Matters arising from Competition Compliance Training

Note - Questions arising from the recent competition compliance training sessions are set out in the boxes below. Given the overlap in questions, answers to a number of questions have been grouped.

Should further questions arise from the below or from the compliance training, the Institute will update this document to ensure that there is an ongoing dialogue with its members on these important compliance issues for the Institute.

The Institute has also established a committee for considering practical cases where Practice Committees, Working Groups, Taskforces or individual members require support to make appropriate choices from a competition law perspective. The Institute encourages references being made to this committee to ensure the Institute continues to comply with its competition law obligations.

Competition Law – Approach of the ACCC

Where do the ACCC's views and responsibilities lay in respect of unhealthy competition that could result in business collapse, market consolidation and reduced competition as a result?

The ACCC may be involved in the consideration of proposed mergers (and resulting market consolidation) as a result of what are known as "failing firm" acquisitions. The ACCC can consider such matters in accordance with section 50 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) which prohibits mergers and acquisitions that have the effect or likely effect of substantially lessening competition. Here the ACCC can consider the prospective failure of one of the merger parties when assessing a merger that would otherwise substantially lessen competition. This will include consideration of:

(a) whether the relevant firm is in imminent danger and is unlikely to be successfully restructured without the merger; and

(b) the likely state of competition with the merger as compared to if the target of the merger exited the industry.

The ACCC may also be involved in considering issues of market failure or unhealthy competition leading to market failures where it is directed to do so by the Commonwealth Government. This is what occurred when the ACCC was asked by the Commonwealth Government to conduct a three year inquiry to help address concerns about insurance affordability and availability in northern Australia and consider how to promote more informed and more competitive insurance markets.

The ACCC otherwise has powers to bring enforcement action to the extent that market participants breach the restrictive trade practices provisions in Part IV of the CCA.

Cartel Conduct – Price Fixing

Is the 'purpose or effect of fixing prices' the same as the 'purpose or effect of heavily influencing prices'?

If the work of the Institute's members results in a general downward or upward trend of premiums in the industry, would this be considered as price fixing?

If you agree to share information which would affect price making, would this be considered as price fixing?

Would, for example, agreeing to cap the replacement rate on disability insurance be considered anti-competitive? This prevents over insurance which would discourage the insured from seeking rehabilitation and increase premium rates for everyone.

Would there be competition concerns if an Institute taskforce was made up of people who had no link to market participants?

The CCA strictly prohibits a business practice where competitors make (or give effect to) a contract, arrangement or understanding containing a provision to fix, control or maintain the price of goods or services (or the amount of a discount, allowance, rebate or credit), instead of competing with each other.

This requires the satisfaction of two conditions:

(c) The **purpose/effect condition** – this is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance or credit in respect of goods or services supplied, acquired or re-supplied by any or all of the parties to the contract, arrangement or understanding.

In this context:

(i) **Fixing** means to make fast, firm or stable (with an intention or likelihood to affect price competition);

(ii) **Controlling** means restraining a freedom that would otherwise exist as to a price to be charged; and

(iii) **Maintaining** means some element of continuity and generally assumes that price has been fixed beforehand.

(d) The **competition condition** – this is satisfied if at least two parties to the contract, arrangement or understanding are, or are likely to be, or but for the contract, arrangement or understanding, would be or would likely to be in competition with each other in relation to the supply, acquisition or re-supply of the goods or services to which the provision relates.

If those involved in the discussion are not market participants – this would not satisfy the competition condition.

Conduct that may "heavily influence prices", or have a "general downward or upward effect on premiums", will also not amount to cartel conduct unless there is some contract or arrangement or understanding between competitors that is to fix, control or maintain prices such conduct.

