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Australian
Competition &
Consumer
Commission

Submission for Enforcement Committee

Meeting date	18 May 2017		
Meeting number	1617/37	Paper number	EC1617/200
Trackit/Dynamics	CS1000080	In depth commenced	30 August 2013
Title	For update and decision – Enforcement ACT – Wholesale Draught Beer		
Recommendation	Seek a direction to discontinue the investigation		
Project staff	Lisa Knight, Stephen White		
Responsible SES	Richard Fleming		
Branch and Office	Enforcement ACT		
Legal/Economic input	Jennifer Orr (CCEU)		
	<input type="checkbox"/> This paper contains confidential and privileged material (shaded)		
Conflict of interest	n/a		
Legal cost to date	n/a		
Previous EC Date/s	17 November 2016 (oral update) 20 October 2016 29 September 2016 (oral update) 30 June 2016 (oral update) 3 March 2016 11 December 2014 (oral update) 21 August 2014 (oral update) 10 April 2014 19 September 2013		

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1. Purpose

- 1.1. The project team seek to update the Committee on the progress of the investigation and obtain the Committee's agreement to discontinue investigation.

2. Previous Committee Consideration

- 2.1. 19 September 2013 (paper D13/127864, minutes D13/133068).
 - The Committee directed the investigation be continued and noted the proposed use of section 155 notices subject to the statutory requirements being met.
- 2.2. 10 April 2014 (paper D14/42578, minutes D14/46538).
 - The Committee noted the update and endorsed the continuation of the investigation, noting the extended timeframes (due to work on the carbon tax repeal monitoring project).
- 2.3. 21 August 2014 (Oral update, minutes D14/113774).
 - The Committee was updated on the status of the matter and requested it return in December 2014 with a revised Investigation Plan.
- 2.4. 11 December 2014 (Oral update, minutes D14/196742).
 - The Committee was advised that the investigation had recommenced and that the timelines within the Investigation Plan had been updated.
- 2.5. 3 March 2016 (paper D16/24320, minutes D16/29765).
 - The Committee directed:
 - further internal consultation in preparation for proposed meetings with [REDACTED] to put forward our concerns with a view to negotiating changes to certain restrictive terms in their contracts with venues; and
 - if negotiations with the parties fail, consideration be given to continuing the investigation but narrowing it to focus on a localised area.
- 2.6. 30 June 2016 (Oral update, minutes D16/86326).
 - The Committee was updated on the status of discussions with [REDACTED] and noted the matter would return to the Committee in August.
- 2.7. 29 September 2016 (Oral update, minutes D16/134351).
 - The Committee was updated on the progress of negotiations with [REDACTED] delays in further meeting with [REDACTED]. The Committee requested that the matter return with a short paper including a description of the [REDACTED] [REDACTED].
- 2.8. 20 October 2016 (paper D16/139785, minutes D16/143048).
 - The Committee requested that further consideration be given to proposed resolution and options for public communication of the outcome of the investigation, for discussion with the relevant Commissioners out of session.
- 2.9. 17 November 2016 (Oral update, minutes D16/156154).

- The Committee directed:
 - Negotiations continue with [REDACTED] on the following basis:
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
 - putting [REDACTED] notice that the ACCC expects contractual arrangements in the industry to develop in a manner which is consistent with consumer demand for craft beers and specifically that the ACCC will continue to monitor the effect on competition of:
 - tap tying provisions;
 - minimum volume provisions; and
 - right of refusal provisions;
 - a proposal from [REDACTED] be invited in terms similar to that from [REDACTED]; and
 - at an appropriate point in time, consult with industry on the changes to craft exclusivity arrangements.

3. Background

Alleged Conduct

3.1. [REDACTED] enter into wholesale draught beer supply contracts with their customers (i.e. pubs, restaurants, sporting venues, entertainment venues etc, collectively Venues²) which contain provisions that may limit small brewers' successful entry and expansion.

3.2. Provisions of concern are of the following types:

- **Tap tying** – these require certain proportions of the customers' draught beer taps to be dedicated to the supplier's products.
- **Category exclusivity** – these require certain product categories of draught beer to be exclusive to the supplier's products.
 - A craft category exclusivity will effectively shut out all competition from small brewers as almost all small brewers produce craft beer.
- **Minimum volume commitments.**
- **Rebates** - Volume based and/or tap representation based.
- **Cash incentives** – including loans for venue infrastructure such as beer reticulation systems, taps and refrigeration.

3.3. More detailed description of the allegations is recorded in previous papers.

² 'Venues' in this context refers to entities that are customers/potential customers of brewers. As such, a Venue (the customer) may have multiple premises.

Context of conduct and investigation

3.4. A Full summary of the investigation is available in the paper dated 3 March 2016 (D16/24320). At that time, the alleged conduct appeared unlikely to constitute a contravention of the *Competition and Consumer Act 2010* (CCA) however there were concerns that industry trends could lead to competition concerns arising in the future. The Committee directed staff to negotiate with [REDACTED] in order to reduce restrictive terms.

