

**EXAMPLES OF OVER-REACH OF CRIMINAL AND CIVIL CARTEL PROHIBITIONS
UNDER THE TRADE PRACTICES ACT 1974 (CTH)**

Example 1

Assume that a hurricane strikes Cairns and is causing extreme flooding and devastating damage to public and private buildings and other facilities. Building contractors, concerned about by the delay or insufficiency of governmental action, stop competing with each other and create an recovery program under which they agree immediately to deploy all their resources on agreed priority recovery projects. Valuable or essential as this private sector initiative is, one substantial purpose is to restrict supply and is caught by s 44ZZRD(3)(a)(iii) and s 4D.

The contractors invite ACCC staff in Brisbane to join the reconstruction team and to help process applications for assistance. Their reaction when told that they need to apply to the ACCC for an authorisation?

Example 2

Assume that a local television blackout of a sporting event is imposed in order to attract the crowds necessary to make the event commercially feasible. Such conduct appears to involve an exclusionary provision:¹

Suppose a group of horse racing clubs agree to allow closed-circuit telecasting of races to social clubs, hotels, motels, racetracks and other institutions but a term of the agreement is that local races are not to be telecast in the local area. The reason for this restriction is that the local horse racing clubs wish to retain racetrack crowds. Without such crowds, local race meetings would be less successful and it is not inconceivable that the subject matter of the telecast itself (that is, races) could cease to exist.

All of the above reasons in favour of home town 'blackouts' have led to the conclusion in the US that such jointly agreed TV 'blackouts' are not anticompetitive. Indeed, the home town blackout restriction 'promotes competition more than it restrains it'. In Australia, a *per se* ban on such jointly agreed arrangements may,

¹ W Pengilly, *Price Fixing and Exclusionary Provisions*, Prospect Media, St Leonards, NSW, 2001, pp. 104–5.

however, be the result. There is no doubt that the immediate purpose is to deny services to certain identifiable persons or institutions. There appears to be little doubt that the various horse racing clubs are competitive with each other (they compete for sponsorships, entries and prize money offered and, highly relevant in the present context, for TV coverage and payments for such coverage). While the blackout certainly does not substantially lessen competition between the horse racing clubs in those matters in respect of which they compete, this is not the relevant test for infringement of the Australian exclusionary provision legislation.

The conduct described in this example also appears to be caught by s 44ZZRD(3)(a)(iii) – a substantial purpose is to restrict the supply of a service (the right to broadcast the sporting event locally) to local television stations.

In this example, as in others, it is possible to perform a vanishing trick on the immediate substantial purpose by shining the spotlight only on ‘the end sought to be accomplished by the conduct’.² However, it is far from clear when such a vanishing trick might work.³

Example 3

Assume that competing aviation companies provide helicopter services for medical emergencies in rural areas at cost or on a subsidised basis. They arrange a system under which each agrees to provide a minimum guaranteed level of emergency transport services for patients in different geographical areas. All of the parties are free to provide additional services whenever they wish to do so, whether on a subsidised or full price basis. This allocation scheme is caught by s 44ZZRD(3)(b)(iii): one substantial purpose is to allocate the geographical areas in which services are supplied, or likely to be supplied.⁴ The allocation scheme is also caught by s 4D: one substantial purpose is to restrict the supply of services to a particular class of persons (patients requiring air transport to hospital) in particular

² *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563, [18] (Gleeson CJ).

³ See further I Wylie, ‘What is an Exclusionary Provision? Newspapers, Rugby League, Liquor and Beyond’, *Australian Business Law Review*, vol. 35, 2007, p. 33, p. 42 (‘the question remains whether, with the unusual advantage of recent consideration on two occasions by Australia’s highest court, practitioners and businesses are now any the wiser as to what does and does not contravene the Act’).

⁴ The wording of s 44ZZRD(3)(a) and (b) is unqualified in any way that exempts roster schemes. Note 1 to s 44ZZRD states that ‘subparagraph (3)(a)(iii) will not apply in relation to a roster for the supply of after-hours medical services if the roster does not prevent, restrict or limit the supply of services.’ However, an immediate and substantial purpose of roster schemes is to restrict or limit the supply of services.

circumstances (where the competitor is not rostered to supply the service required in a particular area).

