Business Council of Australia

SUBMISSION

ACCC Interim Guidelines - Misuse of Market Power and Concerted Practices

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The Business Council of Australia draws on the expertise of Australia's leading companies to develop and promote solutions to the nation's most pressing economic and social policy challenges.

ABOUT THIS SUBMISSION

This is the Business Council of Australia's submission to the Australian Competition and Consumer Commission on the following three documents:

1. Interim Guidelines on Misuse of Market Power
2. Interim Guidelines on Concerted Practices
3. Guidelines for Authorisation of Conduct (non-merger)

The documents, released for comment, set out how the ACCC will interpret and apply recent changes to the Act. This submission recommends changes to the Final Guidelines to provide business with greater certainty about how the new laws will operate and to ensure the provision is properly focussed on the *misuse* of market power, not regular business conduct.

RECOMMENDATIONS

Interim Guidelines on Misuse of Market Power

- The ACCC should produce a more definitive, detailed and comprehensive set of Final Guidelines that can be used by internal or external legal or economic advisors, to ensure businesses can be advised appropriately.
  - The Final Guidelines should reflect the more definitive positions previously adopted by the ACCC that it will focus on exclusionary conduct and that it will take into account legitimate business reasons.
  - The Final Guidelines should adopt the more definitive position previously expressed by the ACCC that 'desirable' conduct (described on page 16 of the Interim Guidelines) will not lessen competition: innovation; efficient conduct designed to drive down costs; responding to price competition with matching or more competitive 'above-cost' price offers; responding efficiently to other forms of competition in the market such as product offerings and terns of supply.
  - If the ACCC Final Guidelines cannot provide such guidance, then amendments to the Competition and Consumer Act 2010 to enshrine such principles in the relevant legislation should be considered.
- Include a clear statement of the objective of the law that could provide reasonable certainty as to the conduct to be targeted by the new section. Specifically, previous ACCC references to 'exclusionary conduct' should be reinserted into the Final Guidelines, as this is the conduct the new provision is seeking to deter.
- Include an unequivocal statement that the ACCC will not pursue conduct where a business has driven a competitor from the market or damaged them, simply by innovating or driving down costs through efficiency-enhancing conduct.

- Include an unequivocal statement that a refusal to deal with a competitor would not be found to have the purpose, effect or likely effect of substantially lessening competition in instances where the refusal to deal is due to a legitimate commercial purpose, or where it is economically feasible for a competitor to establish its own upstream service, along with examples of the kind of legitimate commercial reasons that businesses can rely upon.

- Provide more clarity on how issues such as predatory pricing, loyalty rebates and margin/prize squeeze will be assessed by the ACCC. For example, if the ACCC considers that price discrimination that does not involve a margin squeeze could contravene the amended misuse of market power provision, it is important that the Final Guidelines provide some guidance on the ACCC's approach to assessing such price discrimination.

- Explain how the ACCC will approach enforcement during the period immediately following the law's commencement. An initial focus on compliance would give business the opportunity to better understand the new provision.

Interim Guidelines on Concerted Practices

- The Final Guidelines should make it clear that it is essential to the character of a concerted practice that it involves coordination between competitors. If this is not the case, the Final Guidelines should explain in more detail in what capacity a party who is not a competitor may engage in a concerted practice.

- The Business Council strongly recommends that the Final Guidelines explicitly recognise that for of an unlawful concerted practice to have occurred, there must be element of knowledge and intention from the relevant parties to engage in the unlawful conduct.

- The Final Guidelines should provide more specific guidance to help businesses identify and avoid concerted practices, such as the kind of information disclosure that is more likely to be characterised as a concerted practice.

Authorisation process

- The Business Council remains concerned that the authorisation process is not well adapted to the new prohibitions on misuse of market power and concerted practices. Specifically, the authorisation process should be improved by:

  - Establishing a fast-track authorisation process where the conduct in question is of a nature that the ACCC has previously stated will not substantially lessen competition (see, for example, paragraph 4.3 on page 16 of the Interim Guidelines). The fast-track process would apply much shorter timeframes than the six months contemplated by the current non-merger authorisation process; and

  - Allowing more information to be kept confidential and not exposed to competitors of the business seeking to engage in the conduct.