[REDACTED]

3.5. [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

3.6. [REDACTED]

3.7. The team is of the view that undertakings from [REDACTED] would be sufficient.

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

3.8. The team notes that [REDACTED] have substantial financial backing compared to small brewers but do not have a current market presence that would raise any competition concerns. Negotiations with [REDACTED] are likely to take considerably more time to complete. The team has had previous contact with [REDACTED] and both were cooperative. The team has not previously contacted [REDACTED].

Industry dynamics

Tap Competition

3.9. [REDACTED]

3.10. [REDACTED]

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3.11. [REDACTED] provided a more detailed breakdown of craft taps as at May 2016. It's national estimates for growth of craft taps in the previous 12 months included:

- [REDACTED]
 - [REDACTED]
 - [REDACTED]
- Named competitors of concern
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]
- Selected growing small brewers
 - [REDACTED]
 - [REDACTED]
 - [REDACTED]

3.12. [REDACTED] appears to have had particularly strong growth. Staff interviewed a representative early in the investigation who reported total sales of [REDACTED]
[REDACTED]
[REDACTED]

Product Segmentation

3.13. [REDACTED] also provided a breakdown of internal beer category sales from 2011 to 2016. During that period, compositional changes included:

- Classic Full Strength – [REDACTED]
- Classic Light – [REDACTED]
- Craft – [REDACTED]
- Premium International – [REDACTED]

3.14. Mid strength [REDACTED] and Contemporary [REDACTED]) have remained steady at about [REDACTED] respectively.

3.15. [REDACTED]
[REDACTED] This has been the source of their ability to drive restrictive contracts. In total, these categories accounted for approximately [REDACTED] sales in 2011 but have fallen to a total of approximately [REDACTED] in 2016.

3.16. The growth in Craft (and to a lesser extent Premium International) is consistent with information obtained from other stakeholders.

Stakeholder messaging

3.17. The investigation has attracted attention from a number of stakeholders. Any resolution will require messaging targeted for:

[REDACTED]
[REDACTED]

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- [REDACTED]
- Small brewers via industry associations:
 - [REDACTED]
 - [REDACTED]
- Venues via [REDACTED]

3.18. In consultation with the media team, messaging may be prepared for:

- [REDACTED]
- [REDACTED] published an article on the conduct during the investigation.
- [REDACTED]
 - This is an industry news website that approached the team offering to publicise the final outcome.

3.19. The team will also prepare courtesy responses for stakeholders who have made follow up queries.

4. Assessment and Options

Option 1

4.1. Conclude investigation and provide targeted stakeholder messaging.

4.2. The team would write to [REDACTED] putting them on notice of our ongoing competition concerns and describing circumstances where the ACCC would be likely to take further action.

4.3. Messaging to other stakeholders would also emphasise:

- The level of scrutiny provided by the ACCC over 4 years
- Ongoing growth in the number of small players
- Ongoing growth in sales of certain small players
- Changing dynamics of industry over the last 4 years

4.4. This option has the advantage of requiring the minimum resource input.

4.5. Taking this approach anticipates that observed industry trends are likely to continue, noting that these trends are positive and appear to reflect increasing opportunities for competition. These trends have not yet reached a point where competition concerns are fully alleviated and the team notes that the [REDACTED] [REDACTED]
[REDACTED]

4.6. The team anticipates ongoing active monitoring of internal intelligence and trade media.

4.7. The investigation can be reopened should new information come to hand.

4.8. Anticipated timeframe: Conclude within 6 weeks

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Option 2

- 4.9. Press [REDACTED] further with a view to obtaining consistent undertakings from [REDACTED], without equivalent undertakings from the [REDACTED].
- 4.10. The team anticipates pushing back on [REDACTED] [REDACTED]
- 4.11. This option has the advantage that it could potentially result in an outcome that allows the ACCC to present a stronger message on restrictive contracts.
- 4.12. [REDACTED]
- 4.13. Without potential litigation, limited pressure is available to the ACCC. While the team is putting forward this option as a potentially expedient compromise between options 1 and 3, there is a significant risk that [REDACTED] and [REDACTED] will not accept the position and the ACCC will be faced with a choice between options 1 and 3 at a later date.
- 4.14. Anticipated timeframe: Conclude within 6 months

Option 3

- 4.15. Press [REDACTED] further with a view to obtaining consistent undertakings from [REDACTED] put forward.
- 4.16. The team anticipates pushing back on [REDACTED]
- 4.17. This option has the advantage that it could potentially result in an outcome that allows the ACCC to present a stronger message on restrictive contracts.
- 4.18. [REDACTED] and may not have a significant overall effect on competition. [REDACTED] has been forthcoming in addressing the level of tap tying or other provisions of concern.
- 4.19. Without potential litigation, limited pressure is available to the ACCC. This option will require the greatest resource input and carries a substantial risk of failure given the limited pressure available and the number of participants required to align.
- 4.20. Anticipated timeframe: Conclude within 12 months

5. Recommendation

- 5.1. Conclude investigation and provide targeted stakeholder messaging.
- 5.2. Messaging would emphasise:
- The level of scrutiny provided by the ACCC over 4 years
 - Ongoing growth in the number of small players
 - Ongoing growth in sales of certain small players

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- Changing dynamics of industry over the last 4 years

5.3. Proposed month of return to EC: Not scheduled to return