

The Effect of Competition Laws on
Distribution in the Australian Wine
Industry

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THE EFFECT OF COMPETITION LAWS ON DISTRIBUTORSHIPS IN THE AUSTRALIAN WINE INDUSTRY

Other papers to be presented at this conference deal with the issues involved in making and terminating a distributorship agreement in the wine industry, so this paper concentrates solely on the competition issues which must be taken into account in the winery – distributor relationship.

The first issue to consider in the context of this paper is the nature of this relationship.

Neither the Australian competition laws, nor any other relevant Australian laws, distinguish between agency and distributor contracts. There is, for example, no equivalent of the EU Commercial Agents Directive. Likewise, there is no equivalent of the “franchise legislation” found in some states of America.

Therefore, reference will be made throughout this paper to “distributors”, but in most cases the relevant law will apply equally to agents, except where noted otherwise (such as in relation to price fixing and resale price maintenance).

Finally, when one thinks of distributors in the wine industry, the nature of the relationship that immediately springs to mind is one of sole and/or exclusive. However, in some markets the relationship with a distributor will be neither sole nor exclusive. An example of this is where the winery has its own distribution network. Depending on the size of the winery’s sales force, and its target customers, this can involve the winery competing against its own customers in the distribution chain (i.e. it sells to wholesalers, as well as selling directly to licensed retailers who would otherwise be customers of those wholesalers) – leading to significant competition issues.

1. AUSTRALIA’S COMPETITION LAW - THE TRADE PRACTICES ACT

Competition law in Australia is governed chiefly by the Trade Practices Act, 1974 (Cth).

However, as Australia is a federation, there are competition laws operating at both the Federal and State/Territory level. This paper concentrates on the Federal legislation, the Trade Practices Act; that said, most provisions of this Act are reproduced almost identically in the respective Fair Trading Acts in each of the Australian States and Territories.

1.1 Background – Part IV, Trade Practices Act

Part IV of the Trade Practices Act contains Australia’s “anti-competition” provisions – outlawing such market distorting practices as price fixing, collusive tendering, monopolistic activity, resale price maintenance, exclusive dealing, collective boycotts, etc.

These provisions can be broadly grouped into two camps:

- (1) those which only constitute an offence according to their purpose or effect – i.e. whether they have the purpose or effect of “substantially lessening competition”; and
- (2) those which are prohibited irrespective of the purpose or effect, i.e. the “*per se*” offences.

In assessing what is the “market” for the purpose of determining whether conduct has the purpose or effect (or is likely to have the effect) of “substantially lessening competition”, consideration is given to:

- **Products** – can they be reasonably substituted for each other (e.g. beer, wine, spirits, soft drinks); what would the customer response be to a price change? Would the products compete reasonably strongly with each other?
- **Geography** – how far would a customer be willing to travel to take advantage of a price change; what are the geographical boundaries of the market?
- **Level of function** – Is it the manufacturer’s market, or that of the wholesaler, distributor or retailer?

The scope of prohibited conduct extends beyond contracts to “arrangements” and “understandings” (i.e. the nod that is as good as a wink), with the courts given express power to imply agreements from circumstantial evidence.

The specific prohibitions are as follows:

1.1.1 Anti-competitive contracts

There is a general prohibition on conduct which has the purpose or effect of substantially lessening competition, irrespective of whether it involves any form of arrangement between competitors.¹

1.1.2 Price Fixing

A provision of a contract between competitors which has the purpose of fixing the price (or any discount, credit or rebate) for goods is prohibited, irrespective of the effect on competition (i.e. it is one of the *per se* offences)².

Joint ventures and joint buying groups enjoy a limited exception from the *per se* price fixing prohibition³, although any pricing arrangements in such circumstances are still prohibited if they substantially lessen competition

1.1.3 Exclusionary provision

Any contract, arrangement or understanding which contains an ‘exclusionary provision’ is also prohibited⁴.

An “exclusionary provision” is defined as a provision of a contract, arrangement or understanding between competing parties which prevents, limits or restricts the freedom of any or all of those parties to deal with certain persons or classes of persons.⁵ Such conduct is usually characterised as a “collective boycott”.

