

**MOTOR TRADES
ASSOCIATION
OF AUSTRALIA**

MTAA Limited
Submission to the
ACCC Interim Guidelines on Misuse of
Market Power and Interim Guidelines on
Concerted Practices November 2017

Executive Summary

KEY OBSERVATIONS

- The MTAA and Members:
 - Supports the ACCC and the discharge of its regulatory accountabilities in regard to the substantially changed Section 46 of the Competition and Consumer Act 2010 (CCA).
 - Agrees with the need for Guidelines to assist in the education and awareness of how the ACCC will meet these accountabilities and undertake assessing and investigative functions.
- MTAA suggests the ACCC:
 - Review some of the language used in the guidelines in order to reduce the risk of ambiguity or misinterpretation.
 - Ensure there is adequate balance in the content of the guidelines to not only reflect case law, but preparedness to explore the nuances of changes to the CCA and Sections 46 and 45 and their application to constantly evolving markets, and with a view to testing provisions to establish new case law.
 - Regularly reviews and updates the guidelines particularly following case law or other outcomes resulting from assessment and investigation activities.

Overview

- The Motor Trades Association of Australia (MTAA) Limited and State and Territory Members have been at the forefront of advocating for Section 46 reform for more than two decades. Quite apart from its own advocacy and representation, the MTAA has a proud history of forming alliances with other like-minded organisations, associations and small business groupings including *The Fair-Trading Coalition*; and more recently joining more than 20 other peak associations to advocate for the changes finally realised with the inclusion of changes in 2017.
- MTAA and Members welcome the ACCC Interim Guidelines on misuse of market power and the Interim Guidelines on concerted practices. This guidance material is critically important for consumers, thousands of automotive businesses, the broader small business community, and the wider economy.
- Having advocated for so long a mechanism to better identify, assess and enforce 'excessive' conduct, it will be of little value if the intent of the changes is not realised through strong assessment and where necessary enforcement. The MTAA is a strong supporter of the ACCC, its functions and accountabilities, and recognises the significant challenges the *Competition and Consumer Act 2010 (CCA)* and in particular Section 46 changes will provide.

- Across the automotive industry there are a number of sectors experiencing unprecedented structural adjustment as businesses adapt to a range of external and internal influences that are redefining markets and consumer behaviours within them.
- The MTAA supports strong competition and realises that strong and competitive markets will cause unsustainable, unviable, unprofitable businesses to close. This can be a sign of competition at work.
- However, for small and medium sized businesses, that are sustainable, viable, willing to invest in and adapt to new and emerging technologies, business processes and models, training and equipage, and ever-changing consumer behaviours; the burden of excessive conduct by dominant market participants are often an insurmountable hurdle in providing consumers choice.
- Progressive automotive businesses cannot absorb or address excessive conduct that is increasingly difficult to detect, often disguised, difficult to assess, and difficult to combat – particularly when such excessive conduct seems at face value to deliver outcomes beneficial to competition and consumers.
- MTAA recognises that vertical and horizontal integration can be beneficial to competition and consumers. Unfortunately, in some automotive industry sectors, these business strategies can often mask intended or unintended consequences that ultimately prove disastrous for competition, encourages market concentration rather than competition and will likely produce outcomes that in the medium to longer term are detrimental rather than beneficial for consumers.
- The highly competitive and influential Australian automotive market may appear to external stakeholders as fragmented and disparate. However, there are significant interrelationships and interdependencies that transcend sectors and discrete markets within this important part of the Australian economy. The relationships between vehicle manufacturers, retailing networks, service providers, repairers, insurers, and many other professions and market participants will become more intertwined as the industry seizes opportunities of automation, ride sharing, data sharing, changing propulsion systems and fuelling – to name but a few.
- MTAA suggests that as consolidation and vertical and horizontal integration picks up pace, the 'rules' of relationship or engagement that are predominantly set by dominant market participants whether individual or by group, will become more pronounced. These 'rules' are rarely negotiated, despite other legislation and regulation in place designed to ensure fairness and robustness. More often than not such rules are presented as 'take it or leave it' terms and conditions. This will place greater pressure on businesses within those sectors, on consumers and on the regulator, particularly with the application of competition provisions of the CCA and section 46 in particular.
- The importance of a highly visible regulator, that is agile, flexible and alert to the nuances of such evolving markets and the intricate strategies that can be deployed by powerful market participants to the detriment of smaller business competitors cannot be overstated. Nor can the importance of clarity and conviction of reference material developed and issued to provide guidance to consumers, governments and industry on the regulators approach to interpretation of legislation. MTAA make the following observations and recommendations on the interim guidelines with this in mind.

