Visy Paper v ACCC

The recent High Court decision in the Visy case highlights the potential trade practices risks associated with actual or proposed purchase or supply arrangements between companies that are also competitors or potential competitors. Senior Associate Melissa Randall and Lawyer Dana Wintermantel examine the High Court’s decision.

In this case – Visy Paper Pty Limited & Ors v ACCC – the majority of the High Court held that a proposed supply agreement between Visy Paper (Visy) and Northern Pacific Paper Pty Ltd (NPP), which would have prevented NPP from purchasing waste paper products from some of Visy’s customers in competition with Visy, breached the Trade Practices Act 1974 (TPA).

Background

The High Court case arose out of an investigation by the Australian Competition and Consumer Commission (ACCC) and subsequent proceedings that were dismissed by the Federal Court (Justice Sackville) in January 2000 in relation to conduct involving Visy and Amcor Printing Papers Group Ltd. At the same time that the ACCC brought the proceedings against Amcor and Visy, the ACCC also brought separate proceedings against Visy which related to its dealings with NPP.

In November 2000 the trial judge, Justice Sackville dismissed the ACCC’s second action. However, in August 2001, on appeal, a majority (2-1) of the Full Court of the Federal Court ruled that Visy’s conduct breached the TPA. This decision was upheld by the High Court.

Visy and NPP were both in the business of collecting waste paper (including cardboard), which was recycled by Visy to produce paper and cardboard. In this context, it is worth noting that waste paper collection can be characterised as providing a ‘service’ to the person from whom it was collected, particularly in cases where a collector was paid to take it away. It can also be characterised as an ‘acquisition of goods’, particularly where

a collector pays to acquire the waste paper.

In September 1995, Visy and NPP entered into a five-year agreement under which NPP agreed to sell to Visy, and Visy to buy from NPP, the whole of NPP’s stock of waste paper and cardboard. The agreement did not refer to the sources from which NPP could obtain waste paper. However a dispute arose between Visy and NPP over sources of waste paper, which led to negotiations between them. During these negotiations, Visy attempted to make an agreement with NPP under which NPP would have been prevented from collecting waste paper from some of Visy’s customers (the proposed Visy Agreement). In other words, the proposed Visy Agreement would have prevented NPP from purchasing waste paper from, and supplying waste collection services to, customers from whom Visy obtained waste paper.

The High Court’s decision has important implications for companies entering into supply agreements with customers who are also competitors where the relevant agreement has the substantial and subjective purpose of restricting or preventing a customer from acquiring goods or services from particular persons.

The majority of the High Court held that the proposed Visy Agreement breached the TPA.

What it means

The High Court’s decision has important implications for companies entering (or even attempting to enter) into supply agreements with customers who are also competitors where the relevant agreement or proposed agreement has the substantial and subjective purpose of restricting or preventing a customer from acquiring goods or services from particular persons (as the High Court recently held in the South Sydney case – see Focus: Trade Practices, August 2003). The effect on competition of any such agreement or proposed agreement will not be relevant.

In other words, companies who enter into agreements for the supply or acquisition of goods or services on condition that the customer will not supply goods or services to particular persons, must ensure that the supply of goods or services that is the subject of the restriction cannot also be characterised as an acquisition. If it can, and the customer is also a competitor (or even a potential competitor), following the High Court’s decision in this case, such an agreement will automatically breach the TPA, even if it does not substantially lessen competition.

The decision highlights the trade practices risks for companies entering into purchase or supply agreements with customers or suppliers who are also their competitors.

The legal reasoning of the High Court was highly technical in nature. A summary of this reasoning is set out below for those who may be interested in the legal detail.

Statutory interpretation

The case dealt with the relationship between sections 45 and 47 of the TPA.

Section 45 prohibits (among other things) the making of a contract, arrangement or understanding (agreement) that contains an ‘exclusionary provision’ (s45(2)(a)(i)).

An exclusionary provision is an agreement between competitors that has the substantial purpose of restricting, limiting or preventing the supply or acquisition of goods or services from a particular person or class of persons.

An exclusionary provision is an automatic breach of the TPA and there is no need to establish that the conduct in question had the purpose, the effect, or the likely effect of substantially lessening of competition.
Section 47 prohibits the practice of exclusive dealing. In the context of the Visy case, exclusive dealing refers to the acquisition of goods or services on condition that the supplier does not supply goods or services to a third party. Such conduct does not automatically breach the TPA but is subject to the competition test in s47(10). Even if the exclusive dealing risks substantially lessening competition, a company can notify the ACCC of the exclusive dealing. Notification automatically provides the parties with immunity from trade practices action unless the ACCC determines that the public benefits of the conduct do not outweigh any anti-competitive detriment arising from the conduct.

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Section 45(6) of the TPA is an anti-overlap provision. By virtue of this section, conduct that constitutes an exclusionary provision will not automatically breach the TPA if it also constitutes exclusive dealing under s47. Rather, it will be considered under the competition test in s47(10) and notification will be available. In the Visy case, the ACCC agreed that the proposed Visy Agreement would not result in a substantial lessening of competition and this issue was not considered by the High Court.

In deciding whether the anti-overlap provision should apply, Chief Justice Gleeson and Justices McHugh, Gummow and Hayne looked beyond the provision of the proposed Visy agreement as drafted (which simply prohibited the collection of waste by NPP from Visy’s current and potential customers) and examined the practical operation of the provision. The judges emphasised that the drafting adopted by the parties to the agreement is entirely irrelevant (and in many cases there may not even be a written record of the agreement). In the view of Chief Justice Gleeson and Justices McHugh, Gummow and Hayne, the provision prohibited both the acquisition of goods (waste paper) and the supply of services (waste collection). As s47 did not apply to the first prohibition (acquiring goods), the anti-overlap provision was not triggered for that prohibition and the agreement was held to be in breach of s45(2).

Justice Kirby characterised the provisions under consideration as ‘a less than perfect example of the drafters art’ and stated that, in addition to examining the language used in the provisions, the court must also consider the purpose of the relevant statutory provisions. Justice Kirby expressed the view that the purpose of s 45(6) was to prevent arrangements between suppliers and purchasers that provided for exclusive dealings (which under s47, are only prohibited if they substantially lessen competition) being caught by s45(2), which prohibits all exclusionary provisions in arrangements between competitors regardless of their effect on competition. Justice Kirby found that the exclusionary provisions were part of the relationship between Visy and NPP as competitors and not as supplier and purchaser.
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