

JOINT VENTURES – ACHIEVING A BALANCE: ASSISTING PRO-COMPETITIVE VENTURES WITHOUT PERMITTING OBVIOUS ANTI-COMPETITIVE BEHAVIOUR

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Despite encompassing a wide range of joint activities,¹ the exemption for and treatment of joint ventures under the *Trade Practices Act 1974* (Cth) ('Act') has been unclear and has not always achieved an appropriate balance between assisting pro-competitive ventures without permitting obvious anti-competitive behaviour. The recommendations of the Dawson Committee² ('the Committee'), if implemented, will assist in redressing this imbalance.

It is often existing market players who, as a result of their current investment in the market, are more alert to opportunities for new products and developments. As a result, many joint ventures involve competitor collaborations. Most joint venture participants consider it essential to the success of the venture that they receive an assurance from the other partner that the joint venture will not be undermined by ongoing competition within that field of endeavour, and that joint venture output be sold at a set price. Often these forms of joint venture are pro-competitive, particularly where, but for the joint venture, the activity would not be undertaken in the first place.

The difficulty is that joint ventures involving competitor collaboration risk breaching the per se prohibitions against price-fixing in s 45A and exclusionary provisions under ss 45(2)(a)(i) and (2)(b)(i) of the Act.

I CURRENT JOINT VENTURE PRICE-FIXING EXEMPTIONS

The current price-fixing exemptions for joint ventures in s 45A(2) are based on the traditional joint venture structures that existed in the mining and manufacturing sectors, in which parties pooled resources to jointly produce and supply a product. On a strict reading, s 45A(2) may require that agreement on price be made 'for the purposes of a joint venture ... [and relate to the sale] of

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1 *Trade Practices Act 1974* (Cth) s 4J.

2 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) (the 'Dawson Review').

goods *jointly produced* by those parties in pursuant of the joint venture' (emphasis added). However, this may limit the application of the exemption to many standard joint venture agreements. For example, cases where the sales and marketing activities of the joint venture are carried out by a company separate to that which produces the goods. There is also an argument that where the sales company is selling as principal and not as agent, the supply is not a supply by the parties to the joint venture.³

It is not in the interests of the Australian economy that the benefit of the joint venture exemption from price-fixing should apply on the basis of extremely technical interpretations of the law. The provisions need to be drafted in such a way that the exemption applies to joint ventures in all appropriate instances regardless of the way the joint venture documentation is put together.

II RECOMMENDATIONS ON PRICE-FIXING FOR JOINT VENTURES

The Committee accepted that the current joint venture exemption may operate too narrowly, but was concerned not to provide a blanket exemption from the price-fixing prohibition which may exempt conduct that should be prohibited *per se*.⁴

The Committee recommended that the current exemption be substituted with a new s 45(A)(2) to the effect that:

Section 45(A)(1) does not apply to a provision of a contract or arrangement made, or of an understanding arrived at, or of a proposed contract or arrangement to be made, or of a proposed understanding to be arrived at, if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.⁵

III EXCLUSIONARY PROVISIONS

The technical difficulties with the price-fixing prohibitions in the context of joint ventures can sometimes be overcome by restructuring arrangements, but the prohibition on exclusionary provisions is not so easily avoided. As exclusionary provisions have currently been interpreted by the court, particularly following the Full Federal Court decision in *South Sydney District Rugby League Football Club Ltd v News Ltd*⁶ ('*Souths*') (currently on appeal to the High Court), and the interpretation of the previous decision of *ASX Operations Pty Ltd v Pont Data Pty Ltd*⁷ ('*Pont Data*'), joint ventures involving competitor collaborations which contain restrictions on the way in which the parties will acquire or supply goods

3 *Trade Practices Act 1974* (Cth) s 45A(2)(a).

4 Dawson Review, above n 2, 141.

5 *Ibid.*

6 (2001) 111 FCR 456.