Note the proposed changes to the restrictions on collective bargaining as detailed in section 1.2 below.

1.1.4 Misuse of Market Power

The “misuse of market power” provision states that a company which has a substantial degree of market power must not use that power for any of three proscribed purposes.

- (a) damaging a competitor;
- (b) prevention of entry into a market; or
- (c) deterrence or prevention of competitive conduct.

(It is not necessary to achieve such a purpose – conduct is unlawful if constitutes a “taking advantage” of market power for such a purpose.)

1.1.5 Exclusive dealing

The Trade Practices Act imposes restrictions which are similar to the common law restrictions on restraints of trade. Under the common law, a contract which is a restraint of trade is contrary to public policy and, therefore, on the face of it void. However, if the restraint does no more than is reasonably necessary to protect the interests of both the contracting parties, and it is in the interests of the public, it is not void.

The relevant provision in the Trade Practices Act is much more prescriptive.

The Act defines exclusive dealing as where a person offers to supply or acquire goods (generally, or at a particular price, including by reference to a particular discount, allowance, rebate or credit) on the **condition** that the other party:

- will not buy goods from a competitor (or will not do so except to a limited extent); or
- will not re-supply goods of a competitor; or
- will not re-supply the goods to any person, or to particular persons or classes of persons (or in particular places or classes of places).⁶

Subject to the following (Third Line Forcing), this prohibition only applies to the extent that the conduct “substantially lessens competition”.

Note the proposed changes to this area as detailed in section 1.2.2 and 1.2.3 below.

1.1.6 Third Line Forcing

Although the “exclusive dealing” prohibition is subject to the competition test, one specific type of exclusive dealing is subject to the stricter “*per se*” test.

Third line forcing involves the supply or offer to supply, as described above, on the condition that the customer acquire other goods, or services, from a particular third party.⁷

Companies which operate through a number of different entities need to be aware that related companies are treated as different companies for the purposes of this section.

Note that changes were proposed to the laws restricting third line forcing, but these have subsequently been withdrawn, as detailed in section 1.2.1 below.

1.1.7 Resale Price Maintenance

Resale price maintenance involves the stipulation by a supplier of the price below which its goods (or services) are not to be resold, as it attempts to maintain control over the “image” and margins available from the sale of its products. It is permissible to specify a maximum price (as this is seen as being in consumers’ best interests), but not a minimum price.

Whilst “recommended retail prices” are also permitted – there must be no pressure to observe these.

Because of the significant scope for market distortion, the Trade Practices Act makes this a “*per se*” prohibition.

The one exception to this is where a reseller is involved in “loss leading” with a product – i.e. selling it at below cost, in which circumstance the supplier is entitled to refuse further supply.

1.1.8 Penalties

The maximum fine for a company found guilty of a breach of Part IV of the Trade Practices Act is \$10 million per offence. (The maximum fine for individuals is \$500,000 per offence.)

The courts have not held back in imposing hefty penalties - in a 2004 price fixing case in the power transfer and distribution transformer industries, penalties totalling in excess of \$35 million were imposed on the offending companies and individuals. Prior to that, the record fines in one case were \$26 million ordered by the court against companies involved in the animals vitamin cartel case.

Other penalties imposed during 2004 included penalties for price fixing activities against George Weston Foods (\$1.5 million penalty for price fixing in the wheaten flour market); Metro Brick (\$1 million penalty for price fixing clay bricks); as well as fines of about \$0.5 million in each of the demolition and scrap metal industries.

In 2004, penalties were also imposed on a company and two of its managers (of \$500,000, \$10,000 and \$15,000 respectively) for “attempting” to induce another party to enter in to an agreement containing an exclusionary provision – even though no contract was ever executed.

1.1.9 Notification and Authorisation

Certain conduct which would otherwise constitute an offence can be lawfully engaged in, if the parties follow the relevant notification or authorisation procedure – if the public benefit of the conduct outweighs the public detriment of its anti-competitive nature.

