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Dear Mr Bezzi

## **INTERIM GUIDELINES ON CONCERTED PRACTICES**

The Law Council is grateful for the opportunity to make a submission in regard to the Australian Competition and Consumer Commission's (**ACCC**) Interim Guidelines on concerted practices (**Guidelines**).

This submission has been prepared by two committees of the Law Council's Business Law Section. Part A includes the submission of the Competition and Consumer Committee which has commented in detail on the Guidelines. Part B includes the submission of the SME Committee which has specifically commented on the Guidelines in relation to small business.

### **Part A - Competition and Consumer Committee**

#### Introduction

The Competition and Consumer Committee commends the ACCC on its preparation of the Guidelines, and on its seeking of feedback from interested parties.

The Competition and Consumer Committee notes that it has previously provided submissions on 28 October 2016 (responding to the ACCC's Exposure Draft Consultation), and on 22 November 2016 (responding to the ACCC's Framework for Concerted Practices Guidelines).

Overall, the Guidelines are clear and provide what the Competition and Consumer Committee considers to be a general, if brief, description of the relevant legal principles. The inclusion of examples is desirable and helpful. This submission addresses specific areas where the Competition and Consumer Committee sees scope to clarify these Guidelines, particularly in light of their purpose.

In the Guidelines, the 'Purpose of these Guidelines' is identified as:

- setting out how the ACCC currently proposes to interpret the s 45(1)(c);

- describing the general approach the ACCC will take in investigating alleged contraventions;
- including examples to illustrate the types of conduct that the ACCC considers likely or unlikely to contravene s 45(1)(c); and
- providing general guidance for legal practitioners and business advisors.

As indicated in the Guidelines, they have been prepared for the level of reasonably informed businesspersons. It is this editorial setting that has informed the length of, and detail included in, the submission.

Given the Guidelines' aim to assist legal practitioners and business advisors, the Competition and Consumer Committee considers that it is important that legal practitioners (both external and in-house) who are advising business on the new concerted practice prohibition have a fuller understanding of:

- the ACCC's approach to the underlying competition analysis required by the prohibition;
- conduct that would not constitute a concerted practice; and
- the ACCC's enforcement approach, particularly in relation to the policies and priorities guiding its approach to:
  - compliance with, as well as enforcement of, the prohibition; and
  - persons applying for immunity under the prohibition.

Greater guidance in these areas will enhance overall compliance and reduce the risk, and cost, of ACCC investigations and enforcement action.

#### The necessary competition analysis

The Competition and Consumer Committee acknowledges that the substantial lessening of competition test has always applied to contracts, arrangements and understandings. Nonetheless, the extension of the law into this new area of concerted practices raises significant and complex competitive analysis issues. It would be desirable if the ACCC gave greater guidance about its intended approach in this regard as well. This could be done through a separate, more detailed discussion paper to supplement the Guidelines.

The Competition and Consumer Committee notes that when the substantial lessening of competition standard was applied to mergers in 1993, the ACCC published detailed guidelines setting out its approach to competition analysis in that context, and it has updated that from time to time to address developments in its analytical approach.

The Competition and Consumer Committee also points to guidance that other jurisdictions provide in relation to the complex issues that can arise in competition analysis in a concerted practice context. In referring to other jurisdictions' guidelines, the Competition and Consumer Committee does not propose importing learnings about substantive law from these jurisdictions, and advises against this. Rather, the Competition and Consumer Committee refers to them throughout this submission in order to highlight the type and level of detailed guidance that is beneficial to practitioners.

An illustration of the type of guidance that would be beneficial is an analysis that, as is done in standard competition analysis, connects examples of interference with the competitive process back to the harm that interference causes to consumers. The Competition and Consumer Committee notes that the Guidelines discuss how concerted practices may interfere with the competitive process, but do not draw that connection to consumer harm.