- The Business Council would also like to explore ways to integrate or coordinate the merger authorisation process with the non-merger authorisation processes where a transaction includes both elements.

Review

- The Final Guidelines should be reviewed after 12 months, in consultation with industry.
- The ACCC should collect and regularly publish information on complaints, investigations and authorisations activity under the new provisions, to enable monitoring of the impact on economic activity.

INTRODUCTION

The Business Council recognises the important role of competition law in promoting the long-term interests of consumers. Ensuring Australia's competition laws are effective and proportionate is critical to maintaining a high-performing Australian economy.

However, as the Business Council has consistently warned, uncertainty around the practical effect of the recent amendments to the CCA could discourage businesses engaging in vigorous competition and lead to price increases or less choice for consumers.

Vigorous, legal competition by business is in the best long-term interests of consumers. Businesses need to know with a high degree of certainty whether their competitive conduct is permissible under the law.

As the main enforcement agency for the Act, the ACCC'S considered and clear opinion about permissible activity under the new law is critical to providing such guidance to business and to furthering consumer interests.

Our concern is that the language used by the ACCC in its Interim Guidelines is less certain than previous pronouncements made by the agency. This submission argues there is a need for the previous level of certainty to be reinserted into the Final Guidelines.

1. INTERIM GUIDELINES ON MISUSE OF MARKET POWER

In our comments on the Draft Framework in September 2016, the Business Council was generally supportive of the ACCC's proposed approach to interpreting the new section 46, but was concerned that:

- the Draft Framework introduced a number of concepts and principles that were not reflected in the language of the proposed section 46; and
- the approach and some of the examples set out in the Draft Framework did not cohere into the kind of analytical framework that would provide sufficient clarity to guide the decisions of businesses that may be considered to have market power.

The Business Council suggested a number of amendments to the language of the proposed section 46 to give legislative form to some of the concepts set out in the Draft Framework. However, most of those suggestions were not implemented.

Other than further legislative amendment, the Interim Guidelines now provide the best opportunity to provide certainty to businesses who may be considered to have market power in making day-to-day decisions about the products and services they will offer and the prices and other terms on which they can offer those products and services.

Clarity on key terms under the new section 46

The Interim Guidelines provide less certainty for business about the application of the new provision than previous statements by the ACCC or the Explanatory Memorandum that accompanied the amending legislation. This compounds the Business Council's concern that the new misuse of market power provision creates uncertainty and will deter businesses from engaging in pro-competitive conduct.

A key concern is the apparent change in the ACCC's view about the extent to which innovative and efficiency-enhancing conduct is protected by the substantial lessening of competition test that is at the core of the new misuse of market power provision.

Early last year the ACCC definitively stated in a submission to the Treasury that:

> Advantages gained through research and development, innovation or economies of scale **do not lessen competition**, even if the conduct causes harm to competitors or forces them to exit a market.[1] [emphasis added]

This same comment was repeated by the ACCC earlier this year in its submission to the Senate Economics Committee.[2]

Going back further, in 2015 the ACCC Chairman Mr Rod Sims wrote in the Australian Financial Review that:

> Some argue that if a company outperforms its rivals and drives them out of business then this can lead to a substantial lessening of competition. This is not so. You **cannot** substantially lessen competition by outperforming your rivals, only by excluding them from competing on their own merits.[3] [emphasis added]

These are clear statements that gave business and policymakers a degree of confidence that the new law would not overreach and capture innovative and pro-competitive conduct.

However, in the Interim Guidelines the ACCC is now less conclusive on this point, saying only that innovation (and other efficiency enhancing conduct) '**would not generally** raise concerns' and '**may not** involve a misuse of market power' [emphasis added].

The changes in the ACCC's language gives business less clarity as to what kind of conduct will be found to be unlawful under the amended misuse of market power provision and does little to address the uncertainty inherent in the new legislation.

