

1 December 2017

Mr Marcus Bezzi
Executive General Manager
Specialised Enforcement and Advocacy
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Email: marcus.bezzi@accc.gov.au

Dear Mr Bezzi

Interim Guidelines on misuse of market power

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 misuse of market power (**Interim 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 and Part B includes the submission of the Small and Medium Enterprise Business Law Committee (**SME Committee**).

Although the Committees discuss distinct issues or are largely in agreement, there is one key difference of note:

- **References to 'misuse' of market power:** the Competition and Consumer Committee suggests that the Interim Guidelines be better titled 'Interim Guidelines on Anticompetitive Conduct by firms with Substantial Market Power', as there is no requirement in the provision that substantial market power held by a corporation be 'misused'. However, the SME Committee supports the current wording as it is the wording used in the *Competition and Consumer Act 2010 (CCA)*, is well known within the large, medium and small business communities and captures the view that there are unlawful and lawful uses of market power.

Part A - Competition and Consumer Committee

The Competition and Consumer Committee welcomes the opportunity to comment on the Interim Guidelines. The Interim Guidelines provide some useful insights into the interpretation of a fundamentally new provision in relation to unilateral conduct in Australia.

The Competition and Consumer Committee appreciates the ACCC's objective to ensure that the Interim Guidelines are sufficiently brief and pithy, that they are a useful tool for businesses – including small businesses. However, the Competition and Consumer

Committee invites the ACCC to consider expanding on the current draft of the Interim Guidelines – principally so as to provide greater guidance for the primary audience of the Interim Guidelines, being firms which may have substantial market power, and their advisers.

This is particularly the case in the context where the ACCC has been invited by Parliament some time ago to publish guidelines ‘which will **detail** its approach to the interpretation and enforcement of section 46 as amended’ (emphasis added)¹, and the new provision is now in force (from 6 November 2017).

The Interim Guidelines follow on from, and take up some of the text set out in, the ACCC’s ‘Framework for misuse of market power guidelines’ (**Framework document**), published in September 2016.

Having reviewed the Interim Guidelines carefully, the Competition and Consumer Committee draws out the following observations and suggestions:

1. Interpretation and enforcement

- (a) Picking up on the text in the Revised EM referred to above, the ACCC might usefully consider whether the Interim Guidelines should address (separately) each of the topics of:
 - (i) its ‘interpretation’ of the new provision, and following from that, how the provision might apply to factual contexts such as those in the examples given; and
 - (ii) its likely ‘enforcement’ of the new provision – what policies and approaches will the ACCC take to investigating corporate conduct etc.

2. References to ‘misuse of market power’

- (a) The title of the Interim Guidelines is misleading (as is the heading of the new section in the legislation), as there is no requirement in the provision that substantial market power held by a corporation be ‘misused’, or indeed bear any relationship to the corporation’s impugned conduct. The narrative of the Guidelines also contains many references to ‘misuse of market power’.
- (b) The Competition and Consumer Committee suggests that the Interim Guidelines be entitled ‘Interim Guidelines on Anticompetitive Conduct by firms with Substantial Market Power’. Further, the references to a ‘misuse of market power’ in the body of the guidelines might be amended to ‘a contravention of section 46’.

3. How have things changed?

- (a) The carried-over references to ‘misuse of market power’ also point to a more fundamental issue. In the opening sentence of the Interim Guidelines, the ACCC states that ‘section 46 ... has been significantly altered.’ Having said so, the Interim Guidelines then do not address squarely quite how, practically, the

¹ Revised Explanatory Memorandum, paragraph 3.49, *Competition and Consumer (Misuse of Market Power) Bill 2017 (Revised EM)*.

provision and its impact on commercial conduct has changed, as the prohibition has moved from one form to another.

- (b) As the Competition and Consumer Committee understands the position, the Australian business community is nervous, and holds a very wide range of views, about this 'significant alteration'. It may assist greatly if the ACCC were to address very clearly how the ACCC believes the prohibition may have changed, in its application to common business practices and in relation to common concerns of large and small business operators. Particularly, the ACCC might address:
 - (i) how conduct that was previously not prohibited may now be prohibited; and
 - (ii) vice versa.