For example, section 4 of the Guidelines states the general legal principles about the substantial lessening of competition test. However, the section does not explain the approach that the ACCC will bring to those principles in the specific context of a concerted practice. By comparison, the European Commission's main guidelines on horizontal agreements (**EU Guidelines**)<sup>1</sup> tie the concept of concerted practice back to a standard competition analysis, both in an introductory section on the competitive assessment of information exchanges generally,<sup>2</sup> and in separate sections on the competitive assessment for various types of agreements, including research & development, purchasing and production agreements.<sup>3</sup> The Competition and Consumer Committee considers that such guidance on the ACCC's approach would be particularly useful in relation to conduct that is public and that will likely only constitute an effects-related concerted practice.

### Conduct that would not be a concerted practice

Greater guidance on conduct that would not constitute a concerted practice would also be desirable, including conduct where the ACCC is considering theories of harm based on effects, as opposed to purpose. This is particularly relevant for existing business arrangements that have a clear commercial (and not anti-competitive) purpose, but that the ACCC considers may raise issues under the effects limbs. Of the 5 examples provided, only one is of conduct that the ACCC considers not to be a contravention. As highlighted in this submission's Examples section below, the EU Guidelines and the Office of Fair Trading's guidelines on concerted practices and agreements (**UK Guidelines**)<sup>4</sup> both have a willingness to explore a greater variety of examples, including those where a contravention is not envisaged.

### ACCC's enforcement approach

The Competition and Consumer Committee further notes, as a general observation, that the Explanatory Memorandum to the new concerted practice prohibition<sup>5</sup> (**Explanatory Memorandum**) states that many of the Competition Policy Review Panel's recommendations for the reform were 'specifically designed to help businesses ... [by] encouraging the Commission to publish guidance material which sets out its enforcement approach.'<sup>6</sup> In this regard, the general approach of the Concerted Practices Guidelines appears to set out and explain the operation and interpretation of the law, with

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<sup>1</sup> European Commission, *Guidelines on the applicability of article 101 of the Treaty of the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ C11/01.

<sup>2</sup> EU Guidelines sections on: 'Main competition concerns' 2.2.1 with 'collusive outcome' [65], 'anti-competitive foreclosure' [69]; and 'Restrictive effects on competition' 2.2.3 with 'market characteristics' [77], 'characteristics of the information exchange', 'strategic information', 'market coverage', 'aggregated/individualised data', 'age of data', 'frequency of information exchange', 'public/non-public information', 'public/non-public exchange of information' [86]-[94].

<sup>3</sup> See, eg, EU Guidelines sections on Research and Development Agreements: 'Main competition concerns' 4.3.1; and 'Restrictive effects on competition' 4.3.3 with 'market power' [168], 'direct limitation of competition between the parties' [174], 'collusive outcome' [175].

<sup>4</sup> Office of Fair Trading *Agreements and concerted practices* [2004] OFT401, 14/20.

<sup>5</sup> Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth).

<sup>6</sup> Explanatory Memorandum, 15.33.

comparatively less guidance provided as to the ACCC's enforcement approach to the prohibition.

This lack of guidance is illustrated in section 8.3 of the Guidelines, which refers to the ACCC's compliance and enforcement policy<sup>7</sup> for more information on the ACCC's general approach to compliance and enforcement of the *Competition and Consumer Act 2010* (Cth) (CCA). This policy is very general in nature. Specific guidance around the ACCC's enforcement priorities and policy in respect of the new prohibition, particularly around the two points below, would be desirable.

*i. A compliance approach to the prohibition*

Given the absence of any transition period for the introduction of the new prohibition, it would be helpful if the ACCC outline what its approach would be to existing business practices that may now have to be reconsidered in the context of the new prohibition. The Competition and Consumer Committee suggests that the ACCC adopt a compliance, not an enforcement, approach to what would otherwise be legitimate commercial business practices that may now come within the new prohibition's scope, at least for an initial period.

