DSICA

Distilled Spirits Industry Council of Australia Inc.

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11th June 2010

Mr Darrell Channing
Director
Adjudication Branch
ACCC
GPO Box 3131, Canberra
ACT 2601

Dear Mr Channing,

RE: DSICA Submission to the ACCC re Queensland Government application on Liquor Accords

Thank you for the opportunity to make a submission on the Queensland Office of Liquor and Gaming Regulation (OLGR) proposal for a state-wide authorisation of liquor accords to agree on certain anti-competitive practices. This submission will be based on the original application plus the 4th June submission from the OLGR clarifying some of its terms and meanings.

The Distilled Spirits Industry Council of Australia (DSICA) supports targeted, evidence-based measures to reduce alcohol related violence. As an organisation, DSICA has voluntarily initiated a number of measures to ensure that we contribute to reducing the levels of anti-social behaviour and criminal behaviour that is related to alcohol abuse. Among these initiatives are the DSICA Statement of Responsible Practices, drinking harm labelling, and members' financial support for DrinkWise Australia (alongside other companies).

However, DSICA does not support broad-brush measures that unnecessarily impose restrictions on businesses, individuals or products where those regulations are not required.

DSICA is supportive of the liquor accord concept as it recognises that alcohol misuse and abuse, and related harms, are local in its occurrence, and that type, incidence rates and severity vary quite widely when plotted geographically. Hence, local responses provide better solutions than regional or state responses that may take longer to put in place and impose restrictions where they are not required. The OLGR application for authorisation is directly contrary to the 'localism' approach as it imposes a single approach.

"Free The Spirit"

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DSICA also notes that the OLGR dismisses out of hand the benefit to consumers from having increased choice and the benefits of competition between licensed premises. While many licensed premises that are accord members may appreciate the lessening of competition that would result from authorisation, DSICA believes that the ACCC should give the greater weight to benefits of choice and competition for consumers, and reject the application.

Objections to the granting of authorisation

1. The authorisation is too geographically broad as it includes the whole of the State of Queensland, when the specific public harms (and therefore the expected public good) are localised.
2. The proposed conditions are already existing regulations under Queensland legislation. Hence, rather than the ACCC authorising a lessening of competition and cartel behaviour, the question is one of effective enforcement by the applicant (OLGR) and Queensland Police of the existing Responsible Service of Alcohol regulations set out in legislation.
3. The voluntary nature of accord membership relied upon by the applicant should not be given great weight.
4. The authorisation is too onerous in its conditions, and is inconsistent in its treatment of different alcohol product categories. It imposes severe limitations on every licensed premise that wishes to take part in a new accord, irrespective of whether or not they have alcohol related behaviour that warrant regulation, let alone a substantial lessening of competition. The application notes that any alteration will require legal advice, so imposing a substantial barrier to any lessening of the conditions in those accords that do not support the full suite of conditions.
5. The proposed authorisation elevates liquor accords to a level of regulatory enforcement that they were not intended to provide, and are not structured or resourced to deliver.
6. The evidence submitted by the OLGR on the public benefit in support of the authorisation is weak, and broadly addresses all harms of alcohol rather than the alcohol abuse, antisocial behaviour and related violence within Queensland licensed premises.
7. The requested period for the authorisation – five years -is too long. A shorter period, if granted at all, is warranted.
8. The conditions are contradictory to the agreed Queensland Code of Practice.
9. There is no evidence that competition law restrict accords responding to problems.

The authorisation is too geographically broad

The authorisation includes the entire State of Queensland, when the specific public harms (and therefore the expected public benefits) are localised within well-known entertainment precincts.

The academic literature on alcohol-rated violence is very clear that it is a small percentage of licensed venues that have the great majority of incidents and assaults. These venues are well known to the Police and OLGR through the use of crime monitoring databases.

It is unjustifiable to reduce competition, and remove consumers' choices across all of Queensland by imposing the conditions in the application on licensed premises that have no record or history of violence or substantial anti-social behaviour.