4. Reference to Merger Guidelines

- (a) The Interim Guidelines very briefly summarise the current law in relation to market definition, substantial market power and conduct which may substantially lessen competition. A more detailed and helpful exposition on those issues would assist many readers, but would come at the cost of a much longer document.
- (b) The Competition and Consumer Committee suggests that the Interim Guidelines should explicitly cross-reference to, and only where necessary expand upon, the ACCC's long-standing and helpful ACCC Merger Guidelines on these topics (as was the case in the Framework document). This would retain the brevity of the current document, but provide readers with more detailed notes – and a sense of coherence – in relation to the ACCC's approach to common factors such as market definition and assessing conduct which may substantially lessen competition.
- (c) Of course, in making this suggestion, the Competition and Consumer Committee may be said to have presumed that the ACCC's approach to the 'substantial lessening of competition' test will be the same across both s46 and s50 (at least as to effect/likely effect). If this presumption is not correct, then it will be vitally important for the ACCC to draw out very clearly, for all readers, quite how it considers that these provisions operate differently (notwithstanding their common terms) and how they will be administered by the ACCC.

5. Substantial market power

- (a) The guidance on this critical element of the prohibition is confined to less than a page in the Interim Guidelines. This may be perceived as inadequate, as 'detailed' guidance.
- (b) While the Interim Guidelines acknowledge that two or more firms may have substantial market power in a market,² they do not address whether other established indicia of substantial market power, or its absence, will be applied by the ACCC. Particularly:

² Paragraph 2.16 and ss46(7).

- (i) It should be made clear that barriers to entry are a 'primary consideration'³ (or a necessary but not sufficient condition⁴) in assessing substantial market power.
- (ii) The ACCC's administrative approach to assessments of market power and concentration, is evident from its Merger Guidelines, and might usefully be referred to again in the Interim Guidelines. For example, the Merger Guidelines make it clear that a (merged) firm may be unlikely to have substantial market power where:
 - its market share is less than 20%;⁵ or
 - the relevant market has an Herfindahl-Hirschman index of less than 2,000.⁶
- (iii) Example 10 in the Interim Guidelines suggests that a firm with only 25% market power (even in the context of there being a small number of similarly sized rivals) will not have substantial market power. This insight into the ACCC's view, or working administrative approach, might be usefully made clearer.
- (iv) Further to the points above, the ACCC might usefully confirm that a large market share is not necessarily determinative of substantial market power.
- (v) The ACCC might usefully confirm, from the current authorities⁷, that financial strength, without more, is not substantial market power.
- (vi) The ACCC might usefully point out that low profitability of a firm or an industry is not determinative of an absence of market power.⁸
- (vii) The factors set out in subsections 46(4) and (5) might usefully be drawn out in the Interim Guidelines.

6. Purpose

- (a) The Interim Guidelines include a very short paragraph on how the required 'purpose', to 'substantially lessen competition', may be 'established by direct evidence or by inference'.⁹ In the Competition and Consumer Committee's view, a more detailed explanation of the circumstances in which such a purpose may properly be inferred or otherwise established, is required. Particularly:
 - (i) Previously, under the old provision, an impugned purpose was likely to be more confined,¹⁰ and inferences as to purpose were balanced and constrained by the requirement that the conduct 'take advantage' of substantial market power. Explaining clearly how analysis of these issues

³ *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43, at 63.

⁴ *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

⁵ Notification threshold – see commentary at paragraphs 2.1 to 2.9 of the ACCC Merger Guidelines.

⁶ See commentary on concentration at paragraphs 7.6 to 7.16 of the ACCC Merger Guidelines.

⁷ *Boral Masonry Ltd v ACCC* (2003) 215 CLR 374

⁸ *Seven Network Ltd v News Ltd* [2009] FCAFC 166

⁹ Paragraph 2.18.

¹⁰ That is, under the previous provision, the 'purpose' of the contravening firm might be as limited as intending to damage a rival – see the old s46(1)(a).

has changed with the introduction of the new provision, is consistent with the suggestions already made above.