Table 1 provides examples where the ACCC's wording has changed with respect to key aspects of the Misuse of Market Power provision. Two key changes are the lessening of the emphasis on "exclusionary conduct" and "legitimate business reason".

Consistent with the ACCC's previous statements, it is vital that the Final Guidelines provide far greater clarity and certainty as to the specific type of conduct the ACCC intends to prosecute under the new section 46.

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[1] Australian Competition and Consumer Commission's submission to the Treasury, *Options to strengthen the misuse of market power law,* February 2016, p. 9

[2] Australian Competition and Consumer Commission's submission to the Economics Legislation Committee, *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016,* January 2017, p. 3

[3] Rod Sims, "Why the change to Harper Competition Review law will help boost competition", AFR, 4 August 2015

If the ACCC Final Guidelines cannot provide such guidance, then amendments to the CCA to enshrine such principles in the relevant legislation should be considered, as previously advocated by the Business Council.

Table 1: Changes in the ACCCs language on key aspects of section 46

Issue and the Business Council's concern with the Interim Guidelines	Previous ACCC statement	Interim Guidelines on misuse of market power (October 2017)
Make clearer that the objective of the provision relates to "exclusionary conduct" Consistent with the Draft Framework, the Business Council would welcome a clear statement in the Final Guidelines that the ACCC will only pursue conduct that: • interferes with the competitive process; • by preventing or deterring rivals; • from competing on their merits; • in a way that is likely to harm consumers.	"The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits. Sometimes this is broadly referred to as 'exclusionary conduct'. " Source: ACCC Draft framework for misuse of market power guidelines (September 2016), p. 4	No reference to an objective.
Reinstate certainty The Interim Guidelines leave open the possibility a business *may* breach section 46 by innovating or driving down costs through efficiency-enhancing conduct. The Business Council would welcome a return to the ACCC's more definitive statements that innovation and other efficiency enhancing conduct do not lessen competition.	"Advantages gained through research and development, innovation or economies of scale **do not lessen competition**, even if the conduct causes harm to competitors or forces them to exit a market." Source: ACCC submission to the Economics Legislation Committee, Competition and Consumer Amendment (Misuse of Market Power) Bill 2016, January 2017, p. 3	"Conduct that enhances efficiency, innovation, and product quality or price competitiveness is **unlikely** to substantially lessen competition." "The ACCC considers that the following conduct **would not generally raise concerns**: a. Innovation, regardless of how 'big' the firm is b. Efficient conduct designed to drive down costs … " Source: ACCC's Interim Guidelines, p. 6

Issue and the Business Council's concern with the Interim Guidelines	Previous ACCC statement	Interim Guidelines on misuse of market power (October 2017)
Reinstate "legitimate commercial reason" In the ACCC's assessment of refusals to deal, the Interim Guidelines no longer refer to legitimate commercial reasons as the Draft Framework did. A more definitive statement about the ACCC's treatment of legitimate business or commercial reasons or rationales or economic justifications is required.	"… where a firm that has a substantial degree of market power in the supply of a key input... refuses to supply that input to its competitors in a downstream market, **without any legitimate commercial reason for the refusal (e.g. credit risk, product shortages, etc.),** and the purpose, effect or likely effect of the conduct is to substantially lessen competition in the downstream market." Source: ACCC Draft framework for misuse of market power guidelines (September 2016), p. 8	"Businesses are generally entitled to choose whether or not they will supply or deal with another firm, including a competitor. Even if a firm has a substantial degree of market power, there is usually no obligation for it to deal with other firms." "However, in limited circumstances, a refusal to deal by a firm with a substantial degree of market power may amount to a misuse of market power." Source: ACCC's Interim Guidelines, p. 9
National pricing The "national pricing" example in the Draft Framework suggested that if an individual store was operating profitably overall then below-cost prices on individual lines or products would not be predatory. But the same example in the Interim Guidelines suggests each individual store and each of its major product segments must be operating profitably. The Final Guidelines should explain the basis for this additional condition.	"In this example, the retail chain's model is to attract customers with a standardised offer, which relies on the greater efficiencies and lower purchasing costs it enjoys due to its greater scale and scope. If it is **operating its new store profitably**, it is competing on its merits." Source: ACCC Draft framework for misuse of market power guidelines (September 2016), p. 13	"In this example, the retail chain's model is to attract customers with a standardised offer, which relies on the greater efficiencies and lower purchasing costs it enjoys due to its greater scale and scope." "If the store, **and each of its major product segments (such as bakery products)**, are operating profitably, it is competing on its merits." Source: ACCC's Interim Guidelines, p. 18

