the state of COMPETITION

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While antitrust economics might reflect universal principles, the same cannot be said of the law. Australia's complex system for statutory immunity is one of the more unusual features of our competition law framework – much like a local short-cut, however, not everyone is familiar with it so it can be under-utilised. While the substantive prohibitions in Part IV of the Competition and Consumer Act tell you what you can't *do, a detailed understanding of the statutory immunities set out in Part VII reveals what you* can *do. In this issue – the first of a two-part series – we explain the major filings available for statutory immunity, while our next edition will examine some broader policy considerations.*

A road map to statutory immunity in Australia

The football pre-season was a little more interesting than usual this year, with the Australian Crime Commission – flanked by government ministers – releasing a report into the apparently widespread use of drugs in sport. With the possibility of up to 2 year bans and tarnished reputations, football clubs and players caught up in the current doping investigation are wise to take the process seriously and get legal advice.

For competition lawyers, the issues have a familiar ring: is something illegal even though it's not specifically banned thanks to catch-all descriptions based on effect; the complexities created when doing something one way is okay, but another is not; questions about individual responsibility, as against structural compliance processes that allow individuals to safely rely on following organisational policy; debate about the reach of investigative powers and the appropriateness of public comments (trial by media and encouraging a 'race to the confessional').

It seems that the football community is learning a hard lesson familiar to anyone who has been the target of an ACCC investigation – in sport, as in business, it's vital to know the 'rules of the game'. That means knowing not just what you can't do but, of more value, what you can do: clearly establishing your 'safe ground' in advance, so when someone knocks on the door, you're not only confident that your house is order but you can readily prove this is the case.

You need to know not only what you *can't* do, but also what you *can*

So with that in mind, we thought we'd lift the lid on some measures a best practice compliance culture involves, in particular the protection that can be obtained for businesses prepared to do their homework.

Local road rules apply

The first thing to understand is that while economic principles may be universal, the rules are local. What might be permitted elsewhere so long as it doesn't lessen competition may be prohibited outright, or "*per se*", under the law here. Conversely, things that might be absolutely illegal in another jurisdiction may be possible in Australia if done a particular way or with the protection of a particular type of immunity filing not available elsewhere. For example, we have a pretty broad exemption which means many joint ventures involving competitors don't have to worry about the cartel provisions.

Knowing which rules apply in a particular context is not always straightforward. It's not just the wording of the prohibitions that is complex; there is an intricate web of exemptions and 'anti-overlap' provisions (which

It's not enough to know how to drive to be able to get about - one has to understand the local road rules too (here, a sign for Melbourne's notorious hook turn)

often have the effect of turning apparently *per se* contraventions into perfectly legal conduct). The High Court in 2003 (*Visy Paper v ACCC*) gave a lesson in how to read the Act when ruling on a non-compete clause in a supply contract. Liability will not turn on the economic characterisation of horizontal versus vertical restraints, the Court reminded us; it's the specific wording of the Australian legislation that is crucial.

Fear of breaching the law can be paralysing and can result in self-censorship of commercial options that could, in fact, be protected by one of these provisions. Conversely, parties can inadvertently break the law by mimicking others' conduct without appreciating that their exemplars may have in fact carefully sought specific legal protection.

Ignorance is no excuse

The resulting compliance challenge is that, like ASADA talking about 6 month bans for players who innocently broke the rules, the courts clearly consider that ignorance is no excuse.

Time and again, courts have condemned (and heavily fined) parties who have no apparent 'moral' culpability but have nonetheless broken the law. For example, in 2007, the court acknowledged that several abalone fishermen – who were ultimately found to have engaged in cartel conduct – had acted openly, genuinely believing their arrangements to be legal.

Justice Weinberg said, "it must be remembered that in this area ignorance of the law is no excuse. The respondents had a responsibility to ensure that they knew the law, and that the law was obeyed". He referred to an earlier 2003 case involving record companies (*Universal Music v ACCC*) where the initial penalties had been increased on appeal even though legal advice had been obtained saying the conduct was fine.