Example 4

Assume that A and B, two of 5 competing suppliers and installers of desalination plants in Australia, are requested by the NSW government to bid for several new plants. A manufactures distillation units. B manufactures pumps. A wants to use B's technology for the bid and B wants to use A's technology. They discuss supply arrangements for the bid and agree to supply each other at a mutual discounted rate in order to improve each other's chance of winning the tender. The input cost of A's technology is a material component of B's bid. The input cost of B's technology is a material component of A's bid. Since the discounted rate applicable to A's technology and B's technology has been worked out in accordance with an arrangement between A and B, and the purpose is to implement that deal, the mutual discount provision is caught by s 44ZZRD(3)(c)(v). There is no joint venture between A and B and hence the joint venture exceptions under ss 44ZZRO and 44ZZRP do not apply.

Example 5

ACO, an Australian manufacturer of Product A, supplies Product A on reasonable commercial terms and conditions to BCO, CCO and numerous other companies with which ACO competes downstream in the Australian wholesale market for Product A and competing products. These supply arrangements are pro-competitive given that: (a) BCO, CCO and other companies are able to compete as wholesalers against ACO in relation to ACO's Australian-made Product A; (b) BCO, CCO and other companies are able to compete against each other in relation to ACO's Australian-made Product A and to compete more effectively against companies supplying imported similar products; and (c) the agreements do not include an exclusive dealing condition, a resale price maintenance restriction or any other condition on the freedom of BCO, CCO and the other companies to sell ACO's Product A however and wherever they wish.

The price charged by ACO for Product A obviously is a major input cost of the wholesale price to be charged for Product A by BCO, CCO and the other companies in competition with ACO. The supply price provision therefore "controls" that wholesale price; see *ACCC v CC (NSW) Pty Ltd* [1999] FCA 954 at [164]-[202]. Accordingly, the supply price provision is a cartel provision, as defined by s 44ZZRD(2)(a) and (e) and (4). It is possible that the provision may not control the price to be charged for Product A by ACO. However, that is

irrelevant: the provision does control the price to be charged for Product A by BCO, CCO and other customers and it is sufficient that the competitors agree that the price to be charged by one of them will be controlled.⁵

The Explanatory Memorandum states (at p 13) that s 44ZZRD(2) is not intended to apply where a price is only “incidentally affected” and “where the price is otherwise established independently” and gives this example:

“Company A, having a shortage of inputs for its manufacture of a good, seeks to source the inputs from Company B, a competitor in the market for the good. B agrees to produce the additional inputs and to provide them to A, at an agreed price.

Provided there is no agreement between A and B regarding the price at which A sells the good concerned, the purpose/effect condition would not be met merely because of the reflection of the input price in the price of the good.”

Example 5 does not involve the supply of an input for use in the manufacture of a product but the supply of a product that is to be re-supplied by a competitor. The price charged by ACO has an indirect effect on the price to be charged by BCO, CCO and other customers but it is difficult or impossible to say that the effect is merely “incidental”. The definition of a cartel provision in s 44ZZRD(2) explicitly covers situations where a provision has the purpose or likely effect of controlling the price for “goods or services re-supplied, or likely to be re-supplied, by persons or classes of persons to whom those goods or services were supplied by any or all of the parties to the contract, arrangement or understanding” (s 44ZZRD(2)(e)).

