5.17 NATIONAL COMPETITION POLICY

5.17.1 INTRODUCTION

In April 1995, the Council of Australian Governments agreed to implement a National Competition Policy. An important feature was extending the scope of the Trade Practices Act to States and Territories, including Government businesses and unincorporated businesses.

The Competition Policy Reform (NSW) Bill was passed on the 6 June 1995, which applies the Trade Practices Act, Part IV, 'Restrictive Trade Practices' to NSW Government businesses and agencies from the 21 July 1996. Consequently, from that date the Reform Act will bind the Crown in this State and Territories so far as the Crown carries on the business, either directly or by an authority of this State. This policy ensures compliance with these requirements.

There are sound ethical and commercial reasons for giving proper attention to the subject of Trade Practices compliance. These include:-

1. Setting exemplary business practise to reinforce and consolidate our customer service commitment.

2. The avoidance of penalties which can apply to both organisations and individuals.

3. The legal and management costs associated with enforcement proceedings.

4. The unfavourable publicity associated with contraventions.

5. Mitigation value of having a compliance program.

6. The identification of illegal conduct on the part of competitors.

5.17.2 THE CSI APPROACH TO COMPLIANCE OF THIS REFORM

CSI implementation of these requirements is reflected through:-

1. This policy manual insert.

2. The provision of training and awareness programs to staff on the anti-competitive restrictions under Part IV of the Trade Practices Act.

3. The appointment of the CSI Commercial Manager as the Trade Practices Compliance Officer who will provide a reference point for staff on National Competition Policy issues which may arise in the workplace.

5.17.3 COMPLIANCE RISKS FOR CSI

Part IV of the Trade Practices Act aims to encourage, support and strengthen competition. It identifies a number of forms of conduct, which are strictly prohibited, (that is illegal regardless of the effect upon competition) and other forms of conduct, which are only deemed illegal if proven that the conduct was anti-competitive due to it substantially lessening competition in a market.

It is important for CSI staff to be able to distinguish between these two forms of conduct, as no defence is available for strictly prohibited conduct.

Conduct which is defined as strictly prohibited ie - outright illegal is:-

* Price fixing - Section 45A
* Resale price maintenance - Section 48
* Third-line forcing - Section 47
* Agreements with exclusionary provisions - Section 45

The other, sometimes termed “conditionally prohibited” conduct, provides that a condition, purpose or effect has to be proven as anti-competitive before there is a contravention under the legislation. These are:-

* Agreements or arrangements affecting competition - Section 45
* Exclusive dealings - Section 47
* Misuse of market power - Section 46

5.17.4 PROHIBITED CONDUCT

Price Fixing - Section 45A

Price fixing occurs where a contract, arrangement or understanding has the purpose or likely effect of fixing, controlling or maintaining pricing, discounts, allowances, rebates or credits in relation to goods or services bought or sold by any parties in competition with each other. Under the Trade Practices Act Part IV, the mere agreement with a competitor to fix prices is illegal regardless of how long the agreement lasts or how formal the arrangement. The observance of the CSI Pricing Policy in the Policy Manual will ensure that pricing of CSI products and services is determined independently of any arrangements with competitors.

Resale Price Maintenance - Section 48

The Trade Practices Act gives a reseller rights to sell and advertise at any chosen price by prohibiting suppliers on insisting that a reseller sell or advertise at a minimum price.

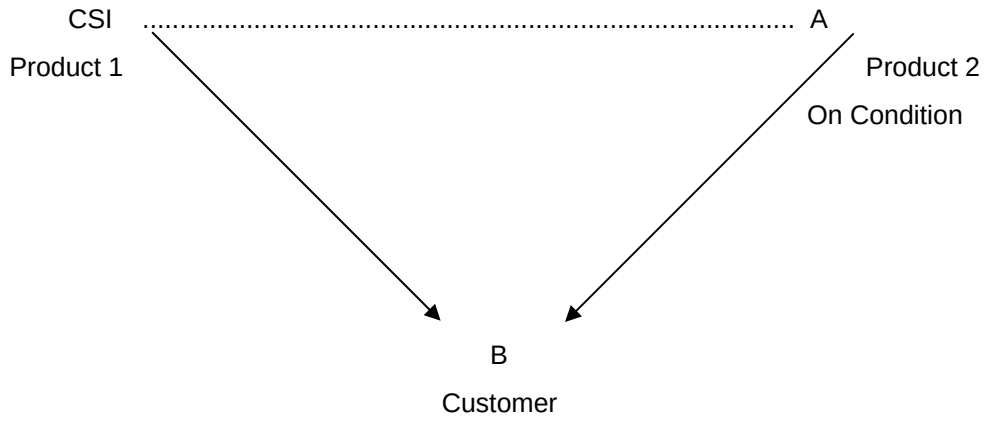
The exceptions under this section to this broad principle are:-

* A supplier may insist on a maximum price.
* A supplier may stop supply if the reseller continually sells below the buying price.

