

CHAPTER 4

SCHEDULE 7—THIRD LINE FORCING

Introduction

4.1 ‘Third line forcing’ is the practice of offering for sale one good or service, or a discount on a good or service, on condition that another good or service is purchased from a third person. A financial institution, for example, may offer a loan at a discounted interest rate on condition that the borrower purchase insurance from a nominated supplier.

4.2 Unlike exclusive dealing which is only prohibited under the Act¹ if it has the purpose, or has or is likely to have the effect, of substantially lessening competition, third line forcing is prohibited per se.² The ACCC may, however, grant an authorisation to a party or parties to engage in conduct that would otherwise be a breach of the third line forcing provisions.³ The ACCC may not grant such an authorisation unless satisfied that there are or are likely to be such benefits to the public that the authorisation should be given.⁴

4.3 There is also a notification process through which a corporation may gain protection from ACCC enforcement action 14 days after notifying the ACCC of third line forcing that it is engaging in or proposes to engage in. The ACCC may object to the conduct where it takes the view that there is no discernible public benefit that would justify the conduct. In such an instance, the notification would be withdrawn and the prohibition reinstated.⁵

4.4 The Dawson Review noted that the ACCC opposes very few of the hundreds of third line forcing notifications it receives annually.⁶

4.5 The Review did not consider that third line forcing would inevitably have anti-competitive effects and saw benefits and pro-competitive outcomes 'where efficiencies in production make it cheaper to produce and sell two or more products in

1 Section 47 of the Act.

2 Subsections 47(6) and (7) of the Act.

3 Subsection 88(8) of the Act.

4 Subsection 90(8) of the Act.

5 Section 93 of the Act.

6 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 129 at <http://tpareview.treasury.gov.au/content/report.asp>.

combination'.⁷ The Review also referred to 'shopper docket' arrangements such as those between supermarkets and petrol outlets which enabled consumers to buy petrol at a discount. These arrangements were seen as 'not necessarily anti-competitive'.⁸

4.6 Third line forcing was considered to have anti-competitive effects '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'.⁹ The Review provided the following 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. 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.¹⁰

4.7 The Review concluded that the current per se prohibition of third line forcing was not necessarily in consumers' interests or anti-competitive. It recommended the repeal of the per se prohibition and its substitution with a prohibition based on a substantial lessening of competition test.¹¹

4.8 Additionally, the Review recommended that related companies should be treated as a single entity for the purposes of section 47. In this regard, it commented that:

Concern was also expressed [in submissions] 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

7 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 128 at <http://tpareview.treasury.gov.au/content/report.asp>.

8 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, pp. 128-9 at <http://tpareview.treasury.gov.au/content/report.asp>.

9 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, pp 128-9 at <http://tpareview.treasury.gov.au/content/report.asp>.

10 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 129 at <http://tpareview.treasury.gov.au/content/report.asp>.

11 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 131 at <http://tpareview.treasury.gov.au/content/report.asp>.

submitted that, consistently with other provisions of Part IV, related corporations should be treated as one business unit.¹²

The provisions in Schedule 7

4.9 The bill implements both recommendations of the Dawson Review.

4.10 The per se prohibition of third line forcing will be removed and the conduct subject to a competition test before it constitutes a breach of the Act. The bill will also treat related corporations as a single entity.

Matters of interest

4.11 At the Committee's hearing, the ACCC indicated that third line forcing covered a very wide range of conduct which could be beneficial for consumers or pernicious in its effect on competition and the public interest. The ACCC indicated that enforcement would be more difficult with the removal of the per se prohibition.

Australian Competition Tribunal – response to ACCC comments

4.12 The Committee invited the President of the Australian Competition Tribunal, Justice Goldberg, to respond to comments made in evidence by Mr Graeme Samuel of the ACCC concerning the roles of the ACCC and the Australian Competition Tribunal. Justice Goldberg's response is included in this report at Appendix A.

Recommendation 1

4.13 The Committee recommends that the Trade Practices Legislation Amendment Bill (No. 1) 2005 be passed.

Senator George Brandis
Chair

12 Committee of Inquiry into the Competition Provisions of the Trade Practices Act 1974, *Review of the competition provisions of the Trade Practices Act*, Commonwealth of Australia, Canberra, 2003, p. 125 at <http://tpareview.treasury.gov.au/content/report.asp>.

