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*It took a long time to get going in 2013 but, over recent weeks, there's been a lot happening in Australian competition law. Consider this your cheat sheet to all major happenings this year. In particular, we analyse the ANZ & Flight Centre decisions, consider the ACCC's shopper docket deal, ponder the Murray Goulburn authorisation application before the Tribunal, and give you an overview of the draft terms of reference for the root and branch review.*

# the state of COMPETITION

## 2013: the year of waiting patiently

Not sure about you, but here at *TSoC* we seemed to spend a good part of 2013 waiting. Waiting for the election, waiting for some significant court decisions, waiting for long-promised action by the ACCC in relation to supermarkets, and – more recently – waiting for policy reform. Oh, and waiting for several outstanding (in a chronological sense) Public Competition Assessments for long-ago mergers. But good things come to those who wait. In the last few weeks, there's been so much happening our heads are spinning. Significant Part IV decisions (*Cement Australia*, *ANZ & Flight Centre*) have been handed down; the High Court has considered civil penalties for consumer protection for the first time; the ACCC and the major supermarkets have “solved” the shopper docket problem; there are 2 new cartel cases; and our first merger authorisation to head straight to the Tribunal has been filed. Some of those outstanding PCAs have been issued and – finally – draft terms of reference for the “root and branch” review have been released.

While it's for you to decide whether 2013's gifts were delivered by the three wise men or just the three wise guys, in this issue we've got gold in the form of enforcement action; frankincense (because Franklins is *so* 2012) in the mergers space; and a mire... yeah, that would be policy reform. Hopefully, though, it will be transformed into myrrh over the next year or two.

### Enforcement gold

In the enforcement arena, lots of items moved from the “pending” column to “actioned”. We had a number of key decisions, an off-the-books resolution to a long-running issue, and some interesting new cases.

#### ANZ & Flight Centre: price fixing between agents & principals

The *ANZ* and *Flight Centre* decisions raise some intriguing questions to ponder in 2014, and perhaps in the root and branch review. As we discussed in Issue 8, the ACCC is clearly pushing the boundaries of what constitutes a competitor (because *per se* prohibitions such as price fixing rely on establishing the parties are competitors, not whether the conduct actually lessens competition).

First, a recap of the price fixing prohibition: to have a price fix, there must be some goods/services in relation to which the parties are competitors and the parties have to be “fixing” the “price” of those goods/services. If that can be established, then there is no need to show any lessening of competition because this is deemed to be the case.

Where a producer wholesales to re-sellers and also sells direct to the public, the producer and the re-seller are independent sellers as far as the buying public are con-

**“Never confuse  
movement with action”:  
was Hemingway talking  
about the ACCC & the  
major supermarkets?**



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*They took a while to get here, but the three wise men arrived just in time to finish 2013 with a bang*

cerned so it's not hard to understand that they will be considered competitors under competition law. But an agent does not buy and re-sell. It provides a service to its principal (like a real estate agent helping you sell your house).

The *ANZ* and *Flight Centre* matters don't attack the fundamental legal notions that agents and their principals don't compete in relation to the principal's product and that the agent is providing a service to the principal. Where the boundaries are being pushed is the notion that, if the principal also deals directly with customers, there is some *additional service* which both principal and agent independently supply to customers out of their own resources and in competition with each other. On this approach, the price the consumer pays actually covers both the product price and a hidden price for this additional service. So when the principal sells direct it keeps this second amount and when it sells via an agent, its payments to the agent (ie the agent's commission) cover both the service provided to the principal and this second service to customers.

It's a somewhat artificial characterisation – and that's where the debate will come in. Does it help shed light on the underlying commercial reality and thus get to the truth or is it a fiction designed to squeeze conduct into the definition of price fixing to make for an easier prosecution?

#### Let's start with the *ANZ*

**case.** The ACCC's economic argument drew a distinction between:

- (1) the supply of loans to borrowers;
  - (2) the supply of loan arrangement services to borrowers; and
  - (3) the supply of distribution services to lenders,
- each being considered a separate market.

