

ACCC RELEASES GUIDELINES ON MISUSE OF MARKET POWER, CONCERTED PRACTICES AND NON-MERGER AUTHORISATIONS

2018

The Australian Competition and Consumer Commission (**ACCC**) has published guidelines on how it plans to interpret and enforce the new concerted practices prohibition and the expanded misuse of market power prohibition which came into effect in November 2017 as part of the Harper reforms to the *Competition and Consumer Act 2010* (Cth) (**CCA**). These “final guidelines” replace the “interim guidelines” issued by the ACCC in October 2017, and have not materially changed from the interim guidelines.

Although the guidelines provide a useful insight into the ACCC’s approach to these new prohibitions, we do not know yet how the Court will apply the new tests and whether it will adopt the ACCC’s position.

The ACCC has also issued guidelines explaining the procedure for, and how it will assess, applications for authorisation of non-merger conduct that could otherwise breach the CCA.

In this Insight we look at the key aspects of the guidelines and provide practical compliance tips to avoid running afoul (even unintentionally) of the misuse of market power and concerted practices prohibitions.

MISUSE OF MARKET POWER GUIDELINES

The prohibition in the CCA against a corporation misusing its market power has been significantly broadened. Previously, it was necessary to show that a corporation with substantial market power had misused its market power for one of four prohibited purposes.

Instead, now a corporation with substantial market power can also breach the misuse of market power prohibition (section 46) if its conduct has the purpose, **effect, or likely effect of substantially lessening competition**.

The fact that intent is no longer a requirement for a misuse of market power creates significant uncertainty for businesses that could be considered to have substantial market power. The [Misuse of Market Power Guidelines \(MMP Guidelines\)](#) attempt to provide some guidance to businesses about how the ACCC will interpret the test.

The MMP Guidelines clarify the ACCC's position that:

- + Conduct may still have the effect or likely effect of substantially lessening competition even when the firm did not have the purpose of substantially lessening competition.
 - This means that firms with substantial market power will need to assess the likely effect of their proposed conduct on competition, even when there are legitimate and pro-competitive reasons for doing so.
- + Having a legitimate business reason for the conduct is not a defence.
 - The MMP Guidelines state that while a firm's commercial rationale may help the ACCC to understand the conduct and assess its purpose/effect on competition, it is not a defence.
- + The ACCC will take into account a number of factors when deciding whether to take enforcement action, such as:
 - the nature and extent of competitive constraints on the corporation;
 - the nature and extent of the conduct ;
 - likely market outcomes (including what would happen if the conduct did not occur); and
 - whether, and to what extent, competition is being impacted.



HIGHER RISK CONDUCT

The MMP Guidelines list certain types of conduct that the ACCC regards as having greater potential to be a misuse of market power by firms with a substantial degree of power in a market.

CONDUCT	EXAMPLE
Refusing to deal	<ul style="list-style-type: none"> + Refusing to supply a key input to a competitor in a downstream market; or + Stating a willingness to supply a key input to a competitor's in a downstream market, but only on terms at which no competitor would reasonably be willing to buy the input (e.g. an excessively high price); <p>AND the purpose, effect or likely effect is to substantially lessen competition (e.g. by preventing or hindering competitors from being able to compete in the downstream market).</p>
Restricting access to an essential input	<p>Preventing or restricting a competitor's access to an essential input (e.g. resources that are indispensable for the supply of goods or services);</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition.</p>
Predatory pricing	<p>A corporation substantially reducing prices below its own cost of supply for a sustained period;</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition (e.g. causes competitors to exit the market, damages competitors from competing aggressively, or discourages entrants into the market).</p>
Loyalty rebates	<p>Sales promotions, including rebates (especially if conditional on a retailer meeting certain targets);</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition.</p> <p>The MMP Guidelines note that rebates (especially unconditional rebates) usually do not harm competition, and in many cases are an example of the competitive process.</p>
Margin/price squeeze	<p>Charging downstream competitors an input price that makes it uncommercial for them to compete;</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition.</p>
Tying goods/services	<p>Only supplying goods/services on the condition that the customer buys another good/service from the supplier;</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition.</p> <p>The MMP Guidelines acknowledge that tying is a common commercial practice and usually does not harm competition.</p>
Bundling goods	<p>Offering at a lower price only where two products are purchased as a package;</p> <p>AND the purpose, effect or likely effect is to substantially lessen competition.</p> <p>The MMP Guidelines acknowledge that bundling is a common commercial practice and usually does not harm competition.</p>

