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| Framework for concerted practices guidelines |
| September 2016 |

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# Purpose of the draft framework

The Australian Government has released an exposure Bill to implement reforms identified by the Harper Competition Policy Review. One area of reform included in the exposure Bill is to amend the Competition and Consumer Act 2010 (CCA) to introduce a prohibition against concerted practices that substantially lessen competition. If the Bill is enacted, we will publish guidelines about our approach to possible breaches of the concerted practices prohibition.

This framework provides a summary of the proposed content of the guidelines. It is intended to help you to understand the proposed reform and help you to provide us with feedback that will inform and improve the guidelines we produce.

An effective guideline should provide you with greater certainty about our understanding of the conduct that is likely to be a prohibited concerted practice and how we will enforce the law. The guideline will provide our views only. It will ultimately be up to the Courts to determine whether you have breached the prohibition on concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

We invite your feedback on this framework. We will prepare and publish the guideline with the benefit of feedback once the CCA is amended to introduce the prohibition.

**Invitation for submissions on the proposed framework**

Submissions are invited to be made to the ACCC by **3 October 2016** and can be made online at <https://consultation.accc.gov.au/legal-economic/draft-framework-for-concerted-practices-guidelines/>

# The proposed law

The proposed amendment would insert a new sub-paragraph (c) into section 45 as set out below:

Section 45

1. A corporation must not:

…

1. engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

# International experiences

The concept of a concerted practice is well established in competition law internationally.

* The European Union (EU) has a long history of prohibiting “concerted practices” that have the object or effect of preventing, restricting or distorting competition. Other jurisdictions introducing new competition law regimes (such as Hong Kong and Singapore) have followed a similar approach.
* 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”.[[1]](#footnote-1) This is based on the idea that in a competitive market each economic operator must determine independently the practices it intends to adopt in the market.[[2]](#footnote-2)

# What is a concerted practice?

Section 45 of the CCA currently prohibits corporations from making or giving effect to contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition.

If the Bill is enacted, section 45 will also prohibit corporations from engaging in **a concerted practice** that has the **purpose, effect or likely effect of substantially lessening competition**.

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.

The following are examples of conduct that is **likely** to amount to a concerted practice. It is important to emphasise, though, that the conduct will only be prohibited if it also has the purpose, effect or likely effect of substantially lessening competition (discussed further below):

* A number of pearl cultivators in a small geographic region regularly meet as part of the pearl cultivators’ industry association, usually to discuss general issues in the industry.

At one of these meetings some cultivators state that they will restrict their output to a certain number for the purpose of artificially increasing the price of Australian pearls and maximising profits for the pearl cultivators.

A practice develops where such intentions are flagged in the meetings and while no party to the conversations is bound to provide the information or commits to act upon it, some cultivators restrict their output of pearls.

These exchanges of information about producers’ output intentions are likely to amount to a concerted practice. They involve the deliberate, regular provision of commercially sensitive strategy information between competitors, absent any legitimate commercial need for such exchanges. Without such information sharing, producers who reduced their output would risk a competitor taking their market share and decreased profitability from lower sales volumes where the producer acted alone.

* A potential customer approaches different brokers in order to find the most attractive exchange price for gold.

The rival brokers participate in private online chat rooms where they communicate through coded or encrypted messages what they consider to be an appropriate spread of buy / sell prices for different volumes of gold to be quoted to customers.

These exchanges of information about each broker’s view of appropriate spreads are likely to amount to a concerted practice. They involve the deliberate, private exchange of commercially sensitive pricing information by competitors, absent any legitimate commercial justification for such exchanges. Although the brokers may not reach an understanding or agree on any particular price they will each set, communicating this information reduces the uncertainty of the range rival brokers are likely to offer the customer and reduces the independent rivalry between the brokers.

* A State Government puts an essential service project out to tender. Supplier A and Supplier B are the only suppliers capable of tendering for this project.

The two suppliers engage in a series of phone conversations where they share details of their tender responses. While neither supplier considers themselves obliged to disclose details of their tender responses or amend their tender in response to the other’s disclosure, both suppliers end up providing an amended tender response because of the information exchange.

The disclosure of tender responses by rival suppliers is likely to amount to a concerted practice. Such disclosures results in the pricing uncertainties present in a competitive market being substituted with practical cooperation.

* At an industry event, Bank A discloses to its main competitor, Bank B, Bank A’s intention to increase its loan interest rate by 25 basis points. This disclosure is made prior to disclosure to the market.

