ACCC v Visy

**Issue:** Did Visy and Amcor engage in per se offences and therefore in breach of the Competition and Consumer Act 2010?

**Legal principle:** s44ZZRA, a corporation must not make or give effect to a contract, arrangement or understanding that contains a cartel provision.

**Application of law to facts:** The price war between Visy and Amcor was ended by ‘negotiations’ in Melbourne hotels between top executives – to retain respective market shares and not enter into contracts with each other’s principal customers. Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect. The cartel here went on for almost 5 years. Had it not been accidentally exposed, it would probably still be flourishing. It was run from the highest level in Visy.

**Conclusion:** Yes, there was cartel conduct and $36 million penalty imposed on Visy and $2 million penalties imposed on Visy executives. Amcor escaped penalty under the ACCC’s Immunity Policy.

TPC v TNT Australia

**Issue:** Was there price fixing between TPC and TNT Australia and therefore were they in breach of the Competition and Consumer Act 2010?

**Legal principle:** Price is a key factor in competition and the CCA enshrines this imperative by the per se prohibition of price fixing between competitors. Anything involving fixing, controlling, maintaining, prices on the goods or services supplied, acquired, resupplied by any or all parties can be considered as price fixing.

**Application of law to facts:** TNT entered into an arrangement with two other firms to fix prices by, amongst other things, deliberately misquoting prices to customers. If a customer of TNT’s requested a quote from one of the other firms, the other firm agreed to supply a higher-priced quote such as to preserve TNT’s business. In return, TNT agreed to do the same regarding the other firms’ customers.

**Conclusion:** Yes, they were in breach.
News Limited v Australian Rugby League

Issue: Did the Australian Rugby League engage in primary boycott and therefore was it in breach of the CCA?

Legal principle: Primary boycotts, otherwise referred to as s45 of the CCA as exclusionary provisions are illegal per se. Exclusionary provision is defined as any provision in a contract, arrangement or an understanding between competitors which has the purpose of either:

- Restricting the supply of goods or services by all or any of those competitors to particular persons or classes of persons
- Restricting the acquisition of goods or services by all or any of those competitors from particular persons or classes of persons.

Application of law to facts: The Commitment and Loyalty Agreements that the clubs signed, and which precluded them from participating for a period of five years in any competition not conducted or approved by the ARL contained exclusionary provisions because the clubs were in competition with each other for the services of News; the clubs and the League had entered into a “contract, arrangement or understanding” within the meaning of TPA; a substantial purpose for them entering into the agreements was to restrict the supply of rugby league teams and players available to the rival competition, this being a prohibited purpose under the Act.

Conclusion: Yes, in breach of the CCA.

Leon Laidley Pty Ltd v Transport Workers’ Union of Australia

Issue: Was the TWU in breach of CCA by engaging in secondary boycott together with Amoco against LL?

Legal principle: Secondary boycotts result where firms act to prevent a third party from supplying/acquiring goods or services or engaging in trade or commerce.

Application of law to facts: LL was a fuel distributor for Amoco, a petrol company. TWU members employed by Amoco commenced strike action to prevent delivery of fuel to LL. The dominant purpose of this action was to cause substantial loss or damage to LL and not to protest working conditions, and that this constituted a secondary boycott.

Conclusion: Yes, TWU was in breach of CCA.
Case Notes – Week 12 Competition Law

Application of Streets Ice Cream Pty Ltd

Issue: Did Streets Ice Cream breach CCA because it was alleged that it was engaged in exclusive dealing arrangements?

Legal principles: Exclusive dealing under s47 of the CCA prohibits supplying goods or services on the condition that the acquirer will not deal, or will limit its dealings, with a competitor of the supplier, or particular customers, or particular locations, and also third line forcing.

Application of law to facts: The supply of a refrigerated cabinet on condition that it was used exclusively for the supplier’s product was held to constitute exclusive dealing. Although no formal restriction on the retailer’s freedom to acquire from the supplier’s competitors was imposed, in practical terms smaller shops were restricted to one brand as they did not have sufficient space for more than one brand of refrigeration equipment. There was a supply “on condition”.

Conclusion: Yes, in breach.

ACCC v Jurlique International Pty Ltd

Issue: Did Jurlique engage in resale price maintenance and therefore in breach of CCA?

Legal principle: S48 of the Act

Prohibits suppliers from specifying a price below which goods cannot be resold or supplied.

Application of law to facts: Jurlique, a manufacturer and supplier of premium skin care products, and its former managing director, were held to have engaged in RPM through:

- Attempting to induce retailers not to sell Jurlique products at prices less than the prices specified by Jurlique from time to time.
- Entering and offering to enter into agreements for the supply of Jurlique products, one of the terms of which included that the products were not to be sold for a price less than a price specified by Jurlique.
- Withholding supply of Jurlique products for the reason that the retailer had sold the products at prices below the retail prices specified by Jurlique
- Using in relation to Jurlique products statements of prices that were likely to be understood as the price below which products were not to be sold.
Significant advertising funding was applied to differentiate the Jurlique product from its competitors and that it gained ‘what it considered to be an advantage in the promotion of its image and stocking of its product by maintaining undiscounted prices for its products’. This gave Jurlique advantages over companies which complied with the law (i.e. variously seen as discounted).

**Conclusion:** Yes, and pecuniary penalties of $3-4 million (for the companies) and $200000 (for the former managing director) were imposed.

**Boral Besser Masonry v ACCC**

**Issue:** A contravention of s46 requires the proof of a substantial degree of power in a market and the taking advantage of that market power for the purpose of damaging and forcing out competitors or deterring the entry of potential competitors. The “taking advantage” issue was relatively straightforward in this case. Although “purpose” is generally very difficult to prove without “smoking gun” documents it was not in issue in this case as there was evidence of Boral’s purpose in BBM’s own internal company documents of its aim to “drive at least one competitor out of the market”. The case was fought primarily on the issue of whether BBM had a substantial degree of power in the market.

**Legal principle:** See s46, misuse of market power.

**Application of law to facts:** The High Court held that BBM did not have a substantial degree of market power and therefore had not breached s46 despite its predatory purpose. Boral, a company with 30% market share, aggressively cut the prices of its concrete masonry blocks to drive rivals out of the market.

**Conclusion:** No, BBM was not in breach of CCA because the predation element was satisfied but not the threshold element.