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Responses to ACCC Guidance and Guidelines

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Introduction

The Institute of Public Accountants (IPA) welcomes the opportunity to make a submission in relation to the suite of Interim Guidance and Guidelines published by the ACCC for consultation on 27 October 2017.

The IPA is one of the three professional accounting bodies in Australia, representing over 22,000 accountants, business advisers, academics and students throughout Australia and internationally. The IPA prides itself in not only representing the interests of accountants but also small business and their advisors. The IPA was first established (in another name) in 1923.

The commencement of the Harper Reforms presents a significant change to competition law in Australia for small business, particularly in relation to the amendments to section 46, the introduction of a prohibition on concerted practices and the potential for the ACCC to grant class exemptions.

We encourage the ACCC to test these new provisions as soon as possible as this will provide the SME community with the clearest guidance on how the provisions will work in practice.

The IPA's submission has been prepared with the assistance of the IPA and the Faculty of Business and Law, Deakin University. The IPA Submission has benefited from consultation with Rachel Burgess, Researcher, Deakin SME Research Centre.

We would welcome an opportunity to discuss this submission at your convenience. Please address all further enquires to Vicki Stylianou on +61 3 8665 3100.

Yours sincerely

Vicki Stylianou
Executive General Manager Advocacy & Technical

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IPA Submission

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

guidelines@accc.gov.au

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1. Interim Guidance on Misuse of Market Power

The IPA-Deakin SME Research Centre is pleased to see practical examples of the types of behaviour that may constitute a misuse of market power, as well as examples of conduct that is unlikely to breach the provisions.

However, it is noted that the examples provided are limited to 'exclusionary' conduct, that is, conduct of a player with substantial market power that has the purpose or effect of substantially lessening competition by "restricting or undermining its rivals' ability to compete"[1]. The IPA-Deakin SME Research Centre submits that the ACCC should give consideration to applying section 46 to exploitative practices, such as excessive or unfair pricing.

Exploitative practices

Although it is accepted that exclusionary practices may be more common place and may be more harmful to the market structure (and thereby competition) generally, exploitative practices also have the potential to substantially lessen competition in a market. This behaviour is prohibited by both the European Commission and the UK Competition and Markets Authority.

The European Commission states in its *Guidance on Article 102 Enforcement Priorities*[2] that "[c]onduct which is directly exploitative of consumers, for example charging excessively high price … is also liable to infringe [the abuse of dominance provision]".

In the UK, the Office of Fair Trading (now the CMA) found that a pharmaceutical company (Napp Pharmaceutical Holdings Ltd) had misused its market power for conduct that included excessive pricing. In December 2016, Pfizer was fined more than GBP84million for excessive pricing of anti-epilepsy drugs. This week, the CMA has issued a draft decision alleging that Concordia has abused its dominant position for excessive pricing of a drug it supplies to National Health Service.

[1] ACCC *Interim Guidance on Misuse of Market Power*, page 4
[2] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN, [Accessed 23 November 2017], para 7

The structure of the European and UK prohibition against misuse of market power is different to the Australian provision in that it specifically includes "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" as a type of abuse[3]. There is no requirement to show a 'substantial lessening of competition' but rather courts are required to determine whether "behaviour deviates from 'normal' or 'fair' or 'undistorted' competition or from 'competition on the merits'"[4].

In Europe and the UK, a firm with a dominant market position has a "special responsibility not to allow its conduct to impair undistorted competition"[5]. Similarly, the special responsibility of firms with market power was recognised in the Final Harper Report:

> "Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns."[6]

From a policy perspective, the goals of section 46 and the UK/European abuse of dominance provisions are similar.

For small businesses, the risk of exploitative practices by firms with substantial market power can take the form of:

- Being charged excessive prices for products or services which make competing in the downstream market difficult;
- Paying high rents or leasing charges for land or equipment;
- Being paid unfairly low prices by dominant players (such as supermarkets).

There are cases of small businesses being treated unfairly in negotiations with larger players that are not currently covered by the other provisions of the CCA. For example, the unfair contract terms provisions only apply to standard form contracts. Small business owners who negotiate with, for example, large shopping centre owners, are in a weak negotiating position vis-à-vis their lessors but the leases are not 'standard form'. Small businesses are left with limited choice but to accept the terms and conditions, without any avenue to seek redress.

