JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF
ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE DRAFT
“FRAMEWORK FOR MISUSE OF MARKET POWER GUIDELINES” OF THE
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

[OCTOBER 21, 2016]

The views stated in this submission are presented jointly on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments to the Australian Competition and Consumer Commission (“ACCC”). The Sections appreciate the opportunity to present their views with respect to the subjects raised in the ACCC’s Framework for Misuse of Market Power Guidelines (“Guidelines”). The Sections’ comments reflect the expertise and experience of their members with competition law in the United States, Australia, the European Union and other jurisdictions worldwide.

The Sections commend the ACCC’s early promulgation of guidelines to clarify its interpretation and enforcement framework of the law on unilateral conduct under the proposed amended Section 46 of Australia’s Competition and Consumer Act 2010 (“CCA”), and appreciate the substantial thought and effort reflected in the Guidelines. The Sections make the following comments in the hope that they may assist the ACCC as it works on more detailed guidelines, with a view to facilitate clearer interpretation of the law, as well as to provide more insight into the ACCC’s enforcement framework.

Executive Summary

The Sections understand that the ACCC has released these guidelines in anticipation of the amendment of the CCA to reframe Australia’s law against misuse of market power. The proposed amendment has come about through recommendations made in the Final Report of the Competition Policy Review (“Harper Report”)¹ aimed at more effectively targeting anticompetitive unilateral conduct and focusing the law more clearly on the long-term interests of consumers.

These comments address the following issues:

- Market power. The Sections recommend that the ACCC provide additional detailed guidance on how it will assess whether a firm has a “substantial degree of power in a market,”

including by reference to market shares and other evidence of market structure and dynamics. The Sections also suggest that the ACCC review its current guidance on market definition and consider the application of economic tools in defining markets.

- **Effects test.** The Sections recommend that the ACCC provide guidance on the interpretation and application of “purpose, effect or likely effect” in the reframed Section 46, and suggest that the focus should properly be on “effects” rather than subjective purpose. The Sections also provide suggestions for the application of the balancing test that is proposed to be introduced into Section 46.

- **Specific conduct.** The Sections provide comments on the ACCC’s description and analysis of various types of conduct discussed in the Guidelines:
  - **Refusal to deal.** The Sections question whether the ACCC’s analysis of refusals to deal is in effect an “essential facilities” test, and recommends the use of strict criteria in such circumstances to avoid unduly chilling single firm conduct.
  - **Predatory pricing.** The Sections recommend that the ACCC consider adding an element of probability of recoupment of losses from below-cost pricing when considering whether low pricing is a potential violation of Section 46.
  - **Tying/bundling.** The Sections suggest the ACCC adopt a framework for tying focusing on sufficiently high and sustained market share in the tying product market and sufficiently substantial foreclosure in the tied product market. With respect to bundling, the Sections recommend that the ACCC clearly articulate the factors it will consider in determining bundling to be anticompetitive, as well as provide an example.
  - **Margin squeeze.** The Sections recommend that below-cost pricing and the probability of recoupment be treated as elements of the margin-squeeze offence, and that the ACCC provide an example of an unlawful margin squeeze.

- **General comments.** The Sections make some general comments on the structure and organization of the Guidelines, as well as suggestions on the appropriate scope and limits of the Guidelines.

I. **Unilateral Conduct Violations Should be Limited to Instances Where a Firm Possesses “Substantial Market Power”**

The Sections support the ACCC’s position as stated in Section 4.3 of the Guidelines that whether a firm has substantial market power is an important threshold that ordinarily should be addressed first, before considering whether the firm’s conduct violates proposed s. 46. This is a key tenet of antitrust law across the globe—including in jurisdictions with statutes the Sections believe to be analogous to the proposed s. 46, such as Article 102 TFEU in the European Union (EU) and Section 2 of the Sherman Act in the United States—and this position provides firms with consistent

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2 There may be instances in which conduct can be determined early in the course of an investigation to be procompetitive such that no inquiry into market power would be required. *See* American Needle, Inc. v. National Football League et al., 580 U.S. 183, 203-04 (2012).
guidance across jurisdictions.\(^3\) The Sections recommend that the ACCC consider expanding upon this position to offer firms further guidance as to what constitutes “substantial market power,” what role market power plays in the unilateral conduct analysis, how the ACCC utilizes direct and indirect evidence, and how the ACCC defines the relevant markets.