According to this characterisation, banks (lenders) provide loans to borrowers (and brokers/agents do not), while brokers/agents provide loan arrangement services to borrowers and distribution services to lenders.

The ACCC argued that the distribution arms of lenders compete with brokers in providing loan arrangement services to borrowers (market 2). Thus *ANZ* and *Mortgage Refunds* were competitors, with the alleged price fix relating to *Mortgage Refunds*' fees for these arrangement services.

However, Dowsett J's view was that *ANZ* did not participate in any market in which brokers provided loan arrangement services to borrowers – thus it was not in competition with *Mortgage Refunds* and, therefore, there was no price fix.

**In *Flight Centre*,** the ACCC's economic argument was also based on a threefold distinction:

- (1) the supply of the airfare to passengers;
- (2) the supply of distribution services to airlines; and
- (3) the supply of booking services to passengers.

But in this case, whilst (1) was characterised as a separate market (in which airlines and travel agents did not compete), (2) and (3) were said to be "inherently provided simultaneously in a single market". Thus *Flight Centre* was said to supply these services "Janus-like", supplying (2) to airlines and (3) to passengers – thereby competing with the airlines' own internal sales depart-

ments when the latter supplied (3) to passengers.

The ACCC successfully argued that *Flight Centre* attempted to fix the price of the airfare sold directly by the airline so it was price neutral with what passengers paid if buying via the travel agent (but this wasn't price fixing, as they weren't competitors here). But this conduct in turn resulted in a price fix of "the transactionally specific retail or distribution margin" which *Flight Centre* received for the distribution and booking service it provided (the booking service being a service for which *Flight Centre* and airlines were competitors).

**In both cases** the alleged "price fix" that troubled the ACCC involved the additional service that both principal and agent were said to provide to customers, the point being that – as competitors in respect of this service – they should not influence what the other "charges". In *Flight Centre* the issue was the agent trying to get the principal to charge more for this service so the airline was not undercutting *Flight Centre*. In *ANZ* there was no issue because the court did not accept that

there was any such additional service being supplied by the principal – it simply supplied its product (whether directly or via an agent).

Neither case manages to explain precisely when an additional service arises. Dowsett J clearly could not see evidence of there being a service for which the parties competed. Contemporaneous documents did not use the "language of competition", suggesting the parties did not see themselves as competitors.

Conversely, Logan J was clearly influenced by the fact that contemporaneous documents *did* suggest that *Flight Centre* viewed itself as being in competition

with airlines. Logan J said the meaning of "competition" is a question of law but whether there *is* competition so construed is a question of fact and the views of industry participants are instructive. But Dowsett J was more cautious, questioning whether industry participants use the language of competition the same way economists do.

The cases are pretty unsatisfactory in explaining how to unpick the agent's commission: how much is for providing a service to its principal and how much is for providing a service to customers, particularly where these two activities are rolled into one market as in *Flight Centre*. They also fall short in explaining how to unpick the principal's selling price: how much is for the product and how much is for a separate service to customers that is bundled in with the product.

Many unanswered questions remain. In essence, intermediaries create their own (two-sided) markets by interposing a step in the supply chain. On the *Flight Centre* analysis, are all principals considered to also be supplying intermediary services ("arranging" or "broking" deals between customers and themselves)? The language itself reveals the nonsensical nature of the argument. And just how far as we prepared to take companies away from their core business when we declare them competitors of others? A small business that normally delivers products via a courier but drops off to local customers is suddenly in the delivery business too? And how many new "markets" are we prepared to create to describe invisible transactions (for which no separate payment is made)?



*Dowsett J couldn't see the "loan arrangement" service allegedly provided by ANZ in competition with Mortgage Refunds*

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There are shades of the ACCC's argument in *Metcash* here. In that case, the ACCC pleaded a product market (the supply of wholesale packaged groceries). But, in its economic arguments, it regarded Metcash as supplying a service (distinct from groceries), contending that the price for this service lay in the margin that Metcash made, not the total price it charged for supplying packaged groceries to retailers. As Emmett J described it, the ACCC identified the mark-up on goods that any middleman in a supply chain adds and adopted that mark-up as the price of a separate service. He concluded that this approach lacked foundation in logic or reality.

