The Law Institute of Victoria

Executive Summary

The Law Institute of Victoria has chosen to address Third Line Forcing. The Section reiterates the Law Council of Australia's submission on this point.

Third Line Forcing

1. Related companies should be permitted to engage in third line forcing without contravening section 47.
2. The per se prohibition should be removed by the introduction of a competition test as applicable to other section 47 conduct.

The Section believes that addressing theses issues will benefit both consumers and business.

Third Line Forcing

Section 47 of the Trade Practices Act

1. Section 47 of the *Trade Practices Act 1974 (Cth)* (**"the TPA"**) prohibits exclusive dealing that has the purpose or effect of 'substantially lessening competition' in a relevant market. In short, exclusive dealing involves one person who trades with another imposing restrictions on the other's freedom to choose with whom or in what it deals. That is, it refers to a number of vertical restraint practices.
2. Third line forcing is a type of exclusive dealing contained within section 47(6) and (7) that essentially involves:
   - supplying or acquiring good or services with certain conditions attached; or
   - refusing to supply goods or services or supply at a particular price, discount, etc for the reason that the purchaser has not acquired goods or services of a particular kind or description from another person.
3. A Corporation which contravenes the third line forcing prohibition may potentially be subject to fines of up to $10 million.

Rationale for section 47

4. The historical rationale behind the per se third line forcing prohibition is not entirely clear.
5. In the Second Reading Speech for the TPA[1], the only comment specifically about third line forcing relates to a concern with secret commissions or 'kickbacks' being received between the firm forcing and the firm supplying the forced product[2].
6. Case law suggests that the legislative intention of the sections is to protect suppliers who compete with a favoured third party supplier[3].

The need for reform

7. Third line forcing is prohibited per se under sections 47(6) and 47(7) of the TPA. It is the only non-price vertical restriction to be prohibited irrespective of its effect on competition.
8. Pursuant to section 47, most types of exclusive dealing must have the purpose, effect or likely effect of substantially lessening competition to contravene the TPA.
9. Third line forcing is prohibited per se, no matter what its effect on competition. However, third line forcing conduct may be notified and authorised under section 90 of the TPA if there is a sufficient benefit to the public. Such conduct will not be illegal while a notice under section 93 is in force.
10. Third line forcing provisions of the TPA should include a related companies exemption and be subject to a competition test.

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[1] Second Reading Speech.
[2] For an analysis of this rationale, see Dr I McEwin, "Third Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 114.
[3] See, for example, *SWB Family Credit Union Ltd v Parramatta Tourist Services Pty Ltd* (1980) ATPR 40-280 per Northrop J and *Kam Nominees Pty Ltd v Australian Guarantee Corporation Ltd & Anor* (1994) ATPR 41-325 per Drummond J.

11. These are not new ideas and have been advocated for some time, with considerable support.

12. The Department of Treasury in a 2001 discussion paper entitled 'Possible Amendments to the *Trade Practices Act 1974*' (**"The Treasury Paper"**) recommended both:

> *the introduction of a substantial lessening of competition test for third line forcing provisions contained in Part IV of the Act, and a further amendment to treat third line forcing involving related companies in the same manner as forcing by a single corporate entity*[4]

13. The Hilmer Inquiry recommended that third line forcing be subject to a competition test to "*bring it into line with the Act's treatment of other forms of exclusive dealing*"[5].

14. A number of well-respected trade practices commentators and practitioners have supported the introduction of both a competition test and related parties exception for many reasons[6].

15. The Law Institute of Victoria and the Law Council of Australia have, at various times, made numerous submissions to Treasury recommending reform of the third line forcing provisions. In view of these previous submissions and the submission before you, it is submitted that there is ample evidence of an urgent need to reform this provision of the Act.

A related companies exception

16. Section 47(12) contains a related bodies corporate exception for exclusive dealing conduct under section 47(1). This exception does not extend to related companies who engage in third line forcing conduct.[7] Related bodies corporate cannot offer their goods and services to the public as a package, without risk of contravening sections 47(6) or 47(7), regardless of any effects of the conduct that might be beneficial for competition. This inconsistency has been criticised widely.

17. The lack of such an exemption has the effect that companies who are engaging in pro-competitive conduct are required to spend significant amounts of time and money preparing and submitting notifications. This particularly effects large companies with multiple subsidiaries whom, for whatever reason, structure their companies in this manner, and whom wish to reward customers of the group with some loyalty discount. It applies not only where it ensures internal company efficiency, but where it is otherwise beneficial to customers.

18. The absence of a related party exemption means that this conduct will breach the TPA automatically, and may only be permitted where a notification is prepared and lodged with the ACCC, and accepted by the ACCC. In effect, many companies may be penalised as a result of their corporate structure.

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[4] Treasury Paper, p2.

[5] Report by the Independent Committee of Inquiry (Chairman - F Hilmer), *National Competition Policy* (1993) ('the Hilmer Report'), pxxivi.

[6] For example, see Dr I McEwin, "Third Line Forcing in Australia" (1994) 22 *Australian Business Law Review* 114; R Baxt, "The Meaning of Condition in Section 47(6) - A Fascinating Decision by the High Court of Australia on Third Line Forcing" (1987) 15 *Australian Business Law Review* 179; D Shavin, "Restrictive Trade Practices" (1979) 15 *Australian Business Law Review* 188.