The Full Court in *Universal Music* said that the conduct ran a serious risk of contravening the Act and that:

> *If this was appreciated, then the fact that the risk came home against expectations does not entitle the perpetrator to a discount. If the existence of the risk was not appreciated, then the company concerned misunderstood the law applicable to an important area of commerce and would not be entitled to any discount…* ***The fact that legal advice was obtained by one of the parties is also of little consequence****. It illustrates that risk was appreciated. However, legal advice is obtained for the benefit of the company and only for the benefit of the company. It is not a discounting factor.* ***If legal advice is wrong, that is a matter between the company and the legal adviser.***

Sometimes even a good economic rationale might not be enough. In 2007 the ACCC secured record penalties for resale price maintenance of $3.4m in total against the Jurlique group and its founder. However, it was clear that the judge (Spender J) saw no harm in the conduct and indeed some justification. He acknowledged that:

> *the attraction of many products to consumers lies in the fact that they are expensive, and have an aura of exclusivity about them. That attraction is enhanced if the product outwardly displays the signs of its expensive exclusivity, as in the well-known pattern of a product, or by the name that is displayed on the product itself, as on the arms of sunglasses, or on a label of a shirt.*

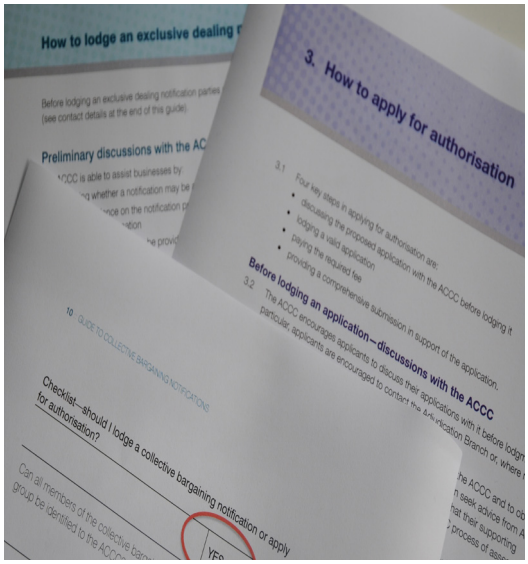
He recognised the economic literature on preventing 'free riding' by discounting retailers, and the possibility that resale price maintenance might enhance consumer welfare: "The use of resale price maintenance to prevent retailers taking a free ride is particularly important for prestige goods, where a manufacturer substantially invests in creating an image based on quality and prestige to increase demand for its product…".

As a new brand trying to compete against established prestige brands, had Jurlique permitted discounting, its sales volumes might well have been lower (something Spender J acknowledged). However, despite this valid justification, the conduct clearly breached the law and a large penalty was imposed.

