BAKER & MCKENZIE

Submission on Issues Paper released by the Competition Policy Review Panel

1. Introduction

1.1 Baker & McKenzie welcomes the opportunity to present this submission in response to the Issues Paper released by the Competition Policy Review Panel. As a commercial law firm, we have direct experience of how competition laws affect our clients on a day to day level. In this submission, we do not propose presenting a detailed analysis of the law, which we expect will be canvassed in detail in other submissions to the Panel. Rather, we hope to identify and discuss below a few key areas of concern for our clients and present feedback from our experiences of where the law may be unclear or may be operating inefficiently for our clients.

2. Cartel conduct

2.1 The cartel conduct offences rightly attract severe consequences. However, this makes it important that the provisions and related exceptions are clearly defined, easily understood, and as consistent with articulated underlying principles, as possible. A failure to do this creates inefficiencies including uncertainty causing failure to engage in competitive conduct or disputes about conduct that has been taken, increased legal costs in assessing compliance and the potential for unnecessary litigation.

2.2 In our submission, the current definition of cartel provision in s.44ZZRD of the *Competition and Consumer Act 2010* (**CCA**) is poorly drafted in places and the exceptions to the cartel offences are insufficiently clear in their operation to provide businesses with certainty. In our experience, the broad application of the cartel prohibitions combined with the complex and technical nature of the various exemptions can lead to outcomes that are not supported by a clear policy basis. While we give some specific examples below in relation to supply agreements and other exemptions, the provisions as a whole would benefit from a review and fresh drafting now that they have been in operation for some 5 years or so.

2.3 One example relates to distribution agreements between a manufacturer and a distributor, where the agreement prohibits the distributor from going out on their own and manufacturing a product similar to the product being distributed for the manufacturer. In some circumstances there may be a legitimate commercial reason for a manufacturer to seek to impose such a restraint. If the distributor is also a competitor of the manufacturer, then this will be assessed under the cartel provisions and subject to per se liability. The s.44ZZRS exception will not apply, as it is not an exclusive dealing condition that falls within s 47.

There does not appear to be a clear basis for this outcome given the competitive impact of the exclusivity provision and the cartel provision would be the same.

2.4 A similar issue may arise where the duration of a restraint clause in a distribution agreement exceeds the term of supply, which may be appropriate in circumstances where the arrangement has given the distributor useful know-how in relation to the suppliers products. It is likely that, to the extent it operates beyond the term of the supply agreement, the restraint will not fall under a head of s 47 and consequently the s.44ZZRS exception is not engaged, potentially exposing a company to the cartel prohibition. These gaps are a cause for concern, particularly given the serious consequences.

2.5 Another example from our recent experience relates to the bid rigging cartel provision defined in s.44ZZRD(3)(c). The background to this form of cartel conduct being expressly defined relates to tender rigging arrangements in cases like *Visy/Amcor* and was to address practices like cover bidding, bid suppression or withdrawal, bid rotation and non-conforming bids. These are all forms of conduct where the parties conspire to eliminate price or quality competition in a bidding process. The s.44ZZRD(3)(c) definition of a provision that has a bid rigging purpose is drafted so widely and vaguely that it may extend to conduct that was never intended to be caught.

2.6 For example, assume A agrees to obtain supply of a raw material from B as its exclusive supplier so that B can negotiate the best prices from its sources by buying in higher volumes. If A is subsequently approached by a seller (C) of the raw material with an offer to sell, it is arguable that the offer from C is a "request for bids" and that A's failure to entertain the offer because of the exclusive arrangement with B would involve bid rigging cartel conduct. The wide meaning that Gordon J has given the phrase "request for bids" in *Norcast Parl v Bradken Ltd* (2013) 302 ALR 486 at [213]-[224] suggests that it may be enough that the relevant product was publicly advertised for sale, without any request to A personally.

