



**Submission – Competition Policy Review:
Draft Report**

November 2014



IPA INSTITUTE OF PUBLIC
ACCOUNTANTS
Partnership beyond numbers

Forward

The Institute of Public Accountants (IPA) welcomes the opportunity to present our third submission to the Competition Policy Review.

The IPA is one of the three professional accounting bodies in Australia, representing over 26,000 accountants, business advisers, academics and students throughout Australia and in 57 countries worldwide. The IPA prides itself in not only representing the interests of accountants but small business and their advisers.

The IPA takes an active role in the promotion of policies to assist the small business and SME sectors, reflecting the fact that two-thirds of our members work in these sectors or are trusted advisers to small business and SMEs. The IPA also pursues fundamental reforms which will result in easing the disproportionate regulatory and compliance burden placed on small businesses.

We welcome the opportunity to discuss our submission in more detail if required and we look forward to ongoing participation in the Review. Please address all further enquiries to Vicki Stylianou, Executive General Manager, Leadership at either vicki.stylianou@publicaccountants.org.au or on 0419 942 733.

Yours faithfully

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

Vicki Stylianou
Executive General Manager, Leadership
Institute of Public Accountants

Introduction

This submission responds to draft recommendations 25, 47, 48 and 49. Our comments are from the perspective of how these recommendations may impact small business.

Most of the submission relates to draft recommendation 47 relating to ACCC governance. In particular, our comments are informed by the report of the Productivity Commission (PC), *Regulator Engagement with Small Business*, released in October 2013.

<http://www.pc.gov.au/projects/study/small-business/report>

Recommendation 25 – section 46 misuse of market power

The IPA made a supplementary submission on this topic, which was supportive of an ‘effects test’. We repeat the recommendations with our suggested draft section (drafted by the Deakin University Law School, Professors Julie Clark and Philip Clark) (see below).

The Draft Report specifically asks for submissions about the proposed defence in order to mitigate the primary prohibition and whether it would be too broad; and whether there are other ways to ensure anti-competitive conduct is caught by the provision but exempted by way of a defence:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

It would be difficult to see how conduct can be assessed as benefitting the long-term interests of consumers. We contend that this would be far more nebulous than the current provision. The amount of qualitative judgment and interpretation inherent in this defence would make it arguably unworkable and difficult to prove (or disprove).

The IPA repeats our recommendations with respect to section 46:

Recommendation

The Institute recommends that a new prohibition be added to section 46 in the following form:

“A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market if the effect or likely effect would be to substantially lessen competition in that or any other market”

Recommendation

The Institute recommends that the words 'take advantage of that power in that or any other market' in s 46(1) be replaced with the words 'engage in conduct'.

Suggested amendments to section 46:

In light of the above recommendations the IPA suggests the following amendments to section 46:

Section 46(1) be repealed and replaced with the following provision:

(1)(a) A corporation that has a substantial degree of power in a market shall not engage in conduct for the purpose of:

- (i) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- (ii) preventing the entry of a person into that or any other market; or
- (iii) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(1)(b) A corporation that has a substantial degree of power in a market shall not take advantage that power in that or any other market if the effect or likely effect would be to substantially lessen competition in that or any other market.

Subsection (1A) should be amended to replace references to subsection (1)(a)(b)(c) with references to subsection (1)(a)(i)(ii)(iii) respectively.

Sub-section (7), which allows purpose to be inferred, should be amended as follows:

(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have a purpose referred to in subsection (1)(a) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

The remaining sub-sections be retained in their current form.

Draft Recommendation 47 – ACCC governance

The IPA is strongly of the view that the status quo should be maintained and does not support draft recommendation 47 to change the governance or structure of the ACCC. We do not believe that a board or an advisory board or any other structure would improve the governance, or be able to more effectively incorporate a wider range of business, consumer and academic viewpoints. A compelling case has not been made for this draft recommendation.

The IPA disagrees with the statement that ‘this option would strengthen accountability of the ACCC to the broader community as represented by the non-executive members of the Board’. We contend that all stakeholders, including consumers, have the opportunity to be heard and considered.

Based on our experience in dealing extensively with the ACCC, we believe that it operates efficiently and effectively with broad stakeholder input; and we would be disappointed to see the current arrangement changed for no compelling reason. For instance, the ACCC has widespread outreach and consultation including the Small Business Information Network, the Small Business Consultative Committee and numerous publications, alerts, stakeholder surveys, help desk, PR, education including education resources and tools and so on. Commissioners and senior staff are always accessible and approachable and present at events and functions held by numerous organizations, including the IPA. It is unlikely that non-executive directors will provide this level of accessibility and approachability given their other interests. In fact, the PC, in the Report noted above, cites the ACCC as being one of the agencies that uses intermediaries [such as the IPA] as an example of effective communications.

We would be concerned if non-executive directors or an advisory board were to replace the various advisory groups which currently exist. We would not support a change which could lead to restricted access and where the opportunity to influence and advise would be restricted to a few who government or the Minister would deem acceptable. This would not broaden input but would rather have the potential to limit it.

