), the ACCC does not have the power to grant authorisation for past conduct.

8 **Providing false or misleading information**
Current s 95AZN
Schedule 10
Part 2
Item 51 – s75B(1)

The ACCC considers that the text of s 95AZN should be reintroduced and amended to apply to merger authorisations and Tribunal review of merger authorisations.

This provision should similarly apply to merger authorisations before the ACCC and Tribunal review of merger authorisations, as well as for non-merger authorisations. This provision is necessary to provide appropriate incentives on applicants and parties being consulted with, to provide correct information to the ACCC and the Tribunal.

Insert a provision similar to current s 95AE(2) that requires the applicant to give a s 87b undertaking to the ACCC (a form approved by the ACCC rather than a form prescribed by the regulations) that the acquisition will not be made while the ACCC is considering the application.

Amend current s 95AZN to apply to merger authorisations and Tribunal review of merger authorisations.

References to s 95AZN in the Act (identified in this table) to be reinstated into the Act, including penalties.

Item 52 – s76(1)(a)(iii)
 Item 53 – ss76(1A)(c) and (1B)(a)
 Item 54 – s 76A
 Item 55 – s 76B (heading)
 Item 56 – s 76B(2) to (4)
 Item 57 – s76B(5)(a)
 Item 65 – s81A(1)(d)
 Item 68 – s86C(4)- definition of contravening conduct

9 Time limit to be specified for a minor variation, or revocation and substitution, of a merger authorisation determination

No schedule
 Current
 ss 95AR(7), (8), (8A)
 s 95AS(10), (11),(11A)

The existing provisions for merger clearance before the ACCC in Division 3 (proposed to be repealed) specify time periods for determination of an application for a minor variation or revocation and substitution; and that the application is deemed refused if not decided within the specified period (ss 95AR(7), 95AS(10)).
 However there are no similar provisions that apply to an application before the ACCC for minor variation of a merger authorisation or revocation and substitution of a merger authorisation.

Under the existing provisions for merger clearance in Division 3, consistent timetables apply for the period in which the ACCC must make a decision, whether it be an application for merger clearance, minor variation or a

Insert a provision similar to current ss 95AR, 95AS to specify that the 90 day period that applies for merger authorisation decisions before the ACCC (including the extensions agreed by the applicant and as required by the ACCC) also applies for determinations of an application for minor variation, or revocation and substitution of a merger authorisation determination.

revocation and substitution decisions. We consider that the 90 day timeframe applicable for merger authorisation applications before the ACCC should consistently apply.

10	Tribunal powers No schedule Current s 102(1)	Under s 102(1), the Tribunal, 'for the purposes of the review, may perform all the functions and exercise all of the powers of the Commission'. However, under the exposure draft the Tribunal is limited to the information, documents, and evidence described in new s 102(8).	Amend s 102(1) to make it subject to new s 102(8).
11	Tribunal determination by consent No schedule Current s 111(4)	The existing provisions for Tribunal review of a merger clearance decision of the ACCC in Division 3 (proposed to be repealed) provide for determination by consent of the applicant and the ACCC (s 111(4)). There is no similar provision in the exposure draft. The ACCC considers that inclusion of a similar provision to current s 111(4) provides flexibility and allow for a timely resolution to a merger authorisation application where the ACCC and the applicant have mutual consent to a determination being made, possibly as a result of new information that has come to hand, or based on recent market events, following the application being made to the Tribunal.	Insert a similar provision for review of merger authorisations in Division 1 of Part IX.
12	Definition of merger authorisation Schedule 10 Part 2 Item 29	The definition of merger authorisation in the exposure draft currently refers to an authorisation that is an authorisation for a person to engage in conduct to which one or both of sections 50 and 50A would or might apply. However, this is inconsistent with s50A(7) which provides that a s 50A does not apply if s 50 applies.	As a person cannot engage in conduct to which both ss 50 and 50A would or might apply, the following amendments are suggested: <ul style="list-style-type: none">i. the definition of merger authorisation reflect that it is an authorisation for a person to engage in conduct to which s

*Definition of merger
authorisation and
overseas merger
authorisation in s 4(1)*

- 50 or s50A would apply but not both.
- ii. the definition of overseas merger authorisation reflect that it is not authorisation for a person to engage in conduct to which s50 would apply.