2.7 By supplying subject to the exclusivity provision, B is likely to be able to rely on the anti-overlap provision in s.44ZZRS on the basis that its conduct falls under s.47(2)(d). However, it is arguable that A's compliance with the provision will not fall under s.44ZZRS in circumstances where its conduct does not involve conditional supply and would not contravene s.47. In the context of the cartel conduct penalties, this uncertainty is a concern. A is at risk of "giving effect to a cartel provision" which in our submission is not an intended outcome of the cartel prohibitions.

2.8 We also submit that the operation of the joint venture exceptions needs to be made much more certain. When they were introduced the ACCC gave notice that it intended to issue guidelines as to the interpretation of the exceptions and the ACCC's approach to their proper operation. This would have been very helpful in creating greater certainty around key issues raised by the exceptions such as the extent of joint activity required and the application of the exception to the preparatory stages of a joint venture. It has not happened to date. Joint ventures are important to innovation and new entry. Competition law should not erect unnecessary barriers to joint venture activity. The exceptions recognise this. However, without better guidance the exceptions do not create clear safe harbours for pro-competitive joint ventures between competitors.

2.9 The exception for collective acquisitions (s.44ZZRV) is another provision which requires clarification. The expression "collectively acquired" is not defined in the CCA, nor is there any binding case law as to its meaning. The ACCC last issued some guidance in a 1995 publication regarding the health industry.[1] Collective acquisitions can enhance competitive by offering companies the benefit of significant savings. Uncertainties around the scope and application of this exception have led to some companies preferring to manage their risk by seeking authorisation from the ACCC or avoiding the collective acquisition altogether. It would be useful if the application of this exception was clarified through the inclusion of a definition of collective acquisition in the CCA or if the ACCC was required to issue guidelines, given the severity of the consequences if a company fails to fall within the exception.

3. Third line forcing

3.1 Section 5.25 of the Issues Paper examines third line forcing and asks if the provisions of the CCA on third line forcing operate effectively and if they work to further the objectives of the CCA.

3.2 Third line forcing should not be per se prohibited. The per se prohibition on third line forcing imposes significant pressure on businesses to obtain sometimes costly legal advice to ensure that their conduct is lawful. It also creates additional red tape for businesses through the ACCC notification process. These issues can be addressed by amending the CCA so that the third line forcing prohibition is subject to the substantial lessening of competition test, consistent with other forms of exclusive dealing. This will also bring Australia in line with other jurisdictions with well-established competition law systems, such as the United States.

[1] Available at http://www.apeccp.org.tw/doc/Australia/Decision/health.html

3.3 The removal of the per se prohibition on third line forcing is not a new recommendation. It was a recommendation of the Hilmer Committee[2] in 1993, however the recommendation was not followed by the Parliament. In 2001, the Review of the Competition Provisions of the Trade Practices Act (Dawson Review) also considered the per se third line forcing prohibition and recommended that the prohibition should be subject to a substantial lessening of competition test. However, a draft bill which proposed this amendment was amended by the Senate and the per se prohibition of third line forcing was retained.[3]

3.4 Businesses can obtain an exemption from the prohibition by lodging a notification with the ACCC and demonstrating that their conduct results in public benefits. Each year, the ACCC reviews several hundred exclusive dealing notifications. The vast majority of notifications reviewed by the ACCC are not opposed and only a small number of notifications have been revoked.[4]

3.5 Whilst the fee to lodge a notification with the ACCC is not large, the costs associated with lodging a notification can be substantial, including the costs of obtaining legal advice to identify if there is an issue as well as further costs to prepare the notification form. In our experience, most clients prefer that a notification to be lodged with the ACCC is drafted by external legal counsel.

3.6 Some businesses are often surprised to hear that their conduct (often conduct which they see encourages efficiencies and fosters competition within their industry) may breach the third line forcing prohibition. In particular, small businesses, many of which may not have in-house legal counsel or the resources to identify complex competition law issues, are often uncertain when and in what circumstances their conduct involves the requisite elements of third line forcing to breach the CCA.