- (ii) There is a reference in the Revised EM¹¹ to some forms of conduct being 'inherently anti-competitive', so as to 'allow a determination that the only plausible purpose for such conduct is to substantially lessen competition'. This possibility should be clearly addressed by the ACCC, in the Competition and Consumer Committee's view. If the ACCC were to adopt such an analytical approach, it will open the way for some forms of conduct to take on a quasi 'per se' illegal nature.

7. 'Use' of substantial market power

- (a) As noted above, the new form of section 46 does not include a requirement that a firm have 'used' (or 'taken advantage') of its substantial market power in order to have contravened.
- (b) The ACCC has stated at paragraph 2.17 of the Interim Guidelines that:

Even with a substantial degree of market power, a firm will only contravene s46 if its conduct has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

- (c) This invites the possibility that the ACCC may investigate and prosecute conduct by a firm with substantial market power in one market, in relation to conduct which has occurred in other, quite remote market(s), in which it and other market participants do not have substantial market power. It would be useful guidance, for both businesses and legal practitioners advising them, for the ACCC to explain its approach in this regard. Particularly, it would be useful for the ACCC to explain its approach to:
 - (i) how it will assess the conduct of a firm in one market, where it (or a related body corporate) has substantial market power in a remote market;
 - (ii) instances where a firm with substantial market power is exercising a statutory power, in that or any other market;¹² or
 - (iii) instances where a firm with substantial market power is exercising a legal or proprietary right, in that or any other market.¹³

8. Legitimate commercial rationale

- (a) Previously, the ACCC's Framework document made several references to a firm's 'legitimate business/commercial reason' for its conduct. At page 7 of the Framework document, the ACCC stated (relevantly) that:

In its assessment of the conduct under the proposed s46, the ACCC will ... take into account ... factors the courts have recognised as relevant to the

¹¹ Paragraph 1.36.

¹² Such as in the context of the *Stirling Harbour Services v Port of Bunbury* case, [2000] FCA 38.

¹³ Such as a power to grant an exclusive licence (*Plume v Federal Airports Corp* [1997] ATPR 41-589) or the termination of a franchise licence or lease.

substantially lessening of (sic) competition test. This would include whether there are legitimate business reasons for engaging in the conduct.

- (b) Among other references, the Framework document's notes on 'refusal to deal' also referred expressly to a refusal made 'without any legitimate commercial reason'.¹⁴
- (c) The Interim Guidelines do not include the notes found in the Framework document. The Interim Guidelines now state that the ACCC will assess the 'commercial rationale' of a firm when it considers whether the firm's conduct has the purpose, effect or likely effect of substantially lessening competition.¹⁵
- (d) There is however, implicit reference to a 'legitimate business reason' in the Interim Guidelines: Example 4 states that 'the firm plans to leave the sites idle for the foreseeable future', drawing out the firm's 'business/commercial reason' and its 'legitimacy' (or absence of it) as a relevant factor in the ACCC's analysis.
- (e) Quite how, and to what end, the ACCC proposes to assess a firm's 'commercial rationale' - both generally and as distinct from a firm's 'legitimate business reasons' - in the context of section 46 should be clearly explained. Particularly:
 - (i) Is it to be assessed only in relation to a firm's 'purpose'?
 - (ii) Does it have wider relevance in assessing the competitiveness of the relevant market, and the prospect of any anticompetitive effect?¹⁶
 - (iii) Will a 'legitimate business reason' to refuse to deal, say (such as poor creditworthiness of a customer, or to preserve efficient distribution arrangements) counter a potential anticompetitive effect of that refusal?
- (f) These issues are critical in educating businesses and their advisers as to how the new s46 will be administered by the ACCC, and the Competition and Consumer Committee urges the ACCC to explain its approach to them clearly.

9. Competition

- (a) The Interim Guidelines and the Examples given focus heavily on the impact of conduct on current and prospective *competitors*. This may be a consequence of the focus in the new provision (in paragraphs (a) to (c) of ss46(1)) on conduct in a market in which the firm, or a related body corporate, operates.
- (b) However, the Interim Guidelines may be significantly enhanced by:
 - (i) Reintroducing and emphasising the paragraph on 'Competition' from the Framework document (on page 7) that:

Competition refers to a process, rather than a situation, and is expressed in the form of rivalrous behaviour. Importantly, it is a

¹⁴ See page 8 of the Framework document.