Paragraph 10.21 of the Explanatory Memorandum would also need to reflect these amendments.

13 Test for authorisation upon review by the Tribunal

This is an issue of clarity only.

New s 101(3) provides that s 91B(5) applies in relation to the Tribunal in like manner as it applies in relation to the ACCC. s 91B(5) enables a person granted authorisation for revocation of that authorisation and outlines the requirements that apply to the ACCC is making a determination revoking the authorisation.

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Item 101

New s 101(3)

In addition to providing the test to be applied in making a determination revoking an authorisation, s 91B(5) also refers to objections to the revocation included in any submissions invited by the ACCC.

A confusing result of applying s 91B(5) to the Tribunal in like manner as it applies to the ACCC is that this implies that the Tribunal may invite submissions from parties in respect of the revocation, where as the information the Tribunal may take into account in review of a merger authorisation is limited by new provisions ss 102(2) and 102 (8).

The ACCC considers that s 101(3) should be amended to ensure that it is only the statutory test in s 91B(5) that is applied and not the additional text regarding the information to be taken into account.

s 91B(5) should not apply to merger authorisations except to the extent that it refers to the test applied by the Tribunal. The references to considering submissions does not apply to merger authorisations and new ss 101(2) and 102(8) make that clear.

Amend s 101(3) to ensure that it is only the statutory test in s 91B(5) that is applied and not the additional text regarding the information to be taken into account.

Table 3: Non-merger authorisation, notification and class exemptions

Section	Issue	Suggested drafting instructions
1(a) Authorisation test	The proposed s 90(7) may not reflect the recommendation of the Harper Panel and Government response in that authorisation of per se conduct should be subject to a net public benefit test because the wording in proposed s 90(7) is ambiguous.	Clarify new s 90(7) to ensure that for the per se conduct listed, the ACCC must only apply s 90(6)(b), even where other provisions of Part IV may apply to that per se conduct.
Schedule 10	Proposed s 90(7) excludes per se conduct from the substantial lessening of competition element of the authorisation test in s 90(6)(a) to the extent that per se provisions of Part IV (i.e. cartel, secondary boycott, RPM provisions) 'and no other provisions of Part IV would...apply to the conduct' .	The ambiguity could be removed by deleting 'and no other provisions of Part IV' from proposed s90(7).
Part 1	In practice, it is highly likely that per se conduct for which authorisation is sought will, simultaneously, fall for consideration under other provisions of Part IV. For example, s 45 will usually also apply to cartel conduct.	
Item 2	As such the current drafting of s 90(7) could be read to provide that the substantial lessening of competition element of the test in s 90(6)(a) will apply to per se conduct in this circumstance.	
New s 90(7)	It would also be useful to include a sentence in the Explanatory Memorandum to make clear the intention that s 90(6)(a) will not apply when the ACCC is considering whether to grant an authorisation under s 88 in relation to conduct referred to in s 90(7)(a) to (c), regardless of whether other provisions of Part IV might also apply to that conduct.	
1(b) Authorisation test	Throughout the Bill there are references to the authorisation test in s 90(6) without also referring to s 90(7). For completeness and clarity it would be preferable to refer to both ss 90(6) and 90(7).	Clarify that both ss 90(6) and 90(7) may apply in ss 91B(5), 91C(7), 101(1A) and 101(3) as it is important to ensure that the correct test is applied in relation to the
Schedule 10		

authorisation of conduct that may breach the per se provisions.