Section 46 – Key Concepts

MTAA Recommendations

1. Point 2.5 under the heading 'Market' be strengthened from 'may also consider' to 'will also consider'.
2. The references under the heading Product Market be strengthened to include references to also assessing the impact of third party relationships that are often characteristics of vertical and horizontal integration as a component of constraint.
3. Consider reviewing the wording under the heading 'Geographic market' to better illustrate the need to assess geographic markets given the differences / impacts that may be found by drilling down into discrete components of a geographic market. Current emphasis could imply an unwillingness to better define the characteristics of a geographic market.
4. MTAA suggests reviewing the wording of 2.12 – 2.16 to improve clarity and address potential for ACCC's intent to be misinterpreted.
5. Case law is helpful but should not be overly relied on, particularly where new provisions and meanings incorporated into the CCA, may be the subject of test cases in the future.
6. Encourages the ACCC to include wording regarding its preparedness to assess the nuances of markets in specific areas of the economy that are undergoing significant change and / or being influenced by market consolidation.
7. Consideration should be given to the inclusion of illustrative material for specific markets.

Market

- MTAA has no major issue with the ACCC's identification of 'Key Concepts', the description of a market, or the 'starting point' (point 2.4) the ACCC describes for assessing market definition.
- However, the MTAA strongly suggests the ACCC place equal emphasis on point 2.5 which states:

2.5. The ACCC may also consider the functional dimension of the market (the different levels in the distribution chain such as the wholesale or retail functional level) and the timeframe over which substitution possibilities should be assessed.
- Rather than 'may also consider' it is the strong recommendation of the MTAA that this be changed to 'will also consider'. The rationale for this change is that it provides greater clarity that the ACCC recognises highly complex markets demonstrating significant vertical and horizontal integration, and that sometimes a 'broad brush' approach will not necessarily uncover the matters that may trigger assessment under Section 46.

Product Market

- MTAA generally agrees with the ACCC's interpretation of the revised Section 46 and applauds the ACCC's recognition in point 2.7 of the relevance of the potential impact of firms being constrained by the potential behaviours of firms supplying other products (supply-side substitution).
- MTAA suggests it is not just the ability of '*suppliers to switch quickly and without significant investment to supply the product to a substitutable product*' that will be relevant. A major factor will also be the role of third party relationships in the actions of complex dominant market participants and whether other businesses can fairly and reasonably compete when facing such arrangements.

Example 1:

- In the Motor Body Repair industry, the capacity of an independent motor body repair business can be constrained by arrangements between a dominant market insurer and that insurer also owning its own body repair business.
- MTAA is concerned that motor body repair businesses in general; whether they be independent, brand, network preferred (insurer aligned / partnered), or franchised, may be significantly constrained by the market share and market power of some dominant insurance companies and their wholly owned repair premises.
- Dominant insurer participants in the motor body repair sector have made no secret and have verbally confirmed to the MTAA and its members on several occasions of their intent to reduce the number of participants and suppliers in the motor vehicle repair supply chain order to: streamline operations, increase efficiencies, market share and shareholder value; in order to respond to competition and consumer demands for lower premiums.
- The capacity of a dominant market participant such as an insurance company, with their own repair businesses, to secure arrangements with suppliers and other market participants, are well demonstrated and can effectively reduce or 'lock out' the capacity of competitors from securing similar arrangements.
- While the consumer may benefit from reduced premiums as a result of potentially lower input costs and a reduced number of participants, these strategies have effectively also delivered increased market share and market power further limiting the capacity of other providers / participants in the motor vehicle insurance / repair market.
- While it might be true that there remains reasonable competition in the provision of motor vehicle insurance products, the vertical and horizontal integration of insurance companies in the motor body repair market has significantly reduced the number of participants.
- MTAA would suggest that while some reduction in participant's maybe the result of effective competition, it is clear others have been forced to close as a result of being constrained from identifying and securing similar arrangements.
- Ultimately in the view of MTAA, in the longer-term consumers may experience detriment from reduced competition because viable alternative repair business cannot compete with businesses owned or controlled by insurance companies who have relationships and arrangements that are only possible because of market share and market power.