3.7 This means that small businesses may incur sometimes substantial costs to obtain legal advice to identify if they have an issue and, if appropriate, prepare a notification. This is even where there is arguably a reasonable and not anti-competitive rationale behind the third line forcing conduct. For example, many clients wishing to introduce loyalty schemes or promotions are required to incur the cost and red tape of lodging a notification with the ACCC, due to the per

[2] The Hilmer Report (Report by the Independent Committee of Inquiry (Chair: F. G Hilmer), *National Competition Policy Review*, AGPS, Canberra, 1993.
[3] Explanatory Memorandum, Trade Practices Legislation Amendment Bill (No 1) 2005 (Cth).
[4] Between 2000 and 2008 (inclusive), of the 2300 matters lodged with the ACCC (the majority of which were third line forcing notifications), only seven exclusive dealing arrangements were revoked and, of those seven, five were third line forcing matters (Hortle, E 'Third line forcing and the notification process: Yet another reason to abolish the per se prohibition', (2010) 18 Competition & Consumer Law Journal at pg 53).

se nature of the prohibition, where the loyalty scheme encourages competition with their competitors and offers a beneficial outcome for their customers. This can be particularly burdensome for small businesses and franchisees seeking to expand their businesses.

3.8 The per se nature of the third line forcing prohibition also means that even trivial or insubstantial conduct caught by the prohibition will be unlawful and absolutely prohibited, unless the conduct is notified to the ACCC. This means that many clients view ACCC notification as additional red tape, which causes them further expense and can be time consuming to prepare. Generally, our experience has been that clients' responses to advice that conduct may breach the third line forcing prohibition varies, with some businesses happy to lodge a notification with the ACCC whilst others are less inclined to incur the expense. This creates an uneven playing field, where some competitors incur compliance costs and others choose to avoid the costs, knowing that their conduct will have to impact on competition and therefore be a low enforcement risk. This distorts competition.

4. Exclusive dealing

4.1 Section 5.2 of the Issues Paper notes that in most cases the relevant test determining the applicability of the CCA will be whether the alleged conduct has the purpose and/or effect of lessening competition in a market, and asks if the current competition laws are working effectively to promote competitive markets.

4.2 We submit that the exclusive dealing prohibition, which is subject to a substantial lessening of competition test, is another area of the law which our clients see as inefficient and which creates further red tape for their businesses.

4.3 In our experience, our clients seek legal advice in relation to a range of common commercial arrangements which are often uncontroversial and innocuous. The vast majority of our clients are involved in competitive markets, where an exclusive arrangement for a relatively short term is unlikely to cause any substantial lessening of competition.

4.4 Nevertheless, unless a client has in house legal counsel, it will have to seek specialist advice as to whether an arrangement will comply with the CCA, given that there is a risk the arrangement will be unenforceable if it breaches the CCA. Obtaining this specialist legal advice may involve collating data on the relevant market and competitors and having it analysed at significant cost. This is often unnecessary and inefficient where there is a very competitive market.

4.5 We submit that consideration should be given to making this prohibition more efficient by adopting a block exemption or outlining safe harbours to define classes of cases which clearly will not be prohibited under the CCA , as has been introduced in the European Union competition rules.

4.6 Adopting a block exemption or safe harbour approach would reflect our experience that for businesses with limited market power (as reflected by their minor market share) exclusivity arrangements with relatively short terms will usually have no anti-competitive effects (or any anti-competitive effects will be outweighed by the positive effects of the arrangement). This has also been noted by the International Competition Network, which has stated, "in the absence of dominance by a party to an exclusive dealing arrangement, an exclusive dealing arrangement is less likely to affect a sufficiently large amount of the trade in any relevant market to have an anticompetitive effect".[5] An exemption or safe harbour, or even ACCC guidelines to a similar effect, will reduce red tape and cost and increase certainty for business.

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[5] International Competition Network, "Unilateral Conduct Workbook Chapter 5: Exclusive Dealing", Presented at the 12th Annual ICN Conference Warsaw, Poland, April 2013. Available at < http://icnwarsaw2013.org/docs/icn_exclusive_dealing.pdf>