Already existing regulations under Queensland legislation impose similar conditions

The Queensland Government already has in place a suite of legally enforceable regulatory measures to control the behaviour of both patrons and licensed premises, including legislation and subsequent regulations, licensing conditions, and the licensing renewal processes. There also is a current *Code of Practice for the Responsible Service, Supply and Promotion of Liquor*, established in 2005, to which both the OLGR and the Queensland Police are parties.

In addition, the ACCC should note that at the time of application, the Queensland Government is determining its response to a parliamentary committee's inquiry into alcohol-related violence, and specifically to 68 recommendations contained in the committee's report.

Central to the existing regulation is the obligations on all licensees in Queensland for the Responsible Service of Alcohol (RSA). This legal obligation is enforced through the Queensland Police and the OLGR.

However, the OLGR's application has ignored the existence of the legally enforceable obligations that all licensees have, and proposes including more restrictive and extensive RSA conditions onto accord members.

The first section of the list of conditions for liquor accord stakeholders (which contains the anti-competitive elements of the application) is entitled Responsible Service of Alcohol. Many of the conditions in the application (as clarified in the OLGR's 4 June submission) mirror the same issues contained in the Queensland Code of Practice, but with substantially tightened the definitions of "extreme discounts".

The 4 June clarification also has a completely opposite approach towards 'discounts of limited duration' than the Code of Practice. Where the application is more concerned about discounts applying for shorter timeframes – as little as 15 minutes – the Code of Practice regards longer happy hours as being the greater risk.

There is no justification for including RSA conditions that have an anti-competitive impact in the application when there are already extensive and legally enforceable RSA conditions in existing Queensland legislation, together with two enforcement agencies – the OLGR and the Police.

Rather than the ACCC authorising a lessening of competition and encouraging cartel behaviour across an entire state, the issue for reducing alcohol related harms is one of effective enforcement by OLGR and Queensland Police of the existing Responsible Service of Alcohol regulations.

The voluntary nature of liquor accords should not be given great weight

The OLGR relies on the fact that membership of a liquor accord is voluntary for licensees, therefore the conditions do not impose an additional compliance burden and that licensees are free not to join.

DSICA submits that this should not be given great weight in the ACCC decision-making for the following two reasons:

1. If the application is granted and accord members are granted permission to conduct anti-competitive strategies and cartel behaviour, then there would be significant economic incentives to join (or to remain) an accord member in order to lawfully benefit from the cartel behaviour through higher prices and lower marketing costs. The logical decision for any business is to join an existing cartel, to the detriment of consumers.

   For example, bars make higher profits from mixing patron's drinks as opposed to the equivalent RTDs products. Measures to remove or restrict RTDs force consumers to the higher profit alternative. The ACCC authorisation would give legal protection to such behaviour, and an economic incentive to be part of the accord.

2. As liquor accords almost always have a Police membership and (as stated in the application) OLGR Licensing Enforcement Officers regularly attend, to not be a member of an accord is to risk drawing unwarranted attention from the two regulatory bodies that can severely restrict (or temporarily close) the business. DSICA has plenty of anecdotal reports from other states of regulators making threats of repeated inspections if perfectly legal and permitted practices are not halted by licensees.

The application is too onerous in its conditions, which are inconsistent in their treatment of different alcohol product categories.

The application would impose severe limitations on every licensed premise that wishes to take part in a new accord, irrespective of whether or not they have alcohol related behaviours that warrant further regulation.

The OLGR's submission of 4 June that clarifies the meaning and definitions of terms used in the original application illustrate a substantial tightening of regulation beyond that of the Queensland Code of Practice and a reduction of consumers' choices, without being based on any evidence.

For example, "extreme discounts" is to mean two-for-one drinks and half price drinks, and should be banned by accords. However, under the Code of Practise, a half price drink is regarded only as 'high risk', not as an 'unacceptable risk'.