ACCC EXAMPLE

REFUSAL TO DEAL – COULD AMOUNT TO A MISUSE OF MARKET POWER

Firm C owns the only cement works in a regional town. The next closest cement works is a considerable distance away and the cost of transport from the next closest town is significant. Firm C also owns all the ready-mix concrete plants servicing the regional town and it is not possible to transport ready-mix concrete from the next closest ready-mix plant. Cement is an essential input into ready-mix concrete.

A new entrant planned to set up a ready-mix concrete plant in the regional town. The new entrant has a strong track record of operating successful ready-mix concrete plants. The new entrant approached Firm C to acquire supplies of cement. Firm C refused. One of its reasons for doing so is to protect the employment of its workers. The new entrant therefore did not proceed with its plant.

Has Firm C engaged in conduct which could amount to a misuse of market power?

Firm C has a substantial degree of market power in the supply of cement in the regional town. It is the only supplier of cement in the town and the costs of transport from the nearest competitor would be too high.

While one of the firm's motivations is to save its employees, it is seeking to achieve this by preventing the rival firm from entering the market and creating competition. Firm C's sole purpose does not need to be to substantially lessen competition, it only needs to be a substantial purpose. Regardless, the new section 46 also prohibits conduct which has the effect or likely effect of substantially lessening competition. The effect of the firm's refusal to supply is to prevent the new entrant from entering the market for the supply of ready-mix concrete and competing with Firm C on the merits.

The ACCC is of the view that the conduct is likely to breach section 46.

ACCC EXAMPLE

MARGIN SQUEEZE – COULD AMOUNT TO A MISUSE OF MARKET POWER

Firm X holds 90% of the world's known deposits of a rare earth mineral (REM), which is a key input in the development of touchscreens. It is unknown whether any new REM sites or touchscreen technologies will be developed in the foreseeable future.

Firms A, B and C are the major producers of touchscreens for tech devices, accounting for 70% of the world's demand for REM. Firm X establishes a subsidiary to begin competing with Firms A, B and C in the manufacture and supply of touchscreens.

Firm X then substantially increases the price at which it sells REM. Even with access to the remaining sources of REM (which has also been subject to a price increase in response to Firm X's price increase), the other Firms still require access to Firm X's REM. Firm X then offers 2-year contracts to provide touchscreens to major tech producers at a price only just above what it will now cost Firms A, B and C to buy just the REM itself from Firm X.

Has Firm X engaged in conduct which could amount to a misuse of market power?

It is likely that Firm X has a substantial degree of market power for the supply of REM. It has 90% of the world's supply and new entry in the foreseeable future is unlikely.

Firm X offers touchscreens at a price above what it would cost its competitors to buy the REM required to produce each touchscreen. If Firm X had to pay the same price for REM as it charged Firms A, B and C, it would make a loss on each touchscreen sold when taking into account production and distribution costs. This conduct is likely to have the effect of substantially lessening competition in the supply of touchscreens.

The ACCC is of the view this conduct is likely to breach section 46.

CONDUCT UNLIKELY TO RAISE CONCERNS

The MMP Guidelines advise that the following conduct will not generally raise misuse of market power concerns (but it will depend on the circumstances):

- + innovation, regardless of how ‘big’ the firm is;
- + efficient conduct designed to lower costs;
- + responding to price competition with matching or more competitive (above cost) offers; and
- + responding efficiently to other forms of competition in the market such as product offerings and terms of supply.



RISK MITIGATION STRATEGIES FOR MISUSE OF MARKET POWER

Below are some practical suggestions for mitigating the risk of a misuse of market power breach.