Protection is better than cure

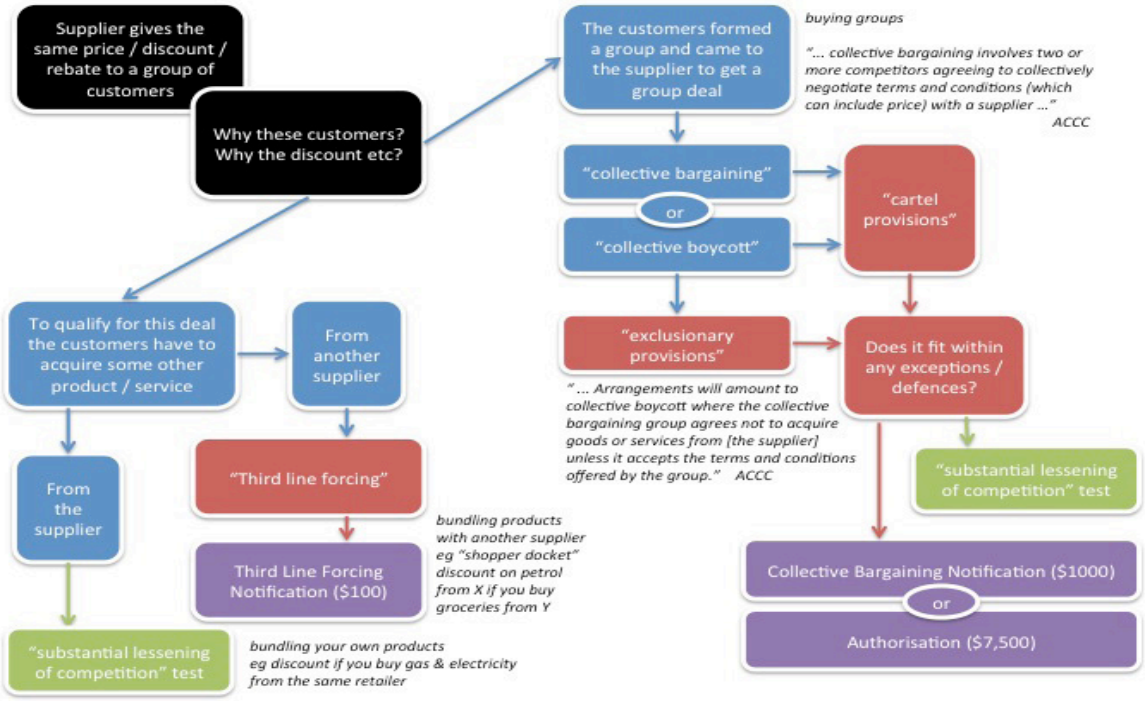
It's often said that 'it's better to seek forgiveness than to ask for permission'... most likely by litigators. After all, they tend to be the main beneficiaries of this approach. In fact, seeking forgiveness is frequently the most expensive legal option. As the ACCC says to shoppers, it pays to 'know your rights'. If you take advantage of a protection to which you're entitled, then you won't need to ask for forgiveness.

One of the special features of our competition law regime is the availability of statutory protection for any type of conduct or arrangement except a breach of section 46 (misuse of market power) provided, of course, that you meet the relevant criteria and make the right statutory filing. Although there is no direct filing to provide immunity for a misuse of market power, a degree of incidental protection can be obtained via other filings (due to the application of an 'anti-overlap' provision). So, for example, if a manufacturer establishes a distribution system that involves, say, territorial restrictions and protects this via an appropriate filing (in this case, notification), then it is protected against a claim that a refusal to supply contravenes section 46 where the refusal is due to non-compliance with the notified territorial restriction.



But these statutory protections can't provide retrospective immunity. Unsurprisingly, however, competition law concerns are generally not front of mind for sales and marketing personnel in a hurry to get results. Businesses can also fall into the trap of assuming that, because others appear to be doing the same thing, there isn't any need to get it checked out by a competition lawyer. For example, as shown in the diagram on the next page, simply knowing that a supplier is giving a group of buyers the same price tells you nothing about whether that is legal and if so whether this is because of a particular filing.

In theory, the first step ought to be a search of the public register. But in practice, it is sometimes hard for businesses to know whether, behind the scenes, a crucial filing exists because the public registers for these (which the ACCC is required to keep under the Act) are only searchable and on-line for filings made after 1999/2000. Experienced practitioners might remember that a particular company used a particular filing to protect its distribution system in, say, 1998 (and can ask the



ACCC's Public Register Officer for a copy) but this information really ought to be easily accessible to all businesses wanting to do their homework. Also, much like road signs, those who already know where they are going are generally best placed to make use of the available guidance – for example, you'll need to know exactly what *type* of filing was used to search for it effectively. And that brings us to the various filing options.