Although there is arguably a case for unconscionable conduct in these circumstances, it may be that these types of exploitative practices could also be covered by section 46 if a substantial lessening of competition could be established. Competition in the relevant market 'with and without' excessive or unfair pricing may be substantially different.

Prohibiting exploitative practices will also be extremely relevant in technology markets where the licensing of IPR at excessive prices can prevent competitors from entering the market (although this may also be considered a refusal to supply).

Conduct resulting in substantial consumer (including small business) detriment and conduct in concentrated markets which impacts on small businesses or suppliers are included as priorities for enforcement by the ACCC[7].

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[3] See section 18 Competition Act (UK) and Article 102(2)(a) *Treaty on the Functioning of the European Union*
[4] Whish, R and D Bailey, *Competition Law*, 7th Edition Oxford University Press, London, p 192
[5] *Michelin v Commission* Case 322/81 [1983] ECR 3461
[6] Australian Government, "The Competition Policy Review Final Report", 2015, p.61, available at *http://competitionpolicyreview.gov.au/final-report/* [Accessed 20 November 2017].
[7] Paragraph 6.3(a) and (f) *Interim Guidelines on Misuse of Market Power*

Cross-subsidisation

The Final Harper Report expressly mentioned exclusive dealing, loss-leader pricing and cross-subsidisation as conduct that might raise competition concerns where it is undertaken by a firm with market power.

Although the Guidance covers exclusive dealing and loss-leader pricing (assuming this term is synonymous with predatory pricing), it does not include a practical example of cross-subsidisation. As this is a complex economic concept, a working example would be beneficial.

The Guidance would also benefit from case illustrations of firms that have been found to have misused their market power. Given the limited successful cases in Australia, overseas cases may need to be used to illustrate the points. There would not be any harm in this provided the Guidance makes it clear that a case may be decided differently in the Australian courts.

Relevance of commercial rationale

The Draft Harper Report recommended including a defence (the 'rational commercial decision' defence) to section 46 that would exclude conduct if it:

a. would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and
b. would be likely to have the effect of advancing the long-term interests of consumers.[8]

The proposed defence came under significant criticism and was replaced in the Final Harper Report[9] with a recommendation that section 46 instead include provisions that directed the court:

> "to have regard to the extent to which the conduct:
>
> (a) increases competition in a market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
> (b) lessens competition in a market, including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry into a market."[10]

This was incorporated into section 46(2) of the *Competition and Consumer Act (Misuse of Market Power) Bill 2016* as:

> "(2) Without limiting the matters to which regard may be had in determining for the purposes of subsection (1) whether conduct has the purpose, effect or is likely to have the effect of substantially lessening competition in a market, regard must be had to the extent to which:
>
> (a) the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and
>
> (b) the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring

[8] Australian Government, "The Competition Policy Review Draft Report", 2014, p.210, available at http://competitionpolicyreview.gov.au/draft-report/ [Accessed 20 November 2017]
[9] Ibid n.6, p 344
[10] Ibid n.6 p 61

the potential for competitive conduct or new entry into that market."

However, the Senate Economics Legislation Committee recommended that subsection (2) be removed as it was likely to create uncertainty[11].

Despite the criticism and ultimate removal of the 'rational commercial decision' defence, paragraph 2.21 of the Guidance states:

> "When assessing a firm's conduct, the ACCC considers the nature and extent of that conduct, including the firm's commercial rationale."

Paragraph 2.27 of the Guidance then states:

> "When assessing whether the conduct has the purpose, effect or likely effect of substantially lessening competition, the ACCC will consider the commercial rationale for the conduct. For instance, if a firm is engaging in conduct to make its products more attractive to customers, the conduct is unlikely to substantially lessen competition."

These statements raise a number of questions:

1. Does this mean that a firm can rely on 'commercial rationale' as a defence to a section 46 action? If so, what will be the relevant factors? The law in relation to 'objective business rationale' in Australia has developed in the context of the 'taking advantage' element of the former section 46[12] and it would be helpful to understand the ACCC's view on the relevance of this jurisprudence moving forward.