We also note that a traditionally legitimate means of avoiding third line forcing (another *per se* contravention) has been via the use of agents. Given *Flight Centre*, however, one has to question whether this still works. When, say, Emirates sells tickets via Flight Centre, isn't it supplying to consumers on condition that they acquire services from Flight Centre?

Ultimately, we're left with a lot of uncertainty for supply chains, particularly those involving agency arrangements. In Issue 11, we noted that the historical rationale for *per se* prohibitions was 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. But such substantial weapons need to be employed with discretion; if they are overused, we're entitled to question their appropriateness. This might be something that falls for consideration during the root and branch review.

The ACCC was quick to announce its intention to appeal the ANZ decision; in the case of *Flight Centre*, final orders remain outstanding, so the appeal period has yet to start running. Nonetheless, one has to assume that Flight Centre will be considering its options very carefully.

### Shopper dockets

Given the ACCC's expansive approach to price fixing, we were a little shocked to see the "secret shopper docket business" that resulted in separate undertakings given by Coles and Woolworths to the ACCC to cease "excessive" petrol discounting. The undertakings, given on the same day, appear to be remarkably similar, even to the point of including a very specific price matching provision, allowing Coles (or Woolworths, depending on the undertaking you're reading) to match – but not beat – discounts offered by other petrol retailers in a local vicinity. Other than to match nearby competitors though, the majors are promising to limit their discounting to 4c per litre. Given the terms of the arrangement, it's hard to see that other petrol retailers have any incentive to engage in substantial discounting beyond the 4c. Doubtless months, if not years, of work preceded this outcome. Nonetheless, the bottom line is that the ACCC and the major supermarkets have effectively ended discounting without any public process. The ACCC has not had to prove that the discounts were as the result of cross-subsidisation or



But the ACCC's decision to deny shoppers the opportunity to save a few dollars -- and even at 45c a litre the savings on the average fill of 28 litres is just \$12.60 -- in the name of supposed competition seems bloody-minded at best. However, reading the ACCC's annual report on fuel pricing released this week offers a clue as to why the regulator may have acted as it has.

**I**f the two big supermarket retailers had met secretly to jointly limit the amount of petrol discounts they offer shoppers, they could find themselves hauled before the courts for anti-competitive price fixing. Yet Coles and Woolworths have been forced to do just that – under the threat of court action – by the competition watchdog.

*We're not the only ones with reservations about the shopper docket deal – above, excerpts from the Australian & the Australian Financial Review*

that they lessened competition (as it has claimed); the supermarkets have not had to prove that the discounts reflect their better efficiencies (as research overseas suggests).

Rather, there's been a backdoor deal which has removed a clear benefit for Australian consumers. Surely this sort of arrangement warranted at least a revocation of existing notifications and an authorisation, both of which would have required a public process? Indeed, there was substantially more transparency **when the original notifications were allowed to stand.**

We note that there is an exception to price fixing when authorisation has been sought. No such exception applies to deals brokered by the ACCC. Think of any other party in the ACCC's position and you'd have a straight-forward hub and spoke arrangement (eg the *Superleague* case). Perhaps someone should remind the ACCC that, according to its own policies, "ring-leaders" aren't entitled to immunity or leniency for cartel conduct...

### New cartel claims

The shopper docket deal, along with several new filings, do have the taste of the Christmas rush about them. If you subscribe to ACCC media releases, you'll have noticed a flurry of activity over the first two weeks of December (including a lot of draft reports and authorisation decisions).

