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WHITE PAPER

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Australia Proposes Competition Law Overhaul

Despite an intention to better harmonize, the most significant amendments to Australia's competition law would in fact reinforce aspects of the country's law that make it a "special case" for suppliers conducting business there. In these areas, Australia-based businesses generally oppose change altogether, and businesses trading internationally would not benefit either—unless additional amendments to properly harmonize with prevailing international standards occur. Other proposed amendments would address aspects of the country's competition law that are unpopular with many Australia-based and international businesses alike.

This Jones Day *White Paper* reviews the most significant proposed amendments and provides historical perspective on Australia's attempts to bring its competition law in line with international norms. Comments on the amendments are due 30 September 2016, and comments on the draft guidelines proposed by the Australian Competition and Consumer Commission are due 3 October 2016.

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Disquiet from owners of major infrastructure and small businesses, together with Australian Competition and Consumer Commission ("ACCC") frustration that it lacks certain statutory powers, has prompted a proposal by the Australian Government ("Government") to overhaul the country's competition law. The amendment would address infrastructure owners' concern that a recent decision of the Australian Competition Tribunal—applying Australia's unique approach to regulating essential facilities—could lead to new regulation of infrastructure that otherwise would have remained unregulated. Amendments requested by the ACCC to expand the law's two most significant existing prohibitions are designed to enable the ACCC to take action against information-sharing between competitors and take action against the anticompetitive effects of conduct undertaken by firms with a substantial degree of market power.

The text of the proposed amendments and draft ACCC enforcement guidelines have been released for comment. The most significant proposals are:

- **Expanded prohibition on information exchanges and other concerted practices.** The ACCC has previously been unsuccessful in enforcement actions where all it could prove was an exchange of competitively sensitive information, but without evidence of a "meeting of the minds" between competitors on how the information would be used to affect prices. The Government believes that this could be addressed by inserting the term "concerted practices" into the conspiracy prohibition, along with "contract, arrangement or understanding". However, the ACCC still would be required to prove that the concerted practice had the purpose or effect of substantially lessening competition. By contrast, EU competition authorities challenging similar conduct can treat confidential information exchanges as "by object" contraventions or automatically illegal.

- **Expanded prohibition on misuses of market power with an anticompetitive effect.** The Australian standard for abuse of a dominant position applies only to conduct taken with an anticompetitive purpose (that is, where business executives have a guilty mind) and not on the basis of effects. Therefore, well-counseled businesses rarely record evidence of the purpose of their conduct, and it is rarely possible for the ACCC to take any enforcement action. Taken in isolation, the proposed amendment would bring this aspect of Australia's law closer to its equivalents in other countries. But the failure to adopt other aspects of other jurisdictions' systems may bring unintended consequences. Unlike other countries, Australia may fine both companies and employees for such conduct. Adopting the "effects test" without protection for employees from such fines is likely to result in conservative business decisions on how aggressively to compete; for example, businesses may fear that offering large discounts raises the risk of a predatory effect and therefore an enforcement action.

- **Simplified application process for exemption from the prohibition against resale price maintenance.** Although resale price maintenance would remain per se illegal, it would become easier to apply for an exemption when there is evidence pointing to procompetitive reasons for the practice (such as free riding by distributors that do not provide ancillary services).

- **European-style "block exemptions" from the prohibition against anticompetitive collaborations.** This would bring Australia better into line with European and Asian competition systems, although their use of this mechanism has become rarer over time. It may assist in markets with unusual features (e.g., news agencies or motor vehicle distribution) or to create a "safe harbor" setting out generalized standards for exempting procompetitive resale price maintenance.

- **Expansion of the existing exception from cartel laws that enable joint ventures to be created so as to also protect ancillary restraints.** Ever since Australia adopted a criminal standard for "hard core" cartels, it has been difficult to find a crisp and effective standard to distinguish what constitutes a permissible joint venture from an antitrust conspiracy. Previously conduct that was "for the purpose of" a joint venture was exempt from the cartel prohibition, and the Government's proposal would also exempt conduct that is "reasonably necessary" for the undertaking of a joint venture.

