



## **Submission to the Ministry of Trade & Industry – Draft Competition Bill**

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# **Submission to Ministry of Trade & Industry in relation to the draft Competition Bill**

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## **1 Introduction**

This submission to the Ministry of Trade & Industry, in relation to the draft Competition Bill, is being made by the Australian Chamber of Commerce, Singapore (**AustCham**).

AustCham thanks the Ministry for the opportunity to participate in making this submission and hopes that the issues raised provide assistance in developing the competition laws of Singapore.

By way of general introduction, AustCham commends the Ministry on introducing competition law into the Singapore business environment and firmly believes that this law will assist Singapore in maintaining its competitive edge across the region.

The AustCham submission seeks to raise a limited number of issues, focused on endeavouring to strengthen the effectiveness of the new law.

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## **2 About AustCham, Singapore**

AustCham, Singapore is the peak business body representing the interests of Australian business in Singapore.

The genesis of the Singapore Australian Business Council (SABC) was in 1977/1978 when a group of Australians with business interests in Singapore met on a regular basis in the Australian High Commission. In 1981, Singapore Australian Business Council (SABC) was formally registered, with the High Commissioner as one of the Patrons.

On 15 June 2001, SABC changed its names to "Australian Chamber of Commerce, Singapore" (AustCham, Singapore) in order to better reflect the role played by the organization in the Singapore business community.

The objectives of AustCham, Singapore are to provide a forum on an organized and continuing basis for Australian business people - irrespective of the origins of the organization for which they work, Singaporeans and other nationals who are senior executives of Australian companies where they can exchange and discuss ideas and common interests regarding economic, industrial and commercial objectives.

### **3 AustCham comments**

AustCham would like to make the following comments in relation to the draft Competition Bill:

#### **3.1 Application of draft Bill**

(a) Sectorial Competition Regulatory Framework

AustCham notes that the Ministry is seeking to have “alignment between these Sectorial frameworks and the draft Bill, where possible and appropriate. This will ensure businesses do not end up being regulated on the same competition matter by more than one regulator.” To emphasize this, certain industries are specifically stated in Schedule 3 as being excluded.

AustCham believes the basic tenet should always be that the Competition Law principles should apply to all business in Singapore, except where the principles are specifically varied to meet Government policy requirements in respect of particular industries (whether the variation is to impose lesser or stricter standards).

The concern in granting blanket exemption to particular industries, on the basis of them being specifically regulated, is that the industry rules may be narrow in their application and may lead to segments of business in Singapore slipping between the competition law gaps.

Further, whilst it may be argued that an industry regulator is best positioned to regulate competition in its industry, this could lead to multiple, inconsistent approaches to competition law.

AustCham would ask that the Ministry reconsiders its approach to exemptions by moving away from an approach of not applying the competition law to certain industries, to identifying the specific aspect of the competition law which should not be applied to particular industries.

(b) General exclusion of Government, statutory bodies etc (Section 33(4))

Whilst AustCham recognizes the need to exempt persons stated in Section 33(4) of the draft Competition Bill from the application of the competition law when conducting government functions, we believe that the persons stated in Section 33(4) of the draft Competition Bill should not be exempt where they are not carrying out government functions. We believe that this was the intention of the Ministry (as expressed in clause 11 of the Consultation Paper). However, this is not clear from the drafting of Section 33(4), which merely provides a blanket exemption.

#### **3.2 Structure of regulatory body**

The draft Competition Bill provides for:

- (a) A Competition Commission, which acts as investigator, prosecutor, judge and jury, where all monetary penalties imposed by it are retained by it.
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- (b) Competition Board of Appeals, which is said to be an independent body appointed by the minister.
- (c) Courts to review on points of law and quantum of financial penalties.