Bank B does not provide its pricing information in return, but circulates Bank A’s pricing information internally and knows that there will be less competitive pressure on its loan product pricing. Bank B does not seek to undercut Bank A but moves its rate broadly in line with Bank A. Bank A notes Bank B’s reaction and this practice continues over time.[[3]](#footnote-3)

* A number of petrol retailers notify each other of their future pricing intentions. While they have not committed to do so, they begin to regularly follow the price change foreshadowed by others. Retailers find such information assists them and start making business decisions in expectation of calls from their competitor. No attempt is made to reject the calls. Such disclosures results in the pricing uncertainties present in a competitive market effectively being substituted for cooperation.[[4]](#footnote-4)
* The two manufacturers of electricity meters issue identical price lists, submit identical tenders, adopt the identical price variation clauses and notify each other of any pricing or product range changes. Such disclosures results in the pricing uncertainties present in a competitive market effectively being substituted by cooperation.[[5]](#footnote-5)
* Buyers for two of the largest beef processors in Australia regularly catch up over coffee before each auction. The buyers give each other a heads up on which lots each is more interested in, on the range of prices they are authorised to bid for the lot, but are never committed to giving the information and never agree not to bid on a lot. Neither is surprised when the bidding starts. This is likely to amount to a concerted practice, with the buyers substituting cooperation with each other for the uncertainties and independent rivalry of competition.

The following are examples of conduct that is **unlikely** to amount to a concerted practice:

* At a trade expo, rival businesses talk amongst themselves about a new technology that will allow their businesses to operate more efficiently. As they are only sharing observations on general market developments and innovations, and it is not likely to impact independent rivalry between the firms, this would be unlikely to amount to a concerted practice. Sharing information and discussing industry issues with other association members on topics unlikely to impact competition can be undertaken for legitimate reasons.
* Airline A runs a promotion offering discounts on flights to a number of popular holiday destinations. Airline B monitors Airline A’s promotional offers in order to match Airline A’s prices as part of its own campaign. This is unlikely to amount to a concerted practice as Airline B is responding to Airline A’s publicly advertised pricing information without any coordination occurring between the two airlines.
* The ACCC invites banks to a discussion on how to identify and take action on scams which are resulting in Australians losing their life savings. The ACCC asks the banks to self-initiate their own measures to identify when customers are being scammed. The banks, fully informed of their obligations, see the problem from scams and establish their own systems. The banks do not substitute cooperation with each other for the uncertainties of competition.

Questions

1. Do you have any comments on our description of concerted practices?
2. Do you have any comments on the examples used of conduct that is likely to amount to a concerted practice?
3. Do you have any comments on the examples used of conduct that is unlikely to amount to a concerted practice?
4. What learnings should we draw from international experience to inform our guidance and enforcement activities?
5. Are there any other matters that you suggest we should address in this section?

# Does the conduct substantially lessen competition?

Concerted practices will only be prohibited if they have the purpose, effect or likely effect of substantially lessening competition. The substantially lessening of competition test is well understood within Australia’s competition laws and acts as a significant filter as to which concerted practices will amount to prohibited conduct.

The threshold for whether there has been a contravention of section 45 of the CCA will not change. To find a breach section 45, the Court will still need to be satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition.

The concerted practices prohibition enables the competitive effect of a broader range of coordinated conduct to be assessed than before.

“**Substantially**” in the context of section 45 has been defined in case law as meaningful or relevant to the competitive process. It is a relative concept and does not require an impact on the whole market.

In Rural Press v ACCC (2003) 216 CLR 53 at [41], the majority of the High Court of Australia assessed “substantially” in section 45 by asking:

“…whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the competitive process, and whether the purpose of the arrangement was to achieve an effect of that kind”.

See also Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission [(2003)](http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/193.html) [131 FCR 529](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%282003%29%20131%20FCR%20529) at [242] and Australian Competition and Consumer Commission v Cement Australia Pty Ltd (2013) 310 ALR 165 at [329].

“**Lessening** competition” means that the field of rivalry is diminished or lessened, or the competitive process is compromised or impacted, and also extends to ‘preventing or hindering competition’ (CCA section 4G).

“**Competition**” is a process, rather than a situation and is expressed in the form of rivalrous behaviour. Importantly, it is a means of protecting the interests of consumers, rather than individual competitors. It is assessed looking at both market structure and strategic behaviour.

Competition occurs within markets. Under the proposed prohibition, “competition” means competition in any market in which a corporation that is a party to the concerted practice, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire, or be likely to supply or acquire, goods or services.

Questions

1. Are there any other matters that you suggest we should address to provide greater clarity on what the substantial lessening of competition test involves in the context of concerted practices?
2. Are there any other matters that you suggest we should address in this section?