First, the Sections believe that businesses would benefit from additional guidance as to what level of market power the ACCC considers substantial. In other jurisdictions, high market shares in a relevant market are an important factor in determining the existence of market power or monopoly power,\(^4\) although market share is not the end of the inquiry and direct anticompetitive effects arising from potentially anticompetitive conduct also can form the basis of liability.\(^5\) Providing ranges of market shares will provide a useful metric for businesses in assessing the risk that conduct that can be procompetitive absent market power, like tying, may constitute misuse if they have substantial market power.\(^6\) Of course, the Guidelines should make clear that market share is only the starting point in determining whether a firm has market power, and it will be critical for the ACCC to consider additional factors before making an enforcement decision.

In the United States, monopolization cases have generally required 65 percent or greater for a finding of monopoly market power, with 80-90% market share being required to presume monopoly market power,\(^7\) while the European Commission is unlikely to find dominance in Article 102 TFEU cases if a firm has a market share of less than 40 percent.\(^8\) Sustained market shares at these levels are necessary (but not always sufficient) to demonstrate that an allegedly dominant firm, in fact, has the capability of exercising power over price, output, or other competitive factors in the market.


\(^4\) See, e.g., United States v. Grinnell Corp., 385 U.S. 563, 571 (1966) (“The existence of such [monopoly] power may ordinarily be inferred from the predominant share of the market.”); ICN SUBSTANTIAL MARKET POWER ANALYSIS, supra note 7, at 3 (“Market shares are generally used as the starting point for assessing market power.”).

\(^5\) See, e.g., Am. Tobacco Co. v. United States, 328 U.S. 781, 789 (1946) (exclusion of some competitors supported jury’s monopolization finding); Re/Max Int’l v. Realty One, 173 F.3d 995, 1018-19 (6th Cir. 1999) (“[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant’s monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition.”).


\(^7\) See, e.g., 2B Phillip E. Areeda et al., Antitrust Law ¶ 532c, at 250 (3d ed. 2007) (“[I]t would be rare indeed to find that a firm with half of a market could individually control price over any significant period.”); Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002) (“[M]arket share at or less than 50% is inadequate as a matter of law to constitute monopoly power.”); Blue Cross & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995); Eastman Kodak Co. v. Image Technical Services., 504 U.S. 451, 481 (1992); United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87 percent); United States v. E.I. du Pont Numours & Co., 351 U.S. 377, 379 (1956) (75 percent); Am. Tobacco Co., 328 U.S. at 781 (over 66 percent); United States v. Dentsply Int’l Inc., 399 F.3d 181, 188 (3d Cir. 2005) (75 to 80 percent predominant); United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (80 to 95 percent predominant).

Similarly, firms would benefit from a fuller discussion of what kinds of evidence the ACCC considers in assessing market power, including the roles that both direct and indirect evidence play in its analysis. Direct evidence, e.g., using data analysis to show anticompetitive effects such as price increases, can be more powerful than indirect evidence, e.g., an analysis of structural factors such as barriers to entry, even if both are admissible and both are typically relied on where both are available.

Finally, the Sections note that the proposed Guidelines currently offer limited insight into how the ACCC approaches defining the relevant market or markets. They reference the Merger Guidelines, which focus upon substitutability, i.e., structural factors, as the primary tool for defining an antitrust market. Additional and improved economic tools are available today to assist in accurately defining antitrust markets, and are employed in jurisdictions such as the United States and the EU. Such tools include the “Hypothetical Monopolist Test,” which posits that an appropriately drawn market is one in which a hypothetical monopolist likely could successfully impose a small but significant and non-transitory increase in price (“SSNIP”). The ACCC’s current consideration of these issues may provide a timely opportunity to update its explanation in the Merger Guidelines of how it utilizes economic tools and evidence to assist in defining markets and assessing competitive effects and to explain how its use may be similar to or differ from other jurisdictions.