Geographic Market

- MTAA supports the inclusion of the ACCC v Flight Centre (2016) exemplar and in particular the emphasis on '*a focusing process*'. However, MTAA takes a different view from the interpretation provided by the ACCC in 2.12. MTAA suggests the ACCC consider reviewing the wording of these points to provide greater clarity.
- MTAA understands the ACCC's explanatory note in 2.12 that a '...market is not defined in isolation', and that '...market definition is not an exact science and that it is not possible or necessary to identify precise boundaries', which is crystallised in the presented case law examples. However, there is a risk that this Interim Guidelines descriptor could be interpreted that the ACCC may not give adequate consideration to matters that do not fit comfortably within these descriptors.
- MTAA cautions that the ACCC not be overly reliant on existing case law as a rationale for not giving prominence, proximity, or weighting to the intricacies or peculiarities that might only become evident by drilling down in assessment or investigative processes, particular in geographic markets. This is particularly relevant when considering the substantive nature of the changes to the CCA and Section 46 in particular.
- MTAA suggests that particular excessive conduct under investigation may not necessarily be evident at a 'macro' or whole of market level, and that the ACCC remain agile, flexible and open in its assessment and investigative functions to also focus on particular attributes, including the geographic market, to gain a clearer picture of particular conduct.
- While MTAA agrees market definition is not an exact science, particularly in highly complex and multi-faceted markets found in the automotive industry, if the intent of the revised Section 46 is to be realised, then the ACCC will be required from time-to-time to allocate the necessary resources to assess particular conduct in classifications within an attribute such as a geographic market.

Example 1:

- MTAA was instrumental in encouraging a further examination of '*Shopper Docket*' marketing schemes in fuel retailing due to the potential of long-term consumer detriment. This examination included market share and market power of two dominant market participants, other franchised operations and independents; along with a range of connected matters including cross-subsidisation.
- Of particular importance in calling for this assessment was the differing impacts in rural and regional markets from urban markets, even though common elements, sites and market attributes existed.
- The downstream impacts in certain geographic markets were found to be considerably different in terms of impacts both on competition and consumer benefit.
- While on the surface the discounts appeared to benefit consumers unilaterally at the time of the dockets being issued, the cumulative impact of schemes and the cross subsidisation clearly constrained markets which had little or no ability to compete.

Substantial Market Power

- The Hilmer Review of Competition policy in 1993 stated:
*'A central difficulty for competition policy, in Australia and elsewhere, lies in distinguishing between vigorous competitive activity by firms with market power, and conduct by such firms which in some way oversteps the mark and prevents the competitive process from continuing to operate effectively. The challenges are to define conduct which is "excessive" in a policy sense, and to develop a mechanism which can identify practical instances of such "excessive" conduct. In addressing these challenges, the need to deter egregious behaviour must be balanced against the need to encourage competitive activity.'*¹

With a mechanism now in place as a result of changes to the CCA, MTAA suggests that ACCC may wish to consider reviewing the wording of the substantial Market Power section to improve clarity, purpose and balance around undesired behaviours and excessive conduct.