- **Abolition of the "*per se*" prohibition against "third-line forcing"**, which is the practice of two suppliers together offering customers a product bundle or bundled discount. Under the proposal, third-line forcing would be prohibited only if it had the purpose or effect of substantially

lessening competition. Over many years, there have been proposals to make the same amendment, but each has previously failed to obtain the necessary political support.

- **Confining Australia's unique negotiate-arbitrate model for essential facilities.** This amendment would effectively reverse the recent Australian Competition Tribunal case concerning the Port of Newcastle, which would have defined most ports and airports as an "essential facility", making them subject to the Australian negotiate-arbitrate framework. If the amendment passes, instead of merely showing that the facility provides an essential service for a firm participating in an upstream or downstream market not already subject to effective regulation, the access seeker would need to demonstrate that gaining access will allow them to provide a material increase in competition in the secondary market.

In general, some aspects of these amendments would move in the direction of harmonization and make doing business in Australia easier. In other respects, the proposed amendments entrench idiosyncratic aspects of Australia's competition law and reaffirm the need for multinational suppliers to treat Australia as a "special case".

Despite opposition against some of the proposals, the draft Bill is likely to pass the House of Representatives, where the Government has a majority of one seat. However, the draft Bill will pass the Senate only if the Government obtains the support of at least some cross-bench senators such as those in the Greens, One Nation or the Xenophon Group. Already these parties are positioning over what the price of their support would be. For example, the Xenophon Group has already indicated that they consider the ACCC should be able to apply to the courts for a divestiture order for serious breaches of the competition law—which to date is available only to reverse the effect of an anticompetitive merger and not for breaches of the conduct provisions.

If the Australian Government succeeds in passing these amendments to the *Competition and Consumer Act 2010*, it will trigger a process by which the New Zealand Government will consider making the same amendments to its *Commerce Act 1985* under the two countries' Closer Economic Relations agreements.

BACKGROUND TO THE PROPOSED AMENDMENTS

We provide a brief summary of Australia's generally unsuccessful attempts to harmonize its competition law with international norms.

Information Exchanges

Any company that wishes to engage in information-sharing exercises, such as industry performance benchmarking, must understand the effect of this proposed amendment and how the Australian law would differ from its international counterparts. The proposed amendment to the law on information exchange is said to bring the Australian law into line with other jurisdictions, as had been the original intention behind Australia's first competition law. However, even after the amendment, Australia's law would still be quite different. To explain how and why the Australian law remains out of step with international norms, it is necessary understand the significance of key legislative drafting choices that were made previously.

In 1906, Australia first adopted a competition law on essentially the same terms as sections 1 and 2 of the United States' Sherman Act:

Sherman Act	Australian Industries Preservation Act
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony". (section 1)	"Any person who … makes or enters into a contract, or is or continues to be a member of or engages in any combination, relation to trade or commerce with other countries or among the States with intent to restrain trade or commerce to the detriment of the public or with intent to destroy or injure by means of unfair competition … is guilty of an offence". (section 4)
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony". (section 2)	"Any person who monopolizes or attempts to monopolize, or combines or conspires with another person to monopolize, any part of the trade or commerce with other countries or among the States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence". (section 7)

Although other parts of Australia's first competition law were ruled unconstitutional, the two key provisions set out above stayed in effect for many years. However, because there was no dedicated enforcement agency, litigation was rare. A 1965 competition law created a Commissioner for Trade Practices, but it gave him an impossibly heavy workload to review, approve or outlaw commercial arrangements. The 1965 law was drafted in such expansive terms that ultimately the High Court decided it exceeded the Federal Government's constitutional power, and the law was largely declared invalid.

The core elements of today's competition law were enacted in a series of legislative instruments passed in 1974–1977. This time, instead of directly adopting the language of U.S. antitrust statutes, the legislation adopted language from U.S. Supreme Court rulings. However, in the area of *anticompetitive conspiracies*, the Australian Government preferred the view of minority U.S. judges to the majority:

***U.S. v Container Corporation of America* (1969) Dissenting judgment of Marshall J, adopted by Harlan & Stewart JJ**	**Trade Practices Act 1974 (Australia)—section 45 as clarified by amendments passed in 1977**
"I would require the Government prove that the exchange was entered into for the purpose of, or that it had the effect of, restraining price competition".	"A corporation shall not make a contract or arrangement, or arrive at an understanding, if … a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition".