   It is noted that the rationale for the conduct is required to be included in an application for authorisation[13].

2. Will the ACCC also be looking at public benefits and detriments when applying section 46 or will those factors only be relevant to authorisation applications?

Some guidance on these issues would be beneficial.

Anonymous complaints

The ACCC should consider extending its online tool for anonymous agricultural complaints to be available more generally.

Many small businesses are reluctant to lodge a complaint with competition regulators for fear of retribution from their powerful suppliers or customers. It is understood that this was a key issue in the ACCC's failure to provide adequate evidence in its unconscionable conduct case against Woolworths[14].

The European Commission has released an online anonymous whistleblower tool this year. The tool allows the complainant to continue to liaise with the Commission through encrypted communications so the Commission can seek clarification and details

[11] The Senate Economics Legislation Committee Report on *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*, 16 February 2017, p 22
[12] See Corones, *Competition Law in Australia*, 6th Edition, Thomson Reuters, Sydney, pp 491-494
[13] Paragraph 3.10 ACCC *Guidelines for Authorisation of Conduct (Non-Merger)*
[14] Evidence of Marcus Bezzi to *Parliamentary Joint Committee on Corporations and Financial Services: Whistleblower Protections in the corporate, public and not-for-profit sectors*, Thursday 27 April 2017, pp 61-62

(http://europa.eu/rapid/press-release_IP-17-591_en.htm) but retains the anonymity of the complainant throughout.

A broader anonymity provision would also be consistent with the introduction of anonymous disclosure provisions in the *Treasury Laws Amendment (Whistleblowers) Bill 2017 - Exposure Draft*[15].

Private damages actions

Finally, the Guidance notes at its outset[16] that "private parties can also take action against businesses for contraventions of section 46".

The ability to bring private actions for damages is a significant tool that has been underutilised in Australia. If a competitor or supplier considers that a firm is misusing its market power, that competitor or supplier can commence a private action for damages against that firm, subject to having the resources to do so. This type of action (or even the mere threat of an action) could act as a substantial deterrent to firms considering misusing their market power.

To date, there have been limited private actions for damages brought in Australia. There are a number of issues that warrant further consideration.

(a) Access to justice for small businesses.

As noted in the Final Harper Report:

> "Access to remedies has been a roadblock for many small businesses, and the Panel finds that access should be improved."[17]
>
> "[T]here are significant barriers to small business taking private action to enforce the competition laws. A private action would be beyond the means of many small businesses. In some cases, a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship."[18]

Consideration needs to be given to how these barriers can be addressed, although that debate is beyond the scope of this consultation.

(b) Procedural issues that require attention.

There are a number of procedural issues that need to be resolved to help facilitate private damages actions for breaches of competition law. Examples given in the Final Harper Report include uncertainty regarding limitation periods, difficulty in obtaining information, uncertainty of the scope of s.83 and difficulty in proving and quantifying loss[19]. However, with the exception of changes to section 83, the Harper recommendations and subsequent amending legislation did little to improve the position.

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[15] Paragraphs 1.73-1.75 of *Treasury Laws Amendment (Whistleblowers) Bill 2017 – Explanatory Memorandum*. It appears that the Whistleblower protections included in the new Bill will have only limited application to competition law breaches. The criminal cartel provisions will be caught under proposed section 1317AA(3)(d) as conduct that "constitutes an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more". It does not appear that any other disclosures would be protected.

[16] ACCC *Interim Guidance on Misuse of Market Power*, pg 3

[17] Ibid, n.6, p 30

[18] Ibid, n.6, p 407

[19] Id.

Significant work has been undertaken in Europe and the UK in recent years to encourage private actions for damages. The EU Damages Directive (2014)[20] has now been implemented in all Member States and deals with many of the issues identified in the Harper Report. For example, it requires Member States to:

- Set limitation periods of at least five years and allow for a suspension of that period if the national competition authority commences proceedings (to allow a claimant to wait until a decision is reached in that case). The clock is paused until at least 12 months after the final decision of the competition regulator;

- Amend its laws to provide that information in the files of competition regulators must be disclosed if a national court orders disclosure but only after the competition authority has closed its proceedings; and

- Introduce a rebuttable presumption that cartels cause harm.[21]

Australia would benefit from a discussion on these issues.

