



Bakers Delight Holdings Ltd
Application for authorisation AA1000650
Interim authorisation decision
27 October 2023

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has decided not to grant interim authorisation at this time in respect of the application for authorisation AA1000650, lodged by Bakers Delight Holdings Ltd on 30 August 2023.

The application for authorisation

2. Bakers Delight Holdings Ltd (the **Applicant**) is a franchisor that owns all the intellectual property relating to the conduct of Bakers Delight retail bakery businesses throughout Australia. The Applicant grants franchises for the operation of retail bakeries and itself owns and operates a small number of retail bakeries (collectively the **Bakers Delight Bakeries**).
3. The Applicant has sought authorisation in relation to Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
4. The Applicant seeks authorisation for five years.
5. The Applicant is proposing to introduce a new point of sale (**POS**) system to be used by Bakers Delight Bakeries.
6. As part of the proposed POS system, the Applicant proposes to implement price limits on what it calls Promotional Discounts.
7. Promotional Discounts are described as a set of rules that get evaluated against a customer's shopping cart and determine if the customer gets a discount or not. Promotional Discounts can apply to multiple Bakers Delight products of the same type which are known as Value Packs (e.g., 6 hot cross buns) or specific combinations of products which are known as Combos (e.g., a bottle of water and a loaf of bread).
8. The Applicant proposes to limit the price that Bakers Delight Bakeries will be able to charge for Promotional Discounts to five tiers of pricing. One price tier would be a recommended retail price set by the Applicant, one price tier would be below that recommended retail price and the remaining price tiers would be above that recommended retail price.
9. The Applicant proposes that in the initial implementation of the new POS system, it would set the price tiers to reflect existing pricing patterns for Promotion Discounts.
10. On 5 September 2023, the Applicant clarified that the Proposed Conduct is also intended to cover future changes to the rationale for setting individual price tiers, the number of price tiers, the spread of price tiers and include Promotional Discounts not currently listed in a confidential list provided to the ACCC as part of the application for authorisation.
11. The conduct set out in paragraphs 6 to 10 is the **Proposed Conduct**.

The authorisation process

12. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from any lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

13. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. This can allow the parties to engage in the Proposed Conduct while the ACCC is considering the substantive application.

14. The ACCC Authorisation Guidelines note that the ACCC will determine whether to grant interim authorisation on a case by case basis taking into account relevant factors including:

- the object of the Act, which includes enhancing the welfare of Australians through the promotion of competition. The ACCC is therefore unlikely to grant interim authorisation to proposed conduct that has the potential to substantially lessen competition unless compelling reasons are provided;
- the extent to which the relevant market will change if interim authorisation is granted. Interim authorisation is more likely to be granted when it will maintain the market status quo. Interim authorisation is unlikely to be granted if doing so would permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied;
- the urgency of the need for interim authorisation. Relevant to this, the ACCC will consider whether an application could have been lodged earlier to avoid the need for an urgent request for interim authorisation;
- the possible harm, if any, to the applicant if a grant of interim authorisation is denied;
- the possible harm to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied; or
- any possible public benefits or detriments that the ACCC can assess at the time of considering the request for interim authorisation. However, granting interim authorisation does not require the ACCC to determine whether the relevant authorisation test is, or is likely to be, satisfied.

The application for interim authorisation

15. The Applicant requested interim authorisation on the basis that it submits:

- the current contract for its existing POS system solution expires in April 2024 – and it is seeking to move to the new POS system well ahead of this deadline to avoid the need to renew the current contract for an additional 2 years;
- the new POS system should be implemented as soon as practicable so that the Applicant and its franchisees can take advantage of the upgrades to the POS functionality and remain competitive;
- sufficient time is required to transition to the new POS;
- the transition to the new POS system takes several months to execute, as all Australian and Canadian bakeries must be transitioned to the new system. The transition will affect over 700 bakeries in the global franchise system;