In the cartel space, there have been 2 new cases filed, the first involving motor vehicle components (following on from a \$2m penalty against another party earlier in the year) and the second, laundry detergent (with Colgate and Cussons named as respondents, and Unilever the immunity applicant). Woolworths has also been named as an accessory to the "laundry detergent cartel" (the ACCC's catchy title, not ours). In a brief statement issued by Woolworths, it said:

*We are particularly concerned that good process has been compromised by the need to meet arbitrary deadlines set by the [ACCC]... Woolworths has serious concerns about the way the ACCC has engaged with us.*

### Cement Australia

The ACCC had a mixed outcome in the *Cement Australia* decision. The case concerned contracts between Cement Australia and 4 Queensland power stations for the acquisition of flyash (a by-product of black coal electricity generation). Greenwood J found that there was a substantial lessening of competition, but that there was no misuse of market power. Happily (given we waited and waited for the judgment to be released before giving up), the judge's analysis was on all fours with our last edition (Issue 14): there was market power, there was purpose but there was no taking advantage.

## Consumer protection

While 2013 was a mixed bag for the ACCC in Part IV cases, it had some impressive wins in the consumer protection space.

The Full Court overturned Jessup J's earlier decision when it found that Lux had engaged in unconscionable conduct while selling very expensive vacuum cleaners to vulnerable consumers by way of door-to-door sales methods. Given how desperately we'd like superior court guidance as to the statutory meaning of unconscionability, the Full Court's decision is disappointingly limited to the facts; fingers crossed, if the High Court agrees to hear the case, we'll get something more.

The Full Court also agreed with the ACCC in its case against Zamels concerning two-price advertising (eg was/now). Again, unless you're looking at very specific conduct, there's not a lot in the judgment providing general guidance.

And the High Court has just reinstated the substantial \$2m penalty imposed against TPG at first instance. This matter was appealed in relation to both liability and penalty, and it is the first time that the new civil penalty regime for consumer protection has been examined by the High Court. On the penalty issue, the High Court upheld the ACCC's approach of splitting the conduct into multiple contraventions ("courses of conduct"), depending on the medium used. Furthermore, in contrast to the Full Court, it considered relevant a prior \$87B undertaking given by TPG concerning similar conduct (even though this was not itself evidence of any earlier contravention).

Last year (Issue 4), we thought the ACCC was perhaps overreaching for penalties in the consumer protection space, at least when compared to Part IV conduct, but the High Court majority (French CJ, Crennan, Bell and Keane JJ) wasn't remotely perturbed by the numbers before it. Then again, given the ACCC hasn't seen a whole lot of success in the Part IV arena since the new civil penalty regime started, it's still a little tricky to compare the relativities.

## Frankincense: merger happenings

### Informal merger reviews

In our 2012 wrap-up, we noted that there had only been 2 PCAs published in 2012 and at year's end there were 7 PCAs outstanding. Over the course of this year, 6 of these were released, leaving one outstanding 2012 PCA (the ALH (Woolworths) NSW Hotels decision from 17 August 2012).

As far as 2013 decisions are concerned, we have had 7 PCAs published with only one outstanding (being the 5 December Bluescope-Orrcon Steel decision). The timeliness of PCAs has greatly improved (now mostly taking around 2-3 months).

Players unlucky enough to have the ACCC oppose their proposed acquisitions were Woolworths (in the Glenmore Ridge decision) and Heinz (Rafferty's Garden). Telstra withdrew its application in relation to Adam Internet. Meanwhile, Baxter gave undertakings to secure clearance for its acquisition of Gambro, likewise Westfield in relation to the Karringup Shopping Centre and Perpetual for The Trust Company.

### MG merger authorisation

In a move that had been widely foreshadowed, Murray Goulburn (MG) filed a merger authorisation in relation to its bid to acquire Warrnambool Cheese and Butter. MG is just one of several trying to acquire Warrnambool (the others being Bega and Saputo) but Bega has already got clearance from the ACCC and Saputo (as a new entrant) doesn't need it.

MG's authorisation is going to raise a number of interesting issues. For example, what's the role of the ACCC? Typically, where there's no obvious opponent in a matter, the ACCC acts as a contradictor (this is what happened in another Christmas merger case, *AGL v ACCC*, in 2003). But has the ACCC had the chance to form its own view? And what if the ACCC is okay with the proposed purchase?