II. The ACCC Should Adopt An Effects-Based Approach in Determining Whether Conduct Lessens Competition

As the ACCC notes in the proposed Guidelines, the “substantially lessening competition” and “effects” tests appear in other parts of Australian competition law. But the Guidelines lack a clear statement of how the ACCC evaluates purpose, effects, or likely effects. The Sections recommend that the ACCC provide guidance or cross-reference particular guidance in other areas that apply the “substantially lessening competition” and “effects or likely effects” tests to help businesses understand their applicability in the context of Section 46.

With respect to the “effect” and “likely effect” elements, the ACCC’s proposed balancing test appears to take the same form as the rule of reason in U.S. law, which the Sections believe is an effective framework for analyzing competitive effects. Ultimately, the framework is a balancing exercise between anticompetitive and procompetitive effects. Clarification of how the ACCC intends to apply the “effect” and “likely effect” elements would help firms in their business planning. Specifically, the Sections recommend that the ACCC clarify: (1) whether it will consider the extent to which procompetitive effects, such as cost savings, benefit consumer welfare (e.g.,

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11 Id. § 4.1.1.

whether cost-savings are passed on to consumers); (2) whether it will consider if there were less restrictive alternatives available to achieve the procompetitive effects; and (3) whether the framework for its enforcement activities is in fact to balance procompetitive and anticompetitive effects. In that regard, the ACCC may wish to consider providing guidance, on when certain conduct may be viewed as more likely anticompetitive or procompetitive. Such guidance would provide further clarity into the ACCC’s enforcement framework as well as useful tools for market participants in assessing and planning their business activities.

The Sections further recommend that enforcement actions should not be pursued against conduct that may have had the “purpose of” lessening competition but did not create or was unlikely to create an anticompetitive effect. If the ACCC does intend to bring such actions purely based on purpose, the Sections suggest that it should provide guidance as to how it would determine whether the purpose of the conduct was to lessen competition and provide examples of conduct that it would find illegal under such a standard.

III. Specific Conduct

The Sections also respectfully offer the following observations regarding the specific conduct discussed in the proposed Guidelines.

(a) Refusal to Deal

The Sections agree with the ACCC’s comment on page 8 of the Guidelines that “[b]usinesses are generally entitled to choose whether or not they will supply or deal with another firm, including a competitor.” The Sections likewise agree that, regardless of a firm’s market power, there is no absolute obligation to deal with other firms. U.S. law concurs that, as a general matter, the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” Compelling a firm that has gained market power through innovation and competition to deal


14 The U.S. Department of Justice & Federal Trade ACCC Intellectual Property Guidelines provide a useful framework for considering less restrictive alternatives, noting,

The existence of practical and significantly less restrictive alternatives is relevant to a determination of whether a restraint is reasonably necessary. If it is clear that the parties could have achieved similar efficiencies by means that are significantly less restrictive, then the Agencies will not give weight to the parties’ efficiency claim. In making this assessment, however, the Agencies will not engage in a search for a theoretically least restrictive alternative that is not realistic in the practical prospective business situation faced by the parties.


with its rival “is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”\textsuperscript{17}

In addition, forcing a firm to deal with its rival creates logistical challenges as it requires courts and agencies “to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”\textsuperscript{18}

The ACCC’s proposed analysis of refusals to deal, as reflected in its description and in the “essential input” example, appears similar to an “essential facilities” test.\textsuperscript{19} In the experience of the Sections, a facility is rarely truly essential, and it has often been the case that those advocating forced sharing of an “essential” facility have underestimated the ability of determined competitors to compete around the facility, with resulting benefits to consumers. Recognizing these concerns, the U.S. Supreme Court has made it clear that it will treat so-called essential facilities claims with great skepticism, stating that courts should be very cautious in recognizing exceptions to the general rule that even monopolists may choose with whom they deal.\textsuperscript{20} The U.S. Supreme Court in \textit{Trinko} explained that the exception recognized in \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}\textsuperscript{21} for compelling a monopolist to deal with its rivals was “at or near the outer boundary of Section 2 liability,”\textsuperscript{22} and stated that it had “never recognized” the doctrine of essential facilities.\textsuperscript{23} When an essential facilities test has been applied by lower courts in the United States or by other jurisdictions, it has involved strict criteria to avoid unduly chilling single firm conduct in the market. These factors have included 1) control by a monopolist of a facility essential to competition in a defined market; 2) competitors’ inability to duplicate the essential facility practically or reasonably; 3) proof that the essential facility was denied to a competitor without legitimate business justification; and 4) the feasibility of providing access to the facility to a competitor.\textsuperscript{24} Moreover, at least in the United States, the courts have held that the doctrine should not apply if a complex regulatory structure has been erected under other laws setting out requirements for when a monopolist should have to provide access to a key facility or input to its competitors.\textsuperscript{25} Such clear articulation of a test for determining whether an instance of refusal to deal is considered unlawful provides valuable information to market participants in planning their business conduct.