Examples need to illustrate the broader analytical framework

The Interim Guidelines provide 13 separate examples to demonstrate how the ACCC would interpret the new misuse of market power provision within a specific set of circumstances. While the Business Council welcomes these examples, the limitations of such an approach are twofold:

1. The examples involve a very specific set of factual circumstances and so it is very unlikely that in the real-world, businesses that are contemplating the application of section 46 will be presented with the exact same factual circumstance (and it is not clear from the examples which of these circumstances have been determinative in the ACCC's conclusion as to whether the conduct would substantially lessen competition), and
2. Therefore, the value of such examples is derived from how well they illustrate the underlying analytical framework that the ACCC has taken to those set of facts and how the ACCC would apply this analytical framework to a similar, but slightly different set of factual circumstances. The current examples do not clearly illustrate such a framework.

For instance, in the case of the "land banking" example, the Interim Guidelines should make it clear that the conduct would not have the effect of substantially lessen competition where:

- there is a reasonable prospect of additional sites being designated by the local planning authority; or
- the firm has legitimate commercial reasons to hold those sites, including reasonable prospects that it will make use of those sites in the future.

While providing factual caveats for every example may not be practical, more nuanced and detailed analysis of examples would better help businesses understand what conduct the ACCC believes would be substantially lessen competition.

Detailed discussion on the elements of the misuse of market power provision

While the Interim Guidelines may be positioned to assist ordinary business people in understanding the general application of the new section, it is also important that a more detailed and comprehensive framework be available to their advisors, whether internal or external legal or economic advisors, to understand the ACCC's approach to the new legislation and advise business appropriately. The Trade Practices Commission's Misuse of Market Power background paper in 1990 provided a framework of this kind, as have the ACCC's merger guidelines up to and including the current Merger Guidelines 2008.

If such a framework cannot be provided in the Final Guidelines, the ACCC should supplement the Final Guidelines with more detailed position papers on particular topics.

It would also be useful for the Final Guidelines to set out the ACCC's position on enforcement in this period when the law remains uncertain. The Interim Guidelines reproduce the ACCC's general enforcement priorities but do not take into account the particular circumstances faced by business in this period. Will the ACCC proceed immediately to an enforcement approach? An initial focus on compliance would give business the opportunity to better understand the new provision and may also give the ACCC the benefit of developing its position in a more constructive context.

The Business Council and others have previously raised the example of the South African Competition Act 1998, which provides that no administrative penalty will apply to first-time contraventions of its general prohibition of exclusionary conduct. The early introduction of "safe harbours" in the merger guidelines have similarly provided certainty to business and its advisors.

(a) Exclusionary conduct

The Draft Framework began with a summary of the objective of a misuse of market power law that was consistent with the Harper Review proposal and the ACCC's public statements in relation to that proposal:

> The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power that interferes with the competitive process

> by preventing or deterring rivals or potential rivals from competing on their merits. Sometimes this is broadly referred to as "exclusionary conduct".[4]

The Business Council supports this statement of the objective of the law and has argued that it should be reflected in the language of section 46. It is unfortunate that the Interim Guidelines no longer contain any clear statement of the objective of the law that could provide reasonable certainty as to the conduct to be targeted by the new section. Instead, the Interim Guidelines note that section 46 does not prohibit:

- a firm from obtaining a substantial degree of market power; or
- a firm with a substantial degree of market power from "out-competing" its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skillful or less efficient.