¹⁵ See paragraphs 2.21 and 2.27.

¹⁶ For example, it is possible that an analysis of whether a firm has a 'legitimate business rationale' remains relevant to whether its conduct is 'consistent with it being in a very competitive market' (per *Boral Masonry*) – just as was the case under the old form of s46.

means of protecting the interests of consumers, rather than individual competitors...

- (ii) In paragraph 2.26 of the Interim Guidelines, deleting the reference to a 'field' of rivalry, and substituting it with 'process'¹⁷ – so that the sentence reads:

Lessening competition means that the process of rivalry is diminished or lessened, or the competitive process is compromised or impacted.

This will avoid the inference being drawn that a 'field' of rivalry – in the sense of a static framework constituted by existing rival firms – is the relevant analytical framework.

10. Efficiencies and innovation – how are they to be considered?

- (a) The Interim Guidelines state that the ACCC considers:

*Conduct that enhances **efficiency, innovation and product quality** or price competitiveness is unlikely to substantially lessen competition.*¹⁸
(emphasis added)

- (b) Further, the ACCC states that both 'innovation' and 'efficient conduct designed to drive down costs' ... 'would not generally raise concerns'.¹⁹ However, the Interim Guidelines do not explain how these factors will be assessed by the ACCC. These are potentially very complex and critical issues: businesses will be greatly assisted by practical guidance on how the ACCC will assess conduct which has the likely effect of substantially lessening competition, on the one hand, and the (countervailing) efficiencies which might arise from that conduct, on the other.

- (c) The Competition and Consumer Committee urges the ACCC to explain:

- (i) How the ACCC will analyse potential efficiencies in this context? Will the ACCC have regard to all types of efficiencies (dynamic and static (allocative and productive))?
- (ii) How such efficiencies to be 'weighed' against conduct which might otherwise ostensibly have the purpose or likely effect of substantially lessening competition?²⁰
- (iii) What procedural approaches the ACCC will take in this context? Will firms claiming efficiencies have the burden of proof, and if so, when would this

¹⁷ This is consistent with the key concept that 'competition is a dynamic process', per QCMA (1995) 132 ALR 225.

¹⁸ See paragraph 4.2.

¹⁹ See paragraph 4.3.

²⁰ The Competition and Consumer Committee notes that in a mergers/acquisitions context, the ACCC has long contended that efficiencies from the transaction may not be relevant to whether the transaction has the effect, or likely effect, of substantially lessening competition, and pointed to the mergers authorisation process in that regard – see paragraphs 7.63 and 7.66 of the ACCC Merger Guidelines. Does the ACCC propose that a similar approach be taken in relation to s46? This seems unlikely, given the current text of the Interim Guidelines, but this is not explained clearly.

burden need to be discharged for the ACCC to be in a position to include efficiencies in its competition analysis?

11. Price-based conduct

- (a) The Competition and Consumer Committee encourages the ACCC to provide more detailed and coherent guidance on the approach it will take in assessing price-based conduct, such as predatory pricing, product bundling and tying, the provision of loyalty rebates and margin squeezes.
- (b) Particularly, it would be helpful to many businesses to understand whether the ACCC's concerns in relation to price-based conduct are focused on the exclusion of equally-efficient competitors. Further, will the principles and application of the ACCC's cost/price analyses fundamentally differ across the contexts of predatory pricing, loyalty rebates and margin squeezes?

12. Refusal to deal/essential input

- (a) The notes on these concepts include several new elements. Particularly:
 - (i) The reference to 'an excessively high price' at paragraph 3.4(b) introduces an 'excessive pricing' concept to the s46 jurisprudence for the first time (as compared to the concept of a 'constructive refusal' in previous analysis). The Competition and Consumer Committee suggests that the ACCC reconsider, or explain much more clearly, what is intended by the reference to 'excessive pricing'.
 - (ii) The reference to an 'essential input' is new – defined as 'a 'non-substitutable resource which is indispensable for the provision of goods and services'. This should be explained more fully.