- There is potential ambiguity in regard to the importance the ACCC places on market share in regard to market power. The ACCC indicates market share is an important threshold (2.13) and this statement is seemingly illustrated by the prominence given to market share in almost every example provided in the Interim Guidelines.
- MTAA recognises the ACCC does not possess the regulatory power to impose a threshold guide and the practicality of such a tool is questionable. However, MTAA respectfully suggests as we approach 2020, and with a significant change to competition policy outlined in Section 46, there are significant other factors that should be considered by the ACCC in determining market power and the correlation of market share to market power. Some other factors may include the impact of vertical and horizontal integration strategies; the applicability of a product manufacturer / supplier controlling an entire supply chains en-route to oligopoly or market monopolisation and whether these actually enhance competition in the longer term.
- MTAA also recognises the importance of case law, the CCA as a whole, and Section 46 provisions, in providing guidance to the ACCC in developing a framework for the discharge of its competition accountabilities. MTAA respectfully suggests that quite apart from the factors outlined in Point 2.15 (including those detailed in *Queensland Co-Op Milling Association Limited and Defiance Holdings Limited*) the ACCC should be agile and flexible enough to include emerging factors that could be considered, and where appropriate tested, within the regulatory and legislative framework.
- MTAA does not necessarily agree with the expressed view that market share does not equate to market power particularly in the automotive industry markets. In Example 1 under this section, market share is a critical factor in the construct of the motor vehicle insurance and vehicle repair sectors. But it is also the nature of how market power, driven by market share, is exercised; and whether such market power is being similarly applied by more than one participant. This is becoming more pronounced as sectors and industries react to globalization, consolidation and implement vertical and horizontal integration as strategies to reduce costs, improve services and increase market share.

¹ National Competition Policy: Report by Independent Committee of Inquiry into Competition Policy In Australia (AGPS) Canberra 1993 [The Hilmer Report] Pg 62.

Example 1:

- In any assessment of a potential breach of Section 46, the MTAA encourages the ACCC to gain as much detail of the full characteristics of a market.
- As an example: It became clear to the MTAA and Members during recent reviews of Australian Consumer Law, ACA and related areas, that there were dangerous assumptions being made in regard to the participants, market share and market power and attributes of the motor vehicle insurance and motor vehicle body repair sectors. There appeared to be a lack of understanding of the differentiation of insurance company participants generally; insurance company brands offering motor vehicle insurance products and concentrated ownership of those brands.
- There was seemingly an assumption made based on an analysis of the overall insurance market and the motor vehicle repair business market that there were a diverse and large number of participants, with seemingly strong competition.
- However, when drilling down into the motor vehicle insurance sector, two companies (along with their myriad of individual brands) have a combined market share of more than 70 per cent.
- MTAA recognises that if that combined market share (70%) were equally distributed at say 35% each, this threshold by a single corporation, in itself, may not be sufficient to warrant further assessment or investigation in response to demands for an inquiry into excessive behaviours, or breaches of new provisions of the ACA.
- However, when the nature of the products supplied; the markets; the relationships and arrangements with suppliers and other market participants; the similarity of the business models and the vertical and horizontal integration strategies deployed (including cost and pricing structures); a picture of market share and market power may prove to be entirely different from initial observations.
- The integration of the supply chain in the Australian motor vehicle insurance and repair market is practically complete from the retailing of the insurance policy to the completed repair of a vehicle by their own or partnered repair facilities and less by other types of repairers; and almost all elements in between including towing, parts supply and distribution, insurance owned repair businesses and systems and processes exclusive to their operations.
- Similarly, in new car retailing the consolidation of dealerships, the influence of motor vehicle manufacturers through dealership agreements, consolidation of dealer networks and identified inadequacies of the franchising code for Dealership specific requirements are another example.
- Of concern to MTAA and Members is not necessarily the individual market share of each of the two dominant participants, but the impact on consumer choice, competition, and in particular constraining the body repair industry from the combined market share of two dominant participants, and the considerable market power exercised by both through the deployment of market distorting vertical and horizontal integration strategies.