# How the ACCC will approach enforcement of the prohibition

In deciding whether to take enforcement action, the ACCC focuses on the extent to which matters will, or have the potential to, harm the competitive process or result in widespread consumer detriment. The ACCC cannot pursue all the complaints it receives and will direct its resources to matters that provide the greatest overall benefit for competition and consumers.

To assist with this determination, the ACCC gives compliance and enforcement priority to matters that demonstrate one or more of the following factors:

* conduct resulting in a substantial consumer (including small business) detriment
* conduct demonstrating a blatant disregard for the law
* conduct involving issues of national or international significance
* conduct involving essential goods or services
* conduct detrimentally affecting disadvantaged or vulnerable consumer groups
* conduct in concentrated markets which impacts on small businesses or suppliers
* conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
* where ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
* where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair trading laws.

For more information refer to the [ACCC’s compliance and enforcement policy](http://accc.gov.au/publications/compliance-and-enforcement-policy).

# Authorisation

Authorisation provides protection against legal action for conduct or arrangements that might breach the competition provisions of the CCA. Parties apply for authorisation where they believe that there is some risk that the conduct they propose to engage in would or may breach the competition provisions of the CCA and they require the certainty provided by an authorisation to undertake the activity. Authorisation is a formal and public process.

In general, the ACCC may grant authorisation if it is satisfied that the likely public benefits flowing from the proposed conduct for which authorisation is sought outweigh the likely public detriments flowing from that conduct.

Industry associations seeking authorisation to engage in conduct on behalf of their members

* Industry associations can provide valuable services for their members, advocating on behalf of their members to government and providing advisory services. In general, the day to day activities of an industry association will not give rise to matters that are likely to substantially lessen competition and concerns will not arise under section 45.
* Where there is a risk of breaching the CCA, industry associations have sought authorisation, for example [to collectively negotiate](http://registers.accc.gov.au/content/index.phtml/itemId/1130021/fromItemId/401858) on behalf of current and future members, [to create a levy](http://registers.accc.gov.au/content/index.phtml/itemId/1187728/fromItemId/401858) and provide a nationally co-ordinated approach to the collection and disposal of waste, and [creating a database of de-identified strategic and pricing information](http://registers.accc.gov.au/content/index.phtml/itemId/1179486/fromItemId/401858) for use of members. This will not change.

With the changes to section 45, authorisation is now available under a revised authorisation test whereby the ACCC may grant authorisation if it is satisfied either that the proposed conduct is unlikely to substantially lessen competition (SLC limb) or is likely to result in a net public benefit (net public benefit limb).

Under the revised authorisation test, in order to grant authorisation to section 45 conduct, the ACCC must be satisfied that the conduct meets at least one limb of the test; but for the ACCC to deny authorisation, the conduct must fail both limbs of the test.

Guidance on the implementation of the revised authorisation test will be provided in the final section 45 guidelines. Further detailed information on the authorisation process is available in the ACCC’s authorisation guidelines.

Questions

1. Are there any other matters that you suggest we should address in this section?
2. Do you have any other comments?

# Consultation on proposed guidelines

The ACCC is interested in receiving comments or suggestions from interested parties regarding the proposed content of the guidelines outlined in this framework.

In particular, the ACCC is inviting feedback from consumers, businesses and other stakeholders about the issues and topics the ACCC can provide guidance on to assist them understand how the proposed concerted practices prohibition will operate and how the ACCC will approach potential breaches of the provision.

Consultation regarding the draft guidelines is a public process. Submissions will be published online in accordance with the ACCC & AER information policy: collection and disclosure of information.[[6]](#footnote-6) We request that submissions be made online and in PDF format, if possible. Information of a confidential nature, or which is submitted in confidence, can be treated as such by the ACCC, provided cause for such treatment is shown.

1. *ICI v Commission* [1972] ECR 619 (“Dyestuffs”) at paragraph 64; Office of Fair Trading, *Agreements and concerted practices: Understanding competition law*, 2004, para 2.12; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (European Guidelines), para 60. [↑](#footnote-ref-1)
2. *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 173. [↑](#footnote-ref-2)
3. This is similar to the factual scenario of UK Office of Fair Trading (now Competition and Markets Authority) matter involving Royal Bank of Scotland and Barclays. [↑](#footnote-ref-3)
4. This is similar to the factual scenario of *Apco Stations v ACCC* [2005] FCAFC 161. [↑](#footnote-ref-4)
5. This is similar to the factual scenario of *Trade Practices Commission v Email and Ors.* (1980) ATPR 40-172. [↑](#footnote-ref-5)
6. <https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information> [↑](#footnote-ref-6)