2. Interim Guidance on Concerted Practices

What is a 'concerted practice'?

It will be vital that the ACCC uses its advocacy and education powers to disseminate information to small business about the application of the new concerted practices provision. Small businesses are unlikely to understand the nuances of a 'concerted practice' or the circumstances in which one-off discussions, meetings or exchanges of commercially sensitive information may result in a competition law infringement.

The ACCC should consider issuing separate guidance for small business on concerted practices that focus on practical examples. Small businesses are likely to have difficulties understanding:

- What is commercially sensitive information?
- When could an exchange of commercially sensitive information result in a concerted practice?
- When would a one-off discussion or meeting be considered a concerted practice?
- When would providing information to a non-competitor (such as a retailer sharing information with a manufacturer) be a problem?
- In all of these cases, what would the individual need to say or do to raise concerns?

Could a small business be implicated in a cartel if the small business has been:

- Sitting in a room where it is being discussed, without participating;
- Involved in a one-off meeting where anti-competitive conduct was discussed;
- Given commercially sensitive information without requesting it?

[20] *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN , [Accessed 20 November 2017]
[21] Burgess, *SMEs and Private Enforcement of Competition Law: Achieving Redress*, [2016] G.C.L.R., Issue 3

Simple, but real, case examples are likely to have the most impact on small businesses. There is a substantial body of jurisprudence in Europe which the ACCC could draw on. Again, the ACCC could make it clear that the Australian courts may reach a different view.

The Singapore Competition Commission includes a useful list of factors that may be considered in determining if a concerted practice exists in its Guidelines on anti-competitive agreements[22], including:

- Whether the parties knowingly entered into practical cooperation;
- Whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings;
- Whether parallel behaviour results from contact between undertakings leading to conditions of competition which do not respond to normal conditions on the market.

Although a list of this nature would not be helpful to small businesses, the ACCC may wish to consider inclusion of a comparable list of factors it intends to consider in a concerted practice case in the current Guidance.

Meeting of the minds and reciprocity

The Guidance states at paragraph 1.2:

> "Australian courts have held that a contract, arrangement or understanding requires a 'meeting of the minds' between two or more parties and the adoption (by at least one of them) of some commitment to act, or not to act, in a particular way. The concept of a 'concerted practice' is new to the CCA. It involves communication or cooperative behaviour that sits between a contract, arrangement or understanding and a person independently responding to market conditions".

The Guidance continues at paragraph 3.3 to say:

> "it captures cooperative behaviour or communication between separate entities which falls short of the commitment required by Australian courts to establish a contract, arrangement or understanding."

Can it be presumed from this paragraph that the ACCC view is that neither a meeting of the minds or a reciprocal commitment to act is required for there to be a concerted practice?

Safe harbours

The ACCC should consider whether the size of the business involved in the concerted practice is relevant. In Europe and the UK (at least until Brexit), application of the De Minimis Notice[23] means that businesses with small market shares (10% in the case of agreements between competitors and 15% in the case of agreements between non-competitors) are unlikely to infringe competition law, except where those parties enter into cartels. (Cartel behaviour is prohibited, regardless of the market share of the parties involved.) In non-cartel cases, small businesses can obtain a significant degree of certainty regarding their day-to-day dealings.

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[22] CCS *Guidelines on the Section 34 Prohibition* (2016), paragraph 2.20, available at https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/legislation%20at%20a%20glance/s34jul07final.ashx, [Accessed 21 November 2017]

[23] *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union* (De Minimis Notice) (2014/C 291/01), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)&from=EN, [Accessed 24 November 2017]

Countries in Asia, such as Singapore and Malaysia[24] also apply a market share threshold to their prohibitions against anti-competitive agreements and concerted practices. We note the upcoming OECD Workshop on *Safe Harbours and Legal Presumptions in Competition Law*, scheduled for 5-6 December 2017 where the pros and cons of safe harbours are open for discussion.