We have not seen any instances of a lack of independence or transparency, in our experience. We have found the commissioners and ACCC staff to be forthcoming, open and always willing to actively listen. On the other hand, non-executive directors have an inherent bias without the sense of loyalty and commitment which a full-time or ‘executive’ commissioner has. One example of a non-executive board that has arguably resulted in sub-optimal outcomes is the Tax Practitioners Board, which has been subject to extensive criticism despite having directors drawn from business, industry, academia and consumers.

The IPA also contends that experts are needed in the area of competition law and policy and

who have built trust and credibility with all stakeholders. This may not be the case if commissioners were replaced by non-executive directors or some other type of board. We are not in favour, as a general principle, of non-executive directors being involved in operational and administrative policies.

The PC Report on *Regulator engagement with small business* refers to ‘regulator posture’ and we believe this concept is particularly useful when considering ACCC governance which must be viewed in this broader context and which is influenced by different factors. The PC sets out the proactive v reactive approach; consultative v cooperative approach; and the prescriptive v discretionary approach. In our assessment, the ACCC has achieved the right balance across all of these categories; which in turn are influenced by its current governance arrangements, its regulation tools and resources, societal and media pressures, organizational culture, risks to be mitigated and so on. (page 42)

Another important influence on regulator posture is the extent to which regulators have access to, and develop, a suitable body of skilled and competent staff. This is discussed in the Report and is a key influence on regulator performance. We would argue that the commissioners undertake this role of bringing expertise and skill in the complex area of competition law. (Chapter 6)

Regulator posture shows that in practice, regulators adopt a variety of engagement approaches, with the choice of approach in any given situation depending on particular circumstances specific to the regulation being enforced, and the businesses being regulated. Where regulators are able to strike the right balance, unnecessary burdens on business are reduced and regulatory effectiveness increased, increasing the likelihood of community wide benefits from the regulation.

Other useful points to draw from the PC report relate to the resourcing of the regulator. Of course, we could all do more if we had more. The IPA has been a long time advocate of adequate government resourcing for all the major regulators including the ACCC. The PC stated that “Resourcing issues appear to be the largest and most significant constraint affecting engagement with business. Around 60 per cent of regulators surveyed by the Commission nominated budget or resource constraints as one of the most significant constraints on their capacity to effectively engage with business. Regulators must be adequately resourced to enable them to efficiently and effectively carry out their regulatory responsibilities. Inadequate resourcing — including insufficient access to adequately skilled staff is a major concern.

The PC report includes examples of what is considered good practice for regulators in their engagement with small business. The ACCC is mentioned on a number of occasions.

The PC report states that “A number of regulators also periodically review the usefulness of their helplines (for example, ACCC and the Brisbane City Council), including monitoring

waiting times, quality of advice, satisfaction levels within business and other relevant aspects that bear on their effectiveness”.

Under the heading of ‘building stronger relationships’, the PC states that client service charters need to be updated as part of regulator continuous improvement processes. The ACCC (2013), for example, recently released a new client service charter. Key changes included reducing the timeframe for responding to correspondence, using plain language in communicating the ACCC’s role and streamlining of feedback processes. (page 162)

The ACCC also deals regularly with other state and federal agencies on small business issues, and seeks to ensure that, wherever possible, a uniform and cooperative approach is developed:

At the regional level, local ACCC Education & Engagement Managers in most states participate in their local government business information network, a forum where local, state and Commonwealth agencies coordinate delivery of information and advice to small firms in that jurisdiction. (sub. 26, p. 8) (page 171)

Another example relates to forums of regulators where the Australian Consumer Law (ACL) regulators meet regularly (for example the Education and Advisory Committee) to discuss a range of current issues, including those affecting small business, to ensure a consistent approach. They also share intelligence through ACL Link — an online communication platform used by all ACL regulators. (page 208)

Another example of engagement is the ACCC’s popular free printed and online publication, *Small business and the CCA: Your rights and responsibilities* that outlines key provisions of the CCA that small business operators need to be aware of. The ACCC also recently developed an online education program to further explain small businesses’ rights and obligations under the CCA. We understand this has enjoyed considerable take up. (page 104)

Draft recommendation 48 – media code of conduct

With respect to the ACCC use of media, and we are a keen follower, the IPA believes there will always be critics, however, we are pleased that this does not dampen the enthusiasm of the ACCC to engage with media and to promote public discourse. Like many other organizations with budgetary constraints, the IPA also engages with media to ‘get the message across’ or to promote debate on a particular issue; and again, there are always critics. While some may consider that the ACCC displays a lack of impartiality or have some other complaint, we have no doubt that many others do not share the complaint. Overall, we do not see the need for a Code of Conduct. Further, from the perspective of fairness, a media code would have to apply to all government agencies.

Draft recommendation 49 – small business access to remedies

The IPA agrees that small business should be given access to more remedies, however, it is a question of adequate resourcing. We note that the Small Business Commissioners in WA, SA, NSW and Victoria all have dispute resolution powers and it is likely that the new Commonwealth Small and Family Business Ombudsman will also be given dispute resolution powers. As with the state based commissioners, it is a case of having clarity and trying to reduce or eliminate duplication. The PC found that 64 per cent of regulators have a complaints resolution function. Despite this, many small businesses complain about accessibility, which in some instances is a case of lack of knowledge or awareness.