Law Council of Australia

Business Law Competition and Consumer Committee Annual General Meeting

Meeting expectations - Industrial relations as a case study

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Introduction

As you all know my practice is to use this event to cover a particular, hopefully topical, issue rather than recount this year's activities, which you are all familiar with anyway.

As I often say most criticism of the Australian Competition and Consumer Commission (ACCC) is that we do not do enough; indeed, we are usually accused of NOT enforcing laws that Parliament has NOT passed.

This is understandable. Everyone has their own notions of what is anti-competitive conduct, and they assume that the Competition and Consumer Act 2010 (CCA) prohibits this behaviour. Very often it does not.

You all know that petrol is my favourite example.

I recently received a heartfelt letter saying that, in this person's town, petrol prices were way higher than elsewhere, and what they should be, and the letter ended with "and the last time I looked ripping off consumers was against the law."

If by this they meant charging prices well in excess of cost then this, of course, is not against the law, and nor should it be in a market economy.

Recently we announced Armidale as one of our regional fuel studies. Some complained that we had just finished a Part IV investigation and gave Armidale a "clean bill of health".

We had not. We simply announced that we had found no evidence of the cartel conduct we had been asked, with great fanfare, by a member of Parliament, to investigate.

Petrol prices in Armidale have been unusually high. This probably drove the cartel allegations; it certainly is why it is the next focus of our regional fuel studies that Minister Billson has directed us to undertake.

Recently there has been attention on alleged behaviour involving unions and the general industrial relations arena. Some have described what they see as anti-competitive behaviour, and then said words to the effect that "the ACCC refuses to enforce the law."

The ACCC is currently resourced to conduct 40–50 in-depth competition investigations each year, and to institute proceedings in 6-8 competition matters a year. In addition at any time we have between 10 and 15 competition cases in Court.

These 6-8 matters are always complex cases; usually many of these cases will involve cartel conduct.

We make judgements about what we take on based largely on the level of expected detriment as well, of course, on the prospects of success.

The examples of behaviour I will now cite all involve potentially significant detriment and would, on that basis, be worthy of investigation.

Some have been investigated. Most, however, cannot be as they are clearly or very likely not a breach of the CCA.

The examples most often cited are as follows.

Example 1: Companies who compete with one another agreeing to identical wages and employment conditions for their employees, whether induced to do so by the union or not. Indeed, the employers could meet in a smoke-filled room to reach this agreement.

Such behaviour does not breach the CCA, even though some may describe it as price fixing (of the price of labour).

Example 2: Enterprise agreements being negotiated by unions with companies that contain provisions restricting competition by:

- nominating a single superannuation fund which is aligned with the union;
- mandating income protection insurance to be purchased from a company that is affiliated with the union.

Such behaviour is highly unlikely to breach the CCA.

The next two examples are more problematic.

Example 3: Construction companies:

(i) refusing to award tenders to contractors unless they have signed an enterprise agreement with the union the company has onsite; or

(ii) negotiating enterprise agreements with unions that restrict the company's use of contractors who don't have union-approved enterprise agreements in place; or

(iii) negotiating enterprise agreements with unions that provide for the engagement of workers from labour-hire companies affiliated with the union.

Example 4: Agreements between unions and companies that provide for the union to hinder the company's competitors.

For example, the recent agreement between TWU and Toll Holdings during negotiations for an EA in which Toll was alleged to have agreed to make donations to a union affiliated entity and the TWU undertook certain KPIs such as auditing Toll's competitors.

Examples 3 and 4 can breach the CCA but only in reasonably narrow, defined circumstances. Much turns on the facts of each matter.

Unions have been given a clear role under the law to represent their members and take action seeking improved wages and conditions. However, this does not give them or businesses cooperating with them a licence to seek to regulate markets. They could take themselves outside the above exemptions if they seek to determine which firms may operate within markets, what prices they can charge or how bids for work will be determined.

In a market economy it should be the market that sets prices and determines who participates and who wins work, not unions or businesses. The ACCC will look carefully at conduct within examples 3 or 4 to ascertain what is really going on.

That said, our focus will be on behaviour that substantially lessens competition, even if other aspects of the behaviour may be very concerning.

To elaborate, this evening I will cover three topics.

1. First, relevant aspects of the legal framework, which this audience will be well aware of.
2. Applying the CCA to the cited examples.
3. Raising some issues for discussion.