13. Predatory pricing

- (a) The notes in the Interim Guidelines on 'predatory pricing' define it as occurring 'when a firm substantially reduces its prices below its own cost of supply for a sustained period with the aim of causing competitors to exit the market, disciplining or damaging competitors for competing aggressively, or discouraging potential competitors from entering the market' – see paragraph 3.8.
- (b) These notes raise several unanswered, important questions:
 - (i) What measure of 'cost of supply'? The ACCC has commonly referred to avoidable or variable costs in various contexts, but makes no reference to these concepts in these notes. The Competition and Consumer Committee encourages the ACCC to be clearer in relation to this issue, at least as to its approach to enforcement.
 - (ii) What is meant by the reference to the firm's 'aim'? Is this referring to a 'purpose' of substantially lessening competition? Or is it alluding to the 'commercial rationale' of the firm, as a distinct element?
- (c) Further, at paragraph 3.9, the Interim Guidelines state that, upon competitors exiting, or rivals not entering, 'the firm may be in a position to charge higher

prices and maintain or increase its market share in the longer term'. These words clearly invoke a recoupment analysis.

- (d) An analysis of whether a powerful firm might ever 'recoup' its losses from very low pricing is an element of the US jurisprudence in this field which provides great practical assistance in the assessment of low pricing conduct by powerful firms.
- (e) In this context, and particularly in light of subsection 46(1AAA)²¹ having been repealed, the Competition and Consumer Committee invites the ACCC to be explicit in relation to the relevance and application of a recoupment analysis, by the ACCC, in this context.

14. Loyalty Rebates

- (a) The Competition and Consumer Committee invites the ACCC to reconsider, and to be more explicit about, its analysis in relation to loyalty rebates. In many instances, as is acknowledged, such rebates are clearly procompetitive.
- (b) Particularly, the Competition and Consumer Committee invites the ACCC to reconsider the text in paragraph 3.12. In the Competition and Consumer Committee's view, it is not necessarily the case that a contravention will occur 'where a firm offers its customers long-term supply terms with volume rebates which are conditional on the customer purchasing a very large quantity of its requirements from the firm' – especially where the firm does not have substantial market power in the product market(s) concerned.
- (c) Further to the points made about cost/price analyses above, it would be useful to include in Example 6 clear workings (including as to movements in per unit costs and profit margins, etc) as to how a large loyalty rebate, which is applicable beyond the marginal sales made with the benefit of the rebate, by a powerful firm, may contravene section 46.

15. Examples

- (a) More generally, the Competition and Consumer Committee encourages the ACCC to improve further the plausibility and the analysis of the various examples set out in the Interim Guidelines. For example:
 - (i) Example 3 refers to the supply of 'cement' in a 'regional town', and suggests a local geographic market. However, the ACCC is quite familiar with the Eastern Australian geographic scope of cement markets, and the potential for both locally produced cement and imported product (cement or clinker to be ground locally) to be distributed widely.²² The factual implausibility of the example greatly reduces its utility in explaining the ACCC's approach to businesses – particularly those involved in construction materials markets.

²¹ Subsection 46(1AAA) previously provided that:

'(1AAA) If a corporation supplied goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection (1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.'

²² See for eg *ACCC v Cement Australia* [2014] FCA 148

- (ii) Example 4 is clearly a case for the application of s50, in relation to anticompetitive acquisitions, well ahead of a s46 investigation/prosecution. This should be clearly explained.
- (iii) Example 5 might usefully be reviewed against the ACCC's recently published Media Merger Guidelines and several decisions taken by the ACCC in the last year or so.²³ The proposition that a firm has substantial market power in a local 'newspaper market' may not be plausible.
- (iv) Example 7 is implausible in proposing that a resources company (Firm X engaged in mining rare earth minerals) would commence operations as a 'downstream' technology company in the manufacture of touchscreens. Absent this unlikely proposition, there would be no possibility of a contravention.
- (v) The ACCC might usefully also consider including an example of a firm with substantial market power refusing to provide (an 'essential input') to a downstream rival in light of poor creditworthiness of that rival. Explaining the analytical process and approach of the ACCC in this context may be very useful to many readers.

