CHAPTER 8: PER SE PROHIBITIONS

Background

In Part IV of the Act, certain conduct is of itself — per se — regarded as anti-competitive and is prohibited, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition. Other conduct is proscribed by Part IV only if it has the purpose, effect or likely effect of substantially lessening competition.

The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.

The per se prohibitions in Part IV are those relating to price fixing (section 45A), exclusionary conduct (section 45(2)), certain kinds of exclusive dealing known as third line forcing (sections 47(6) and (7)) and resale price maintenance (section 48).

Price fixing

Sections 45(2)(a)(ii) and (2)(b)(ii) proscribe the making or giving effect to a provision in a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition. These are not per se prohibitions, but section 45A(1) deems price fixing contracts, arrangements or understandings to have the purpose, effect or likely effect of substantially lessening competition with the result that price fixing is effectively prohibited per se under section 45. Section 45A(1) does not apply to certain agreements made for the purposes of joint ventures or joint buying groups, but the test of substantial lessening of competition continues to apply.

Exclusionary conduct

Sections 45(2)(a)(i) and (2)(b)(i) proscribe the making or giving effect to an exclusionary provision in a contract, arrangement or understanding. This is a per se prohibition. An exclusionary provision is defined in section 4D as one made between competitors which has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons either altogether or in particular circumstances or on particular conditions. The section proscribes conduct which is frequently

described as a collective or primary boycott. It also may prohibit arrangements for the sharing of a market amongst competitors or for the rigging of bids amongst tenderers.

Exclusive dealing amounting to third line forcing

Section 47(1) prohibits a corporation from engaging in the practice of exclusive dealing. Section 47 then goes on to specify conduct which amounts to exclusive dealing, but provides in subsection (10) that subsection (1) does not apply to certain specified conduct unless engaging in that conduct has the purpose, effect or likely effect of substantially lessening competition. Third line forcing, which is prohibited by sections 47(6) and (7), does not fall within subsection (10) and so is prohibited per se. Third line forcing occurs when a corporation sells goods or services or gives a discount, but only on condition that the purchaser acquires other goods or services from a third person.

Authorisation

Under section 88(1) of the Act, the ACCC may authorise price fixing, but under section 90(6) may only do so where it is satisfied that the result or likely result would be a benefit to the public and that benefit would outweigh the detriment to the public constituted by any lessening of competition. The ACCC may also authorise an exclusionary provision under section 88(1) and conduct that constitutes exclusive dealing (including third line forcing) under section 88(8), but under section 90(8) may not do so unless it is satisfied in all the circumstances that there is such a benefit to the public that the authorisation should be given.

Notification

A corporation may notify the ACCC of conduct amounting to exclusive dealing (including third line forcing) under section 93(1) of the Act. In the case of third line forcing, the notice takes effect and gives exemption from section 47 after 14 days from the date on which it is given. The exemption may be withdrawn by the ACCC if it is satisfied that the likely benefit to the public will not outweigh the likely detriment. The availability of the speedier and cheaper procedure for notification means that an application for the authorisation of third line forcing is unusual. Under section 93(2), notification is not available for exclusive dealing conduct where an earlier authorisation application in respect of the conduct has been granted or dismissed.

Issues

The submissions to the Committee generally accepted that the prohibition of price fixing per se was justified because of its anti-competitive nature. There was criticism of the limited extent to which joint venture agreements are exempted from section 45A(1), but that is dealt with separately in Chapter 9.

However, many submissions to the Committee criticised the per se prohibition of exclusionary provisions. It was said that in its present form the prohibition extends to a wide range of co-operative arrangements, such as joint ventures, that are not anti-competitive and may even be pro-competitive. It was suggested that the prohibition should not apply where there was no substantial lessening of competition or that there should be a defence of no substantial lessening of competition in any proceedings in relation to an exclusionary provision. It was also said that the persons or classes of persons referred to in section 4D as the targets of an exclusionary provision have been construed to extend to anyone affected by the provision and should be confined to the competitors, actual or potential, of the parties involved in the exclusionary conduct.

The per se prohibition of exclusive dealing in the form of third line forcing was not supported in any of the submissions. It was said that third line forcing may be competitive and benefit consumers. Many customer-loyalty schemes and shopper docket discounts, such as the grocery/petrol discount schemes, were said to be in this category. Concern was also expressed that the prohibition of third line forcing is anomalous in that it applies where the third person (the supplier of the forced product) is a corporation related to the initial supplier of the goods or services, but does not apply where the initial supplier and the supplier of the forced product are the one corporate entity. It was submitted that, consistently with other provisions of Part IV, related corporations should be treated as one business unit.

International context

Exclusionary conduct is treated differently in other jurisdictions.