This is one of the key areas of change about to be introduced to the Trade Practices Act – as detailed further in section 1.2 and the Appendix below.

1.2 **Current Amendments to Trade Practices Act**

Australia's Federal Government is in the process of implementing amendments to the competition provisions of the Trade Practices Act, recommended by a recent review of the Act (the details of which are set out in the Appendix).⁸

Legislation that enacted most of the Dawson Report's recommendations was initially introduced into Parliament on 24 June 2004⁹. However, the Bill was stalled in the Senate, and Parliament rose for the 2004 election before the Bill was passed. As a result, the Bill lapsed.

The Government reintroduced the legislation in February 2005, with some amendments¹⁰. It has been subject to still further amendments since its reintroduction. It is expected that the current Bill will have its third and final reading during the next Senate sitting, commencing on 4 October 2005. (This had not occurred at the time of writing of this paper.)

Note that some of the most significant detail of how the new provisions will operate will be contained in Regulations (as opposed to changes to the Act). These Regulations have not yet been released, so there are still a number of grey areas as to how some of the changes will operate.

1.2.1 Third Line Forcing

The 2004 Bill adopted the Dawson Report's recommendation, for which business had been lobbying for many years, of bringing the treatment of third-line forcing in line with the treatment of other types of exclusive dealing, i.e. that it no longer be subject to the per se prohibition, but only be unlawful where it would have the purpose, effect or likely effect of substantially lessening competition.

The decision to abandon the changes to this provision was apparently made in response to a proposal by one of Australia's two large retail chains, Coles Myer Limited, to require all suppliers to use a single in-store demonstration company, which raised the spectre of 'big business' engaging in third line forcing in all manner of areas.

1.2.2 Joint Ventures

The Act's somewhat narrow definition of joint ventures was not altered.

The Bill provides a defence to the price fixing and exclusionary provision prohibitions if a

person establishes that the provision is for the purposes of a joint venture and that it does not have the effect, likely effect or purpose of substantially lessening competition. It confirms that the alleged price fixing must be part of a joint venture activity that is separable from the activities in which a joint venturer is engaged in individually.

The Bill also incorporates the same defence regarding “exclusionary provisions” for joint ventures.

1.2.3 Collective Bargaining

The Bill introduces, as an alternative to authorisation, a notification process for collective bargaining by small business with big business.

The Government has accepted the recommendation of the Dawson Report of a definition of ‘small business’ by reference to the value of the transactions involved. This is the same cap that is already in the unconscionable conduct provisions of the Act to define transactions by small business – namely \$3 million.

More specifically, the value of the transaction which is the subject of the notification must not reasonably be expected to exceed \$3 million over a 12 month period, and the public benefits must outweigh any public detriments.

Notification can be sought on behalf of a group by a third party (e.g. the wholesaler running a banner group).

More details of the collective bargaining notification procedure are set out in the Appendix.

1.2.4 Penalties

The maximum fine for companies engaging in cartel behaviour will be increased to the greater of:

- \$10 million;
- three times the benefit from the cartel; or
- where the benefit cannot be determined, 10 per cent of the company’s annual turnover.

These maximum fines are in line with proposals to increase the maximum penalties for civil contraventions of the competition provisions in the Trade Practices Act.

The Government has followed the Dawson Review’s recommendation on prohibiting corporations from directly or indirectly indemnifying officers, employees or agents against the imposition of a pecuniary penalty against them. The new provision prevents a corporation from not only indemnifying against a civil liability, but also against legal costs incurred in defending or resisting proceedings in which the person is found liable.

1.2.5 Authorisation and Notification Process

As these processes may not be of significant relevance to the distribution contracts, they are set out in the Appendix at the end of this paper.

1.3 Uncertainty

There is a residual element of uncertainty, as referred to above, in that some of the significant detail of how the new provisions will operate will be contained in Regulations, which were never released, and have still not been released. Some of these issues are:

1.3.1 Grandfathering

It is not clear the extent to which agreements entered into under the previous provisions of the Trade Practices Act will be grandfathered – for example if there is a change to the terms of (or parties to) a previously exempted agreement.