These exclusions leave a wide range of ordinary business conduct that may be captured by section 46, including conduct not directed at rivals, conduct at the expense of firms that are equally skillful and efficient, or conduct that does not use superior skills or efficiency but nevertheless results in other firms leaving the market.

The Business Council would welcome a clear statement that the ACCC will only pursue conduct that:

- interferes with the competitive process;
- by preventing or deterring rivals;
- from competing on their merits;
- in a way that is likely to harm consumers.

These elements are touched on in the Interim Guidelines, particularly in the examples of conduct given, but not as part of a clear framework for assessing conduct that is likely to be of concern.

(b) Substantial lessening of competition

The Interim Guidelines provide that:

> 'Lessening competition' means that the field of rivalry is diminished or lessened, or the competitive process is compromised or impacted. 'Lessening competition' extends to 'preventing or hindering competition' (s. 4G of the CCA).

This definition does not appear to clarify the distinction between damage to or elimination of a competitor and damage to the competitive process. If a competitor exits the market then it is arguable that the "field of rivalry" has been diminished or lessened even if there has been no interference in the competitive process.

It would also be useful for the Final Guidelines to provide more detail on the circumstances in which damage to an individual competitor or competitors may have the effect or likely effect of substantially lessening competition.

[4] ACCC Draft framework for misuse of market power guidelines (September 2016), p. 4

(c) Legitimate business reasons

The Draft Framework noted that the ACCC would continue to take into account all of the factors the courts had recognised as relevant to the "substantial lessening of competition" test, and that:

> This would include whether there are legitimate business reasons for engaging in the conduct.

The Business Council noted that this statement echoed the apparent intention of the Harper Review that the proposed section 46 should apply to conduct that "substantially harms competition and that has no economic justification" but requested more detail about the ACCC's approach to legitimate business reasons or economic justifications.

The Interim Guidelines remove references to legitimate business or commercial reasons but note that:

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

In their assessment of refusals to deal, the Interim Guidelines no longer refer to legitimate commercial reasons as the Draft Framework did. The Draft Framework had stated:

> For instance, where a firm that has a substantial degree of market power in the supply of a key input... refuses to supply that input to its competitors in a downstream market, without any legitimate commercial reason for the refusal (e.g. credit risk, product shortages, etc.), and the purpose, effect or likely effect of the conduct is to substantially lessen competition in the downstream market...

As a result, the role that legitimate business reasons will play in the ACCC's assessment remains less clear than it was in the Draft Framework.

More detail about the ACCC's treatment of legitimate business or commercial reasons or rationales or economic justifications would be useful. Since rationales and justifications are closely related to purposes, it would be particularly valuable to understand how a particular commercial rationale might be taken into account in the assessment of an effect or likely effect on competition.

The Business Council recognises the concern that the "take advantage" test of the former section 46 could excuse conduct that had a legitimate business purpose even when the effects of the conduct were disproportionate to the achievement of that purpose. Accordingly, the Business Council recommended that the new section 46 be amended to provide that conduct would not be considered to have the purpose or effect of substantially lessening competition where:

- the corporation has or had a legitimate commercial or business reason for engaging in the conduct; and
- the conduct was not unreasonable or disproportionate to the achievement of that legitimate commercial or business reason.

The Business Council would recommend a statement in the guidelines that the ACCC will not pursue conduct that is reasonable and proportionate to the achievement of a legitimate commercial or business reason. This protection mirrors the approach developed in the United States, as acknowledged by the Harper Review's final report.

(d) Refusal to deal

The Interim Guidelines' discussion of refusals to deal retains the Draft Framework's recognition that businesses are generally entitled to choose whether or not they will supply or deal with another firm, including a competitor. The subsequent discussion significantly undermines that proposition and has the flavour of an "essential facilities" approach.

In fact, it goes further than the "essential facilities" approach by removing the legitimate commercial reasons for refusal set out in paragraph (b) above, suggesting that even if a business refuses to supply to a customer that presents a credit risk, or because it has contracted all of its capacity, it may still breach the new section.