ACCC EXAMPLE

REWARDING BEHAVIOUR – NOT LIKELY TO AMOUNT TO A MISUSE OF MARKET POWER

Firm A identified a new way of treating timber to prevent termite infestation (Tproof Timber), which became very popular for residential construction in rural areas. The R&D phase was very expensive, however the new treatment is inexpensive to apply. Firm A charges a very substantial premium on the product, almost double the price of other treated timbers.

Has Firm A engaged in conduct which could amount to a misuse of market power?

Assuming Firm A has a substantial degree of market power, the ACCC is of the view that the conduct would not breach section 46.

While Firm A is making a considerable margin, its ability to charge higher prices is Firm A’s reward for innovation. Rather than deterring competition on the merits, Firm A’s higher profits should incentivise other timber producers to develop better termite resistant timber products and directly compete with Firm A.

MISUSE OF MARKET POWER: RISK MITIGATION TIPS

When considering loyalty schemes, bundling, tying, long term exclusive contracts, refusing to supply or very deep discounts, assess the rationale (there may be several), and what its effect on competition is likely to be.

If it could lead to significant decline in competition or its purpose is to reduce competition, it needs to be considered more closely.

Establish guidelines about when to escalate (e.g. to legal or senior management) decisions about pricing, bundled discounts, tying, and customer loyalty schemes.

Use factual language in internal communications – avoid vague statements from which adverse conclusions could be drawn.

Price competitively, but establish processes to ensure decisions about very low pricing (e.g. below cost) undergo appropriate due diligence (e.g. testing for purpose and effect).

Only offer volume rebates or discounts where the discount reflects the reduced cost of selling both products to a single customer.

Don’t take actions with the purpose or the likely effect of causing competitors to exit the market.

Don’t engage in conduct that may be perceived as having the purpose of damaging or disciplining competitors.

Don’t buy up scarce inputs or lock-in crucial suppliers with long-term contracts in order to stop new competitors entering the market or to damage current competitors.

CONCERTED PRACTICES GUIDELINES

The Harper reforms in November 2017 introduced a prohibition against concerted practices. A corporation must not engage in a concerted practice with another person if it has the purpose, effect or likely effect of substantially lessening competition.

This is a completely new prohibition in Australia that has yet to be prosecuted. The [Guidelines on Concerted Practices](#) (**Concerted Practices Guidelines**) set out how the ACCC proposes to interpret the concerted practices prohibition (section 45(1)(c)) and describes the general approach the ACCC will take in investigating alleged contraventions.



WHAT IS A “CONCERTED PRACTICE”?

A “concerted practice” is not defined in the CCA, but the Concerted Practices Guidelines say that it:

“involves communication or cooperative behaviour that does not require all of the elements of an understanding but involves more than a person independently responding to market conditions.”

It also cites the [Explanatory Memorandum](#) to the Bill that explains that a concerted practice is:

“any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition.”

WHO CAN ENGAGE IN A “CONCERTED PRACTICE”?

The Concerted Practices Guidelines clarify the position in the CCA that at least two of the persons engaging in a concerted practice must be separate entities, and that it does not apply to related bodies corporate.

However, the ACCC’s position is that there is no requirement that the persons engaging in a concerted practice are competitors or potential competitors in a relevant market. Depending on the nature of their involvement, other parties such as suppliers, distributors, trade or professional associations or consultants could also be involved.

Furthermore, an individual employee or company officer can also be involved in a concerted practice (section 76 of the CCA).

IDENTIFYING WHEN A CONCERTED PRACTICE HAS OCCURRED

The Concerted Practices Guidelines state that it while it is impossible to list all of the circumstances in which a concerted practice may occur, a number of factors may be relevant in identifying a concerted practice:

- + Cooperative vs independent behaviour
 - While uniformity of purpose/action is likely to be a factor, the Concerted Practices Guidelines state that the persons don't need to be acting in the same way at the same time to engage in a concerted practice. Nor is it always necessary for a person to alter their behaviour in response to a communication to show that they are engaging in a concerted practice.
 - A concerted practice will often involve the exchange of strategic commercial information. Sometimes this can facilitate the alignment of companies' competitive behaviour and soften competition between them.
- + A concerted practice isn't parallel behaviour as a result of independent responses to market conditions
 - A concerted practice is not parallel behaviour that is simply the result of a person's independent response to conditions in the market. For example, the Concerted Practices Guidelines states that in highly competitive markets where competitors' prices are similar or they have similar offers, competitors may independently respond almost immediately to each other's changes in pricing.
- + Concerted practices can involve a broad range of communications
 - Concerted practices can involve communications occurring in public (e.g. to the media) or private, in formal or informal settings, or with or without the involvement of agents or other intermediaries.
 - Concerted practices will usually involve a pattern of cooperative behaviour or communications, but can arise from a single instance of information sharing.
 - It may not be necessary to identify specific communications to establish the existence of a concerted practice. It may be possible to infer that a specific outcome or behaviour was only possible as a result of communications between the parties.
- + Concerted practices more likely if the information is acted on, or expected to be acted on
 - The ACCC is more likely to conclude that a concerted practice has the purpose of harming competition if competitively sensitive information is exchanged between competitors where:
 - it's expected that the recipient will act on the information; and
 - the recipient acts or intends to act on the information.

ACCC EXAMPLE

MERE INNOCENT PARALLEL CONDUCT – NOT LIKELY A CONCERTED PRACTICE

Airline A runs a promotion offering discounts on flights to a number of popular holiday destinations. During the promotional period, it places restrictions on customers' ability to make changes to their bookings of these promotional fares. Airlines B and C monitor Airline A's promotional offers in order to match Airline A's prices as part of their own campaigns. Several hours after Airline A announces its new promotional airfares, Airlines B and C reduce their fares on selected flights on the same route and place similar restrictions on customer's changes to their bookings.

Have Airlines B and C engaged in a concerted practice?

Despite having similar discount offers and restrictions, this conduct is unlikely to amount to a concerted practice. Airlines B and C are independently responding to Airline A's publicly advertised pricing information without any cooperation occurring between the three airlines.

HIGHER RISK CONDUCT

The Concerted Practices Guidelines state that a business has a higher risk of engaging in a concerted practice (with the purpose, effect or likely effect of substantially lessening competition) by cooperating with its competitors regarding decisions such as:

- + Determining the price of its products;
- + Where it sells its products;
- + To whom it sells its products;
- + Whether it bids for a tender and/or the terms of the tender; or
- + The quantity of the product it offers or produces.

The Concerted Practices Guidelines also offer some “practical” examples of circumstances where concerted practices could arise (see over page):





ACCC EXAMPLE

PRIVATELY SHARING COMMERCIALY SENSITIVE INFORMATION – LIKELY A CONCERTED PRACTICE

A number of petrol retailers notify each other of their future pricing intentions. The petrol retailers find this information assists them so they start making business decisions in expectation of calls from their competitors. No attempt is made to reject the calls and the retailers go to considerable length to ensure their conversations are in secret and only refer to each other using code names. The practice continues and the petrol retailers regularly follow the price changes foreshadowed by the others. However, they have made no commitment to do so, and on some occasions they do not follow each other.

Have the petrol retailers engaged in a concerted practice?

Most likely yes. While the conduct does not reach the level of an understanding, the ACCC is of the view that the retailers are engaging in a concerted practice that has the purpose (and may also have the effect of likely effect) of substantially lessening competition. The disclosures resulted in pricing uncertainties in raising or lowering prices in a competitive market being substituted by a degree of cooperation between the petrol retailers.

ACCC EXAMPLE

PUBLIC SHARING OF INFORMATION – COULD AMOUNT TO A CONCERTED PRACTICE

Airlines A, B and C and various travel agents have access to a common online reservation system which lists the Airlines' available seats and airfares. Airline A begins releasing a class of fare on this system indicating the price it proposes to offer at a specific point in the future, however it does not make those tickets available for purchase. Airlines B and C adopt the same practice.

Have Airlines A, B and C engaged in a concerted practice?