By contrast, **agreeing** with competitors (rather than making an individual competitor's choice) to cap certain product feature levels which has a direct impact on the premium price levels may give rise to a cartel conduct risk as such caps may be seen as seeking to control pricing levels. To the extent that this cap is recommended by a body/entity such as the Institute for good public policy reasons such as the likelihood of rehabilitation, there is no cartel conduct risk as there is no agreement between competitors; there may, however, be concerted practice risks associated with the recommendation of a cap (see further below).

Particular caution should be shown with respect to the sharing of any confidential pricing information or other information that may have an influence on price. Such conduct can also give rise to concerted practice risks (see further below).

Care should also be taken with the publication of any material that may influence prices, for example resulting in the upward or downward movement in price. Whilst this would not amount to cartel conduct, it too could be considered to give rise to a concerted practice risk (see further below).

You should speak to the Institute (who will seek legal advice as appropriate) if granular pricing information or information that could influence price is to be shared (irrespective of the source) and if you are proposing to publish materials that may have an impact on the direction of pricing or premium levels.

Interaction with competitors

What if the Institute wished to charge external parties for the education course as in the scenario, but not collude on price with the tertiary institutions?

What if Bob did not specify that this is the strategy of his insurer as in the scenario, but rather his expectation of the industry?

Meetings between competitors give rise to the risk of competition law contraventions. It is, therefore, very important when the Institute itself meets with those who could be perceived as their competitors that care is taken to ensure such meetings do not facilitate anti-competitive arrangements.

When meeting with competitors where there is a need to share certain commercial information, this should, as far as possible, be information that is publicly available, anonymised, aggregated and historic. You should avoid sharing any information that could be considered to be competitively sensitive information. Before sharing any commercial information (regardless of its source) with a competitor you should speak to the Institute (who will seek legal advice as appropriate).

This is equally true where professional associations bring together professionals who are employed by competing employers. Care must be taken that such meetings do not facilitate anti-competitive arrangements between such professionals.

The ACCC considers that serious competition concerns can arise, for example, where competitors are brought together and discuss and agree matters that limit the availability of products in a market or improve the profitability of particular products.

It is therefore important that what is discussed:

(a) is reflective of personal views on the industry (for example) and not reflective of, or the views of, the person's employer;

(b) is not competitively sensitive strategy/information of a person's employer;

(c) is not reflective of future commercial strategy. For example whilst discussions may not relate to price specifically and therefore may not give rise to price fixing cartel risks, care should be taken if discussions relate to future commercial strategy as this could give rise to other cartel conduct risks or concerted practices (see further below).

Contracts, Arrangements and Understandings

Does an agreement to include or exclude certain product terms constitute anti-competitive behaviour?

If we assume that the agreement is not being reached between competitors and not being pursued for an anti-competitive purpose, the potential competition risks will depend on the nature of what is agreed to and the effect or likely effect that it can have on a relevant market.

The ACCC is only concerned with contracts, arrangements and understandings that substantially lessen competition in a relevant market. The CCA does not define 'substantially lessen competition', however it is in essence where a contract, arrangement or understanding interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition.

Concerted Practices

If Institute discussions or joint papers resulted in cover not being offered to customers suffering from mental health due to uncertainty of risk and difficulty in pricing across the industry, might this be considered as allocating customers, suppliers or geographical areas? *Would publishing future climate expectations that people may use (as one of many factors) to price directly or indirectly their property portfolios raise competition law issues?* *If the Institute was to promulgate a standard which discourages a certain behaviour, for example charging people premiums they cannot afford or which violate ESG standards such as discrimination or using big data to produce results which may have impacts on certain groups, would this be considered anti-competitive?* *Currently insurance access and affordability is a core issue Actuaries are examining. In the coal industry, the industry as a whole is limiting access to the thermal coal sector partly as a response*

to APRA guidance and other international financial regulation. Another response to climate risk might be to limit access to certain geographic regions. If insurers independently arrive at their responses to these issues - is there any risk under competition law?

Would it make a difference if the information being collated by the Institute is about forecasts and future behaviour? Would there be any risk in collating and aggregating information about assumptions already being used by companies that impact future prices, for example, capital risk margins companies are using at a point in time?