1.3.2 Operation of the \$3 million ‘small business’ cap

The sort of uncertainty surrounding how the small business cap of \$3 million will operate includes:

- to what extent should the number of participants in the group of bargainers be managed down to avoid “undue anti-competitive detriment” (outweighing the public benefit);
- will the regulations provide for higher transaction limits in industries that comprise businesses with high turnover and small profit margins (if so, what are these industries, and what will be the pre-requisites to get such a classification);
- can medium or large businesses engaging in transactions within the \$3 million limit from attempting to make use of the notification process;
- can businesses with more than the \$3 million in relevant transactions split this business into multiple transactions (with either the same or different suppliers) to come under the limit;
- where there is uncertainty as to whether a contract will be concluded with a particular supplier, do multiple applications have to be lodged, in relation to each possible different supplier;
- where some participating small businesses would be happy to deal with one supplier, but not others, do there have to be separate applications lodged;
- where there are multiple applications, can small businesses have the additional fees waived

1.3.3 Individuals

Can sole traders and partnerships use the notification process – the Bill states that a collective bargaining notice can only be given on behalf of a party which could have given the notice itself – which seems to be limited to corporations.

1.3.4 Conditions imposed on applications for notification

Will the regulator, the Australian Competition and Consumer Commission (**ACCC**) have any power to impose conditions on a collective bargaining notification.

1.3.5 Blanket refusals / conferences

In the face of the extremely short timeframes, will the ACCC simply put most applications in the “too hard basket” by refusing the application, or referring it to a conference (and thereby deferring the need for any serious consideration or decision)?

1.3.6 How big is big

The notification process was proposed only for negotiations by small business with “big business” – how big is big? (Query the idea of “substantial degree of market power” since the *Boral* case.)

1.3.7 Boycotts

For a collective bargaining agreement to have any likelihood of effect, the participating members must have a willingness to withhold from dealing with the target if the target does not consent to the wishes of the collective as a whole.

This necessarily involves the concept of a boycott by all members of the collective if the target does not come to the party.

The Dawson Report noted the distinction between collective bargaining and behaviour amounting to a primary boycott, or exclusionary conduct, and noted that the ACCC takes the view that the latter can significantly increase the anti-competitive effect of collective bargaining arrangements. The Committee was unclear whether the ACCC would view a collective bargaining agreement between buyers to refuse to buy from a supplier in the absence of a satisfactorily negotiated price as a primary boycott, but it would seem to the Committee to be an integral part of such an agreement.

To what extent will the presence of the threat of boycott push the ACCC to hold the public detriment to outweigh the public benefit?

2. Competition Issues with Distributorships in the Australian Wine Industry

2.1 The “Per Se” Prohibitions

These are the offences considered so anathema to the functioning of a “competitive” market that they are prohibited irrespective of their effect on competition.

2.1.1 Resale Price Maintenance

This is one of the key issues for wine producers

It is only natural for suppliers to have specific price points in mind for each of their products. They will also usually want retailers to be able to make good margin on their products, driving them to purchase (and sell) higher volumes.

In some cases, suppliers seek to specify the price at which their distributors are to sell the products. This would constitute a breach of the resale price maintenance (**RPM**) provisions.

To get around this, some suppliers have sought to use a formula – such as a specific margin (e.g. 30% higher than the winery’s sell price). Once again, this would constitute a breach of the RPM provision. Likewise setting a benchmark price, such as that of a leading brand in the market.

In fact, even the offering of (or the threat to withdraw) a particular rebate, discount or credit from a distributor / reseller who is selling the winery’s product at a price point below where the winery would like to see it, would constitute unlawful resale price maintenance.

Even if a particular customer is cutting the price of the winery’s goods to the bone, such that other sellers stop carrying the product, and the product comes to be seen as “cheap” by consumers, this cannot provide justification for ceasing supply or changing the pricing to that customer, e.g. by withdrawing certain rebates or discounts.