By adopting the above formulation, Australia's current prohibition on horizontal agreements does not:

- Apply to concerted practices that fall short of an understanding. In other words, there must be a meeting of the minds between the parties and not simply a substitution of a less competitive practice for the rigors of competition.
- Exchanges of confidential information are not per se illegal, even if pursuant to an contract, arrangement or understanding. Rather, the purpose or effect must be proved.

In 2003, the ACCC brought a court case against petroleum retailers that had been exchanging confidential intentions over pricing movements. This action failed because the Court did not accept that any relevant "contract, arrangement or understanding" had been reached. Shortly afterward, the ACCC also expressed concerns when banks made public statements concerning the changes they would be likely to make to their retail interest rates in response to changes mooted by the central bank to wholesale interest rates.

Since that time, the ACCC has sought law changes to address the issue. The first attempt to address the issue was a "price signaling" law, which prohibited certain confidential and public exchanges of information. Instead of applying to the economy generally, industries could be brought within the purview of the law by regulation. Only the banking industry has been made subject to the law, and in the intervening years the law has been widely criticized by the ACCC and industry alike.

By contrast to Australia's current approach, the European competition law system preferred the standards reflected in the U.S. Supreme Court's majority opinions:

U.S. v Container Corporation of America (1969) Douglas J, for the majority	*T-Mobile Netherlands* case applying [then] article 81 of the Treaty of Rome
"Here all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. **Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. That concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act".**	"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market…". (Treaty of Rome) **"[A]n exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object…"**. (paragraph 41 of T-Mobile which adopts the standard in Suiker Unie case of 1975)

The Australian Government now proposes to repeal Australia's idiosyncratic price signaling law mentioned above and instead include "concerted practices" in the Australian prohibition against anticompetitive collaborations between competitors. In doing so, the Government suggests that the change will bring Australia into line with Europe. However, after amendment, the proposed law would still be very different from the European standard. The other key element of Europe's law on information exchange relies on the conduct being regarded as a "by object" or per se infringement, which will not be the case if the currently proposed text is adopted. Indeed, the ACCC's 2003 failed attempt to prosecute petroleum retailers that prompted requests for legislative change would probably still fail under the proposed new standard for want of evidence as to an anticompetitive purpose or effect of the information exchange.

Individual and Block Exemptions

Block exemptions could be significant in industries with vertical competition issues, such as print media retailers or vehicle distributors, or companies seeking to adopt resale price maintenance arrangements to prevent cut-price distributors from free riding on those who invest in quality service. Below we explain what a "block exemption" is and how it fits into the overall competition law.

Although the Australian and European systems adopted somewhat different inspiration from the United States concerning how to address concerted action, the Australian and European systems both adopted a mechanism to "soften" the edges of the U.S. Sherman Act § 2. Both the European law from the 1950s and the Australian law from the 1970s exempt conduct considered to be beneficial notwithstanding its anticompetitive features, although the provisions are worded very differently (for EU, *see* Article 101(3); for Australia, *see* section 88).

In Europe, whole categories of conduct can be exempted under Article 101(3) pursuant to a "block exemption", or the parties to individual contracts or particular instances of conduct can assert the exemption is applicable in an individual case. By contrast, Australia's section 88 can be claimed by the parties only to an individual instance of conduct.

Originally, both Europe and Australia provided for individual exemptions to be claimed through *ex ante* applications to the competition authority, but in 2003, Europe switched to a "self-assessment" system, and scrutiny (if any) applies *ex post* as part of an infringement investigation. The Australian system has always processed such applications for exemption through a highly public process, often vigorously contested by third parties and appealed through the tribunal and court hierarchy.

Because the Australian system provides only for *ex ante* decision-making, it is common for the ACCC to attach conditions to the grant of authorization. In Australia, while most competition law litigation occurs in courts of general jurisdiction staffed only by judges, appeals from the ACCC's authorization decisions are heard by the Australian Competition Tribunal, which is staffed by both judges and expert economists.

