

28 May 2004

Ministry of Trade and Industry  
100 High Street #09-01  
The Treasury  
Singapore 179434  
**Attn: Director, Market Analysis Division**

By Post and E-mail:  
[MTI\\_draftcompetitionbill@mti.gov.sg](mailto:MTI_draftcompetitionbill@mti.gov.sg)

Dear Sirs

**COMPETITION BILL (THE “BILL”) - SUBMISSION OF FEEDBACK**

We refer to the Bill and the request by the Ministry for public feedback.

On behalf of Fraser and Neave, Limited, we set out our comments on the Bill as attached.

Please do not hesitate to contact the undersigned, if you have any further queries at :-

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Yours faithfully  
**FRASER AND NEAVE LIMITED**

Lau Su Lian  
Group Legal Manager/Compliance Officer

Enc.

j'ss

## **Table of Contents**

<b><u>Content</u></b>	<b><u>Attachments</u></b>
Summary of Major Points	1
Statement of Interest	2
Comments	3
Conclusion	4

**Summary of Major Points**

1. Any statutory regime regulating competition should be clear in terms of:
  - a) scope of interpretation and application, and
  - b) equitable and transparent in terms of enforcement.

While judicial interpretation and case law precedent will be useful and in fact forms a fundamental process of the statutory regime, they are heavily dependent on whether the affected parties to bring the matter to court and takes time.

2. Therefore, it may be better that the Bill provides clarity in terms of interpretation, application and enforcement. In this regard, there are certain provisions in the Bill that may require amendments or clarifications. These include the following:-
  - a. Application of “appreciable adverse effects” test for clause 34 prohibition;
  - b. Application of clause 47 prohibition;
  - c. Application of Paragraph 8 of the Third Schedule exception in respect of vertical arrangements to clause 47;
  - d. Application of clause 54 prohibition;
  - e. Safeguards to prevent abuse of process in making complaints to the Competition Commission;
  - f. Right of persons found not to have infringed prohibitions under the Competition Act to be compensated if they are subjects of abuse of process.
  - g. Clarity in respect of rights of private action under clause 75.
  - h. Transition provision under clause 94..
3. The detailed comments on the above are found in **Attachment 3**.

**Summary of Interest**

1. As a long-established company listed on the Singapore Exchange and having major brands and presence in the Singapore and Asia-Pacific markets in the food and beverage, property and printing and publishing businesses, Fraser and Neave, Limited (“F&N”) believes in a free and open economy which allows:-
  - (a) industry / market players a level playing field to compete,
  - (b) more efficient allocation and use of limited resources, and
  - (c) consumers choice in terms of price and quality of products and services.
2. F&N therefore welcomes the Competition Act as it will enhance economic activities in the Singapore markets.
3. F&N is therefore following the process involving the Competition Act with great interest and will be pleased to offer further feedback and comments after the revision of the Bill.

**COMMENTS CONCERNING THE COMPETITION BILL**

RELEVANT CLAUSE/ SCHEDULES	BRIEF DESCRIPTION	COMMENTS	REASONS
<b>Clause 34</b>	Agreements between undertakings which have their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited.	<p>It appears that <u>Clause 34</u> applies an “effects test”.</p> <p>In paragraph 6b of the Consultation Paper, it is stated that “focus will be placed on anti-competitive agreements or conduct that will have an <u>appreciable adverse effect on markets in Singapore</u>”.</p> <p>Clause 34(5) provides for retroactivity to apply to agreements, decisions and concerted practices implemented even before the commencement date of the Act.</p>	<p>There should be a clear approach as to the application of the “effects” test under <u>Clause 34</u>.</p> <p>Since the Consultation Paper has set out the approach (which is the same approach used in many other jurisdictions), this should be specified in <u>Clause 34</u>.</p> <p>The retroactive application of clause 34 may result in unscrambling of agreements which may have been entered into historically, and hence would in all probability, add to business costs which is not what is intended.</p>

<b>RELEVANT CLAUSE/ SCHEDULES</b>	<b>BRIEF DESCRIPTION</b>	<b>COMMENTS</b>	<b>REASONS</b>
<b><u>Clause 47(3)</u></b>	“dominant position” means “a dominant position within Singapore or elsewhere”.	It appears that the <u>Clause 47</u> prohibition also extends to activities outside Singapore and if they amount to an abuse of dominant position in any market in Singapore.	<p>It is important that undertakings understand clearly the scope of the Clause 47 prohibition, especially since it has “extra-territorial” effect.</p> <p>We support the position that s.47 is aimed at prohibiting “abuse of a dominant position” and does not prohibit companies from increasing market power through efficiency, competitiveness and productivity.</p>
<b><u>Clauses 47 and 48</u></b> <b><u>Paragraph 8 of Third Schedule</u></b>	<p><u>Clause 48</u> provides that exceptions to <u>Clause 47</u> prohibition are found in Third Schedule.</p> <p>Paragraph 8 of the Third Schedule (“Para 8”) specifies Clause 34 prohibition does not apply to vertical agreements.</p>	<p>For the same reasons why Para 8 excludes vertical agreements from the <u>Clause 34 prohibitions</u>, Para 8 should also apply to <u>Clause 47</u> prohibitions.</p> <p>In any event, for the other exceptions found in the other paragraphs in the Third Schedule, they clearly apply to both <u>Clause 34</u> and <u>Clause 47</u> prohibitions.</p>	<p>The economic benefits of vertical agreements are clear, especially if an undertaking has valuable proprietary / intellectual property rights (“<u>IPRs</u>”) and vertical agreements are part of the undertaking’s usual economic/ business activities.</p> <p>Such exception should therefore extend to <u>Clause 47</u> prohibitions.</p>