New ss 90(6),
90(7)

Current

s 91B(5)

s 91C(7)

s 101(1A)

s 101(3)

2 Minor variation

Current s 87ZP defines a minor variation as one that does not involve a material change in the effect of the authorisation. If a proposed variation was to substantially lessen competition, by definition it would not be a 'minor' variation.

Suggest amending new s 91A(4)(a) to reflect that it would not result or be likely result in an increase in the extent of any [competitive detriment] or [detriment constituted by a lessening of competition].

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New s 91A(4)(a)

The nature of a minor variation is reflected in the current test under ss 91A(4) and (5) which provides that the *variation would not result or would be likely not to result in a reduction in the extent to which the benefit outweighs the detriment.*

Proposed s 91A(4)(b) reflects the nature of a minor variation (and the existing s 91A(4)) but new s s 91A(4)(a) does not and is inconsistent with the definition of a minor variation.

3 Revocation of exclusive dealing notification

There is an inconsistency between the test in proposed s 93(3) that the ACCC would apply to revoke an exclusive dealing notification and the test in current s 102(4) which is applied by the Tribunal when reviewing an ACCC decision to revoke an exclusive dealing notification.

Ensure that the Tribunal applies the same test to review a decision by the ACCC to give a notice revoking an exclusive dealing notification as that applied by the ACCC in the first instance.

Schedule 10

Part 1

Item 4

The proposed amendments to s 93(3) change the test so that the ACCC must be satisfied that the conduct would be likely to substantially lessen competition **or** would not be likely to result in

<p>s 93(3) and Current s 102(4)</p>	<p>a net public benefit. It is not clear if the change to the effect of the test is intended. A consequence of change to the effect of the test that the ACCC would apply is that the ACCC could revoke an exclusive dealing notification because it is satisfied that the conduct would not be likely to result in a net public benefit but the Tribunal, upon review, could overturn the ACCC's decision because the Tribunal was satisfied that the conduct would not be likely to substantially lessen competition.</p>	
<p>4 Tribunal review of class exemptions Schedule 10 Part 1 Item 22 New s 101B and Schedule 10 Part 1 Item 25 New s 102(5F)</p>	<p>Under new s95AA the ACCC may, by legislative instrument, issue a class exemption where one or more provisions of Part IV do not apply to conduct as specified by the ACCC in a class exemption determination. The proposed class exemption power is properly characterised as legislative (rather than administrative) in nature because class exemptions will apply broadly by creating safe harbours. For this reason the ACCC queries new section 102(5F) which gives the Tribunal the power to review a class exemption determination made by the ACCC. This would provide an avenue for an administrative review of the exercise of a power that is legislative in nature. Typically legislative instruments are subject only to disallowance by Parliament (under the process set out in the <i>Legislation Act 2003</i> (Cth)). The ACCC does not consider that there is any basis to depart from the standard process for legislative instruments in respect of class exemption determinations, including the usual Parliamentary disallowance process.</p>	<p>Maintain consistency with the standard process for legislative instruments by removing the possibility for Tribunal review of ACCC class exemptions.</p>
<p>5(a) Class exemptions</p>	<p>Proposed s 95AA(4)(a) provides that the ACCC's class exemption</p>	<p>Amend s 95AA(4)(a) to enable a</p>