In the United States, there is no explicit prohibition of exclusionary conduct. The *Sherman Act 1890* prohibits '… every contract, combination …, or conspiracy, in restraint of trade' and this prohibition is regarded as extending to collective boycotts. However, under the case law as it has developed in the United States, a collective boycott is only treated as prohibited per se when it is an attempt by a business with market power to eliminate a competitor or is

designed to fix prices. In all other circumstances, a collective boycott is subject to the rule of reason analysis, which requires consideration of the competitive impact of the conduct.

The definition of an exclusionary provision in section 4D was an attempt to codify the principles of United States law. It was felt by the Swanson Committee that the phrase 'in restraint of trade or commerce' may have been a technical expression unfamiliar to the business community and it recommended a different wording as follows:

> 'We consider that a collective boycott, for example, an agreement that has the purpose or effect or is likely to have the effect of restricting the persons or class of persons who may be dealt with, or the circumstances in which, or the conditions subject to which, persons or classes of persons may be dealt with by the parties to the agreement, or any of them, or by persons under their control, should be prohibited if it has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons.'[1]

It is apparent that the draftsman of section 4D did not adhere to the recommendation. Nevertheless, New Zealand adopted the Australian provision. It has, however, subsequently made two amendments.

First, section 29(1)(c) was added to the *Commerce Act 1986* in 1990 making it a requirement of an exclusionary provision that:

> 'The particular person or class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or understanding in relation to the supply or acquisition of those goods or services.'

Secondly, section 29(1A) was added in 2001 providing a competition defence:

> 'A provision of a contract, an arrangement or an understanding that would, but for this subsection, be an exclusionary provision … is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.'

Australia appears to be the only country which prohibits third line forcing per se. New Zealand and Canada prohibit third line forcing, but only when it has a detrimental effect on competition. The United States and the

1 Committee to Review the Trade Practices Act 1974 (1976), *Report to the Minister for Business and Consumer Affairs*, Commonwelath of Australia, Canberra, p. 33.

European Union do not make any specific provision for third line forcing, leaving the matter to be determined by the application of general laws relating to anti-competitive arrangements.

Analysis

Exclusionary provisions

Exclusionary provisions in the form of collective boycotts are generally anti-competitive because they involve the deliberate exclusion of a competitor from a market. This restriction of competition constitutes a loss of efficiency when it results in a lesser supply of goods or services or higher prices to consumers.

It would appear that the reasons for the prohibition of exclusionary provisions per se are that exclusionary provisions are unlikely to enhance efficiency, that a breach is more easily made out without the need to prove a substantial lessening of competition and that an unqualified rule generates certainty. It should also be noted that, notwithstanding the per se prohibition, an exclusionary provision may be authorised under the Act in an appropriate case. Socially beneficial and pro-competitive conduct may be permitted on a case-by-case basis whilst anti-competitive boycotts continue to be prohibited.

However, many submissions expressed concern that the authorisation process is not a satisfactory answer to the criticism that section 4D is cast too widely. Again, the view was expressed that authorisation is too expensive, is time consuming, and is uncertain because it is provided for a limited time only and is subject to appeal by third parties. These concerns about the authorisation process are dealt with more fully in Chapters 6 and 7.

The Committee believes that, because of the cumbersome nature of the authorisation process, section 4D should be reduced in scope so that it does not extend to conduct that is not anti-competitive. There are two ways in which this could be done.

First, it might be provided that only those exclusionary provisions that result in a substantial lessening of competition were prohibited. That would mean that the prohibition would cease to be a per se prohibition. However, such a provision would make it more difficult to prosecute an anti-competitive boycott. This is undesirable, it being accepted that collective boycotts are generally harmful to competition.

Secondly, provision could be made to allow a competition defence to be raised to a prosecution under the per se prohibition. This would allow a party to an alleged collective boycott to establish by way of defence that the conduct in question did not have the purpose, effect or likely effect of substantially lessening competition. This was the solution adopted in New Zealand and it is preferable because it recognises that collective boycotts are generally anti-competitive. There would be a reversal of the onus of proof in relation to the competitive nature of the conduct in question, but that would be justified in this instance in order to facilitate the prosecution of collective boycotts, given that they are generally undesirable. Such a provision would also accord with the recognition under the Australia-New Zealand Closer Economic Relations Trade Agreement that the harmonisation of business laws, including competition laws, can be of mutual benefit.

The broad construction presently given to section 4D means that there need be little, if anything, to identify the 'particular persons or classes of persons' to which the section refers, other than the fact that they are affected by the collective boycott in question. This gives the section a wider application than is necessary to protect competition. It was submitted that the persons or particular classes of persons referred to should not extend beyond a competitor or competitors, whether potential or actual, of one or more of the parties to the collective boycott. The amendment to the *Commerce Act 1986* in New Zealand is to this effect and the Committee is of the view that a similar amendment should be made to the Australian Act. An alternative would be to provide that a class of persons does not constitute a particular class of persons for the purposes of the section unless the persons who comprise the class each share a quality or attribute and it is by virtue of that quality or attribute that they have been selected as the object of the provision. The Committee prefers the first alternative which maintains a focus on competition.