As mentioned above, the only exception is where the product is being sold at below cost, i.e. a “loss leader”. (There is very little authority regarding what constitutes the “cost”, but the most prudent approach is to assume that this will be the “net, net” invoice price – including any off-invoice discounts, rebates, etc.)

Termination / Refusal to Supply

The issue of resale price maintenance is one which is often raised when a supplier refuses to continue supply – whether there is a formal distribution contract in place or not. (Misuse of market power is often also alleged – but if the winery has a low market share, it can be hard to get past the “market power” threshold.)

Where there is a retailer heavily discounting a branded product – to attract consumer traffic to their store – there is usually a high level of resentment by other retailers who want or need to sell at higher margins. These other retailers will often believe that the discounter is getting a better deal than them – which allows them to offer the lower price to consumers. This may be true, but in many cases it is not.

These other retailers will put pressure on the winery, who may then try to cut off supply to the discounter. Refusal to supply unless a retailer sells above a particular price is just as much an offence under the RPM laws as supplying subject to a condition that a particular price will be met.

Therefore, a cessation of supply to a discounter will, in the absence of a strong, commercially justifiable alternative reason, provide grounds for at least an allegation of RPM.

In the Australian case of *Petty v Penfold Wines Pty Ltd*, the judge found that that the applicant, Petty, who ran two liquor retailing businesses, “always intended to ‘loss lead’ his discounted products and to run his business as a whole at a loss in the first phase of his business strategy”.¹¹

A dispute had arisen over the late payment of Petty’s account with Penfold’s; Petty made one payment, but his account was still in arrears. He then placed another large order with Penfold’s, which Penfold’s refused to supply in full. Penfold’s also decreased his credit limit, and reduced his terms of payment.

The Court was satisfied that the purpose of Penfold’s’ action was not to ‘curry favour’ with another retailer who was concerned by Petty’s discounting activities. Instead, the Court was of the view that this action was to ensure that Petty’s account did not fall further into arrears and that a responsible credit limit would apply; this change of credit policy was in part due to his payment history, and in part due to Petty’s own statement that his bank manager was ‘getting nervous’.

These were the “commercially justifiable reasons” in the case – although it took two court cases (the matter was appealed to Australia’s Full Federal Court), and many hundreds of thousands of dollars in legal fees, to establish this.

One way to avoid the problems of RPM (at least at the wholesale level) is to sell through “agents”, as opposed to distributors. In this way, it is permissible for the winery to set the selling price (assuming its contract with the agent allows this) – because the law regards the winery as the “principal” in the transaction – as opposed to where a “distributor” is involved, who has purchased the wine from the winery and is reselling on its own account. Of course, there are structural disadvantages in using a true agent – the winery is liable for any bad debts, and also has a higher degree of responsibility and liability for the conduct of the agent. There may also be less incentive for the agent to perform, as well as a number of other issues.

2.1.2 Price Fixing

Because of the “branded product” nature of the wine industry, the situation in which this section is most likely to come into play is where the winery operates its own distribution network – so that it is in competition with wholesalers to whom it also sells.

The most obvious form of “price fixing” would be where the winery makes it a condition of sale (either expressly or by implication), that the wholesaler must match the winery’s selling price for each product.

Even where the winery does not self-distribute, if it operates a cellar door mailing list or other similar direct-to-consumer program, there must be not agreement with wholesalers about their respective pricing.

A less obvious situation is where the winery has particular terms of trade, such as volume discounts at say 5 cases, 20 cases, and 64 cases, and it wants to keep “relativity” between the winery’s direct offer, and that available “indirectly” through a wholesaler. To do this, it offers the same volume discounts to its wholesaler, upon proof of specific volume purchases by the wholesaler’s customers in accordance with the winery’s specified volume breaks.

As noted above, it is not just the fixing of prices that attracts the attention of this section – but also any “discount, allowance, rebate or credit” – which could mean that such an arrangement between wholesaler and winery on discounts for specified volume breaks could constitute unlawful price fixing.