Schedule 10	determination enters into force on the day it is made.	determination to enter into force on a day specified by the ACCC, not being a day earlier than the date the determination is made.
Part 1	It would be preferable to provide flexibility about when a class exemption comes into force by enabling the ACCC to specify the date.	
Item 21		
s 95AA (4)(a)	This flexibility is particularly important if there is a Parliamentary disallowance period.	
5(b) Class exemptions		Preferable to have an express power in the CCA to enable the ACCC to vary or revoke/withdraw a class exemption
Schedule 10	There is no express power for the ACCC to vary or revoke/withdraw a class exemption legislative instrument in the CCA.	
Part 1		
Item 21	The ability to review and vary or revoke a class exemption, if required, provides the ACCC with the certainty that would be needed to issue a class exemption for the maximum time.	
s 95AA	Any ACCC decision to vary or revoke/withdraw a class exemption would be subject to an appropriate public consultation process and transition period. This process is expected to be similar to that followed when the class exemption was made.	
5(c) Class exemptions		Preferable to have power in the CCA. The ACCC would expect this decision would be reviewable by the Tribunal as it would relate to a specific matter.
Schedule 10	There is no power for the ACCC to exclude the application of a class exemption in a specific matter.	
Part 1	The European Commission can withdraw the benefit of the class exemption when it considers that in a particular case the conduct to which the class exemption applies nevertheless has the effects of the kind prohibited by Part IV.	
Item 21		
s 95AA	It is preferable for the ACCC to have a specific power to exclude the application of the class exemption to a specific matter as per the European Commission.	
	The ACCC's decision to exclude the application of a class exemption to a specific matter would be subject to Tribunal	

review.

6 Collective bargaining notification – future members

Proposed s 93AB(7A) allows a collective bargaining notification to be expressed to cover future parties but it does not expressly require that those parties must also be able to have given the notice on their own behalf (similar to current s 93AB(7)).

Require that a collective bargaining notice may be expressed to be given on behalf of persons who become members of the group after the notice is given but only if those parties could have given the notice on their own behalf.

Schedule 10

This is the mechanism that ensures that members of the group meet the requirements for lodging a collective bargaining notification in ss 93AB(2), (3), (4) (5)

Part 1

Item 13

s 93AB(7A)

7 Forms approved by the ACCC

Proposed s 89(1)(a) replaces the form prescribed by the regulations with one approved by the ACCC. However, there is no express power in the CCA for the ACCC to approve or prescribe forms.

Include an express power for the ACCC to approve forms for purposes of this CCA.

No schedule re power to approve forms

Consider whether also to provide for the ACCC to approve the form for notifications rather than using a form prescribed by the regulations.

Schedule 10

See e.g., s 109 *Commerce Act (NZ)*: 'For purposes of this Act, the Commission may from time to time prescribe forms of applications, notices, and other documents required for purposes of this Act.'

Part 1

s 172(3) to be amended to provide for forms approved by the ACCC in addition to forms prescribed by the regulations.

Item 1

The proposed amendment to s 89(1)(a) only relates to applications for authorisation.

s 88 and

It does not apply to forms required for notifications for exclusive dealing or resale price maintenance in s 93(1A) or for forms required for notifications of collective bargaining s 93AB(6).

[Note: An express power for the ACCC to approve forms is similarly required for merger authorisations]

Part 2

It is preferable that the ACCC is able to approve forms for notifications in addition to applications for authorisation.

Item 72

new s 89(1)(a)

Alternatively, given that the ACCC will be able to approve some forms, while other forms will be prescribed by regulation, there is

and current ss 93(1A), 93AB(6) and 172(3)	a need to amend s 172(3) to reflect prescribed or approved by the ACCC. Section 172(3) relates to the substantial compliance requirement only in relation to forms prescribed for the purposes of the CCA.
8 Schedule 8 Item 2 s 47(10)(a) and Current s 47(10)(b)	Exclusive dealing Amendment to s 47(10)(a) should also be reflected in s 47(10)(b). Amendment to s 47(10)(a) also to be reflected in s 47(10)(b).
9 Schedule 10 Part 2 Item 51 s 75B(1)	It appears the text to be substituted should be '55B, 60C, 60K, or 95AZN' and substituted with the text in the exposure draft. Note separate queries above in relation to the deletion of s 95AZN from a number of provisions. Check text to be substituted in Item 51, s 75B(1).
10 Schedule 10 Part 2 Item 82, 101 s 91A(5), s 101(3)	It is proposed that ss 91A(4) and (5) be repealed and substituted with a new s 91A(4). For s 101, the substituted text for s 101(3) refers to repealed s 91A(5). Check text to be substituted in Item 101, s 101(3).