1. The legal framework

Most relevantly to the four examples that have been highlighted above are the prohibitions on the following:

1. Agreements *between competitors* which impede competition, such as agreements by competitors to fix the prices they will charge, or the prices they will pay, or to restrict the acquisition of services or goods from certain suppliers. This extends to third parties involved in these agreements, for example, a union facilitating competitors reaching such an agreement (i.e. the cartel prohibitions and exclusionary provisions under section 4D/section 45).
2. Agreements between parties who *don't necessarily compete* with one another, but whose agreements have the purpose or likely effect of substantially lessening competition. Hence, agreements between unions and companies, even though they are not competitors, can be caught by the Act (i.e. section 45), albeit that there are some particular difficulties concerning whether the union involved is a "trading corporation" within the meaning of the CCA.
3. Agreements between parties in a *vertical relationship,* where supply or acquisition is made conditional on the acceptance of some restriction on further supply or acquisition (i.e. section 47).
4. Agreements between unions and other persons *where a pre-existing supply or acquisition relationship exists,* and the agreement is designed to prevent or hinder the person from continuing the relationship with that particular supplier or acquirer (i.e. section 45E).

When talking about industrial relations issues, people will of course also think of the prohibitions in the CCA on secondary boycotts. In very general terms, they apply where two or more persons act in concert to prevent a third person dealing with a fourth person (i.e. sections 45D and 45DA), or to prevent that third person from engaging in trade or commerce involving the movement of goods between Australia and overseas (i.e. section 45DB). These prohibitions do not apply to the facts of the four examples referred to above.

The prohibitions that could apply in the examples highlighted are the four I've outlined, but they are subject to significant exemptions.

Relevant exemptions

The first exemption that is relevant here is "the IR carve out" in section 51(2)(a) of the CCA.

The second exemption arises from the kinds of "services" the Act can deal with. Broadly speaking, the CCA doesn't apply to services of employees performed under a contract of service.

The final exemption is for enterprise agreements that have been approved by the Fair Work Commission. These kinds of agreements likely fall outside of the ACCC's jurisdiction.

i. The IR carve out

First, and most significantly, the CCA specifically excludes acts done in relation to a contract, arrangement or understanding (CAU) or provision of a CAU, or the making of a CAU or any provision of a CAU, to the extent that the CAU, or the provision, relates to the remuneration, conditions of employment, hours of work or working conditions of employees.

The effect of this IR carve out is that the ACCC does not have jurisdiction to deal with agreements, or aspects of agreements, that relate to employment conditions.

Some will no doubt find this outcome unsatisfactory. Nevertheless, the IR exemption has been part of the CCA and its predecessors, in one form or another, since 1965 and the fact is that where agreements or relevant provisions in agreements fall within the IR carve out, the CCA does not apply.

There is one exception relevant for present purposes. Section 45E is not subject to the IR carve out. Accordingly, if the ACCC identifies conduct that falls within this prohibition, the IR carve out won't operate to exclude it from our jurisdiction.

Without wanting to over complicate things, I note that the IR carve out also doesn't apply to the secondary boycott provisions I mentioned earlier. However, for those provisions, there's a defence in section 45DD which in a way mirrors the carve out. It applies where the dominant purpose of the union and employees' conduct is substantially related to remuneration, conditions of employment, hours of work or working conditions of the employees.

ii. The confined definition of "services"

The second relevant exemption arises from the way "services" are defined in the CCA.

Rights or benefits from the performance of work under a contract of service (ie employment contracts) are expressly excluded from the kinds of "services" the CCA can apply to (see s 4).

Performance of work under a "contract of service" covers services provided by employees pursuant to their employment contract.

iii. Approved EAs likely fall outside of the CCA

The final exemption which is relevant here relates to the fact that many of the agreements which have been highlighted in the press are enterprise agreements.

In the 2012 decision of *Australian Industry Group v Fair Work Australia* (**AIG Case**), the Full Federal Court found that approved EAs are a "creature of statute" with statutory force, and are not the consensual type of agreement, arrangement or understanding which the CCA can apply to.

The focus of the AIG Case was on section 45E, but the Court's observations likely have broader application to the rest of the Act.

The Harper Panel sought to deal with the AIG Case in its Final Report by recommending an amendment to section 45E so that it expressly applies to awards and industrial agreements.

However, the Harper Panel considered that with that extended coverage, section 45E should, in effect, then become subject to an IR carve out.

The Panel's recommendation is that section 45E apply to awards and industrial agreements "except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees".

In practice, however, it may be difficult to apply an expanded section 45E since the distinction between the extent to which awards and industrial agreements "relate to" employment conditions and the extent to which they do not, is not always clear.