- In highly complex market relationships of the automotive industry, it is easy to overlook behaviours and actions that may well be seated in strategies designed to address a myriad of influences. It is also understandable that the immediacy of consumer benefit and welfare may appear attractive and not worthy of triggering further assessment. However, MTAA believes the success of the Section 46 changes will in part be determined by preparedness the regulator has to look beyond the purported current benefits and assess what the impact of such behaviours and actions may produce in the medium to longer term.
- While accepting the statement in Point 2.14 that *'Market power comes from a lack of effective competitive constraint'*, and an observable manifestation of market power is *'the ability of a firm to profitably sustain prices above competitive levels'*; MTAA suggests that these are not the only indicators of Market Power. Consideration should also be given to specific characteristics that make up Market Power in designated markets. It is respectfully suggested that the regulator must be alert to nuances and attributes of a market, that may not be present in other industries or parts of the economy.
- The ACCC is aware as a result of a current market study into automotive new car retailing of the depth and complexity of relationships, arrangements, requirements and behaviours between manufacturers and dealer retailing networks. It is a highly competitive market with more than 17 global companies, with 69 brands and more than 400 model variants of those brands competing for consumers in the Australian new car market. On the surface, the market is working well. Delivering abundant consumer choice, with strong price differentials and service offerings. But as the study team is discovering there are complexities and elements of this market that can and has impacted other market participants and consumers.

Purpose, Effect or Likely Effect

- MTAA has had verbal confirmation from some motor vehicle insurance and motor body repair market participants that the intent of various actions and activities are designed to reduce the number of participants and 'complexity' in the market. Such statements when combined with the deployment of actions and strategies that seize increased influence and control of markets give rise to increased concerns about potential breaches of the revised CCA and Section 46 in particular.
- MTAA suggests section 2.21 should be reviewed. While understanding a need to examine the impacts on a market *'with or without'* the conduct being assessed, MTAA is concerned that this suggested approach, as currently described, may not be in keeping with the intent of the changes to Section 46.
- MTAA suggests the apparent emphasis on *'commercial rationale'* in 2.21 could imply that other important factors in determining likely effect may not have equal weighting. These other factors include concerns MTAA has expressed in previous sections of product and geographic market definitions; substantial market power and issues surrounding market share thresholds. If there is valid rationale for not having a market share threshold, then MTAA suggests there is equally no need for a commercial rationale threshold to be established in determining the purpose of effect or likely effect on competition.

Substantially lessening competition

- MTAA suggests that the ACCC needs to exercise care in again placing too much emphasis on '*commercial rational*' as outlined in 2.27. While it is certainly a factor to be considered and assessed it should not be any more or less than other factors and considerations.
- MTAA is otherwise generally comfortable with this section.

Types of conduct that may involve a misuse of market power:

- MTAA agrees with the concept of '*vigorous competitive activity*'. However, it is the experience of MTAA and Members that in consolidating markets which currently dominate the automotive industry, the lines between vigorous competitive activity and consumer detriment and market constraint are becoming increasingly blurred. It is for this reason that the MTAA and members advocated for the changes to the CCA and Section 46.
- MTAA understands that vertical and horizontal integration are competitive levers that may deliver consumer benefits and improved competition outcomes. However, MTAA is increasingly concerned about the manner in which such strategies are being implemented and the impact of them on consumers and markets over the longer term. Increasingly the commercial rationale that may have given rise to efficiencies and potential benefits to consumers appear more as a masquerade for increasing market share, market power and ultimately creating a market dependent on less participants and less competition.

Refusal to deal

- The MTAA is mindful of several examples of potential '*refusal to deal*' matters including changes to consumer choice policies within the motor vehicle insurance market. It is the opinion of MTAA and Members that limiting or putting a price on a consumer's right to exercise choice is tantamount to '*refusal to deal*'.
- Similarly, MTAA is increasingly concerned that coercive directing of consumers away from potential motor body repair businesses to their own company owned facilities also potentially constitutes '*refusal to deal*'.
- There is also potential in other automotive industry sectors with relationship arrangements providing potential cause for '*refusal to deal*' including new car and parts retailing where the procurement of tools, goods and services, may be worthy of further assessment.