AustCham is concerned with the robustness of this structure for the following reasons:

- (1) The multiple roles of the Commission may be perceived as giving rise to a conflict of interest and raise questions as to the fairness of decision making (given that the Commission will only be investigating for breaches and then determines whether a breach has occurred). It would be more transparent if the Commission investigated and prosecuted but that the Board acted as decision maker on breaches of the law. It would also be more appropriate that monies recovered by the Commission are paid into general Government revenues, rather than to the Commission for its own use.
- (2) In Australia, the Australian Competition Tribunal (an appellate body reviewing decisions *de novo* of the Australian Competition and Consumer Commission) is constituted by 3 persons, one of whom must be a Federal Court judge. Questions of law at the tribunal level are determined by the judge, with all three then determining the application of the facts to the law. There does not appear to be a similar process in the draft, raising concerns that the law may be misinterpreted at the Commission or Board level, giving rise to a misinterpretation of fact.
- (3) Given the courts are only to hear appeals of law not fact, there is ambiguity as to the extent the courts may hear matters of mixed law and fact, which are often faced by courts in competition law cases in other jurisdictions.
- (4) Finally, the Commission and the Minister are not required to publish reasons for their decisions. Only the Board is required to do so. Given one of the stated objectives is to ensure regulatory costs are kept to a minimum, in order to reduce the number of appeals, many of which may be based on the uncertainty of the basis of the Commission's decision, reasons for decision should be published at all stages. AustCham would encourage the draft to be amended to require reasons for decisions to be issued.

### **3.3 Transitional Provisions**

Section 34(3) of the draft provides that any agreement or decision prohibited by subsection (1) is void.

Unless the bill is intended to apply retrospectively, AustCham would request that the law make it clear that agreements which would be void under Section 34(3) would be enforceable in respect of matters arising prior to the draft Bill (or any subsequently impacting amendment to the law) coming into force. The same should apply in respect of agreements which are the subject of an exemption or exclusion, which is subsequently removed. The agreement should only be void as from the date of the removal of the exemption or exclusion and all matters arising before that date should be enforceable.

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### 3.4 Guidelines

(a) **Non-binding nature of guidelines**

Section 61(4) states that guidelines published by the Commission under that Section shall not be binding on the Commission. This may lead to uncertainty for business. At a minimum, AustCham believes that the Commission should not be permitted to apply changes retrospectively and further that changes should only be applicable after an adequate transition time has occurred.

(b) **Important issues where immediate guidelines required**

It is understood that the draft Bill provides the framework for competition law and that there will be guidelines developed by the Commission. In order to provide greater certainty to business, there are a number of issues for which guidelines should be developed, preferably in time for the Act coming into effect. These include:

- **Section 34 Prohibition - Appreciable adverse effect:** A threshold should be established by which anti-competitive agreements will be judged.
  - **Section 47 prohibition - Dominance and Abusive Conduct:** Guidance is needed on defining dominance and categories of conduct that the Commission will regard as likely to amount to abusive behaviour.
  - **Section 54 prohibition, Mergers - Substantial lessening of competition:** The thresholds for prohibiting transactions is whether or not the transaction gives rise to a "substantial lessening of competition" within any market in Singapore. Guidelines are needed on this.
  - **Public interest exemption:** The Competition Bill gives the Minister power to intervene in transactions on public interest grounds and to exempt a transaction on grounds of public interest. Guidelines should be developed as to how this power will be exercised.
  - **Timetable:** Guidelines should be developed as to likely timing for obtaining clearance in respect of mergers which are notified to the Competition Commission.
  - **Enforcement** - The Competition Bill contains only the bare minimum of the process to be adopted by the Competition Commission. The procedures to be adopted by the Competition Commission should be clarified, such as the process that the Commission will follow before reaching an infringement decision and the extent of opportunities given to the parties to comment in writing and orally on the Commission's initial views.
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## 4 Conclusion

AustCham welcomes the introduction of the draft bill and the opportunity to make this submission.

We hope that the comments submitted by us are seen to be constructive, aimed at building a stronger framework for competition law in Singapore. We look forward to receiving the next draft.

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## 5 Contact

Should the Ministry of Trade & Industry wish to contact AustCham for clarification of any issue, please contact:

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Signed for and on behalf of  
Australian Chamber of Commerce, Singapore  
Phillip Forrest  
President

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