Trade associations and industry bodies

Paragraph 2.3 of the Guidance states:

> "Depending on the nature of their involvement in a concerted practice, other parties such as suppliers, distributors, trade or professional associations and consultants may engage in a concerted practice".

The IPA-Deakin SME Research Centre suggests that the ACCC consider issuing separate guidance (or updating its existing guidance) for industry associations to cover 'concerted practices'.

The inclusion of concerted practices into section 45 has a significant potential impact on industry associations, particularly in the context of information exchange. Trade associations involve the meeting of competitors to discuss legitimate industry concerns and often involves the sharing of information and ideas. Some clarity is needed for industry associations on:

- What types of information can be shared and in what format? An obvious example is historical data. Presumably, historical, aggregated data can be shared provided this type of data cannot be disaggregated to identify individual entities;
- When an association may be found to have been part of a concerted practice;
- What steps the association should take to protect itself and its members in relation to concerted practices;
- The existing ACCC guidelines on *Industry Associations, Competition and Consumers* includes a section on 'Recommended Price Lists'. With the introduction of a prohibition against concerted practices, it would be helpful to understand whether the exchange of price recommendations and fee schedules as referred to in this guideline are likely to contravene the concerted practices prohibition.

3. Guidelines for Authorisation of Conduct (Non-Merger)

Does the ACCC intend to issue guidelines on when conduct is, or is not, likely to substantially lessen competition? Now that conduct such as third line forcing is subject to the SLC test, the ACCC may find benefit in providing guidance on this issue as it could result in a reduced number of authorisation applications (if parties are able to form their own view on whether the conduct substantially lessens competition).

[24] See CCS *Guidelines on the Section 34 Prohibition* (2016), paragraph 2.25, available at https://www.ccs.gov.sg/~/media/custom/ccs/files/legislation/ccs%20guidelines/guidelines%20in%20chapters%20with%20layout%20aug%202017/2%20ccs%20guidelines%20on%20the%20section%2034%20prohibition%202016.ashx [Accessed 20 November 2017] and MyCC *Guidelines on Chapter 1 Prohibition*, paragraph 3.4, available at http://www.mycc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition.pdf, [Accessed 20 November 2017]

4. Merger Authorisation Guidelines and Notification of proposed collective bargaining form

The IPA-Deakin SME Research Centre does not have any comments specific to these documents.

5. Other Guidance Required

The IPA-Deakin SME Research Centre requests that the ACCC provide guidance on its new power to grant class exemptions.

Class exemptions have the potential to provide legal certainty for many small businesses (and their representative bodies) in relation to common business arrangements, such as distribution arrangements and the licensing of intellectual property. This could be an extremely useful tool for small business. As noted in the Final Harper Report, a class exemption power would "reduce costs for business, especially small business', as it would not be necessary to seek individual authorisations or notifications. The Harper Report specifically referred to the granting of class exemptions in relation to liner shipping arrangements and licensing of IPR.[25] In the UK and Europe, class exemptions (called 'block exemptions') have been granted in relation to vertical agreements generally, vertical agreements in the motor vehicle sector, transfer of technology (e.g. licensing of IPR), research and development agreements and public transport ticketing schemes.

Consideration should be given to whether market share thresholds could be included in each class exemption, providing businesses with a more defined measure against which they can assess their agreements or conduct. This is common practice in Europe and the UK: see for example, the Vertical Agreements Block Exemption[26] which exempts vertical agreements provided the market share of the supplier does not exceed 30% (on the relevant market in which goods or services are supplied) and the market share of the buyer does not exceed 30% (on the relevant market in which goods or services are purchased) and provided other key conditions are met.

IPA Head Office

Level 6, 555 Lonsdale Street
Melbourne Victoria 3000
Australia

Tel : 61 3 8665 3100
Fax: 61 3 8665 3130
Email : headoffice@publicaccountants.org.au
Website: www.publicaccountants.org.au/

IPA Divisional Offices are located in the following cities:

Melbourne
Sydney
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[25] Ibid, n.6, pp 40, 42

[26] *COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0330&from=EN, [Accessed 20 November 2017]