16. Paragraphs 46(1)(a) to (c)

- (a) All of Examples 3 to 8 in the Interim Guidelines involve conduct which is aimed at, or has a foreclosing impact on direct competitors. It would be useful for many readers, for the ACCC to draw out whether, in light of paragraphs 46(1)(a) to (c), there will be any contexts in which a contravention may occur in relation to an anticompetitive impact on an upstream or downstream firm, with which the powerful firm does not compete directly.
- (b) We suggest also that the ACCC might usefully provide guidance on the practical implications of the term 'indirectly through one or more other persons' in each of paragraphs 46(1)(b)(ii) and (c)(ii). For example, does the ACCC consider that this extends to supply, or acquisition, via a chain of intermediaries, each of which has taken title to the goods involved, or is it likely to be confined to the context of an agent, or similar, through which the powerful firm might be 'supplying' or 'acquiring' goods or services?

17. Authorisation etc

- (a) The amendments to the principal Act set out in Schedule 9 of the *Competition and Consumer (Misuse of Market Power) Act 2017*, include the insertion of sections 95AA and following, dealing with the determination by the ACCC of 'class exemptions' in relation to conduct which might otherwise contravene a provision in Part IV of the principal Act.
- (b) The Competition and Consumer Committee suggests that the ACCC might usefully consider how it could apply these new provisions in managing

²³ See Media Merger Guidelines, ACCC, November 2017, especially at paragraph 17. See also the ACCC's decisions in *News/APN*, media release on 8 December 2016, and *Seven West Media/Sunday Times*, media release on 15 September 2016.

uncertainty across the Australian economy around its interpretation and enforcement of the new form of s46.

Part B – SME Committee

Thank you for the opportunity for the Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) to provide this submission in response to release by the Australian Competition and Consumer Commission's (**ACCC**) Interim Guidelines on misuse of market power and concerted practices.

Thank you also for facilitating the focus group sessions in Sydney and Melbourne. The Deputy Chair of the SME Committee, Michael Terceiro, attended the Sydney focus group and found the discussion to be very helpful in better understanding the outcomes the ACCC is seeking to achieve through the Guidelines.

The SME Committee has always been very supportive of the proposed amendment of section 46 of **CCA** to replace the existing 'purpose' based test with an 'effect or likely effect' test. The SME Committee was of the view that the previous test did not operate to prevent the exercise of market power by firms with a substantial degree of market power.

The SME Committee believes that the Interim Guidelines are clearly and concisely expressed and well set out. The various examples used in the MMP Guidelines are also very helpful in understanding how the new laws are intended to operate.

In the Committee's view, it is vitally important for any guidelines to be accessible to both larger firms as well as small businesses. This can be achieved by either:

- ensuring that the language and terminology used in the Interim Guidelines is not overly technical or complex; or
- preparing two separate guidelines, one for larger businesses who may be the subject of an ACCC investigation, and another set of Guidelines for use by smaller businesses who may be the target or victim of an alleged unlawful exercise of market power.

The SME Committee would strongly counsel against any changes to the Guidelines which made the document more complex or lengthy than the existing draft document.

The SME Committee notes the concern expressed by some attendees at the Sydney focus group about using the words 'misuse of market power' in the title to the guidelines. The view was expressed that the use of the word 'misuse' was misleading and suggestive of an additional moral element in relation to the provision.

The SME Committee does not share these concerns.

First, the SME Committee notes that the words 'misuse of market power' appear as the title to the relevant provision in the legislation.

Second, the SME Committee believes that section 46 is well known within the large, medium and small business communities as the 'misuse of market power' provision.

Third, the use of the term 'misuse' also captures the view that there are unlawful and lawful uses of market power. For example, the use of market power to achieve monopoly rents is

not illegal in unregulated industries. Therefore, we think that the use of the term 'misuse' helpfully distinguishes lawful and unlawful exercises of market power.