\textsuperscript{17} Verizon Commc’ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004).

\textsuperscript{18} Id. at 408.

\textsuperscript{19} An essential facility is a facility that is necessary to competitive viability because competitors cannot compete effectively in the relevant market without access to it. \textit{See, e.g.}, City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 n.5 (9th Cir. 1992); MCI Commc’ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983);.

\textsuperscript{20} \textit{E.g.}, \textit{Trinko}, 540 U.S. at 408.

\textsuperscript{21} 472 U.S. 585 (1985).

\textsuperscript{22} \textit{Trinko}, 540 U.S. at 409-10.

\textsuperscript{23} Id. at 411.

\textsuperscript{24} \textit{See, e.g.}, \textit{MCI Comm’n Corp}, 708 F.2d 1081.

\textsuperscript{25} \textit{Trinko}, 540 U.S. at 409-11, 415-16.
(b) Predatory Pricing

The Sections agree with the ACCC’s recognition that “[i]n almost all circumstances low pricing is beneficial for consumers and is part of the competitive process.” U.S. law is clear that competition on price is “the very essence of competition,” and so “[e]ven if the ultimate effect of the [price] cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.”

In the same vein, the Sections recommend that the ACCC’s predatory pricing test add an element of probability of recoupment of losses from below-cost pricing. Consistent with the ACCC’s recognition that the competition law protects the competitive process, not individual competitors, an intent to cause competitors to exit the market, discipline pricing, or discourage entry, does not without more harm the competitive process or consumers, who benefit from lower prices. On the other hand, the probability of recoupment of the losses from pricing below cost is important because recoupment by the predating firm is what causes consumer harm, not the below-cost pricing itself. Unsuccessful predation, i.e. below-cost pricing that does not result in recoupment of the losses, no matter how malicious, is “in general a boon to consumers.”

For example, in the ACCC’s example 1.C (“Predatory Pricing”), the predating firm has a probability of recoupment, i.e. return to its higher pricing over a long enough period of time to offset the losses made from pricing below cost, only if entry barriers are high and another new entrant cannot readily enter. Otherwise, if another new entrant can readily enter and the predating firm and this new entrant continue to compete on price, consumers will have benefited from lower prices during the predatory pricing period, and will suffer no harm because the incumbent is unable to raise


27 Brooke Grp., 509 U.S. at 225 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’”) (citing Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); see also Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38 (1990) (“[C]utting prices to get more business is the essence of competition.”).

28 Brooke Grp., 509 U.S. at 224 (“Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation.”). Of course, if a firm’s predatory pricing strategy is supported by its government, such that it can incur losses that its government subsidizes, then recoupment may not be as important; ICN PREDATORY PRICING ANALYSIS, supra note 30, at ¶ 3 (“The predator expects not only to recoup the losses it sustained during the predatory period but also to enhance profits by holding prices above what they otherwise would have been.”).

29 Id.; see also Phillip Areeda & Donald Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975) (arguing that where barriers to entry are low, it is costly to lower prices to predatory level because new entrants can correct the market).
its prices due to competition from the new entrant. In this case, finding the predatory pricing conduct illegal would deprive consumers of the lower prices and deter vigorous price competition in markets that are not susceptible to predation.

As currently drafted, the Guidelines already require that the conduct have the “effect or likely effect of substantially lessening competition in a market.” It would be logical for the ACCC to clarify that the probability of recoupment is a proxy for such “effect or likely effect,” while also making clear that an anticompetitive purpose is an insufficient basis for liability for this category of conduct. In light of this recommendation, the Sections also suggest that the ACCC modify its “Predatory Pricing” example to include facts that would amount to what it considers to be barriers to entry or other factors sufficient to make recoupment probable.