*ii. Application of the ACCC's immunity policy to the prohibition*

The Guidelines do not state whether the ACCC's immunity policy<sup>8</sup> will apply to the new prohibition. The immunity policy aims to incentivise businesses and individuals to disclose cartel conduct by protecting them from certain enforcement action for engaging in a cartel. However, the Competition and Consumer Committee considers it unlikely that the policy can achieve this aim of incentivising persons to disclose cartels if those persons nevertheless face enforcement action for engaging in a concerted practice.

Therefore, the Competition and Consumer Committee suggests that the ACCC's immunity policy be extended to all types of concerted practices, including those that involve vertical restraints. The Competition and Consumer Committee notes that the European Commission's notice on immunity from, and reduction of, fines for cartel conduct also applies to concerted practices.<sup>9</sup>

The below sections contain the Competition and Consumer Committee's comments and suggestions on specific aspects of the Guidelines.

Parties (Section 2) And Engaging in a Concerted Practice (Section 3)

Section 2 of the Guidelines discusses the necessary parties to a concerted practice. Section 3 of the Guidelines discusses issues that may be relevant in identifying a concerted practice, specifically cooperative versus independent behaviour and the nature of the communication.

*Cooperative versus independent behaviour*

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<sup>7</sup> Australian Competition and Consumer Commission, *2017 ACCC Compliance and Enforcement Policy* (February 2017).

<sup>8</sup> Australian Competition and Consumer Commission, *ACCC immunity and cooperation policy for cartel conduct* (September 2014).

<sup>9</sup> European Commission, *Notice on Immunity from fines and reduction of fines in cartel cases* [2006] OJ C298/11.

Paragraph 3.3, and the Explanatory Memorandum,<sup>10</sup> state that:

*A concerted practice may be thought of as any form of cooperation between two or more persons, **or conduct that would be likely to establish such cooperation.***  
(emphasis added)

This definition of a concerted practice appears to have two limbs, with the emphasised limb about ‘conduct that would be likely to establish such cooperation’ (**Limb 2**) being broader than the un-emphasised limb about ‘any form of cooperation between two or more persons’ (**Limb 1**). The Competition and Consumer Committee presumes that these Limbs will not necessarily operate in the same way. The Competition and Consumer Committee questions whether the broader Limb 2 seeks to cover the one-off or unilateral conduct mentioned above. The Competition and Consumer Committee would advise against Limb 2 covering such conduct because:

- that approach would conflict with other sections of the Guidelines that refer to a concerted practice as ‘any form of cooperation between two or more firms’ (1.3) and that ‘captures cooperative behaviour or communication’ (3.3); and
- if certain conduct may constitute a concerted practice only if a person acts on that conduct, and that person does *not* act on it, then that person should not be considered a party to a concerted practice.

Furthermore, the reference in the Guidelines and the Explanatory Memorandum to these two limbs highlights that the new prohibition is not on ‘engaging in conduct’, as is the case with prohibitions elsewhere in the CCA. The prohibition is on engaging in a concerted practice, or ‘any form of cooperation’. Therefore, the Competition and Consumer Committee considers that the ACCC will necessarily have a different approach to this prohibition, and greater explanation is necessarily required. In particular, the Competition and Consumer Committee suggests that the Guidelines:

- state that the ACCC approach such unilateral or one-off conduct as an attempt to engage in, rather than an actual, concerted practice, as described in section 3 below;
- further explain when a person will likely not be a party to a concerted practice in section 2; and
- say whether each example with a concerted practice (Examples 2-5) is a concerted practice of a Limb 1 type, of a Limb 2 type, or of both types. In particular, the Competition and Consumer Committee suggests including an example where only Limb 2 might apply.

Paragraph 3.4 states that:

*Nor is it necessary for a person to alter their behaviour in response to a communication in order to demonstrate that they are engaging in a concerted practice.*

The Competition and Consumer Committee considers that it would be helpful if the Guidelines provide clarification on this statement, as it may be challenging to apply in practice. For example, it could be difficult to distinguish between ‘a person’s independent

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<sup>10</sup> Explanatory Memorandum, 3.19.

response to market conditions' (3.5) and a person who, in response to a communication, determines not to alter their behaviour. Ideally the Guidelines would set out the factors that the ACCC will look for in demonstrating that a failure to alter behaviour indicates a concerted practice.