- there are blackout periods whereby the Applicant is unable to progress the transition, namely during the Christmas period and for the period of the Canadian franchise network bread conference which is to be attended by representatives of the Applicant and the franchisees of the Canadian bakeries;
- there are significant licensing costs associated with failure to complete the transition before April 2024. The Applicant provides IT services to franchisees at cost, so the Applicant will pass on the increased costs to franchisees, which may then be passed on to consumers by way of increases in product prices;
- the new POS system requires sufficient expertise and knowledge to implement and install. The new POS system vendor is ready and able to commence the transition of the systems, so if the implementation is delayed then there is a risk of losing key staff who are currently on standby to commence the transition. Loss of such staff and expertise will further add to costs which will be passed on to franchisees, and in turn consumers by way of increases in product prices;
- there is a significant opportunity cost associated with not transitioning to the new POS system. The new POS system is a superior system to the current system with additional features and improvements including integrated payment gateway, more secure payment options, better layout and user interface and more customer support from the supplier. This will provide greater efficiencies in serving customers and processing transactions, and will make the Applicant more competitive; and
- there will be little impact on franchisees if the interim authorisation is granted because there are limited restrictions to franchised bakeries that will be imposed under the new POS system. The Proposed Conduct is unlikely to affect the current pricing strategy of Bakers Delight Bakeries. Therefore, the Proposed Conduct will have little impact on the existing degree of competition in the retail bread market.

16. The Applicant submits that if interim authorisation is not granted, it will engage with the new POS system supplier to proceed with implementation without the Proposed Conduct, to allow Bakers Delight Bakeries unrestricted ability to deviate on pricing.

17. However, this would mean that:

- The Applicant's Information Technology Service Team will need to devote significant time and resources to set up the Promotional Discounts and Promotional Discount Records to facilitate the unrestricted ability for Bakers Delight Bakeries to deviate pricing and the costs will be passed onto franchisees by way of an increase to their IT services monthly fee;
- more "compute" resources are needed to be added to the POS System. If the additional Promotional Discounts and Promotional Discount Records degrade system performance, then the further costs associated with this will be directly charged to franchisees again via an increase to their monthly IT services fee;
- the increased costs in the form of increases to the monthly IT services fee will most likely lead to price increases of BDH Products to enable franchisees to recover their increased IT service costs.

Consultation

18. The ACCC invited submissions from a range of potentially interested parties including franchisees. No submissions were received that specifically addressed the issue of interim authorisation. However, the ACCC has received submissions from interested

persons, including a franchisee, that raise concerns regarding the application for authorisation more generally.

19. Further information in relation to the application for authorisation, including the public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's [website](#).

Reasons for decision

20. The ACCC considers that it is not appropriate to grant interim authorisation for the Proposed Conduct at this time.

21. In not granting interim authorisation, the ACCC notes that the following.

- Granting interim authorisation would change the status quo, in that the current ability of franchisees to independently select pricing on a range of promotional products would be removed. At this stage, the ACCC does not have enough information to properly assess the impact of that change on franchisees and competition.
- The ACCC does not consider that there are compelling reasons to support the urgency of the request for interim authorisation, and notes that the application was not lodged until 30 August 2023.
- The Applicant has stated that if it is not granted interim authorisation, it still anticipates being able to progress the implementation of its plans for the new POS system without the Proposed Conduct, although this would involve some additional cost and difficulty. The Applicants have provided a confidential breakdown of those costs to the ACCC. The Applicant would reconcile these costs and adjust the technology fee payable by franchisees.
- The Applicant's submit that the new POS system should be implemented as soon as practicable, so that it and its franchisees can take advantage of the upgrades to the POS functionality and remain competitive, but this submission has not been substantiated with supporting information at this stage.
- The ACCC has received submissions from interested persons raising concerns in relation to the Proposed Conduct. At this early stage in the assessment, the ACCC considers that it does not have sufficient information to assess the likely public benefits and public detriments resulting from the Proposed Conduct.

Reconsideration of interim authorisation

22. The ACCC may reconsider whether to grant interim authorisation at a future date if requested by Applicant. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.