Restricting Access to an essential input

- MTAA suggests that restricting access is becoming a matter of increasing concern in sectors across the automotive industry.
- The ACCC is currently studying the new car retailing sector and is determining the extent that restricting access to information for the servicing and repairing of motor vehicles by manufacturers may have on competition and consumer choice. The non-provision of certain types of technical information in order to carry out repairs is known to be causing considerable issues for independent repairers.
- In the motor vehicle insurance and vehicle repair sectors, there are increasing issues with restriction as a direct result of vertical and horizontal integration strategies. An example is provided in the section margin / price squeeze.

Predatory Pricing

- MTAA is generally comfortable with the predatory pricing section.

Margin /price squeeze

- MTAA is concerned that in many automotive markets margin / price squeeze activities are not transparent and capable of impacting markets to the point of potential consumer detriment and market distortion.
- While accepting the ACCC Interim Guidelines are designed for the whole of the economy and all industries, consumers, governments; there are numerous examples specific to some industries and sectors within those industries that may benefit from inclusion in the guidelines.
- In the Motor Body Repair Sector, MTAA believes a requirement of some dominant market participants to demand the use of proprietary pricing systems designed to 'deliver' a market wide or network average price is not satisfactory nor transparent. Such pricing mechanisms / tools are widely available to all the market, but it is the ability of some market participants to incorporate factoring into the mechanisms / tools, that is causing detriment to wider competition.

Example 1:

- MTAA is aware of a trial by a dominant participant in the vehicle insurance and repair sector that will potentially define supply-side substitution by restricting the number of participants and type of participants in the accessing (sourcing) and distribution required automotive parts to complete a repair.
- The trial involves three major market participants, the parts manufacturer (usually the vehicle manufacturer); that manufacturer's dealer network; the insurance provider; the insurance company owned repair business or contacted repairer; establishing a separate parts acquisition and distribution arrangement. There is no intention that other market participants are able to take advantage of this potential arrangement and nor is there transparency on the structures or prices to be paid.
- In a regional location, this arrangement could potentially preclude other body repair businesses in that location from accessing parts at a price comparable to those available through the arrangement. In such locations, the dealership may be the only source of parts and there is likely to be less capacity for accessing another arrangement or system.
- While this is but one dominant market participant with one trial, and while there are currently options for other 'cooperatives and distribution channels' for parts; the overlay of vertical integration and adoption of other 'complimentary' strategies by other market participants can have the effect of determining the parameters of this product market.

Authorisation

- MTAA is comfortable with the guidance material provided on the topic of authorisation.

ACCC approach to investigating allegations of misuse of market power

- MTAA is generally comfortable with the guidance material provided on the ACCC's approach to investigating allegations of misuse of market power.
- MTAA and Members as peak representative bodies for the automotive supply chain post manufacturing encourages the ACCC to continue to utilise its already well established relationships with the MTAA and its membership in monitoring and where necessary auctioning compliance with the revised CCA.

Sanctions

- MTAA is comfortable with the guidance material provided on the topic of sanctions.

Section 45 – Guidelines for concerted practices

- MTAA is generally comfortable with the guidance material provided.
- MTAA suggests that because of the implications for associations such as the MTAA and its Members that more examples be considered for inclusion that specifically deals with the role of Section 45 and the role of associations.
- MTAA and its Members are generally not-for-profit organisations with accountabilities centred in advocacy and representation. However, accountabilities can also include provision of advice and tools to assist small business constituents improve business acumen, access information, adapt to change and be aware of requirements, legislation and regulation. MTAA believes it would be beneficial if the ACCC could give further consideration to the potential of supplementary materials specific to the role of associations to ensure any risk of provision breach is mitigated or removed.

MTAA National Secretariat
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