Paragraph 3.5 notes that:

*Parallel behaviour by competitors in a market, such as where their prices are similar or they make similar offers, is not by itself evidence that those competitors are engaged in a concerted practice.*

Although paragraph 3.5 states that mere parallel behaviour alone is not evidence of a concerted practice, it would be helpful if the Guidelines expand on what is meant by 'parallel behaviour'. The Competition and Consumer Committee notes that the Guidelines' example 1 is intended to be an illustration of parallel behaviour.

Further, as mentioned above, it would be helpful if Guidelines identified what forms of co-operative behaviour which do not involve communication might constitute a concerted practice.

#### *Nature of Communication*

Paragraph 3.8 of the Guidelines provides:

*... depending on the circumstances, a concerted practice may arise from a single instance of information being provided by one person to one or more other persons.*

As noted above, the proposition that a single unilateral instance of information being disclosed may be a concerted practice sits somewhat uncomfortably with other aspects of the Guidelines. It would seem more plausible that an isolated unilateral information disclosure might constitute an *attempt* to engage in a concerted practice, rather than a concerted practice itself. Therefore, the Competition and Consumer Committee suggests that the Guidelines emphasise the *risk* of such conduct constituting an attempt to engage in a concerted practice.

However, if it is the ACCC's intention that a unilateral disclosure of information not acted on could constitute a concerted practice it should very clearly set out examples of the circumstances in which this might occur and what the liability is for the 'innocent' party.

The Competition and Consumer Committee also suggests that the Guidelines set out the ACCC's approach to the assessment of conduct as an attempt to engage in a concerted practice, including, in particular, the requirement of intention for an attempt.

#### Purpose, Effect or Likely Effect of Substantially Lessening Competition (Section 4)

Section 4 of the Guidelines summarises the existing law about how relationships between businesses can undermine the competitive process by having the purpose, effect or likely effect of substantially lessening competition.

#### *Substantially lessening competition*

Paragraph 4.23 states that:

*‘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’.*

The paragraph’s footnote refers to s 4G of the CCA. However, only the phrase ‘preventing or hindering competition’ is a quote from that section. The rest of the sentence, with its focus on diminishing fields of rivalry, could imply that simply reducing the number of competitors could lessen competition even if that reduction does no harm to consumer outcomes. The Competition and Consumer Committee considers it more important to focus on the competitive process’ effects on consumers, rather than on individual competitor welfare. Therefore it suggests:

- deleting paragraph 4.23; and
- defining ‘purpose, effect or likely effect’ and ‘substantially lessening competition’ together, rather than separately as the Guidelines do.<sup>11</sup> The Competition and Consumer Committee considers that doing so can ensure the focus is on the effect on consumers of substantially lessening competition.

#### Anti-Competitive Concerted Practices (Section 5)

Section 5 of the Guidelines aims to provide and analyse examples of behaviour where anti-competitive concerted practices may arise.

Paragraph 5.3 notes that:

*For example, the ACCC will be likely to conclude that a concerted practice has the purpose of harming competition where competitively sensitive information, such as a corporation’s planned future pricing or output or capacity, is exchanged between competitors in circumstances where:*

- a. the information is given with the expectation or intention that the recipient will act on the information when determining its conduct in the market; and*
- b. the recipient acts or intends to act on the sensitive information, or **fails to positively reject the information.** (emphasis added)*

The Explanatory Memorandum also suggests that ‘expressly rejecting [an information provider’s] approaches and requesting that [they] not communicate any further information of this nature’ will ensure an information recipient does not breach the new prohibition.<sup>12</sup> As mentioned above, these statements appear to adopt a similar presumption of concerted practice to the European Commission, as described in the EU Guidelines:

*“When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.”<sup>13</sup>*

The Competition and Consumer Committee considers that Australian courts will not necessarily apply such presumptions, particularly in light of the ordinary meaning of

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<sup>11</sup> Guidelines, 4.13-4.18 and 4.19-4.23.