Third line forcing

Third line forcing may be beneficial and pro-competitive where efficiencies in production make it cheaper to produce and sell two or more products in combination. Consumers may also benefit when they have the opportunity to purchase a product at a discount under 'shopper docket' arrangements such as those found between supermarkets and petrol outlets. This kind of third line forcing makes the discount conditional on the purchase of a further product from another supplier but is not necessarily anti-competitive.

Third line forcing is anti-competitive where corporations are able to exploit their market power in one market to distort an unrelated market, perhaps

facilitating anti-competitive price discrimination or barriers to entry. For example, the ACCC removed the immunity sought through notification by a retirement country club that proposed to sell retirement units subject to a condition that purchasers, on resale of their units, engage a real estate agent nominated by the club.[2] The ACCC determined that there was insufficient public benefit to justify removing the choice of real estate agent from a vendor in a competitive real estate market.

In 1976, the Swanson Committee concluded that third line forcing, while it may be justifiable in certain cases, nearly always had an anti-competitive impact. At that time there were particular concerns about lending institutions insisting on borrowers using a nominated insurer which tended to charge high premiums. Extensive reforms have increased competitive pressures in Australian markets, including financial markets, since the 1970s. Accordingly, in 1993 the Hilmer Committee recommended the adoption of a competition test for third line forcing.

The ACCC opposes very few of the hundreds of third line forcing notifications it receives annually. An inspection of the ACCC's on-line notification register indicates that in 1999 there were 258 third line forcing notifications. None resulted in immunity being withdrawn.

Given that the notification process is relatively cheap and provides legal immunity after 14 days, it may be argued that the current position should be continued. The notification process has the benefit of providing certainty and clarity for the notifying parties. If litigation occurs where conduct is not notified or the notification is opposed, the per se nature of the prohibition means that the ACCC or another litigant need only to prove that the conduct amounts to third line forcing and does not have to prove that there is a substantial lessening of competition.

Notification does, however, involve expense for the party that notifies the conduct and for the ACCC in considering the application. These are mostly unnecessary expenses given that the notification of third line forcing is rarely opposed. If a competition test were introduced and third line forcing ceased to be prohibited per se, the cost of notification would be largely avoided. Notification would still be available to parties requiring assurance that a proposed course of conduct involving third line forcing did not result in a substantial lessening of competition.

2 ACCC February 1998, *Guide to authorisation and notification for third line forcing conduct*.

It may also be observed that the per se prohibition of third line forcing is anomalous in the context of section 47. Other forms of exclusive dealing, such as full line forcing, will only be in breach of the Act where they substantially lessen competition.

Section 47(6) and (7) prohibit a corporation from forcing the product of a related company or offering a discount to achieve a similar purpose. If the same practice were undertaken by a single corporate entity, it would be subject to a substantial lessening of competition test. This inconsistent treatment of corporate groups could be overcome by their notifying conduct to the ACCC or by changing their corporate structure to avoid a breach of the third line forcing provision. For example, related companies could transfer the marketing of their separate products to the same company within the group. This reorganisation would bring the conduct within the other exclusive dealing provisions (sections 47(2), (3), (4) and (5)), but at some potential cost and inconvenience.

The Committee also considers it anomalous that, by virtue of the operation of section 93(2), conduct that was previously authorised cannot be the subject of a notification, even though identical conduct entered into by another party could be notified.

Conclusions

- The current per se prohibition of exclusionary provisions proscribes co-operative arrangements that may not have a detrimental impact on competition.
- The persons or classes of persons that may be the subject of an exclusionary provision has been construed broadly, and the prohibition therefore extends to conduct that is unlikely to be anti-competitive.
- The current per se prohibition of third line forcing proscribes conduct that may benefit consumers and may not be anti-competitive.
- The current provision prohibiting third line forcing discriminates on the basis of corporate structure.

Recommendations

8.1 The Act should be amended so that it is a defence in proceedings based upon the prohibition of an exclusionary provision to prove that the exclusionary provision did not have the purpose, effect or likely effect of substantially lessening competition.

8.2 The Act should also be amended to restrict the persons or classes of persons to which a prohibited exclusionary provision relates, to a competitor or competitors, actual or potential, of one or more of the parties to the exclusionary provision.

8.3 The prohibition of third line forcing should cease to be a per se prohibition and be made subject to a substantial lessening of competition test.

8.4 Related companies should be treated as a single entity for the purposes of section 47.

8.5 Section 93(2) should be repealed.