Similarly, the discussion in the Interim Guidelines is not restricted to facilities that are uneconomic to duplicate or are a natural monopoly. It is clear from the language of section 46 that a firm may have substantial power in a market even though it does not substantially control that market, and that more than one firm may have substantial power in a market. Section 46 may apparently require access to inputs in many circumstances where the criteria of the National Access Regime would not be satisfied. In these circumstances it is important to establish that the market power is relevant the conduct – for example that the conduct uses, maintains or increases market power, even if there is no "take advantage" element in the legislation.

For example, the ACCC's example of a refusal to supply cement is predicated on the fact that cement is an essential input for ready-mix concrete but does not make it clear, even as an assumption, that it is critical to the analysis that it would not be economic to build another cement plant. Unless that assumption is made, it suggests that a firm could avoid making investment in a cement works and use the prohibition on misuse of market power to compel its vertically integrated competitor to supply cement to it and (see the discussion concerning margin squeeze below) to do so at a price which would allow the firm a sufficient margin to enable it to cherry pick ready-mix concrete customers. The example also fails to consider whether the owner of the cement works would have invested in those cement works unless it had exclusive access to those cement works for its ready-mix concrete business, and the consequences for competition if it would not have made that investment.

The Business Council would welcome a clear recognition in the guidelines that a refusal to deal:

- for a legitimate commercial purpose such as credit risk, product shortage or committed supply; or
- in circumstances where it is not uneconomic for a competitor to establish its own upstream service,

would not have the purpose, effect or likely effect of substantially lessening competition.

(e) Restricting access to an essential input

The Interim Guidelines usefully abstracts the Draft Framework's "land banking" example to a category of restricting access to an essential input. However, as with the treatment of refusals to deal, the guidelines should make clear that any restriction of access to an input will only raise concerns where:

- the input can only economically be provided by the firm that is alleged to be restricting access, and not by any other firm including the firm who is seeking access; and
- access to the input is not being withheld for legitimate commercial reasons including the firm's own use.

In the case of the "land banking" example, the Interim Guidelines should make clear that the conduct would not have the effect of substantially lessen competition where:

- there is a reasonable prospect of additional sites being designated by the local planning authority; or
- the firm has legitimate commercial reasons to hold those sites, including reasonable prospects that it will make use of those sites in the future.

(f) Predatory pricing

The treatment of predatory pricing in the Interim Guidelines does not develop the Draft Framework and continues to raise a number of questions that could be further explored to increase certainty in this complex area:

- What is the relevant measure of a firm's own cost of supply? Average avoidable cost and average variable cost are often used as the relevant cost of supply. What if a firm has very high fixed costs and low variable costs?
- Does the ACCC consider that there needs to be a reasonable prospect of recouping the losses incurred during the predatory period?
- The guidelines suggest that low pricing will be predatory only if it has an "aim" of causing competitors to exit the market, disciplining or damaging competitors for competing aggressively or discouraging potential competitors from entering the market. Is an "aim" different from a purpose? How will the ACCC determine what a firm's aim is?
- The "national pricing" example in the Draft Framework suggested that if an individual store was operating profitably overall then below-cost prices on individual lines or products would not be predatory. The same example in the Interim Guidelines suggests each individual store and each of its major product segments must be operating profitably. What is the basis for this additional condition? If one product segment is more expensive to transport to a regional area than a metropolitan area, is it not able to be provided at the same price? What if a chain does not have an "established practice" of national pricing but wishes to introduce one?
- How are free services offered in one market, by a firm which has substantial power in another market, to be analysed? A free service is clearly being supplied below various measures of cost but this business model delivers considerable benefits to consumers but

may be disruptive to the business models of other firms, which rely on charging for equivalent services.

The guidelines should also make it clear that section 46 does not apply to purely vertical relationships such as low prices paid to suppliers, where a business with market power is not in competition with its suppliers. The Interim Guidelines suggest that making profits above competitive levels by charging high prices to customers is not prohibited, but they do not address charging low prices to suppliers.