The proposed law change would make the following changes to the exemption framework:

- The availability of this exemption mechanism would be extended to the misuse of market power prohibition.
- Applicants will be able to claim an exemption either on the basis that the conduct does not substantially lessen competition or that even if it substantially lessens competition, it has redeeming public benefits.

In Europe, block exemptions have been used to provide comfort for selective or exclusive distribution arrangements generally or distribution arrangements for particular sectors (as in motor vehicles), and the change would enable the same in Australia. It is also quite possible that the ACCC could use this mechanism to provide some "safe harbors" for procompetitive use of resale price maintenance and therefore warrant relief from the per se prohibition against such vertical price restraints. However, even after the legislation passes, the block exemption provision will not be of any immediate effect unless and until the ACCC goes through the public consultation process required by the new law (and potentially appeals) before a block exemption can be issued.

Anticompetitive Purpose or Effect in Monopolization or Abuse of Dominance Cases

Any company that could be alleged to hold a significant market power in an Australian market must understand the effect of this proposed amendment and how the Australian law would differ from its international counterparts. Even after the amendment, Australia's law would still be quite different from its international counterparts, particularly with respect to the exposure to penalties.

To explain how and why the Australian law remains out of step with international norms, it is necessary understand the significance of key legislative drafting choices that were made previously and the approach that the Australian courts have developed.

As noted above, Australia's first constitutionally effective competition law drew on the minority view of the U.S. Supreme Court when it adopted the concept that agreements, arrangements or understandings should be illegal if they had the "*purpose or effect or likely effect* of substantially lessening competition". Despite the apparent similarity in the Australian phrase "purpose or effect" and the European phrase "object or effect", there are important differences. The term "effect" is applied similarly in Australia, Europe and the United States. By contrast, Australia's law also prohibits the "sin of a guilty mind" in that the term "purpose" means the result intended to be achieved.

"Purpose" can be contrasted with the European concept of "object", which is akin the Australian and U.S. concept of "per se" illegality. When conduct is recognized by the European courts as a "by object" contravention, the court conclusively presumes the conduct is anticompetitive and therefore illegal. The Australian law also recognizes the concept of "per se" illegality but does so through a series of additional, fully drafted "per se" prohibitions covering price fixing, market sharing, resale price maintenance and other kinds of conduct, and this is one reason why the text of the Australian law is many times longer than its equivalents in other countries.

With this background explained, we can return to describing how the Australian law has come to address monopolization and abuse of dominance cases differently from the United States and Europe. As noted above, in 1906 Australia adopted the text of the Sherman Act, but by 1974, this had been replaced with a series of prohibitions drawn from U.S. case law. The original version of section 46 of the Trade Practices Act concerning "monopolization" prohibited:

> a corporation that is in a position to substantially control a market … shall not take advantage of the power … it has by virtue of being in that position to … deter or prevent a person from engaging in competitive behaviour in that or any other market.

In 1976, a Review Committee was commissioned to examine all aspects of the competition law. Many submissions were put to the Committee raising the issue of whether the above prohibition was concerned with "purpose or intent" or "effect". These submissions, and the Committee, were concerned that if the above prohibition was an "effects" prohibition, it would prohibit a corporation who substantially controls a market from:

> [A]ttempting to sell as much as possible and … consciously seeking sales at the expense of its competitors.

The Review Committee stated that:

> Normal competitive behaviour of itself is clearly not what the Parliament intended to prohibit—nor, in our view, should this be prohibited.

That observation is unobjectionable. However, because the submission had framed the issue for the Committee to consider as one of "purpose or effect", the Committee's recommendations set the Australian law off in a direction quite contrary to the U.S. and European equivalents. In the United States, the courts have addressed the issue through the "rule of reason". Instead, in Australia, based on a recommendation by the 1976 Review Committee, the prohibition was amended to capture only conduct with an anticompetitive "purpose".

The "effect" of conduct is only relevant in the highly unusual circumstance in which the courts lack clear evidence of "purpose". In that event, the courts are entitled to infer the purpose of the dominant firm's conduct from the effects it has.