Price fixing might also arise in the “commodity” end of the market – where competing wineries agree on prices (or other terms) for products such as:

- buyer’s own brand (BOB)
- function / pouring wines; and
- tender responses (such as for hotel chains and major events).

As with RPM, problems with price fixing between winery and wholesaler can be avoided by making the appointment one of legal “agency”, as opposed to a true distributorship. Once again, this allows the winery to set the selling price. However, the same structural disadvantages would also be present as discussed above.

2.1.3 Misuse of Market Power

There are no offences under the Trade Practices Act of “refusal to supply” or “predatory pricing” as such. To the extent that such conduct constitutes an offence, it is likely to be under the prohibition against misuse of market power.

There is no defined percentage as to what constitutes “substantial market power”, although anything greater than 30% of market share would be difficult to defend as not being “substantial”. That said, Australia’s ultimate court, the High Court of Australia, recently considered this section in the context of a building materials company (Boral) which had more than 30% market share, and which had recently invested very significant capital in modern plant and equipment, and which was found to have sold product at less than its cost of production (i.e. the classic definition of ‘predatory pricing’). The High Court held, in a 6:1 decision, that Boral did not have substantial market power and it priced its products below cost for a legitimate business reason.¹²

In some recent cases prior to Boral, the Australian courts had been prepared to find a market share of nearly as low as 15% constituted “substantial market power” for the purposes of this section.¹³ There is likely to be a move away from this following the Boral case, but it is certainly an uncertain area at the moment!

Whilst the significance of the ‘misuse of market power’ prohibition as something to be managed and avoided is likely to apply only to the biggest of the major producers in any market, it can be a useful bargaining tool for smaller producers in their dealings both with the major supermarket chains, and in dealing with and responding to the “competitive activity” of major competitors.

That said, the recent major prosecutions in Australia under this section which have been heard by the High Court have failed, on the basis that allegedly offending activity has either been a response to the competitive nature of the industry¹⁴, or a valid commercial structural issue¹⁵, rather than anti-competitive.

2.1.4 Third Line Forcing

This issue is likely to arise where a winery (or an individual at a winery) has a relationship (presumably financial, but perhaps familial) with the supplier of wine-related goods or services.

For example, a winery might agree to supply to a distributor on condition that the distributor print all its price books using the printing company owned by the sales manager's brother-in-law. Or perhaps if the distributor agrees to stock the stemware produced by a company which pays a commission to the winery for such referrals.

Slightly less obvious, but nonetheless still illegal as third line forcing, is where the winery is horizontally integrated, perhaps operating itself as a distributor of stemware or cellaring systems, or even other brands of wine. If these other products are sold through a separate company – even if that company is a 100%-owned subsidiary – this is still unlawful as third line forcing.¹⁶

It is only if these other products are sold through the same company (called 'own line forcing'), that it would not fall foul of the third line forcing provisions.

2.1.5 Exclusionary arrangements

For an "exclusionary provision" to be present in a contract, arrangement or understanding, the parties must be "competitive with each other" – so this section will apply not only to arrangements with competing wineries, but also where the winery self-distributes in competition with wholesalers.

Examples of the sort of conduct which would fall foul of this section are:

- where a retailer is heavily discounting the winery's product, and the winery and its wholesaler agree not to supply that retailer; and
- where a major supermarket chain seeks to increase the "advertising allowance" payable by suppliers, or impose push out payment terms to 90 days, and a number of wineries band together (to increase their bargaining position) and tell the chain that none of them will supply the chain unless they reinstate the original terms.

The Australian off premise liquor retailing industry is currently characterised by "banner groups" – large 'groups' of independent retailers operating under a common trade mark (or "banner"), coming together to gain economies of scale in purchasing power, advertising and marketing, etc. These groups are usually organised by one of the major liquor wholesalers – and provides for an 'enforced loyalty' while the store remains part of the banner group.

However, whilst these groups can collectively agree to acquire goods from a supplier, they

cannot collectively agree not to buy from a particular supplier (for example, where that supplier does not agree to give the banner group the same trading terms as the major chains). This may change under the proposed new collective bargaining provisions for small businesses – described in more detail in the Appendix.