7 (1990) 27 FCR 460.

or services risk breaching the prohibition on exclusionary provisions because of the wide interpretation given to the requirements of *purpose* and *class* in s 4D of the Act.⁸

For an exclusionary provision to exist, the provision must have the relevant *purpose* of preventing, restricting or limiting the supply or acquisition of goods or services. In *Souths*, Moore J found the 14-team term had a prohibited purpose, stating that supply could be restricted or limited in a qualitative as well as quantitative sense. He stated that the supply of something to a number of people could be restricted or limited if the character of what was supplied was altered even though its fundamental character remained the same. This meant that even though *Souths* could continue to provide a team by merging to form a joint venture, the services being provided to this team were not the same as those being provided or acquired before the adoption of this term. The team acquiring the services would not be a team of that club, but a hybrid team of two or more clubs.⁹ The difficulty with this approach is that a joint venture involving competitor collaboration often involves the cessation of the provision of services individually in exchange for the provision of services by the joint venture.

Justice Merkel also held that, although the ultimate purpose of the term (the end) was the achievement of a viable and sustainable national competition, its immediate purpose (the means) was to exclude any clubs in excess of the 14 selected to participate in the 2000 competition. This seems to confuse the purpose of the provision with its effect. If this reasoning is applied, it makes it a lot easier to find an exclusionary purpose where conduct has an exclusionary effect. I think it likely that the High Court will not follow Justice Merkel's view on this issue. However, as the law currently stands, the interpretation of purpose in the context of exclusionary provisions in competitor collaborations is very wide.¹⁰

In relation to classes of persons, following on from *Pont Data*, it has sometimes been argued that it is possible that the requirement that the restriction or limitation aimed at 'particular persons' or 'particular classes of persons' could be construed to include a class of people defined by the fact of exclusion only. However, in *Souths*, Merkel J (who was part of the majority on appeal) found that the particular class that was the subject of the exclusionary purpose had to have 'a distinguishing or identifying characteristic in addition to the mere fact of exclusion'.¹¹ In this case, the distinguishing characteristic was that the top level rugby league clubs eligible to participate by meeting the basic criteria, but which did not achieve the requisite level in the selection criteria, would not be supplied with the services. Similarly, Heerey J (who delivered the minority judgment) found that there needs to be 'an identified and defined class of persons in the minds of the alleged contravenors at the time the exclusionary provision is

8 For a detailed analysis of the difficulties in this regard, see Carolyn Oddie and Leah McKeown, *Joint Ventures and Exclusionary Provisions: Anti-Competitive Purpose or Unintended Effects*: (2002) 10(2) *Competition & Consumer Law Journal* 192.

9 *Souths* (2001) 111 FCR 456, 501–2.

10 *Ibid* 526–7 (Merkel J).

11 *Ibid* 531.

included in the contract'.¹² He also found that the class must then be 'aimed at specifically'.¹³ The Full Federal Court in *Rural Press Ltd v Australian Competition and Consumer Commission*¹⁴ ('*Rural Press*') also supports this minority view.

The judgment of Heerey J must be correct with respect to the fact that if a whole class of persons is defined by exclusion alone, the 'class' becomes the whole world.¹⁵ However, unless this issue is clarified by the High Court in the *Souths* appeal, it will be very difficult to be certain that any restriction in a joint venture agreement involving competitor collaboration that specifies some criteria (in the same way as the 14-team term) will not be taken to affect a 'class' of persons.

This broad interpretation of exclusionary provisions is inconsistent with the international position and unreasonably treats the conduct of many pro-competitive competitor collaborations in the same way that it would treat an arrangement involving market-sharing, output restrictions or collective boycotts designed to eliminate a competitor. Clearly, competitor collaborations that result in this type of conduct should be prohibited, but competitively neutral or pro-competitive joint venture arrangements between parties who happen to be competitors should not be unduly restricted.

IV THE COMMITTEE'S RECOMMENDATIONS ON EXCLUSIONARY PROVISIONS

The Committee, in recognition of the Australia New Zealand Closer Economic Relations (CER) trade agreement and the benefit of the harmonisation of business laws, including competition laws, recommended that a defence be provided in similar terms to that in the *Commerce Act 1986* (NZ).¹⁶ It would be a defence to an argument that an arrangement was prohibited as an exclusionary provision if it was proved that the provision did not have the purpose, effect or likely effect of substantially lessening competition in the market.

The Committee also recommended an amendment 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.¹⁷

In addition, it is recommended that dual listed companies be treated on the same basis as corporate groups so that they also avoid technical breaches of the Act as a result of the separate status of the companies.