Furthermore, as the text references a product at 5% Alcohol by Volume (or ABV) as an example "very high alcohol substances" in the application shall be ready-to-drink products above 5% ABV. In contrast, Queensland's Code of Practice makes no mention of high strength products and takes the commonsense view - and one that supports the RSA obligation - by setting out a number of standard drinks for hourly or daily consumption, differentiated by gender.

The text of the 4th June submission refers to very high alcohol products ranging from 10% to 5% ABV. If the ACCC grants authorisation, then it would amount to a de-facto ban on RTDs above 5% ABV. It is hard to justify on any grounds that a 5% ABV RTD is worse than the 4.8% ABV major beer brands available in Queensland.

The OLGR the OLGR somewhat disparagingly refers to higher ABV RTDs (above 5.9%) as:

> *"so-called "premium" RTD products,(e.g. Smirnoff, Bundaberg Rum and Johnnie Walker) containing 2 standard drinks... Premium or "super-strength" RTD products appear designed to target consumers who want to drink rapidly and become intoxicated. Super-strength RTD products also pose a risk to people who may confuse them with milder products."*

These products are 7% ABV. However, there are several categories of popular alcohol products above 5% and 7% ABV that the OLGR and the application is completely silent on – which is a glaring inconsistency based more on prejudice than evidence.

Wine at ABV from 11%-14.5% is completely unrestricted, as are ciders. Fortified wines (port, sherry, and liquors with 18%-25% ABV) are much stronger, but not mentioned.

These statements by the OLGR are completely unsupported by any research evidence and illustrate the prejudices of the OLGR. "Appear" is not evidence – it is an assumption.

It is very unlikely that a consumer would mistake a high ABV RTD product with a lower ABV RTD as the prices for the higher strength RTDs are substantially greater and the taste of alcohol is much stronger. Quite simply, that some consumers like a stronger taste of alcohol has not occurred to the OLGR.

The OLGR's only supporting arguments used against these "very high alcohol substances" are merely references to alcohol in general being causally linked to some diseases, and some statistics on the number of Australians drinking at high risk levels. These arguments are in fact somewhat hysterical against the 'demon drink'.

There is no evidence that high strength RTDs cause of anti-social behaviour and violence any more than any other type of alcohol product.

DSICA notes that the OLGR has somewhat surprisingly defined "High alcohol carbonated drinks" in its application as solely meaning energy drinks mixed with alcohol, rather than the more obvious reading as high ABV RTDs.

DSICA also notes that the clarification is silent on what is considered "over-strength spirits". This must leave the ACCC and objectors to the application unclear as to what is actually being granted in the authorisation.

The application notes that any alteration will require legal advice, so imposing a substantial barrier to any lessening of the conditions by an accord that wishes to do so. There is a substantial risk that authorisation would lock accords into fulfilling the complete set of conditions, even when not all of them are required.

The proposed authorisation incorrectly elevates liquor accords to be part of regulatory enforcement

The purpose and structure of liquor accords is that they are a voluntary initiative by stakeholders in the alcohol industry and related government services in order to have a process to discuss and respond to local alcohol-related issues. Liquor accords were never intended to provide, and are not structured or resourced to deliver, more onerous forms of regulation that are properly the responsibility of government.

Liquor accords do not have legal responsibilities to report their activities or to have any external scrutiny.

Authorisation would create the situation that an accord would feel legally safest imposing the complete 'suite' of conditions in the application if it was to take any action at all as the suite would have the legal 'safe harbour' of being authorised. Any other or lesser action would not be protected by the authorisation. This would be a complete removal of the flexibility that makes accords effective. Together with the pressure on licensees noted above from the government bodies responsible for regulating them to become members of the local accord, this will create accords as another layer of regulation.

DSICA submits that the proposed conditions– even when read together with the OLGR's clarification of terms and meanings – are so broad that they can be interpreted very generously by licensed premises wishing to reduce the level of competition, services to consumers, and their promotional costs.