Additionally, the Sections interpret the guidelines to mean that the test is effect-based and would recommend that the guidelines clarify that conduct will not be actionable based simply or intent or purpose without actual or likely anticompetitive effects. If intent is in fact an element of the offense, the ACCC should clarify how it will assess intent vis-à-vis the effects element. Any clarity the ACCC can provide will be invaluable to market participants, who will rely on the ACCC’s guidance in determining their strategies on price competition.

(c) Tying/Bundling

The Sections welcome the ACCC’s carefully balanced assessment that tying can have both anticompetitive and procompetitive effects depending upon the circumstances. However, the ACCC may wish to make clear how it will undertake an analysis of tying conduct, including the factors on which it may rely in determining when it may find this conduct to constitute misuse of substantial market power. Some jurisdictions have recognized that tying can be anticompetitive as long as a firm has market power in the tying market without the need to show foreclosure or market power in the tied product market. While recent economic scholarship has confirmed that such circumstances can result in anticompetitive effects (absent a very narrow caveat), it is recognized that there is still a need to assess potential procompetitive effects and less restrictive alternatives. The ACCC may wish, as part of its discussion of tying conduct in these proposed Guidelines, to consider whether

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30 See Areeda & Turner, supra note 32, at 699 (suggesting that proved cases of predatory pricing have been extremely rare).

31 See Brooke Grp., 509 U.S. at 224-25.


34 See, e.g., Elhauge, 80 ANTITRUST L.J. at 494-95, 515 (characterizing the Court’s jurisprudence on tying as imposing a presumption that tying cannot be justified because of the likelihood of less restrictive alternatives). It may not be an accident that outside of the franchise context, the only case to have apparently accepted an efficiencies defense to tying—and notably cited by the Proposed Update—is United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 560 (E.D. Pa. 1960), aff’d 365 U.S. 567 (1961) (per curiam) involving new entry.
sufficiently high and sustained market shares in the tying product market and sufficiently substantial foreclosure in the tied product market should warrant a presumption that tying is anticompetitive in accordance with unilateral conduct prohibitions in other jurisdictions.\textsuperscript{35}

The Sections believe that this framework is applicable to example 1D in the draft guidelines (“Bundling a competitive product with a monopoly product”).\textsuperscript{36} It fits well with the balancing exercise between procompetitive and anticompetitive effects envisioned by proposed s. 46 and offers guidance to market participants on when a tying arrangement is considered unlawful.

With respect to bundling, the Sections recommend that the ACCC clarify the factors it considers in determining whether a particular arrangement is unlawful. The ACCC defines bundling to involve lowering prices for products purchased in a package, which generally has the effect of lowering prices to consumers. Therefore, the Sections recommend that the ACCC clearly articulate a test for determining when bundling is considered unlawful, as well as provide an example of its application of such a test.

\textbf{(d) Margin Squeeze}

The Sections agree with the ACCC’s recognition that “[b]usinesses are generally entitled to charge different prices to different buyers for the supply of goods or service along the supply chain.” Furthermore, margin squeeze generally leads to lower prices to consumers,\textsuperscript{37} so even if some competitors may be harmed, the net effect is generally “benefits to the community through lower prices,” which is consistent with the ACCC’s statement of the objective of competition law in the draft Guidelines.

Consonant with this principle, U.S. antitrust law does not recognize margin squeeze as an independent offense but analyzes such claims under refusal to deal and/or predatory pricing principles.\textsuperscript{38} Accordingly, if the conduct in the upstream market, i.e., setting the price of supplies too

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\item \textsuperscript{35} See ICN REPORT ON TYING AND BUNDLED DISCOUNTING, supra note 36, at 23; see also Eastman Kodak Co. v. Image Technical Services., 504 U.S. 451, 488-89 (1992) (Scalia, J., dissenting) (discussing tying); ZF Meritor LLC v. Eaton Corp., 696 F.3d 254, 270-71 (3d Cir. 2012) (discussing exclusive dealing). This proposed distinction between misuse of substantial market power and other Australian statutes dealing with joint conduct is mirrored in U.S. law. In the Microsoft decision, the Court of Appeals for the D.C. Circuit proposed a stricter standard for finding software tying to be anti-competitive, including a required showing of foreclosure in the tied product market, while rejecting a need for such a showing in the monopoly context. See United States v. Microsoft, 253 F.3d 34, 60-62, 64-67, 95-97 (D.C. Cir. 2001) (en banc). Though this decision has been criticized for articulating incorrectly a special tying rule in the joint conduct context for the software industry, see, e.g., IX PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW \textsection\textsection 1728f2, at 326 (2004), it does suggest that the ACCC may wish to view tying conduct differently if sufficiently high market shares in the tying product market may be involved.