Would collating industry claims data and producing standard tables create competition law risks?

Can a member of an association present results of experience that they are seeing in the business, for example, seeing an increase in cancer claims in Queensland which could be public?

Is there a distinction between input costs and output prices to a product or service? Competition law focuses on output prices, it does not (or perhaps should not) deal with or prohibit an industry forming a common view on input costs. Is this correct?

How does industry claims data, which forms the basis of up to 80% of offered premiums in some products, sit within the law if it limits the level of premium variance to the remaining 20% of charged premium?

Would it be possible for the industry to meet and debate the response to legislation?

Would publicly advocating a change in the direction of price, for example by publishing white papers, be considered to be price fixing?

If the work of the Institute's members results in a general downward or upward trend of premiums in the industry, would this be considered as price fixing?

If you agree to share information which would affect price making, would this be considered as price fixing?

Why is a text message 'not being responded to' considered an anti-competitive agreement?

Who is most exposed if some actuaries in an Institute committee overstep a line around considering industry issues? The Institute or the actuaries' employers (who might gain)?

The CCA prohibits persons who engage with one or more persons in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition.

Concerted practice is not defined in the CCA but has been explained in the explanatory notes to the CCA amendments that introduced the concerted prohibition to mean the following:

> *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.*

Concerted practices capture cooperative behaviour or communication between separate entities which falls short of the commitment required by Australian courts to establish a contract, arrangement of understanding.

Often, a concerted practice may involve the exchange of strategic commercial information between firms which facilitates an alignment of companies' competitive behaviour and softens competition between them. For example, where persons "*share information which would affect price making*" this may give rise to concerted practice risks.

Concerted practice conduct can also arise from a one-off single instance of information being provided by one person. This could be in the form, for example, of a one-off text message that is not responded to or a disclosure of information that signals to your competitors timing or size of future price increases or reductions in discounts. [1]

In their concerted practice guidelines, the ACCC recognises that the publication of material around which competitors may adjust their behaviour may give rise to a concerted practice risk. For example, the ACCC considers that the publication of the aggregated results of a survey of competitors regarding future pricing intentions by category hinders competition as it restricts a key competitive uncertainty that would otherwise be inherent in the market. The ACCC considers that publishing price intentions through such reporting could be considered as engaging in a concerted practice.

The Institute in publishing white papers, discussion documents and other professional development materials is in broad terms doing so for the public benefit (which includes for the benefit of the profession) and therefore any such publication would, generally speaking, not be being made for the purpose of substantially lessening competition.

The risk for the Institute is the effect or likely effect of the proposed publication on a relevant market and whether this has the effect or likely effect of substantially lessening competition in that market.

Care therefore needs to be taken regarding the proposed information that the Institute intends to publish to the extent that the information published will reduce the uncertainty of competition in a market and enable competitors to substitute this uncertainty with convergence (for example) around the information that has been published.

Care would need to be taken in respect of any publication that has the effect, for example of "*cover not being offered to customers suffering from mental health*" or that "*promulgate a standard which discourages a certain behaviour*" or "*publicly advocating a change in the direction of price*" or "*work of the Institute's members result in a general downward or upward trend of premiums in the industry*". To the extent that the publication has the effect of constraining the competitive choices of insurers, for example, or results in convergence of behaviour or the movement of prices in a particular direction, you should discuss such proposals with the Institute (who will seek legal advice as appropriate).

Particular care needs to be taken with the publication of any information or collated views of an industry that may impact on future pricing behaviour. This equally would apply regarding the collating and aggregating of assumptions that underpin businesses' future prices as this may

[1] It may also be used as part of the evidence of an actual agreement, arrangement or understanding to fix, control or maintain prices

provide insight into future pricing behaviour. You should discuss any specific publication proposals with the Institute (who will seek legal advice as appropriate).