Another key difference between the Australian law and that of the United States and Europe concerns the sanctions for abuse of dominance. In the United States, the authorities occasionally seek restitution or disgorgement but not monetary penalties (see Statement of the FTC in the matter of Cardinal Health 2015). In Europe, only corporations face penalties and only where the conduct is "intentional or negligent" (see Article 23 of Council Regulation 1/2003). Many Asian countries have followed this. By contrast, in Australia, the ACCC seeks penalties from both corporations and individuals in abuse of dominance cases (*see*, for example, *Rural Press*).

Many large Australia-based businesses cherish the fact that the ACCC is required to prove that alleged conduct has an anticompetitive "purpose", which has enabled a long-standing approach of educated business people to be careful not to engage in conduct where there is evidence of an anticompetitive purpose. By contrast, where there is no proof as to an anticompetitive purpose, managers need not be concerned about the effects of the conduct.

By contrast, foreign-based corporations that trade in Australia get cold comfort from the focus on "purpose", because their compliance programs typically counsel employees to consider the U.S. and European enforcement agencies' focus on the *effects* of the conduct. Further, foreign-based corporations are often alarmed that both the company and individual executives may be exposed to significant penalties if they adopt proposals for business strategies advanced by junior staff who express their motivation for proposed conduct in a careless or exaggerated fashion.

For its part, the ACCC is frustrated that it is unable to take action against conduct that actually has an anticompetitive purpose where the corporation has avoided generating any evidence recording that purpose. Consequently, there are very few prosecutions for unilateral conduct, and some cases of single firm abuses are prosecuted as vertical agreement cases instead.

The Government now proposes to expand the current prohibition against companies with a substantial degree of market power taking advantage of that power for certain anticompetitive *purposes* to also prohibit firms with a substantial degree of market power from taking advantage of that market power with anticompetitive *effects*. In other words, the ACCC or private plaintiff can succeed by proving *either* anticompetitive purpose or anticompetitive effect.

The ACCC's proposed guidelines do not provide any comfort with respect to when the agency would or would not seek corporate or personal penalties. Without this, many companies with some market power can be expected to take a risk-averse approach and avoid any aggressively competitive strategies, to avoid the perception that they may be "too successful" and damage competitors with the effect of substantially lessening competition.

Like the change with respect to information-sharing, the Government asserts that this change will bring Australia into line with Europe and the United States, but this will not be so in the absence of either an amendment to the remedy provisions to mirror European regulation 1/2003 or a statement by the ACCC that businesses and executives will not face fines for procompetitive conduct. The significant danger is that without protection from penalties, businesses will behave in a conservative manner and avoid types of conduct (e.g.,

significant discounting) that competition policy would ordinarily seek to encourage.

Resale Price Maintenance

The proposal with respect to resale price maintenance is welcomed by manufacturing companies that wish to encourage distributors to invest in providing quality service when selling products. The proposal would soften what is currently a strict per se violation relief that is available only after an expensive and very public exemption application process.

HOW WAS THE CURRENT AUSTRALIAN STANDARD DEVELOPED, AND HOW WOULD IT CHANGE?

Following U.S. case law of the time, Australia has had a *per se* prohibition against resale price maintenance since 1974. Although it would have been possible for the parties to seek authorization, the ACCC strongly discouraged exemption applications.

Since the recognition in the United States that resale price maintenance is not always anticompetitive (*see Leegin Creative Leather Products v PSKS* (2007)), the ACCC has received, and granted, just one application for exemption from the per se prohibition against resale price maintenance (*Tooltechnic Systems*). The Australian treatment can be contrasted with the *Bundeskartellamt*'s decision in 2012 to fine Tooltechnic €8.2 million for resale price maintenance.

Under the proposed new legislation, resale price maintenance would remain *per se* illegal but an easier process would apply to obtain an exemption from the ACCC. Instead of a full public assessment, it will be possible to formally notify the ACCC, and immunity will become automatic unless the ACCC takes steps to disallow the exemption after two weeks or if the ACCC later affirmatively withdraws the exemption on a prospective basis.