<sup>12</sup> Explanatory Memorandum, Example 3.3.

<sup>13</sup> EU Guidelines, [62].

'practice' conveying habitual or repeated activity. If the new prohibition will use neither this ordinary meaning of 'practice', nor the historic meaning of 'concerted' in Australian competition law relating to secondary boycotts,<sup>14</sup> the Competition and Consumer Committee suggests that the Guidelines explain in greater detail:

- why the ACCC considers that the party receiving sensitive information must positively reject that information and what does "positively reject" entail. This explanation would be particularly useful for more complex situations where the information recipient has already independently decided on the course of conduct that the information provider is hoping to achieve; and
- whether the ACCC would consider a company to be party to a concerted practice if:
  - the information recipient works in the company, but has no role in the area of the company where that information could be used; and
  - that information is not disclosed to any other person, including within the company.

#### ACCC Investigation and Enforcement (Section 8)

Section 8 of the Guidelines describes the issues that may impact the likelihood of the ACCC taking enforcement action.

##### *Economic evidence beyond independent behaviour*

Paragraph 8.7 provides that:

*Without additional evidence of communication between competitors or economic evidence suggesting that parallel behaviour arises from a concerted practice, the ACCC is unlikely to investigate allegations of parallel behaviour.*

Assisting businesses to distinguish between lawful parallel conduct and an unlawful concerted practice should be a key object of the Guidelines. Accordingly, it would be helpful if the Guidelines described in detail the types of economic evidence which would suggest that parallel behaviour arises from a concerted practice.

##### *Information recipient's response to the receipt of information*

Paragraph 8.9 sets out that:

*Where a person unexpectedly receives sensitive information from a competitor, that person should take immediate steps to make it clear that they do not wish to receive or act upon the information to ensure they do not contravene the CCA.*

Although an unwitting recipient of sensitive information may seek to reject the information, the Competition and Consumer Committee is concerned about the Guidelines advising persons to signal in reply to one of their competitors that they will not do certain things.

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<sup>14</sup> CCA, s 45D.



## Examples in the Guidelines

As mentioned in the Competition and Consumer Committee's November 2016 submission on the ACCC Framework for these Guidelines, the Guidelines' examples are very useful. However, the Competition and Consumer Committee considers that the examples would benefit from more detailed analysis that:

- identifies the conduct that constitutes the concerted practice in each example;
- explains why the relevant concerted practice has the purpose or effect of substantially lessening competition in each scenario; and
- refers to actual business practices that the ACCC would likely regard as a concerted practice, and which may be anti-competitive. By comparison, the EU and UK Guidelines cite numerous cases with actual concerted practices. Although clearly the Guidelines cannot yet cite case law, referring to actual business practices that may pose problems under the new concerted practices law would be similarly useful.

Finally, the Competition and Consumer Committee considers that the Guidelines should have examples and analyses that address each of the following scenarios:

- **Unilateral conduct example:** in line with the comments in sections 1-3 and 5, the Guidelines could include an example where there is a single, unilateral instance of information being disclosed, and the recipient does not act on that disclosure. The example could illustrate, as the Competition and Consumer Committee suggests, that the ACCC approaches such conduct as an *attempt* to engage in, rather than an *actual*, concerted practice.
- **Purpose and effect examples:** the Competition and Consumer Committee considers that the Guidelines should analyse what the ACCC considers is the requisite purpose or effect in each example. For example, the purpose-related examples should state whose purpose matters, and why it matters. As mentioned above, it would also be helpful to include a pure effects-related example.
- **Conduct that the ACCC would likely regard as legitimate:** As noted in the Competition and Consumer Committee's November 2016 submission, the Guidelines would benefit from further explanation of what business conduct the ACCC would likely regard as legitimate. The EU Guidelines have approximately 22 examples of behaviour that is unlikely to breach concerted practices law.<sup>15</sup> The UK Guidelines also have examples of conduct that is unlikely to breach concerted practices law.<sup>16</sup>
- **Information in the public domain:** The Competition and Consumer Committee considers that it would be beneficial to have an example that explains the ACCC's approach to information that is placed in the public domain, such as when competitors advertise their prices online.