RELEVANT CLAUSE/ SCHEDULES	BRIEF DESCRIPTION	COMMENTS	REASONS
<b><u>Clause 54</u></b>	Prohibition of mergers that have resulted, or may be expected to result in a substantial lessening of competition.	Use of the term “mergers that have resulted” raise concerns on whether it is intended that this clause has retroactive effect. It should be clarified that <u>clause 54</u> prohibition to apply prospectively and not retroactively.	Prospective application of <u>Clause 54</u> prohibition is necessary as it avoids disruption and upheaval as well as uncertainty in mergers and acquisitions undertaken before the appointed date of the Competition Act.  In any event, any merged entity will still be subject to <u>Clause 34</u> and <u>Clause 47</u> prohibitions.
<b><u>Clause 62</u></b>  <b><u>Clause 82</u></b>	Commission may conduct investigation if there are reasonable grounds for suspecting infringement of <u>Clauses 34, 47 or 54</u> prohibition(s).	There should be procedures addressing abuse of process by persons making frivolous, malicious complaints to Commission, eg:- a. payment of a filing / registration fees, b. making statutory declaration concerning facts and/or reasonable beliefs that a <u>Clause 34, 47 or 54</u> prohibition has been infringed, c. deterrence and punishment for making false reports to Commission including compensation to persons not found to have infringed any <u>Clause 34, 47 or 54</u> prohibition. d. <u>Clause 82</u> may be extended to complainants giving false or misleading information to the Competition Commission.	Current Bill does not address abuse of process.  Public interest of having persons coming forward to make legitimate complaints of possible breach of <u>Clauses 34, 46 or 54</u> prohibitions need to be balanced against abuse of process especially by entities which may act in bad faith and disrupt the businesses of competitors.

RELEVANT CLAUSE/ SCHEDULES	BRIEF DESCRIPTION	COMMENTS	REASONS
<p><b><u>Clauses 68 and 69</u></b></p> <p><b><u>Clause 73</u></b></p>	<p>Decision of Commission upon completion of investigation and enforcement of decision.</p> <p>Powers and decisions of Appeals Board</p>	<p>Powers of Commission and/or Board should also include power to award costs in favour of a person who was investigated by Commission and was found by Commission not to have breached <u>Clause 34, 47 or 54</u> prohibitions or if person's appeal against Commission's finding of breach is successful.</p>	<p>Competition laws should not be abused to stifle businesses and the economy and it is also in public interest that person incurring unnecessary costs and expenses be compensated.</p> <p>Person investigated by Commission or having to make representations to Commission or appeal to Board will incur substantial management time, legal costs and expenses and disruptions to his business (if Commission suspends business pending decision under <u>Clause 67</u>).</p> <p>Costs should be paid either by:-</p> <ol style="list-style-type: none"> <li>a. complainant (if he has committed abuse of process),</li> <li>or</li> <li>b. out of the Consolidated Fund or other public funds to be established (as a last resort).</li> </ol>

RELEVANT CLAUSE/ SCHEDULES	BRIEF DESCRIPTION	COMMENTS	REASONS
<b>Clause 75</b>	Any person who suffers loss or damage as a result of an infringement of a <u>Clause 34, 47 or 54</u> prohibition shall have a right of action for civil relief against undertaking which was part of the infringement (“ <u>infringing undertaking</u> ”).	It appears clear that the classes of persons protected by the Bill include:-  a. consumers/customers/suppliers of the infringing undertaking who had suffered losses; and b. competitors of the infringing undertaking.  Not clear if it applies to shareholders of an infringing undertaking (which is a public-listed company) who may have suffered loss in the drop of the share price of the infringing undertaking following an adverse finding by the Commission.	Clarity may be useful as it avoids unnecessary and costly litigation.
<b>Clause 94(3)</b>	Minister may make regulations to provide for such transitional, savings and other consequential provisions as he considers necessary or expedient.	Transitional period of 12 months may not be sufficient, given the impact of the Act on the commercial sector.	Propose a transition period of 24 months.

**CONCLUSION**

1. It is hoped that the Ministry will take into account the comments in **Attachment 3** in revising the Bill and at the second stage of public consultation, provide the necessary clarifications.
2. The competition legal regime requires adjustments and fine-tuning to take into account the nature of the Singapore economy and this process may require time and constant public feedback from the relevant industries, providers of goods and services and consumers.
3. It is appreciated in Clause 61 of the Bill, that the Competition Commission may publish its views indicating the manner in which the Competition Commission will interpret, and give effect to, the provisions of Part III (Competition) of the Bill.
4. Therefore, we urge the Ministry and/or the Competition Commission to continue to be receptive to such feedback even after the Competition Act has come into force and where necessary, make the necessary adjustments to the Competition Act or the relevant regulations or issue the necessary views pursuant to Clause 61 of the Bill.