Essential Facilities

Australia has sought to strike a balance between providing an incentive for investors to build major infrastructure and ensuring that natural monopolies do not unduly prevent competition. In response to the Australian Competition Tribunal decision that puts a significant number of infrastructure investments at risk of price regulation, this amendment would confine the "essential facility" principle to the narrow circumstance where a true bottleneck facility actually prevents a competition in an upstream or downstream market.

To explain this change, we review how Australia's approach to essential services developed and what this change means for access seekers and infrastructure owners.

In 1995, the Australian Government enacted a law based on the "essential facility" doctrine drawn from then U.S. case law:

MCI Communications v AT&T (1983)	**Competition and Consumer Act 2010 (Australia)**
"The case law sets forth four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) **a competitor's inability practically or reasonably to duplicate the essential facility**; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility". (paragraph 192)	A facility may be declared resulting in a right to seek access when: "(a) that access (or increased access) to the service would promote a material increase in competition in at least one market … other than the market for the service; (b) **that it would be uneconomic for anyone to develop another facility to provide the service**; (c) that the facility is of national significance …; … and (f) that access (or increased access) to the service would not be contrary to the public interest". (section 44H)

However, the Australian Government did not warm to the American system, by which access seekers and access providers must resort to antitrust litigation. One reason for this was undoubtedly the fact that about half of the assets that might be considered "essential facilities" were at the time owned and operated by state or federal governments, which owned almost all seaports, airports and water utilities.

Instead, the Australian system provides for a two-stage process consisting of:

- Providing a route for access applicants to apply for an administrative decision by a Government minister on the advice of the National Competition Council (a special purpose competition authority dominated by the state governments rather than the federal government); and
- If terms of access cannot be agreed, arbitration by the ACCC.

Both stages can, and usually are, appealed to the Australian Competition Tribunal and then up through the courts.

The meaning of the statute's "criterion (a)"—the need for access to increase competition in at least one market—has long been contentious. The question is whether the access seeker may only demonstrate that the service is a natural monopoly and that it is necessary for effective competition in the dependent market or must also show that, once it gains access, the dependent market would become significantly more competitive (for example, by showing that a significant new player will emerge in the dependent market and compete down prices).

In 2016, the Australian Competition Tribunal considered Glencore Coal's request for access to the Port of Newcastle. Glencore Coal was able to demonstrate that the port was essential for it to access the global seaborne coal market, but it made no serious attempt to demonstrate that its participation in that market would have any effect on global prices. But the Tribunal ruled for Glencore Coal, unnerving owners of airports and ports throughout Australia.

The Government now proposes to amend "criterion (a)" to require "that access (or increased access) to the service, *on reasonable terms and conditions, following a declaration of the service*, would promote a material increase in competition in at least one market … other than the market for the service".

While this provision might be attractive to most infrastructure owners, it runs directly contrary to a more specific proposal by the same Government's energy minister, at the behest of the ACCC, which would have the reverse effect in relation to gas pipelines. That provision would see gas pipelines subject to access regulation if the energy minister considered that "the pipeline in question has substantial market power [and is likely to] continue to have substantial market power in the medium term and coverage will or is likely to contribute to the achievement of the National Gas Objective". The National Gas Objective is the enormously subjective and broad aspiration to "promote efficient investment in, and efficient operation and use of, natural gas services for the long-term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas".

CONCLUSION

The proposed overhaul of Australia's competition law would address a raft of rules today widely regarded as unsatisfactory. Some of the proposals are likely to be beneficial both for domestic Australian and international companies, softening the prohibition against resale price maintenance and reserving the essential facilities mechanism for true bottleneck problems, for example. However, others fall well short of harmonizing Australia law with other jurisdictions', such as the proposals to change the rules on competitor information exchanges and actions by single firms with market power. Unless the amendments are broadened to include other aspects of harmonization, these provisions are likely to disappoint companies trading internationally. There is a particular risk that unless Australia's expansive penalty regime is better confined, the broadened prohibition against the misuse of market power could strongly discourage significant discounting or other pro-competitive conduct.

Read the draft text of the amendments. Comments are due 30 September 2016.

Read the draft ACCC guidelines. Comments are due 3 October 2016.

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