



Law Council
OF AUSTRALIA

Business Law Section

Mr Bruce Cooper
Australian Competition and Consumer Commission
Via email: concertedpracticesframework@accc.gov.au

22 November 2016

Dear Bruce,

ACCC FRAMEWORK FOR CONCERTED PRACTICES GUIDELINES

INTRODUCTION

These comments assume that the proposed amendments to Section 45 to prohibit a person from engaging in a concerted practice with one or more other persons, which has the purpose, effect or likely effect of substantially lessening competition, will be enacted in substantially the same terms as the Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*.

The introduction of a prohibition on concerted practices will introduce a concept which is novel in Australian law and the Committee commends the ACCC on the timely preparation of its Framework for Concerted Practices Guidelines.

These comments address certain of the Questions in the Framework.

QUESTION 1: DESCRIPTION OF "CONCERTED PRACTICE"

The Framework describes a concerted practice as:

"... 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."

This description is based substantially on the decision of the European Court of Justice in the *Dyestuffs* case but it omits the reference to "knowingly", which was an important part of the ECJ's formulation. The Committee considers that it is important that the prohibition not be seen to catch innocuous contact between competitors and suggests that "knowingly" be inserted in the description before "substituted".

The description also seems to exclude the possibility that a concerted practice might involve an arrangement or understanding. It appears to the Committee that the ACCC's apparent desire to ensure that the law concerning "arrangements and understandings" is not imported into the definition of a concerted practice may have the consequence of unduly limiting the operation of the prohibition. The Committee suggests that "necessarily" be inserted in the description set out above before "having".

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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The Committee also questions whether, in the Australian context, it is necessary that the risks of competition be reduced by "practical cooperation". Whether or not there is practical cooperation, the Committee suggests that the focus should be on conduct, particularly the communication of information, which knowingly removes some of the risks and uncertainties of competition.

QUESTION 2: EXAMPLES OF CONDUCT LIKELY TO AMOUNT TO A CONCERTED PRACTICE

The giving of examples is very useful and the questions below are not intended to deter the ACCC from providing this type of useful guidance. The Committee considers, however, that further consideration should be given to some aspects of a number of the examples as set out below:

Pearl cultivators example

This example raises a number of questions:

- What is the significance of the reference to 'a small geographic region' in determining whether the conduct constitutes a concerted practice?
- What is the significance of the reference to '...the purpose of artificially increasing the price of Australia's pearls...' in determining whether the conduct constitutes a concerted practice? Would the information exchanges have been a concerted practice in the absence of such a purpose?
- What is the significance of the reference to "...some cultivators restrict their output of pearls..."? Would it be a concerted practice if none of the cultivators restricted their output?
- What "commercial need" for the information exchanges would be "legitimate"?

Bank example

Can a one-off disclosure of an intended interest rate increase be a "form of coordination" which substitutes "practical competition" for the risks of competition?

Is the essential feature of this example that Bank A repeats its disclosures to Bank B over time? If so, perhaps that feature should be emphasised.

Electricity meter manufacturers example

It is not clear which disclosures substitute cooperation for pricing uncertainties. For example, are the price lists and tenders identical as a result of prior disclosures? If so, the example should also refer to those disclosures. If not, how is the fact that the price lists and tenders are independently identical relevant in determining whether the conduct constitutes a concerted practice.

QUESTION 4: LEARNINGS FROM INTERNATIONAL EXPERIENCE

The Committee considers that, at this stage, explicitly importing any learnings from EU experience would be inadvisable. The extent to which Australian courts will have regard to the EU jurisprudence is currently unknown and unpredictable. The Committee considers that, at this stage, the ACCC should describe its own approach to interpretation and enforcement without express reference to EU experience.

QUESTION 5: OTHER MATTERS

The Committee considers that the description of a 'concerted practice' and the examples in the Guidelines would benefit from a discussion of those reasons for information disclosures or exchanges which are likely to be regarded by the ACCC as legitimate.

QUESTION 6: THE SLC TEST

The Committee considers that the counterfactual or 'with and without' test for 'lessening of competition' should be set out in the Guidelines. This will make it clear that the likely state of competition with the concerted practice must be compared with the likely state of competition without the concerted practice.

The proposition that competition is "...assessed looking at both market structure and strategic behaviour..." is not settled law in Australia. Decisions of the Tribunal point in this direction but decisions of the High Court and Federal Court are inconclusive. The consideration of strategic behaviour by the Courts has largely concerned strategic barriers to entry. The Committee suggests that "strategic" be deleted from the proposition.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Fiona Crosbie, on 02-9230 4806 or via email: fiona.crosbie@allens.com.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Teresa Dyson', written in a cursive style.

Teresa Dyson, Chair
Business Law Section