12 Ibid 477.

13 Ibid.

14 (2002) 118 FCR 236.

15 Ibid.

16 *Commerce Act 1986* (NZ) s 29(1A).

17 Dawson Review, above n 2, 131.

V COMMENTS ON THE COMMITTEE'S RECOMMENDATION

Both the recommended exemption from price-fixing and the defence for exclusionary provisions would have the effect of reversing the onus of proof and requiring joint venture parties to justify their arrangements if challenged. I agree with the Committee's view that, given the general undesirability of price-fixing and collective boycotts, the shift in onus of proof is appropriate. It seems to me that, in practice, this will only be of concern for a limited number of joint venture arrangements, in markets where the joint venture parties are significant competitors. In these instances it is appropriate that arrangements should be carefully scrutinised to ensure they do not have a significantly anti-competitive effect. The proposals will assist in encouraging innovation through competitor collaborations in circumstances where the parties have largely complementary products, but happen to compete in some areas, while continuing to curtail truly anti-competitive arrangements. In those few instances where this may be an issue, the authorisation process, albeit with its attendant difficulties, would still be available.¹⁸

The more controversial recommendation is 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.¹⁹ As set out above, the application of this provision definitely needs clarification. However, some concerns have been raised since the release of the Dawson Review that this limitation on the class of persons unduly narrows the scope of exclusionary provisions in circumstances where conduct ought to be prohibited from a public policy perspective.

Traditionally, exclusionary provisions were thought to catch market-sharing conduct as well as more traditional collective boycotts. The decision in *Rural Press*²⁰ challenged this assumption. In *Rural Press* an agreement between two rival newspapers to limit their circulation boundaries after their advertising catchment area started to overlap was held not to be an exclusionary provision. The Full Federal Court stated:

It is of course, obvious that the provision for geographic zoning would limit the ability of persons in the area to have access to a second local newspaper. But that is the effect of the arrangement rather than its purpose. The potential customers suffered what, in other contexts, is called collateral damage.²¹

This would seem to be a case involving market sharing and should be regarded as anti-competitive. Even adopting a more restricted view of purpose, one would have thought that the purpose of this arrangement was clearly to restrict or limit the supply of newspapers to people resident outside the territorial boundary that had been the primary circulation area.

18 Under s 88 of the Act, the Australian Competition and Consumer Commission can authorise corporations to enter into contracts, even if they involve anti-competitive conduct such as exclusionary provisions or price-fixing, if it considers that there are public benefits which outweigh the anti-competitive detriment.

19 Dawson Review, above n 2, 131.

20 (2002) 118 FCR 236.

21 *Ibid* 266.

This decision provides context for the current debate. If the class of persons to whom exclusionary provisions are directed is limited in the way foreshadowed, market-sharing conduct that does not involve the exclusion of a competitor, boycotts by competitors of particular suppliers and the black-banning of a particular customer by competitors, would not be caught by the *per se* prohibition. However, in *Rural Press*, conduct of this kind was held to substantially lessen competition.

An alternative would be to require the class of persons to be defined by a particular quality or attribute over and above the fact of their exclusion, and that they be the 'target' of the exclusion, without limiting it merely to competitors.

When examined in the context of joint ventures, however, there are certainly arguments both ways. A *per se* prohibition on restrictions in respect of suppliers to a joint venture involving competitor collaboration is not justified in many instances. Given the current interpretation of the law in this regard, a prohibition of this kind may unduly restrict the joint venture parties from agreeing to restrictions which are common in standard joint venture agreements, such as restrictions on the way in which the parties through the joint venture will acquire or supply goods or services. These can be agreements by the parties not to supply goods or services produced by the joint venture to a particular person following a competitive tender for the sale of the joint venture output in which the particular person is unsuccessful or because the person has not invested in the joint venture facility or has not agreed to pay a price they regard as adequate. However, on reflection I wonder whether the limitation of class to competitors is necessary or will leave a gap for anti-competitive conduct which ought to be filled. Perhaps, given that most clearly anti-competitive conduct will be likely to substantially lessen competition, this gap for most practical purposes is already filled.