It may be very unwise for the ACCC to grant an application permitting such bodies to conduct anti-competitive strategies and cartel provisions, even with the application's note that a liquor accord would be advised to seek legal advice before varying the conditions. Is this a genie that the ACCC would wish to let out of the bottle?

The evidence submitted by the OLGR on the public benefits to be gained in support of the authorisation is too weak to justify an authorisation

The evidence submitted by the OLGR in support of its application addresses a broad spectrum of harms from alcohol and completely fails to give any evidence about the alcohol abuse, antisocial behaviour and related violence within and around Queensland licensed premises. As noted above, the Parliament of Queensland has only just completed an inquiry into alcohol related violence in Queensland, so there is no shortage of relevant and current evidence.

DSICA submits that a general smearing of alcohol consumption (including a list of cancers, eye diseases, male impotency, etc) does not equate to a substantial or persuasive case that liquor accords need to have authorisation for cartel-like behaviour in order to reduce alcohol-related harm in licensed premises.

Similarly, references to underage drinking as a pattern of risk-taking behaviour has no bearing on the efficiency and effectiveness of accords in preventing alcohol-related violence. Underage drinking is far more likely outside licensed premises (in family homes, parks, etc), and if it occurs on licensed premises, then the Police and the OLGR officers have enforcement duties.

Throughout the application and in its submission of 4th June, the OLGR has presented very weak or irrelevant evidence.

However, the application gives no evidence or explanation that imposing the conditions onto accord members will bring about any further benefits, given that the all licensees have existing RSA obligations, and the *Queensland Code of Practice for the Responsible Service, Supply and Promotion of Liquor*.

It should also be noted that the OLGR does not make a case that accords are failing to have any effect because of concerns that they are anti-competitive, hence requiring the application to be granted so as to allow accord to operate successfully.

The requested period for the authorisation is too long

The OLGR has requested that the authorisation be granted for five years. This is a very substantial period of time for anti-competitive behaviour and cartels to be allowed before a formal re-application is considered.

DSICA notes that the OLGR makes no undertaking that the public benefits impact of the authorisation will be researched. Even if the OLGR did carry out such research (ideally this would be done independently), given the entire state of Queensland is included how would the research have a control element, i.e. what was the impact of no change?

A shorter period, if granted at all, is warranted, and there should be some obligation to independently measure the public benefit impact of authorisation.

The conditions are contradictory to the industry-agreed Queensland Code of Practice established in 2005

AS discussed above, many of the conditions in the application are contradictory to the established code of practise operating in Queensland, which in DSICA's opinion, is a better designed and more easily followed set of guidance.

In contrast to the OLGR application, the Code of Practice has the support of all stakeholders.

There is no evidence that competition law restrict accords responding to problems.

As noted above, the OLGR application makes no mention of liquor accords failing to be effective due to fears of the Trade Practices Act and competition law, let alone provide any evidence that this is occurring.

In the absence of such reasoning or evidence to that effect, the ACCC would be in error to grant the authorisation of anti-competitive behaviour for one accord, let alone Queensland-wide.

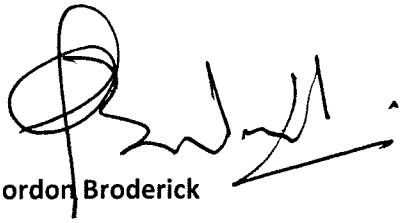
Conclusion

DSICA submits that the ACCC should reject the application as it fails to show evidence of how the claimed public benefit would eventuate through the authorisation. It is completely silent on consumers' loss of choice and the reduction of competition.

Further, the application is redundant in that what it proposes to authorise for the public benefit is already regulated by legislation and regulation, through two existing government authorities.

There is also a substantial risk that the anti-competitive behaviour would not be confined strictly to the conditions within the application, as those conditions will always be open to interpretation by people who would gain by broadening the conditions' meaning. Given the number of accords and their non-existent reporting obligations, this would be difficult for the ACCC to monitor, substantially lessening the benefits to consumers from competition and choice.

Yours Sincerely,



Gordon Broderick

Executive Director