[7] Although it is noted that such an exception did apply between 1977 and 1978.

19. Apart from the general related parties exception in section 47(12), the TPA does treat related parties as one entity for other purposes. For example, sections 45(8) treats related companies as one entity in economic terms.

20. There is much support[8] for the amendment of the general related bodies corporate exception in section 47(12) so that related bodies are treated as one business entity for the purposes of all exclusive dealing conduct, including third line forcing.

21. Third line forcing involving related companies would then be treated in the same manner as forcing by a single corporate entity. This would result in such conduct falling for consideration under one of the other forms of exclusive dealing set out in section 47.

Inclusion of a competition test

22. The rationale for a per se prohibition is arguably no longer valid. It "is not apparent that the competition and consumer concerns of the mid 1970s are still relevant given that Australian markets (including financial markets) are now more competitive"[9];

23. It is recognised that not all third line forcing is necessarily anti-competitive.[10] Many forms of third line forcing can benefit consumers.[11] For example, the shopper docket discount programs and other similar customer loyalty schemes demonstrate that some forms of third line forcing are not anti-competitive and can benefit consumers.

24. The ACCC rarely prosecutes and does not pursue all third line forcing conduct it becomes aware of,[12] however companies still pay the costs of notification. This imposes significant compliance costs on both companies and government for no benefit.[13]

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[8] For example The Department of Treasury in a 2001 discussion paper entitled 'Possible Amendments to the *Trade Practices Act 1974*' (**"The Treasury Paper"**) and the Report by the Independent Committee of Inquiry (Chairman - F Hilmer), *National Competition Policy* (1993) ('the Hilmer Report') recommended the reinstatement of the related company exception to third line forcing.

[9] Treasury Paper, p2.

[10] In the financial year ending June 2000, there were 335 notifications lodged with the ACCC - none of these were rejected by the ACCC

[11] As acknowledged in the Treasury Paper, page 2. A good example of this would be the shop-a-dockets programs where a consumer buys an item from a supermarket and receives a receipt containing offers of discounted goods/services by third parties. The discounted good/service is only available to the consumer if they purchase an item from the supermarket, thus receiving the receipt. However, strictly speaking, if another consumer attempts to demand the equivalent discounted good/service from the third party, and are refused because they have not purchased an item from the supermarket and obtained a receipt, this may amount to a refusal to deal within the meaning of section 47(7) of the TPA due to the per se nature of the prohibition, unless notified or authorised, despite the fact that this conduct may benefit the consumer (i.e. lower prices, increased competition, etc).

[12] ACCC, *Guide to Authorisation and Notification for Third Line Forcing Conduct*, February 1998, 17.

[13] As referred to in footnote 10, despite most notifications being given immunity, companies are still required to pay:

- a $7500 lodgment fee for a single authorisation application and, a concessional fee of $1500 for two or more authorisation applications which relate to conduct in the same or related markets; or
- a $1000 notification fee for a single notification application and a concessional fee of $200 for two or more notification applications which relate to conduct in the same or related markets.

25. The current per se prohibition is at odds with international best practices. Australia is unique in imposing a per se prohibition on third line forcing conduct. The relevant legislation in the European Union[14], Canada[15], South Africa[16] and the United States[17] provide that vertical restraints are only prohibited where they have an adverse effect on competition.

Benefits of amendments

26. Amending the third line forcing provisions so as to include an exemption for related companies and to introduce a substantial lessening of competition test are likely to:

- bring consistency to sections of the TPA, particularly those concerning exclusive dealing;
- permit conduct that is pro-competitive or competition neutral;
- reduce business and government compliance costs and free ACCC resources to address serious anti-competitive conduct; and
- promote competitive trading.

Addressing small business concerns

27. Small business has expressed concerns that the introduction of a competition test will result in an adverse impact on consumers.

28. It is our view that a "substantial lessening of competition" test will in fact prevent those instances where third line forcing adversely impacts on consumers.

29. In the alternative, such instances could be appropriately dealt with under other consumer protection provisions, such as those in relation to unconscionable conduct in section 51AC of the TPA[18].

30. It is likely that such an amendment will permit pro-competitive conduct that will benefit consumers - for example, in relation to improvements in consumer choice and value for money - instead of capturing conduct that has no discernable anti-competitive effect.

Implementation

31. In conclusion, it is submitted that an amendment to the third line forcing provisions contained in sections 47(6) and 47(7) of the TPA is logical and necessary.

32. For various reasons, including consistency in the treatment of all forms of exclusive dealing, reduced compliance costs to business and government, and permitting many forms of pro-competitive conduct, the third line forcing provisions of the TPA should be amended to:

[14] Articles 81 and 82 of the *Treaty of Rome*.
[15] *Competition Act*, section 77.
[16] Section 5(1) of the *Competition Act* (1988).
[17] *Sherman Act*.
[18] This suggestion has much support, particularly from the BCA.

Recommendation 1:

The third line forcing provisions of the TPA should be amended to permit related companies to engage in third line forcing without contravening section 47.

Recommendation 2:

The per se prohibition should be removed by the introduction of a competition test as applicable to other section 47 conduct.