(g) Loyalty rebates

The Interim Guidelines introduce a new category of conduct with the potential to constitute a misuse of market power in the form of rebates that are conditional on a distributor meeting certain sales targets. The Interim Guidelines distinguish between:

- volume rebates which are conditional on the customer purchasing a very large quantity of its requirements from the firm; and
- unconditional rebates which simply reduce the price of an item with no additional conditions placed on the distributor.

The European Commission's guidance on Article 102 include a number of additional considerations that are not addressed by the Interim Guidelines, including:

- whether rebates are conditional on purchasing particular volumes rather than a proportion of their requirements;
- whether rebates are applied only to volumes above a particular threshold or to all purchases;
- the extent to which volumes are contestable, that is, whether there is any reason why another firm could not compete for the whole of a customer's requirements; and
- where only a proportion of volumes are contestable, how to determine whether another firm would be able to compete for the contestable portion of volumes.

Since, as the Interim Guidelines acknowledge, rebates in many cases reduce prices and promote competition, it would be useful for the final guidelines to address these issues in more detail.

(h) Margin/price squeeze

The discussion of "margin/price squeeze" contains a statement to the effect that businesses are generally entitled to charge different prices to different buyers. Implicit in the statement is that, in some circumstances, price discrimination may contravene the misuse of market power prohibition.

The only type of price discrimination addressed in the Interim Guidelines is a margin/price squeeze, but not all price discrimination involves a margin squeeze. If the ACCC considers that price discrimination that does not involve a margin squeeze could contravene the amended section 46, it is important that the Final Guidelines provide some guidance on the ACCC's approach to assessing such price discrimination.

The discussion of "margin/price squeeze", like the discussion of refusals to deal, also has the flavour of an "essential facilities" approach. It would be useful for the Final Guidelines to provide guidance on:

- how the ACCC will determine that an input is essential; and
- how it will assess pricing. For example, will it use some form of imputation testing and, if not, how is a supplier to determine a price which is not likely to contravene the prohibition?

(i) Conclusions

In a number of aspects, the Interim Guidelines provide less certainty to business than the Draft Framework. This may be because neither the language of the new section 46, nor the existing case law on what may constitute a substantial lessening of competition, limit or focus the application of the section in the way that is required to deliver certainty and avoid capturing or deterring competitive conduct that will benefit consumers.

The Interim Guidelines recognise that it is for the courts to determine whether section 46 has been contravened. While the Interim Guidelines cannot predict or affect the courts' interpretation or the actions that may be brought by private parties, as the agency responsible for the enforcement of the CCA the ACCC has a critical role in providing guidance to business including through its enforcement priorities and its guidelines on the way it will interpret and apply the law. Given this role, the guidelines must commit the ACCC to a position that goes beyond a simple statement of the law – subject always to further developments in the law that may require a refinement of that position.

If the ACCC is not able to provide even this level of certainty through the Final Guidelines then the Business Council would suggest that further amendments to the legislation remain necessary.

2. INTERIM GUIDELINES ON CONCERTED PRACTICES

The Business Council has previously commented on the ACCC's draft Framework for concerted practices guidelines (Draft Framework). The Business Council was generally supportive of the ACCC's proposed approach to the new prohibition on concerted practices but was concerned that the Draft Framework relied on disparate examples rather than setting out a coherent framework of underlying concepts or principles.

The Business Council also noted that the Draft Framework's approach to the definition of concerted practices appeared to depart in significant respects from the established international jurisprudence.

The Interim Guidelines provide significantly more clarity than the Draft Framework and are a useful guide to the ACCC's interpretation of the new section. However, the Business Council remains concerned that the ACCC's interpretation appears inconsistent with international approaches and with the approach of the Draft Framework in a number of respects.

Detailed discussion on the elements of the concerted practices provision

(a) Parties to a concerted practice

The Draft Framework described a concerted practice as follows:

- A concerted practice is a form of coordination between competing businesses by which, without them having entered a contract, arrangement or understanding, practical cooperation between them is substituted for the risks of competition. [emphasis added]

However, the Interim Guidelines depart from this position, claiming that:

- There is no requirement that persons engaging in a concerted practice are competitors or potential competitors in a relevant market. 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 Business Council considers that this departure is likely to confuse the issue. While the Business Council acknowledges that an industry association or a supplier may be knowingly concerned in a concerted practice by acting as a hub or conduit between competitors, it is essential to the character of a concerted practice that it involves coordination between competitors. The guidelines should make this clear or should otherwise further explain in what capacity a party who is not a competitor may engage in a concerted practice.