CSI staff are to be wary of dealings with a customer which might inhibit the ability of the customer to set and sell at their own selling prices. In this regard, the accurate completion of the Product Pricing Sheet, Form 44 will provide suitable justification.

Third-Line Forcing - Section 47

In essence, third-line forcing involves a company, in supplying its goods or services, imposing a condition that the purchaser must also acquire the goods or service of a third person.



Under this above situation, eg - CSI provides Product 1 to the customer on the strict condition that the customer has to buy another suppliers -A- Product 2.

Dealings such as these are third-line forcing and are illegal.

Provisions with Exclusionary Agreements - Section 45

Exclusionary provisions arise where two or more competitors agree with each other not to supply or buy from a particular customer or to make supply in particular circumstances.

Another form of this exclusionary agreement is called market sharing, in which competitors agree to keep their own customers and not attempt to take customers from each other.

Both cases are illegal irrespective of whether a formal arrangement exists.

In circumstances where CSI staff are placed in a position where a restriction to a customers' or suppliers' business might occur, direction is to be sought from the Compliance Officer.

5.17.5 CONDITIONALLY PROHIBITED CONDUCT

1. Arrangements or Understandings Affecting Competition - Section 45

This relates to a contract, arrangement or understanding where the purpose or effect is to substantially lessen competition in the market place. To arrive at a decision you need to consider the following:-

1. What is the market. Determine the size of the market in question.
2. Whether the conduct lessens competition.
3. Whether the lessening is substantial.

Arrangements, contracts or understandings need not be formal under this section for it to be caught by the Act. CSI staff are to be aware that any arrangement, even verbal or implied, which minimises competition to any great degree should be referred to the Compliance Officer in the first instance.

2. Exclusive Dealing - Section 47

This arises where the situation is applied to a purchaser or supplier of goods to not buy from a competitor. If the conduct has a purpose, effect or likely effect of substantially lessening competition it contravenes the Trade Practices Act.

This may apply if CSI was to place a condition on a customer which prevented the customer from stocking a competitor’s product.

3. Misuse of Market Power - Section 46

The misuse of market power is described as unconscionable conduct under the Trade Practices Act. Typically this arises where the market is limited by the number of players or where one competitor in the market place has extreme marketshare.

To identify whether there has been a misuse of power, an affirmative interpretation to the following questions is required:-

1. Does the company have substantial market power?
2. Is it taking advantage of that power?
3. Is it using the power for an illegal purpose?

It is extremely unlikely that CSI would contravene this test.

5.17.6 COMMON MISCONCEPTIONS OR MYTHS ABOUT THE TRADE PRACTICES ACT AND NATIONAL COMPETITION POLICY

1. All exclusive dealing arrangements breach the Trade Practices Act.

This is incorrect. Exclusive dealing arrangements will only breach the Trade Practices Act if they have the purpose, effect or likely effect of substantially lessening competition or can be said to involved a misuse of market power.

2. It is a breach of the Trade Practices Act to refuse supply.

This is incorrect. Only in a few circumstances will a refusal to supply breach the Trade Practices Act. They are:-

a) Where the refusal is because of discounting below specified prices.

b) Where an organisation with a substantial degree of power in a market uses that power by refusing to deal and does so for the purpose of deterring or preventing business or deterring or preventing entry into the market.

c) Where the refusal is on the condition that the customer agrees to take a product from a third party (the practice of third-line forcing).

d) Where the refusal is the result of a boycott or agreement between competitors.

e) Where the refusal amounts to exclusive dealing and has the purpose, effect or likely effect of substantially lessening competition in a market.

3. The Trade Practices Act or competition policy requires that every contract for the acquisition of goods or services must be subject to competitive tendering.

This is incorrect. The Trade Practices Act does not require competitive tendering. It is silent on the subject.

While the Hilmer Report recognises that competitive tendering has its benefits, there is no requirement in relation to competitive tendering in the national competition policy being implemented by the Commonwealth and the States.

The fact that a particular transaction or contract has been the subject of competitive tendering may, however, be relevant to an assessment of the competitive consequences of certain conduct.

4. The Trade Practices Act or national competition policy prohibits repeat business.

This is incorrect. As in the case with private sector businesses, repeatedly giving a particular firm business does not, of itself, breach the Trade Practices Act or run contrary to national competition policy.

5. Different prices cannot be charged to different customers.

This is incorrect. There is no outright prohibition against price discrimination. In fact, the specific prohibition against anti-competitive price discrimination has been removed from the Trade Practices Act. Price discrimination now normally falls to be considered under Section 46, the prohibition against misuse of market power.

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