2.2 The “Substantial Lessening of Competition” Prohibitions

These two offences only become unlawful where either the purpose of the winery, or the effect or the likely effect of the conduct, is to substantially lessen competition in the relevant market.

2.2.1 Exclusive Dealing

As stated above, this provision prohibits the establishment of exclusive supplier or distributor arrangements which would be likely to substantially reduce competition.

One can see exclusive arrangements all around in the business world – particularly in the increasingly popular world of franchising, such as that traditional version of the franchise – the petrol station. Closer to home are the milk bars and similar outlets who only stock products from one of the Cola companies. Those are good examples that ‘solus’ (or exclusive) arrangements can lawfully exist – the key element being the effect on competition.

Some of the danger signs to look for, when considering the effect on competition of an exclusive distributorship, are:

- the length of the term – how long term is the arrangement;
- how many (or few) other suppliers or distributors are there (how easy is it for competitors’ product to otherwise get to the market); and
- how significant would be the disadvantage to those other parties by the exclusive nature of the proposed arrangement.

This section does not prevent the tailoring of special offers for particular retailers, provided they do not ‘substantially lessen competition’. For example, the sort of offers which have been given to one or other of the major chains in the last few years have included:

- special 1.0 litre bottles; and
- a particular brand or product is only released through that chain’s outlets,

(in some cases the exclusivity has only been for a limited period).

The example of “banner groups” is given above in section 2.1.5 – ‘groups’ of independent retailers operating under a common banner. The new collective bargaining provisions may also be used to avoid allegations of unlawful exclusive dealing – although as detailed in the Appendix the ‘public benefit’ test will need to be satisfied.

Note in relation to ‘purpose’, that in the CD case (referred to in section 2.1.3 above), the court

considered that unlawful exclusive dealing had been established, notwithstanding that the offensive conduct involved only a few retailers. This occurred because the court, in assessing the "purpose" of the music companies, held that pressuring those few retailers not to stock CDs which had been imported directly was designed to send a signal to retailers generally.

2.2.2 General anti-competitive agreements

This provision is not, like some of the more specific provisions detailed above, limited to agreements between competitors, but relates to any contract, arrangement or understanding – whether or not with competitors.

3. Appendix

3.1 The Dawson Report¹⁷

The terms of reference for the Dawson Report were for the Committee to examine the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:

- inappropriately impeded the ability of Australian industry to compete locally and internationally;
- provided an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
- promoted competitive trading which benefits consumers in terms of services and price;
- provided adequate protection for the commercial affairs and reputation of individuals and corporations (in this regard, the Committee could examine the processes followed by the Australian Competition and Consumer Commission (**ACCC**) and the laws under which the ACCC operates, but not reconsider the merits of past individual cases);
- allowed businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and used compliance or authorisation processes applicable to their circumstances; and
- were flexible and responsive to the transitional needs of industries undergoing, or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas.

The Committee was instructed to identify, where justified, improvements to the Act, its administration and/or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law.

3.2 Notification Process for Collective Bargaining by Small Business with Big Business

The following are the key aspects of the new notification process to be introduced into the Trade Practices Act, in line with the recommendations of the Dawson Report:

- The ACCC must notify an applicant within **five days** if it considers the notice is invalid (for example because it does not contain the prescribed information);
- The application can be about a proposed contract – or a contract already in existence;
- There are three requirements:
 - There must be more than one party in the “collective”, proposing to buy or sell goods from a “target”;
 - The applicant must “reasonably expect” that it will conclude a contract with the