Authorisation

Authorisation is the big daddy of them all. It can be used to protect any type of commercial arrangement from contravening Part IV (except section 46, as explained above) if there is sufficient "public benefit". The concept of public benefit was articulated by the Competition Tribunal in its seminal 1976 decision relating to rival bids by two flour milling firms, QCMA and Defiance, to take control of a third flour milling firm, Barnes. The Tribunal gave a deliberately broad interpretation:

> *we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.*

The Tribunal rejected the idea that "public" meant the 'consuming public' noting that the Act did not say this: "…we cannot but think that the choice of a wider expression was deliberate, as pointing to some wider conception of the public interest, though no doubt the interests of the public as purchasers, consumers or users must fall within it and bulk large." The Tribunal also noted: "If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable."

The public benefit test is wider than the consumer welfare test familiar to other jurisdictions. Particularly in the early years, the ACCC and its predecessor accepted a wide range of benefits such as improved health and safety, encouraging research and capital investment, growth in export markets, employment growth in regional Australia, industrial harmony and environmental protection. More recently, boosts to tourism and the promotion of international trade have also been accepted as public benefits. These have been accepted as benefits in their own right, not re-cast in economic terms.

It's worth pausing for a moment to appreciate just what a powerful tool authorisation is. Put simply, if enough of us (as a community) believe there is sufficient value in overriding competition law, or if the community values something *more* than economic efficiency, then the legislation provides a mechanism for the will of the community to prevail. In theory. Of course, one of the issues (as touched on in our last edition) is how we can actually know what consumers value and indeed what the community generally values.

Authorisation is a public process that takes 6 months (although that statutory timeframe can be extended in certain circumstances). It isn't cheap. For starters there is a filing fee of $7,500 ($1,500 for additional related applications) but the ACCC has discretion to waive all or part of the filing fee (for example, in the case of not-for-profit bodies). However, the bulk of the cost lies in the complex work required to put together the application (which often involves detailed economic analysis) and to respond to issues raised in public submissions or by the ACCC during the authorisation process.

The process starts with the ACCC publishing the application (confidential material can be kept off the record) and accepting public submissions. The ACCC will release a draft determination (typically around the 3 month mark) and invite responses from the applicants and interested parties, who may also request that the ACCC hold a pre-decision conference at which they can present their views in person before the ACCC makes its final determination. The applicants or interested parties may seek a review of the ACCC's final determination by the Tribunal (where the Tribunal will conduct a re-hearing and reach its own decision); this decision can in turn be appealed to the courts on administrative grounds only (judicial review).

Immunity protection commences when authorisation is granted, but sometimes the ACCC may grant "interim authorisation", allowing the applicants to proceed with the conduct while the application is considered. The length of protection afforded by authorisation will be decided by the ACCC on the merits of the case but about 5 years is standard. Upon expiry of the authorisation, protection can be rolled over via a re-authorisation application.

So how often is authorisation used and for what?

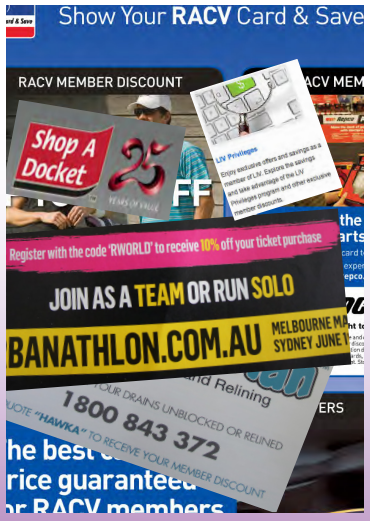
Currently, about 20-30 authorisations are lodged each year. To give a snapshot of how authorisation is being used right now, during FY2011-12, the ACCC issued 20 final determinations, 10 of which were for collective bargaining which would otherwise be caught by the *per se* prohibitions designed to catch cartels. Codes of conduct and agreements on fees in shared professional practices (basically, other types of arrangements that are caught by the wide *per se* cartel prohibitions) have also featured prominently over recent years. Relatively few authorisations are for conduct that would substantially lessen competition but is justified by public benefit, as we will discuss in our next issue.

