

# Legal Mythbusters!

Basil Stavropoulos  
Argus Lawyers

# Competitors can't talk to each other, can they?

Trade Practices Act 1974 Part IV prohibits some types of anti-competitive conduct

Extremely large civil and criminal penalties for companies and individuals, whether directly breaching the law or being knowingly involved

So it pays to be careful!

# So they can?

”

It depends...

”

Some provisions prohibit certain conduct outright

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Others prohibit conduct only if it has the purpose, or has or is likely to have the effect, of substantially lessening competition +

# What is prohibited outright?

“ Cartel conduct

“ Exclusionary conduct

“ Third line forcing

# Cartels

“ No formal agreement is necessary . %contract, arrangement or understanding +

“ Prohibits certain conduct between competitors

# Cartels . price-fixing

“ Competitors agree to fix, control or maintain the price of goods or services

“ Applies to selling and buying prices

“ Prices need not be the same

“ Could be formulas for price, discounts, credit terms, etc

# Visy and Amcor packaging

“ 90% of cardboard packaging . \$1.8b - \$2b pa.

“ 2000 - 2004, conspired to raise prices & maintain market shares

“ Coordinated price rises and colluded on quotes

“ Execs secretly in public places; used public phones & prepaid mobiles

# Visy and Amcor packaging cont.

“ When customers were renegotiating contracts, the companies swapped information to ensure competitor’s quote was higher

“ Scheme discovered when Amcor management reported to ACCC. Amcor granted immunity

“ Visy admitted its role. Fined \$36 million. Individuals fined \$2 million

# Cartels . market sharing

“ Agreements between competitors that divide up the market so that the participants are sheltered from competition

“ Eg, by restricting supply of services

# Hypothetical - 1

“ Actuaries chatting after IFSA Hot Topics meeting

“ Conversation moves to recent tightening of prof its

“ Participants agree that business conditions are much tighter than they have been for quite some time and that things were better in the good old days

# Hypothetical - 2

“ One actuary goes on to say that part of the problem is that the insurers are cutting each other's throats in response to the research houses and that the focus should be on lifting premiums. IFSA should concentrate on improving the bottom line for members by putting out a guide on premiums.

# Hypothetical - 3

“ You are non-committal and leave shortly afterwards. Several weeks later, you receive from your competitor an email containing a draft premium schedule arranged by type of policy and benefits offered, with suggested monthly and annual premiums, and suggesting that this is something the life industry should adopt as a guide, to overcome the debilitating effects the research houses are

# Allocating customers, suppliers or territories

“ Allocating customers by geo graphic area

“ Dividing contracts within an area

“ Agreeing not to compete for established customers

“ Agreeing not to produce each other's services

“ Agreeing not to expand into a competitor's market.

# Bid rigging

“ Aka collusive tendering.

“ Common bid rigging tactics:

“ cover bidding

“ bid suppression

“ bid withdrawal

“ bid rotation

# Bid rigging hypothetical

"

Bidding for large contract

"

Offered sub-contract above going rate by competitor on condition they win

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Accompanied by threat of no more work

# Output restrictions

“ When participants in an industry agree to prevent, restrict or limit supply.

“ Purpose is to create scarcity in order to increase prices (or counter falling prices) while protecting inefficient suppliers.

“ Any business may decide to reduce output for its own business reasons. What is prohibited is an

# Civil Penalties

“ For corporations, court can impose the greater of :

“ \$10 million

“ when the value of the illegal benefit can be ascertained, three times the total value

“ when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the

# Criminal penalties

“ Corporation intended to enter into contract, arrangement or understanding that it knew or believed contained cartel provision.

“ Intended to give effect to contract, arrangement or understanding that it knew or believed contained a cartel provision.

“ 10 years

# Exclusionary Provisions (boycotts)

“ Exclusionary provisions (boycotts) between competitors are prohibited irrespective of their effect upon competition

“ This is in addition to the cartel conduct provisions which might also capture many forms of exclusionary provisions caught by the definition in s 4D.

# Boycott case

“ Three Rockhampton obstetricians' boycotted 'no - gap' billing offered by private health insurers

“ 200 patients had to pay a gap for in-hospital medical expenses for birth of a child

“ Orders by consent - \$97,000 repaid to patients

# Third line forcing

“ Supply of goods or services on condition that the customer acquire other goods or services from a third party

“ Refusing to supply because the customer will not agree to such an acquisition

“ Example: bank lends to customer on condition customer insure house with particular insurer

# Prohibitions subject to competition test

- “ Anti-competitive agreements
- “ Misuse of market power
- “ Full-line forcing
- “ Resale price maintenance

# Competition test

“ Must define market

“ Geographic

“ Type of goods or services

“ Expert economic evidence, market surveys



# Privacy . can we share information?

“ Collecting sensitive information

“ Collecting direct from individual

“ Providing usual information +- including retrocession

“ Access

# Sensitive information

“ The collection is necessary for the establishment, exercise or defence of a legal or equitable claim +

“ Reinsurance claim

“ So, no consent necessary at claim time

“ Underwriting, consent is necessary

# Direct collection?

“ Obviously, it is not reasonable or practicable for reinsurers to collect direct from individual

# Usual information

“ At underwriting, insurer should provide on behalf of reinsurer

“ At claim time, again, reinsurer can make insured aware through the insurer

“ But reinsurer must have sufficient control to ensure that ITS obligation is met at each stage

# Providing advice

“ Personal advice about financial products - the adviser has considered person's objectives, financial situation or needs, or should have.

“ General advice - not personal advice.

“ But still must be advice

# Financial product advice

“Financial product advice means a recommendation or a statement of opinion, or a report of either of those things that is intended to influence a person or persons in making a decision or could reasonably be regarded as being intended to have such an influence.

Thank you!