⁵ This is consistent with the wording of ss 45A(1) or 44ZZRD(2)(a) and the apparent legislative intention to avoid creating a loophole in situations where e.g. a price fixing agreement between two competitors relates only to the price to be charged by one competitor or where it may be difficult to prove that the price fixing provision controls the price to be charged by both parties. Assume that GCO competes with HCO in relation to Type G products. GCO threatens to expand its production of Type G products if HCO discounts the price it charges for Type G products. HCO agrees not to discount its price for Type G products and GCO agrees not to expand production of Type G products. In such a case it may be difficult or impossible to prove that the agreement is likely to control the price to be charged for Type G products by GCO. Such proof is unnecessary under the s 45A(1) definition of price fixing. The contrary has been suggested in I Tonking, ‘Competition at Risk? New Forms of Business Cooperation’, *Competition & Consumer Law Journal*, vol. 10, 2002, p. 169, [54]–[55] on the basis that the words ‘in competition with each other’ that succeed the wording ‘by any of them’ in s 45A(1) indicate that the earlier words should be read as if they said ‘or by any *two or more* of them’, since there must be at least two competitors for there to be competition. However, it is difficult to reconcile that interpretation with the wording of s 45A(1) and the requirement that there be two or more competitors requires only that there be two or more competitors, not that the price fixing agreement must control the price to be charged by two or more competitors.

Apart from the limited scope of the exception stated and the example given in the Explanatory Memorandum, the extent to which supply agreements between competitors are subject to per se liability should not depend on the vague notion of an “incidental effect”, the obscure distinction between indirect and incidental effects, or the opaque qualification “where the price is otherwise established independently”. The position should be governed by a clearly drafted statutory provision, not a makeshift rescue attempt in an explanatory memorandum.

The anti-overlap provisions do not exclude Example 5 from per se liability. The supply price provision in ACO’s supply agreements is not excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRF or s 44ZZRG or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: there is no exclusive dealing condition in the supply agreements.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 44ZZRR does not apply: the supply price provision is not a resale price maintenance provision. Nor is there a way out under the joint venture exceptions in ss 44ZZRO and 44ZZRP: there is no joint venture between ACO and BCO or any of the other companies to which ACO supplies Product A.

Example 6

XCO, an Australian manufacturer, agrees to supply Product D to YCO on condition that YCO agrees to supply Product E to XCO. YCO agrees to supply Product E to XCO on condition that XCO agrees to supply Product D to YCO. XCO and YCO compete against each other in the market for Product D, Product E and competing products. The reciprocal supply provisions are pro-competitive because they increase the ability of XCO and YCO to compete against major competitors in the market. Neither XCO nor YCO are prevented from deciding to acquire Product D or Product E from alternative sources at any time.

The reciprocal supply provisions are exclusionary provisions as defined by s 4D of the TPA. XCO and YCO compete with each other in relation to the relevant competing products. A substantial purpose of each reciprocal supply provision is to restrict the supply of a relevant competing product unless the condition of reciprocity is satisfied. It is irrelevant that the exclusionary purpose is conditional: an exclusionary purpose under s 4D may be conditional or unconditional. Nor can it be maintained that the “real” or “ultimate” purpose of each reciprocal supply provision is not an exclusionary purpose but a purpose to “act in the best

interests of the market' or to "improve competition": if the purpose of a provision is to restrict the supply or acquisition of goods or services in the way prescribed by s 4D it is irrelevant whether or not the defendant believes that the restriction is in the best interests of the market or a way of improving competition.

Each reciprocal supply provision is also a cartel provision, as defined by s 44ZZRD(3)(a)(iii) and (4). A substantial purpose of the provision is to restrict or limit the supply or likely supply of goods or services to a person (YCO or XCO) by a party to the contract (XCO or YCO) – s 44ZZRD(3)(a)(iii).

The reciprocal supply provisions are not excepted by s 45(6) from per se liability for making a contract containing an exclusionary provision under s 45(2)(a)(i): they are not exclusive dealing conditions. Nor are the reciprocal supply provisions excepted by s 44ZZRS from per se liability for a cartel offence under s 44ZZRF or s 44ZZRG or for breach of the civil penalty prohibitions under s 44ZZRJ or s 44ZZRK: they are not exclusive dealing conditions.

Nor is there any other escape route short of the unrealistic possibility of applying for an authorisation. For example, the resale price maintenance exception under s 45(5)(c) and s 44ZZRR does not apply: the reciprocal supply provisions are not resale price maintenance provisions. Nor is there a way out under the joint venture exceptions in ss 44ZZRO and 44ZZRP: there is no joint venture between XCO and YCO but merely a reciprocal supply agreement.