One of the interesting questions is why authorisation is not used for resale price maintenance, given the discussion in *Jurlique* that it can sometimes be justified and indeed welfare enhancing. Authorisation was made available for resale price maintenance as part of 1995 Hilmer reforms but typically each year there are several successful prosecutions of this sort of conduct. The judge's comments in *Jurlique* suggest that, for at least some of these matters, there might have been a case for authorisation had it been sought at the outset.

One of the questions this raises for policy makers is whether authorisation is the right process. The 1993 Hilmer Report recommended that authorisation be allowed for resale price maintenance recognising that it could sometimes enhance economic efficiency – but the Hilmer Committee did not have sufficient evidence that this would occur frequently enough to justify relaxing the *per se* prohibition in favour of the substantial lessening of competition test or to warrant the simple notification process available for third line forcing (discussed below). Nonetheless the Committee clearly assumed authorisation would be used where a legitimate case for resale price maintenance existed. If a simpler notification process were available, would businesses be more inclined to make a filing?

Exclusive dealing notifications

At other end of the scale, the simplest and most common filing is notification for third line forcing (a particular form of "exclusive dealing"). Third line forcing involves linking two offerings from different suppliers, either via an express obligation to buy one in order to get the other or by some form of inducement (eg a discount offered on a shopper docket).



Offers such as these are very common but, absent notification, may be illegal

Unlike other forms of exclusive dealing, third line forcing is *per se* prohibited but nonetheless is generally recognised as being pro-competitive (*why* it's *per se* is a whole other story…).

Unsurprisingly, the ACCC receives hundreds of third line forcing notifications each year, rarely objecting to any. During FY2011-12, it assessed over 500 exclusive dealing notifications, the vast bulk of which were for third line forcing.

Lodging a third line forcing notification usually involves simple paperwork (many companies do it in-house) and the filing fee is $100. Immunity starts 14 days after filing (unless ACCC objects) and, unlike the fixed term of an authorisation, it lasts until revoked.

Notification for other forms of exclusive dealing (which are only prohibited if they lessen competition) is reasonably straight-forward (although they can sometimes become complicated). The filing fee is $2,500 ($500 for additional related applications) and immunity takes immediate effect upon filing, lasting indefinitely until revoked by the ACCC.

Notification immunity has no expiry but can be revoked by the ACCC, with revocation decisions reviewable by the Tribunal. Once notification is revoked (or withdrawn), a party cannot file another notification for the same or similar conduct.

Collective bargaining notification

As we noted earlier, collective bargaining accounted for half the authorisations granted last financial year. The ACCC has, for some time now, tried to make the process more accessible by expediting collective bargaining authorisations so that a final determination can be given in just 3 months. However, there is also another, much simpler, notification filing that can be made for collective bargaining. This was introduced in 2007 with the intention of assisting small businesses.

The filing fee for a collective bargaining notification is $1,000 (with no fee for additional related applications) and it provides immunity 14 days after filing (unless the ACCC objects). But the protection lasts for a fixed term of just 3 years and is only available where each party proposing to engage in the collective bargaining reasonably expects that the value of its transactions with the relevant target supplier (or buyer) will not exceed $3 million in any 12 month period (with a higher limit for certain specific industries).

In FY2011-12 the ACCC considered 4 collective bargaining notifications. This figure is typical since the introduction of these notifications, other than a blip in 2009 which saw the ACCC assess double that number.

Mergers

General authorisations and notifications are handled by the ACCC's Adjudication Branch. Mergers, however, have their own branch which manages a bespoke informal clearance process which we discussed in Issue 6 of *TSoC*. Alternatively, merger parties can avail themselves of one of two statutory filing processes (each incurring a $25,000 filing fee).

The first is formal clearance, introduced in January 2007. Formal clearance is not based on any public benefit test; rather it is to be granted where the ACCC is satisfied that the merger will not have the effect of substantially lessening competition. The ACCC has 40 days to make its assessment and, if no decision is made within this period, the application is deemed to have been refused. Applicants can appeal the ACCC's decision to the Tribunal but third parties have no right of review.