\item \textsuperscript{36} The Sections also note that the ACCC appeared to be describing a tying arrangement in its example 1D, rather than a bundle because, as currently drafted, Drug B is available only when a consumer purchases Drug A. If so, the ACCC should clarify that this example is an instance of unlawful tying.

\item \textsuperscript{37} See, e.g., Town of Concordia v. Boston Edison Co., 955 F.2d 1373, 1378 (9th Cir. 1992); see also Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 451 (2009).

\item \textsuperscript{38} See linkLine, 555 U.S. at 449-52. But see INT’L COMP. NETWORK UNILATERAL CONDUCT WORKING GROUP, REPORT ON THE ANALYSIS OF REFUSAL TO DEAL WITH A RIVAL UNDER UNILATERAL CONDUCT LAWS 29 (2010),
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high to competitors in the downstream market, does not amount to an illegal refusal to deal, and conduct in the downstream market, i.e., pricing too low, does not amount to illegal predatory pricing, the margin squeeze does not violate the antitrust law. Just as a firm has no general duty to deal with a competitor, it has no duty to price its products or services at a level that maintains its rivals’ margins. Furthermore, if the pricing in the downstream market does not involve a probability of recoupment, there is no consumer harm, and prohibiting such pricing runs the risk of discouraging vigorous price competition, as discussed above.

Accordingly, the Sections recommend that below-cost pricing and the probability of recoupment be treated as elements of the margin squeeze offense and that the ACCC provide an example of what it considers to constitute unlawful margin squeeze to give businesses clearer guidance as to the ACCC’s perspectives on this issue.

IV. General Comments

The Sections offer the following general comments on the structure of the Guidelines, as well as the scope of application.

Sections 4 through 4.7 of the Guidelines provide only brief descriptions of the factors that the ACCC will consider in deciding to bring an enforcement action against a firm for a violation of proposed s. 46. Through the examples in Tables 1 and 2, the Guidelines suggest additional factors that may be important. The Sections respectfully suggest that it may improve the usefulness and comprehensiveness of these Guidelines for the ACCC to discuss all of these factors more completely up front in its description section rather than in the hypothetical examples where they are more difficult to discern. The ACCC may wish to add hypothetical examples that may fall into grey areas, so as to convey to businesses an understanding as to how the ACCC may approach more difficult cases.

The Sections recommend that the ACCC clarify that the Guidelines may have limited application to competition matters involving the exercise of intellectual property (IP) because there are distinct issues in the interplay of competition law and IP, such as the impact of the right to exclude granted by patents. Typically, in other jurisdictions, these matters are handled in separate

[39] Id. at 452.
[40] Id.
guidelines, and the ACCC already has separate guidelines to address matters involving certain IP and antitrust.

Finally, regarding the statement of the objectives of the proposed s. 46 in section 4 of the Guidelines, the Sections recommend that the ACCC clarify that the Guidelines will focus on consumer welfare by seeking to balance anticompetitive and procompetitive effects in assessing when business conduct will constitute misuse of substantial market power.

V. Conclusion

The Sections appreciate the opportunity to provide these comments and are available to provide additional comments or to participate in any further consultations that may be helpful to the ACCC.


45 See, e.g., id. at 2238 (2013) (Roberts, C.J., dissenting); see also, e.g., id. at 2234 (maj. op.) (discussing the anticompetitive effects of reverse payment patent settlements in terms of the loss to consumers of paying lower prices).

46 See, e.g., id. at 2235-36, 2237-38 (maj. op.); see also In re Cipro I & II, 348 P.3d 845, 865-71 (Cal. 2015).