The Interim Guidelines also state that "[t]wo or more persons are required to engage in a concerted practice" but also that "a concerted practice may arise from a single instance of communication being provided by one person to one or more other persons". The position of a one-way communication in these circumstances should be clarified: is it the case that there is only a concerted practice is the communication is acted upon by the recipient? What if the communication is made publicly and not to any particular person or persons?

(b) Knowledge and intention

The Business Council notes that the Draft Framework correctly summarised the European position as follows:

- In the EU and United Kingdom, the principle at the heart of establishing whether an unlawful concerted practice has occurred is whether "the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition".

By contrast, the Interim Guidelines do not include any element of knowledge and intention, resulting in a significant departure from the international jurisprudence. The Business Council strongly recommends that this omission be corrected in the Final Guidelines.

(c) Further guidance

The Final Guidelines could also provide clearer high-level principles that would help businesses identify and avoid concerted practices. For example, it should be made clear that:

- firms are permitted to adapt themselves intelligently to the existing and anticipated conduct of their competitors; and

- this includes independently raising prices to meet the prices of a competitor in order to maximise profits.

Other questions that could usefully be clarified in the Final Guidelines include:

- Under what circumstances would a public disclosure of pricing information risk being characterised as a concerted practice?
- What kinds of information disclosures are more or less likely to be characterised as a concerted practice? For example, what kinds of data (other than price) are commercially sensitive, when is data public, when is an information exchange public, historic v future data, frequency of exchange?
- How efficiency gains and other consumer benefits, including increasing transparency and reducing information asymmetries, are to be taken into account?

3. AUTHORISATIONS

The Business Council remains concerned that the authorisation process is not well adapted to the new prohibitions on misuse of market power and concerted practices.

Conduct that risks breaching these prohibitions may in many cases be responsive competitive conduct that does not reach the level of formality of a contract, arrangement or understanding or an exclusive dealing and needs to be executed more quickly and with greater confidentiality than the current authorisation process allows.

Particularly where conduct is submitted to the ACCC for authorisation on the basis that it does not have the purpose, effect or likely effect of substantially lessen competition, the ACCC is more likely to be able to assess the conduct without a lengthy public process.

For example, as discussed earlier in this submission, the Business Council would welcome a more definitive statement that the ACCC would not pursue conduct where a competitor has been harmed or forced to exit the market due to innovation or efficiency-enhancing conduct of a business that is found to hold market power.

In these circumstances there should be a fast-track process that:

- has shorter timeframes than the six months contemplated by the current authorisation process; and
- allows more information to be kept confidential and not exposed to competitors of the business seeking to engage in the conduct.

The ACCC's fast-track authorisation process should be near immediate where the conduct in question is of a nature that the ACCC has previously stated will not substantially lessen competition. Therefore, the ACCC should be able to quickly assess and authorise conduct that, for example, lowers the cost of goods and services through efficiency-enhancing conduct or product / service innovation.

The Business Council would like to explore ways to incorporate a fast-track process within the formal authorisation process in order to immunise authorised conduct from third-party action. However, it may also be useful to explore an informal clearance process for this conduct similar to the informal merger clearance that the ACCC has developed over time.

Taking a risk-based approach and using streamlined processes where possible will require less resourcing for all parties.

The return to the ACCC of the power to authorise mergers provides opportunities for streamlining the authorisation of transactions that involve both the acquisition of shares or assets and other conduct that may risk breaching the CCA, for example ancillary agreements or understandings. The Business Council would encourage to the ACCC to address this issues in the guidelines, including:

- the circumstances in which merger and non-merger conduct may be authorised in the same authorisation; and
- the process and timeframes that would apply.

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