The formal clearance process has never been used, possibly given its unwieldy nature (and steep filing fee). The process is more akin to an authorisation, but without the ability to argue public benefit. It is a very burdensome filing, particularly as it is only appropriate where the parties can readily demonstrate there will be no impact on competition. The application form is extremely detailed and complex with penalties if any information provided is false or misleading. Once filed, it cannot be amended (other than minor technical corrections) so any new information or issues mean going back to square one and filing a fresh application (presumably along with another cheque for the filing fee).

The second type of formal merger filing is authorisation. Since January 2007, such authorisations go straight to the Tribunal, with the ACCC's role being limited to assisting the Tribunal. The Tribunal has a 3 month statutory timeframe to reach a decision. There have been no direct applications to the Tribunal since this change was introduced and some factors seemed to have been overlooked, such as 'alliances' involving an authorisation for cartel conduct (which would go to the ACCC) as well as the acquisition of shares or assets (which would go to the Tribunal). Once upon a time, these applications (such as in *Qantas/Air NZ*) would have been heard together by the same decision-maker.

Merger authorisations used to be relatively common in the early days of the Act. Indeed the *QCMA* case discussed earlier involved a review by the Tribunal of a decision by the ACCC's predecessor to refuse merger authorisation.

In the next issue, we'll consider why merger authorisations may have fallen out of favour. For now, we note that parties appear to be placing all their eggs in the basket of arguing there is no substantial lessening of competition or – to the extent there is – that it can be resolved via undertakings.

Some lessons for the 'Son of Hilmer'

While statistics about filings are publicly available, there is little analysis of how they are being used (or not used) and what implications there may be from a policy perspective.

With talk of a post-election 'son of Hilmer' root and branch review of our competition law regime, it's worth remembering the role filings play in this regime. The Hilmer Committee acknowledged that filings serve the public interest in two ways: first, where competitive market conduct will not maximise economic efficiency (ie to address 'market failure') and second where competitive market conduct may achieve economic efficiency but at the cost of other valued social objectives (whatever these may be at any given time). We'll pick up this latter thread in our next issue but for now, given that at present filings are predominantly used for *per se* prohibitions and the "public benefit" arguments largely align with the market failure justification, let's look at what fatherly advice the original Hilmer Report might contain.

The Hilmer Committee described the rationale for *per se* prohibitions as being to provide savings in enforcement costs (through not having to prove effects on competition) and also greater certainty for businesses seeking to comply with the law. On the other hand, it acknowledged that there may be cases where conduct breaches a *per se* prohibition but nevertheless promotes economic efficiency and community welfare so an "authorisation or notification scheme provides a mechanism for consistent and cost-effective resolutions of these conflicts on a case-by-case basis".

So viewed from this perspective, is there anything useful we can say about how filings are currently working for the three types of *per se* prohibited conduct (ie, conduct between competitors that is covered by the cartel prohibitions, third line forcing and resale price maintenance)? In relation to cartel conduct, the number and nature of both prosecutions and filings suggests that the cost-effective balance the Hilmer Committee sought is probably working as intended. Indeed, it's rare to see heavy penalties emerge from a prosecution in circumstances where an apparently obvious public benefit justification has gone begging. In terms of third line forcing, the very low level of prosecution and very high level of benign filings reinforces the near universal consensus that a *per se* prohibition is not warranted. As discussed above, the lack of filings for resale price maintenance makes it harder to draw any useful conclusions and perhaps a notification process may produce better information for policy makers.

Conclusion

Filings play an important part in risk management and compliance, and could probably be used more. They also have an important role in making our current laws workable, and policy makers would be wise to monitor their use in considering adjustments to the Act. Our legislation is becoming increasingly prescriptive as we try to enhance certainty, but the result (as a former High Court judge said) is a maze of statutory provisions that "requires the negotiation of too many cross-references, qualifications and statutory interrelationships" with the "danger of losing one's way in the encircling gloom". Calling on some of the 'forgotten' tools of the trade to light the way can help lawyers provide the many businesses who want to do the right thing with the best road map for navigating Australia's competition law framework.

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