Most likely yes. This conduct amounts to a disclosure of intended future prices by competing airlines. As customers and travel agents are unable to book these fares, it discloses sensitive commercial information and provides the Airlines with a platform to test and align their future prices.

RISK MITIGATION STRATEGIES FOR CONCERTED PRACTICES

The Concerted Practices Guidelines recommend that if a person unexpectedly receives commercially sensitive information from a competitor, it should:

- + reply immediately, stating that it did not wish to receive that information and will not follow or take that information into account in its future actions; and
- + give effect to its intention (as described above).

The Concerted Practices Guidelines also state that the information recipient can notify the ACCC of the conduct.

Below are some practical suggestions for mitigating the risk of concerted practices:

CONCERTED PRACTICES: RISK MITIGATION TIPS

Have a written policy that sets out what is commercially sensitive information and how it should be protected. This will reduce the risk of inadvertent disclosure.

Expressly reject any commercially sensitive information you receive from competitors.

Conduct competition law compliance training for all employees who attend industry meetings or have face to face interactions with competitors and customers.

If you attend an industry meeting make sure that it has a legitimate (i.e. not anti-competitive) purpose.

If employees are in a situation where anti-competitive discussions are happening, the employee should express their disagreement and immediately leave the discussion. Companies can be held liable for merely attending a meeting where collusion is occurring, even if the company has not explicitly agreed to the conduct. The incident should be immediately reported to the company's legal counsel.

Seek legal advice before sharing commercially sensitive information with a competitor (or with someone who could share it with a competitor), even if for a legitimate purpose, such as a joint venture.

Exercise extreme care if you are asked to provide commercially sensitive information (especially current/future pricing, capacity, customer or strategic plans) to an industry association or similar third party. Legal advice should be obtained before providing such information.

Be alert to receiving commercially sensitive information (even unsolicited) from an industry association or similar third party. This includes aggregated information where it is possible to identify details that belong to particular competitors.

Do a compliance review of existing business practices associated with involvement in industry associations.

Document the purpose of any external disclosure of competitively sensitive information, and comply with that purpose.

Don't disclose information for the purpose of passing it on to a competitor.

Don't suggest that a specific price or strategy is dependent or contingent on whether your competitors follow that price or strategy.

Don't comment publicly, or to competitors, about pricing in the market or the company's plans about pricing strategy.

Remember there is no requirement that persons engaging in the concerted practice are competitors or potential competitors. Other parties such as suppliers, distributors, industry associations and consultants could also engage in a concerted practice.

GUIDELINES ON NON-MERGER AUTHORISATION

If a business is concerned that its proposed conduct may result in a breach of certain provisions of the CCA, they can seek authorisation from the ACCC. Authorisation provides the business with statutory protection from legal action.

It is important to seek legal advice before engaging in conduct that may be at risk of breaching competition laws, as the ACCC can only authorise future conduct.

The ACCC will only authorise proposed conduct that:

- + would not have the effect or likely effect of substantially lessening competition; or
- + would result in a public benefit that outweighs the public detriment (i.e. a net public benefit).

The ACCC's [Guidelines for Authorisation of conduct \(non-merger\)](#) (**Authorisation Guidelines**) provide information about the authorisation process and the framework the ACCC uses to assess applications.

The Authorisation Guidelines:

- + describe in detail what information is required in the application;
- + confirm that authorisations apply to concerted practices and misuse of market power

It remains to be seen whether the ACCC will actually grant authorisation for conduct such as misuse of market power given that it will be very difficult to prove that the likely public benefits will outweigh the likely public detriment.

The Authorisation Guidelines also contain an overview of the steps involved in a non-merger authorisation, with indicative time frames for key milestones.

Chart 1: Usual steps and indicative times for the authorisation process



Source: Guidelines for Authorisation of conduct (non-merger)

CONDUCT THAT CAN BE AUTHORISED BY THE ACCC

Previously	Cartel conduct Anti-competitive agreements Secondary boycotts Exclusive dealing Resale price maintenance Dual listed company arrangements
Now	All of the above, plus Concerted practices Misuse of market power



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