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*There's lots of new territory to explore in the MG authorisation*

Of course, MG lodged an application for informal clearance back in 2010. The ACCC released a **Statement of Issues** identifying some concerns, and the application was subsequently withdrawn. In essence, the ACCC was concerned that if MG were to acquire Warrnambool, competition in the market for the acquisition of raw milk in parts of Victoria and South Australia would be affected. Amber lights were also raised in relation to the markets for the bulk supply of milk to manufacturers of dairy products and the supply of bulk cream.

The application is available on the **Tribunal's website**. In short, MG claims that the acquisition would result in no substantial lessening of competition and that it would in fact enhance efficiency. There's also a touch of the "national champion" argument – an approach which was common in authorisations a couple of decades ago but which has more recently fallen out of favour. Chris Jose of Herbert Smith Freehills is running the matter for MG, with Chris Pleatsikas (an expert who regularly appears for the ACCC) as its economist. The timing is tight with little allowance for Christmas and the cricket – there's even a directions hearing scheduled for 27 December (that's Day 2 of the Test, your Honour, so keep it brief!).

### Other happenings

In September, the ACCC released its new **Merger Process Guidelines**. They replace the 2006 version, and notably include revised timelines more in keeping with actual outcomes.

## The murky mire that is policy

### At last... draft terms of reference

Whoa! They made us work for this. It's pretty hard to find the draft terms of reference for our long-awaited review but **Dr Julie Clarke's wonderful website** again comes to the rescue.

The review is explicitly couched in the tradition of Hilmer. As noted in the "Background",

*the Government is looking to further engage the engine of competition to broaden durable benefits for Australians, foster economic prosperity and enterprise that enables efficient business – including small businesses – to grow and prosper, promote Australian businesses, attract investment, and establish a footing for exports.*



The Review Panel will be asked to consider reforms (not limited to current legislation) to improve the economy and the welfare of Australians, “by identifying and removing impediments to competition that are not in the long-term interests of consumers or the public interest...”. The role of regulation, policy and regulatory agencies will also be considered to ensure their effectiveness in protecting and facilitating competition.

There’s also the question of whether “Australia’s highly codified competition law is responsive, effective and certain in its support of economic policy objectives”. In addition, are the operations and processes of regulatory agencies transparent, efficient, subject to appropriate external scrutiny and providing reasonable regulatory certainty?

Access, misuse of market power, industry codes and unconscionable conduct are specifically identified as areas requiring examination, along with historical and/or sector-specific exemptions (eg international liner shipping). Meanwhile, natural monopolies, groceries, utilities and petrol all receive particular mention. Interestingly, the draft terms specifically limit consideration of the consumer protection provisions contained in the *Australian Consumer Law* except to the extent they relate to “protections... for small business”.

As for process, at a minimum, the Review Panel is expected to release an Issues Paper, hold public hearings, and receive written submissions culminating in a draft report. That report will be subject to further consultations, with a final report to be provided to Government within 12 months.

Meanwhile, we’re still waiting for the make-up of the Panel to be announced and the terms to be finalised. Whoever gets the job is going to be busy in 2014!

#### **PC review of access**

The draft Terms of Reference acknowledge the Productivity Commission’s recent review of the National Access Regime. The final report was sent to Government in late October, although it is not clear when it will be publicly released.

The **draft report** (May 2013) included a lot of specific recommendations for legislative reform, particularly for ss44G and 44H. The PC also called for the ACCC to publish guidelines as to when it would exercise its power to direct facility extensions or expansions. Probably the most significant draft recommendation was that, if the decision date comes and goes without the Minister acting, the NCC recommendation should become the default. This position, of course, is at odds with the very specific policy intent that there should be ministerial responsibility where an owner’s right to deal with their property as they wish is overridden.

The PC also addressed the no-man’s land that is competitive neutrality – however, the draft recommendation (essentially requiring more prompt reporting) would do little to rectify the problems identified in our Issue 13. Hopefully the final report – and, more to the point, the Government’s response – includes something with a little more substance to it!

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*Rachel and Alexandra are both Australian Legal Practitioners within the meaning of the Legal Profession Act 2004 (Vic), with liability limited by a scheme approved under Professional Standards Legislation.*

*Thanks again for your fabulous support this year.*

*Enjoy the festive season & we'll see you in 2014*

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