There was also a query during the focus group as to whether the ACCC may decide to implement a transition period in terms of the enforcement of the new provision. The SME Committee's view is that there should not be any transition period. In the SME Committee's view, larger businesses have known of the proposed change to section 46 for a lengthy period of time. Accordingly, these businesses have had ample opportunity to review the proposed legislation and to review their existing and proposed business practices to ensure that they abide by the new law.

The SME Committee also believes that there is a great deal of expectation within the small business community about the new laws. In particular, many in the small business community believe that the introduction of an effects tests is well overdue. Accordingly, we believe that the small business community is likely to respond adversely to any proposal by the ACCC to implement a transition period.

Specific comments

The SME Committee also has the following specific comments about the Interim Guidelines:

1. The Committee notes that in the discussion of market definition the ACCC only refers to the product and geographic market dimensions and not to the functional market dimension. The Committee does not know whether this was a conscious decision or an oversight.
2. In paragraph 2.13 the ACCC makes the statement that '*substantial market power is an important threshold which needs to be met*'. The Committee believes that this statement may be misunderstood, to the extent that it suggests substantial market power is an 'important' rather than 'essential' threshold. In the Committee's view, substantial market power is an essential threshold which must be met for there to be a contravention of the provision. The Committee proposes the following amendment:

The first element which must be proven under section 46 is that the firm has a substantial degree of market power in a market. This element must be established before considering whether a firm has misused its market power.
3. The SME Committee found the second sentence of paragraph 2.27 to be quite vague and unhelpful and suggests that the paragraph should be removed or reworded.
4. The SME Committee was surprised that the ACCC has not used the word 'foreclosure' anywhere in the Interim Guidelines. The SME Committee thinks that the concept of foreclosure is a helpful way of understanding much of the conduct which will be the subject of the new provisions – that is, attempts by firms with a substantial degree of market power to foreclose their competitor's access to raw materials, customers, shelf-space, markets and so on.
5. The SME Committee believes that the ACCC's discussion of predatory pricing in paragraphs 3.7 to 3.10 needs to be expanded. The SME Committee believes from its experience that a significant area of complaint amongst small businesses under the new law will be that they are the target of predatory pricing activity by a larger competitor. Accordingly, it would be helpful for both small businesses and their legal advisers to have greater guidance from the ACCC on the challenges associated with establishing a predatory pricing case, including the relevant below cost tests which

will apply. The provision of more detail in this section would also make it somewhat easier for legal advisers to explain to their small business clients that predatory pricing was unlikely to be occurring in a particular situation.

6. The Committee does not agree with the view expressed in paragraph 3.17 that tying and bundling 'usually' does not harm competition. From the experience of the members of the SME Committee, the opposite is true – that is, most tying and bundling has the effect of lessening competition. The Committee suggests that a more accurate statement would be that '*most tying and bundling does not substantially lessen competition*'.
7. In the Committee's view, the first sentence of paragraph 6.2 should be amended. The way the paragraph is currently drafted suggests that damage to the competitive process and widespread consumer detriment are separate considerations rather than part of the same assessment process. In addition, the Committee considers that the word 'substantially' should be inserted so the sentence reads as follows:

*In deciding whether to take enforcement action, the ACCC focuses on the extent to which matters will, or have the potential to, **substantially** harm the competitive process **and result** in widespread consumer detriment.* (emphasis added)

8. It appears to the Committee that the ACCC may have referred to a previous version of its compliance and enforcement priorities rather than its current version, given that factors (b) and (i) are no longer part of the ACCC's priorities - namely:
 - (b) *conduct demonstrating a blatant disregard for the law*
 - (i) *where the person, business or industry has a history of previous contraventions of competition, consumer protection or fair-trading laws.*

Contacts

Should you require further information or clarification, please contact:

- Fiona Crosbie, Chair, Competition and Consumer Committee on (02) 9230 4383 or at Fiona.Crosbie@allens.com.au; or
- Coralie Kenny, Chair, SME Committee on 0409 919 082.

Yours sincerely



Teresa Dyson
Chair, Business Law Section