By contrast, publishing material on one aspect that feeds into prices (such as "*future climate expectations that people may use (as one of many factors) to price directly or indirectly their property portfolios*") is unlikely to have a substantial lessening of competition effect. It is also **unlikely** that the following will give rise to concerted practice risks:

(a) collation of publicly available information such as "*collating industry claims data and producing standard tables*";

(b) aggregation of historical publicly available information; and

(c) sharing insights that professionals may see from publicly available information (such as "*seeing an increase in cancer claims*").

Concerted practice risks also do not arise from innocent parallel behaviour, for example where it can be demonstrated that "*insurers independently arrive at their responses to*" certain issues. This is key - businesses should make **individual and independent decisions** and not substitute this type of decision making with coordinated behaviour or behaviour that can be demonstrated as being facilitated by, for example, the publication of materials to industry.

Matters of public policy debate such as submissions to consultations instituted by Regulators or Government are also unlikely to give rise to competition law risks. However, care needs to be taken in the way that such submissions are developed and the approach taken to any proposed legislative or policy reform. This is because whilst the ACCC may acknowledge the particular concern that is requiring the legislative and policy change is important, the ACCC will scrutinise behaviour in response to such reform that may facilitate competitors to meet and potentially develop a common understanding relating to particular market sensitive matters that are the subject of the proposed legislative reform.

Ultimately, whether something will be a prohibited concerted practice will need to be considered on a case-by-case basis as it will be the nature of the information shared, the particular competitive effects of the sharing of that information and the coordinated behaviour that has been observed as a result of the publication that will likely be determinative.

Who is ultimately the subject of any concerted practice enforcement action by the ACCC or private enforcement action by businesses will depend on the particular circumstances of the contravention. This may involve those involved in the sharing of the information, those who facilitated that sharing as well as those who benefited from the sharing. The ACCC in their guidance on concerted practice relevantly state:

> *Parties to a concerted practice…. will often be competitors or potential competitors. However, there is no requirement that persons engaging in a concerted practice are competitors or potential competitors in a relevant market. Depending on the nature of their involvement in a concerted practice, other parties such as suppliers, distributors, trade or* ***professional associations*** *and consultants may engage in a concerted practice.*
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> *Section 76 of the CCA provides that, depending on the circumstances, a person such as an individual employee or company office holder may also be found to be involved in a contravention of s. 45(1)(c). For example, if a corporation participates with several*

competitors in a concerted practice the contravenes s. 45(1)(c), a director of that corporation may contravene the CCA if that director was in any way directly or indirectly knowingly concerned in that corporation's contravention of s. 45(1)(c).

Authorisation

Is authorisation a particular entity's responsibility? Should a particular business or industry body or union or association or a regulator be the one to engage with the ACCC?

Where there is a concern that certain proposed conduct may give rise to a breach of the restrictive trade practice prohibitions in the CCA, authorisation for that proposed conduct can be sought from the ACCC. It is therefore open to anyone participating in the conduct that may choose to apply to the ACCC for authorisation. The applicant for authorisation is the one who chooses who it proposes should be covered by the authorisation. This may be in the case of a professional association, the association itself and its members (current and future) rather than the industry players that the association members are employed by, for example.

If the ACCC is satisfied that the relevant legal test is met and grants authorisation, this removes the risk of legal action under the relevant restrictive trade practices prohibitions under the CCA.

Authorisation applications are particularly useful where the proposed conduct may have an impact on competition, however, can be authorised if it has a net public benefit.

Authorisation is an option available to the Institute with respect to future conduct which may give rise to competition concerns to ensure that there is no risk of legal action under the CCA arising from the proposed conduct.

The authorisation process is, however, a public and lengthy process and can typically take 5-6 months to complete once the ACCC has reviewed the application, sought and obtained submissions from interested parties, made a draft determination, allowed for submissions on that draft determination and then published a final determination (either to decline authorisation or approve the authorisation, with or without conditions).