target; and

- The price for the supply or acquisition of the goods or services (and if there is likely to be more than one contract — the sum of the prices) will not exceed \$3,000,000, or such other amount as is prescribed by the regulations, in any 12 month period. The regulations may prescribe different amounts in relation to different industries.
- A collective bargaining notice comes into force 14 days (or such longer period as set out by the regulations) after the applicant gives the ACCC the notice, unless the ACCC issues a “conference notice” during that period, in which case the period begins when the ACCC “decides not to give an objection notice”.
- An applicant is only allowed to give **one notice** – if it withdraws the notice, or if it is rejected by the ACCC, it cannot serve another notice “in relation to the same conduct or in relation to conduct to the like effect”
- Appeals can be made to the Tribunal from decisions of the ACCC.
- A notice cannot be given if:
 - (a) the applicant already has applied for an authorisation in relation to the conduct; and
 - (b) the Commission has made a determination dismissing the application; and
 - (c) either:
 - (i) the Tribunal has made a determination on an application for a review of the Commission’s determination; or
 - (ii) the time for making such an application for review has ended without the making of an application.

The ACCC’s role in the new process is:

- If the ACCC is satisfied that the likely benefit to the public from the provision will not outweigh the likely detriment to the public from the provision, it must give the applicant a written notice (the **objection notice**) to this effect.
- The ACCC must, at the time it gives an objection notice, give a written statement of its reasons for giving the notice.
- However, before the ACCC can give an objection notice, it must go through the procedure of holding “conferences about draft objection notices”.
- For the purposes of deciding whether or not to give an objection notice:
 - (a) the Commission must seek such relevant information as it considers reasonable and appropriate; and
 - (b) the Commission may make a decision on the basis of:
 - (i) any information so obtained; or
 - (ii) any other information given to it by the corporation or any other person; or

(iii) any other information in its possession.

Note that the onus of proof of satisfying the public benefit argument is reversed under the notification process, and it will be the ACCC which must satisfy itself that the public benefits do not outweigh the detriments before it can object to the notification – and this has to happen all within 14 days.

This puts a great responsibility on the ACCC, particularly given the tight timeframe involved and the ‘deeming’ consequence if they do not make a decision in time.

3.3 **Non-Merger Authorisations**

The Bill introduces some improvements to the authorisation process, such as:

- a six month time limit for consideration by the ACCC of non-merger authorisation applications; and
- providing for regulations to prescribe circumstances in which the ACCC may waive, in whole or in part, the fee for filing a non-merger authorisation application.

There was no reference to the recommendation in the Dawson Report that the ACCC develop an informal system of consultation with non-merger authorisation applicants to provide guidance about the authorisation process and the requirements of the Trade Practices Act, although the Government has said that it supports the development of an informal system of consultation with non-merger applicants for authorisation.

ENDNOTES

- ¹ Section 45
- ² Section 45A – more specifically, the section refers to “fixing , controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties”
- ³ Sections 45A(2) and 45A(4)
- ⁴ Section 45
- ⁵ Section 4D
- ⁶ Section 47
- ⁷ Section 47(6)
- ⁸ *Review of the Competition Provisions of the Trade Practices Act - The Dawson Report*
- ⁹ Trade Practices Legislation Amendment Bill, 2004
- ¹⁰ Trade Practices Legislation Amendment Bill (No. 1) 2005
- ¹¹ (1993) ATPR 41-263, 41,554
- ¹² *Boral Besser Masonry v Australian Competition & Consumer Commission* (2003) 77 ALJR 623 (Boral case).
- ¹³ In a decision at first instance, Hill J had held that the music companies Universal and Warner each had ‘substantial market power’, notwithstanding their respective market shares of 17.6% and about 16%. *Australian Competition & Consumer Commission v Universal Music Australia Pty Limited* [2001] FCA 1800 (14 December 2001) (**the CD case**). This decision was handed down before the Boral case – but the appeal from the CD case was heard soon after the Boral case, and based on the High Court’s decision in that case, the appeal court in the CD case set aside the finding that the two music companies had substantial market power for the purpose of this section.
- ¹⁴ The Boral case
- ¹⁵ *Melway Publishing v Robert Hicks* ([2001] HCA 13, 15 March 2001)
- ¹⁶ This would have been lawful if the proposed changes to Third Line Forcing had not been scrapped – see section 1.2.1 above.
- ¹⁷ *Review of the Competition Provisions of the Trade Practices Act - The Dawson Report*