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<sup>15</sup> EU Guidelines examples in: [102], [110], [147], [149], [187], [190], [221], [223], [224], [252], [253], [254], [256], [326], [327], [328], [329], [330], [331], [333], [334], [335].

<sup>16</sup> UK Guidelines examples in: 3.18, 3.21; and Office of Fair Trading, *Trade Associations, Professions and Self-regulating Bodies* [2004] OFT408, examples in: 3.5, 3.10, 3.11, 3.16, 4.7, 4.8.

- **Vertical relationships:** The Competition and Consumer Committee suggests that the Guidelines provide examples on if/when the ACCC considers that concerted practices involving vertical relationships would likely be anti-competitive. This guidance would be particularly useful to clarify that situations involving the supply of pricing information in the ordinary course of business with the supplier would not be expected to amount to a concerted practice.
- **Joint venture and collective activities:** The Competition and Consumer Committee suggests that the Guidelines address both whether conduct involving participants in a joint venture, and whether communications required for collective activities, are likely to be concerted practices. Examples could include:
  - an information exchange that does not result in an understanding; and
  - a disclosure among joint venture participants about an LNG plant's operation being curtailed for maintenance, with potential consequences for supply, demand and pricing.

The EU Guidelines have approximately 7 examples on joint venture-related conduct.<sup>17</sup>

## **Part B - SME Committee**

The SME Committee only wishes to make some general comments about the Guidelines.

From the SME Committee's view, there is an important difference between the small business community's expectations about the changes to section 46 (Misuse of Market Power), and the introduction of concerted practices provisions. It is clear that small business has been a strong advocate for the changes to section 46 and the introduction of an effects test. There is a great deal of expectation amongst small business that the new section 46 will be effective in preventing all manner of misuses of market power by large businesses. It remains to be seen whether the hopes and expectations of small business about the utility of the new section are realistic.

The small business community, however, has been much less focused on the introduction of the new concerted practices provisions. Most small businesses see these new laws as directed to large business, such as financial institutions, airlines and manufacturers.

The SME Committee also believes that small businesses are more likely to see themselves as potential victims of illegal concerted practices rather than the target of an ACCC investigation.

The SME Committee thinks that the perceptions of small business about the application of the concerted practices laws are likely to be correct. Given the new laws will focus on concerted practices which have the purpose or effect or likely effect or substantially lessening competition, it is likely that most ACCC targets will be larger companies with a significant share of the relevant market.

However, the SME Committee can envisage situations where small businesses may become the subject of an ACCC investigation into alleged concerted practices. This may

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<sup>17</sup> EU Guidelines examples in: [147], [149] [187], [188], [189], [191], [255].

arise where the relevant market is defined as a local market, such as, for example, a local grocery or a local petrol retailing market.

Accordingly, the Committee's main concern with the proposed Guidelines is whether they will be accessible to small businesses and their legal advisors given their complexity, use of technical language and numerous case laws references.

Having said that, the Deputy Chair of the SME Committee, Michael Terceiro, attended the Sydney focus group where the ACCC representatives advised that the ACCC is proposing to have two separate Guidelines – one for larger more sophisticated businesses and a second version aimed specifically at small businesses.

The SME Committee believes that this a sensible approach for the ACCC to adopt in relation to the Guidelines. The SME Committee also believes that the proposed small business guidelines should make it very clear that any small business which finds itself the subject of an ACCC concerted practices investigation should take steps to immediately obtains specialist advice from a lawyer with proven expertise in competition law matters.

### **Contacts**

Should you require further information or clarification, please contact:

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Yours sincerely



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