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# Key Competition & Consumer Law Issues

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COMPETITION · REGULATION · POLICY · STRATEGY

# Overview

- Key competition & consumer law issues:
  - How many distribution models likely breach the Commerce Act (**Act**)
    - price fixing prohibition is broad
    - price fixing between principal and agent – The *Flight Centre* case
  - When restraints of trade likely breach the Act
  - Pitfalls around trade associations & industry groups
  - The new unsubstantiated representations regime

# How many distribution models likely breach the Act

- Arrangements often involve a supplier that has both a vertical (supplier - customer) and horizontal (competitor - competitor) relationship with its customers
- Suppliers often retain the right to supply end-customers directly
- If suppliers and customers could be viewed as competing avoid horizontal understandings in relation the price
- Poorly defined “territories” which allow competition at the fringes can create ongoing competition risks
- The Act applies to agency and franchise models

# Examples of distribution arrangements that raise risks

- Examples of risk areas we have advised on include:
  - A supplier that wanted to change its arrangements with a distributor which it had allowed to supply outside its territory in competition with the supplier
  - A supplier that had implemented poorly defined territories which allowed competition between the supplier's dealers and the supplier
- *Elly Lilly* case – subsequently changing distribution arrangements to remove competition

# The *Flight Centre* case

- In *Flight Centre* the Australian Federal Court (FC) found that Flight Centre (an agent) sought to prevent 3 airlines (its principals) from offering cheaper international airfares directly to consumers than the airlines offered to Flight Centre
- The FC held that that Flight Centre competed with airlines for the supply of air travel “booking and distribution” services to consumers
- The price for the booking and distribution services was the retail or distribution margin (ie for the agent its commission), which was included in the headline price for the fare
- Accordingly the FC held that Flight Centre attempted to **fix prices** with the airlines and was fined AUD11 million.

# The *Flight Centre* case- continued

- On appeal the Full Court of the Federal Court of Australia (**Full Court**) overturned the FC's decision finding:
  - no separate market for “booking and distribution services”
  - booking and distribution services was an ancillary part of the supply of international air travel
  - Flight Centre acted as agent for the airlines
  - accordingly, Flight Centre and its principal airlines did not compete with each other and could not fix prices
- But Full Court noted that agencies do not always mean that parties cannot be in competition
- The ACCC is seeking leave to appeal the decision

# Restraints of trade that likely breach the Act

- The Act's price fixing prohibition is broad (price fixing, market allocation, bid rigging & output restrictions)
- Could the parties be viewed as competing?
- Increasingly seeing restraints between competitors which risk being viewed:
  - as market sharing; or
  - otherwise anticompetitive

# The types of restraints we are seeing

- Note exemption for restraints solely to protect goodwill
- Types of restraints of trade that risk breaching the Act:
  - excessively long restraints
  - restraints that risk being viewed as market sharing or anti-competitive
    - trans-Tasman triangular arrangement between a vendor and 2 purchasers
    - non-compete in a sale and purchase agreement for a building
    - longstanding arrangement between members of a business group not to compete for each others customers
    - IP settlements that exceed length of patent - *Consolidated Alloys* warning



# Restraints - practical tips for practitioners

- Could the parties be viewed as (potential) competitors?
- What is the purpose of the restraint – is it solely to protect goodwill?
- Is the restraint reasonable and what is the likely effect on the relevant markets?
- Just because the arrangements have been in place for a long time does not exclude the application of the Act

# Pitfalls around trade associations

- Trade associations - a “hot-bed” for inappropriate communications
- Act deems arrangements entered into by a trade association to be entered into by all members with limited exceptions
- Recommendation by association to its members is deemed to be an arrangement

# Trade association & working group examples

- Association levies based on members' future production estimates
- Gisborne farmers market - sell above wholesale prices (2010)
- Wine growers – suggesting growers limit harvest (2010)
- NZ Society of Physiotherapists – accusations of undercutting (2010)
- The *laundry powder* case - Unilever fined €315.2M
- Informal meetings (*Trustpower “uncommercial” pricing comment to Genesis*)
- Chairman of Fortescue Metals - *"I'm happy to put that challenge out there, let's cap our production right here and start acting like grown-ups"*.

# Trade associations – practical tips

- Ensure:
  - association is legitimate with objective membership criteria
  - agendas are circulated before meetings and followed
  - association has a compliance culture and meetings are conducted under strict competition law protocols
  - Chair refers to the protocol before each meeting starts
  - information exchanges do not relate to price or strategy
- If concerned, object, have it noted, leave if necessary and seek legal advice

# New law on unsubstantiated representations

- 18 months since Fair Trading Act's new prohibition against unsubstantiated representations
- Businesses that make claims about goods or services (whether express or implied) must have “reasonable grounds” for making those claims, at the time they are making the claim
- Commerce Commission warned Baby bead supplier - claims “*lack independent and credible scientific evidence*”
- Commerce Commission has indicated that it expects to bring its first proceedings this year

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