Another issue

Where the ACCC does have jurisdiction to act in relation to IR-related conduct, the issue of overlapping regulation arises.

The *Fair Work Act 2009* deals with the issue of civil "double jeopardy", by providing that if a person is ordered to pay a pecuniary penalty under a civil remedy provision for particular conduct, then they cannot also be ordered to pay a pecuniary penalty under another law of the Commonwealth for the same conduct.

2. Applying the CCA to the cited examples

Example 1 raises a scenario, in competition terms, of companies which compete with one another agreeing to identical terms and conditions in their EAs.

Ordinarily, competitors coming together to agree matters such as the price at which they will acquire services would fall foul of the cartel provisions.

If a third party, such as the union, were involved in facilitating that agreement, they would also be caught under the Act.

However, where the matters being agreed are things like employee wages and employment conditions, both the IR carve out and the limited definition of "services" in the CCA operate to exclude the conduct from competition regulation.

Once part of an approved EA, this raises further impediments to action by the ACCC.

Thus, even if the ACCC uncovered employers meeting in a smoke filled room to agree what they will all pay their employees, this would not be a matter for the competition regulator.

Example 2 involves EAs that nominate a single superannuation fund that is affiliated with the union, or which mandate income protection insurance from a company affiliated with the union.

While these could be contrary to the section 45 prohibition on agreements that substantially lessen competition, the provisions are likely to fall outside of the CCA where they are part of an approved EA, and/or insofar as they may be shown to relate to employment conditions bringing them within the IR carve out.

If they somehow fall outside these exemptions, which we doubt they do, the ACCC would then need to show a substantial lessening of competition in a market from this conduct, which would be difficult given, for example, that there are many superannuation funds.

Example 3 effectively looks at construction companies refusing to deal with particular contractors in order to appease the union. This involves a couple of scenarios:

(1) Construction companies refusing to award tenders to contractors unless they have signed an EA with the union that the company has onsite because the company considers it is in its commercial interests to operate that way.

(2) Construction companies negotiating enterprise agreements with unions that restrict the company's use of contractors who don't have union-approved EAs in place, or which provide for the engagement of workers from labour-hire companies affiliated with the union.

In scenario 1, if the facts involve companies imposing such a restriction for their own reasons, even if their reasons are to keep the industrial peace, rather than because of a side agreement or understanding reached with the union, the conduct is extremely unlikely to breach the CCA.

Such a “unilateral” kind of practice would not fall within section 45, because no CAU is involved; and it would not fall within the section 47 prohibition on exclusive dealing. Although the construction company may be saying they will only acquire goods or services from the contractor subject to conditions, those conditions do not fall within the scenarios contemplated in section 47 of restrictions on re-supply or acquisition from competitors etc of “goods or services” within the meaning of the CCA.

However, if scenario 1 was actually the outcome of a side arrangement or understanding reached between the union and the construction company (outside an approved EA), rather than the company’s own decision on how to deal with union issues, the conduct would contravene the CCA, if the restriction amounts to a substantial lessening of competition.

Turning to scenario 2, if a union and a company entered into an arrangement which had the purpose of stopping the company from continuing to acquire services or goods from a contractor it was accustomed or under an obligation to acquire from, this would breach section 45E. This is because section 45E makes such behaviour unlawful, but only when a specific supply relationship is being targeted.

The other possibility if an agreement between the union and the company outside of the approved EA could be demonstrated is a breach of section 45.

An agreement between a union and a construction company that the company would not use particular contractors (or would *only* use particular contractors) could contravene section 45 if it was for the purpose or effect of substantially lessening competition. This is because such an agreement involves only an indirect connection to employment matters covered by the IR carve out, and so is unlikely to fall within the exemption.

There are, of course, many difficulties. By way of illustration, in relation to section 45E, in 2008 the ACCC was unsuccessful in proving that the CFMEU and two of its officials were accessories to a contravention of section 45E.

The company we alleged had entered into an agreement with the union in contravention of section 45E admitted the conduct, and our case before the court was about proving the union and officials were liable as accessories. However, the court found the contravening conduct had not been made out.

The company in question provided project management and construction services and had engaged a contractor to perform some plasterboard work on an apartment development. That contractor in turn engaged subcontractors. The union was not happy with the choice of subcontractors and told the company they needed to “fix it now”.

At the time, the union and the company were negotiating an enterprise agreement. The issue of the subcontractors became what the court termed “an irritant” in those negotiations.

The company subsequently terminated the contractor’s contract, citing breaches of the subcontract provisions which the company was not happy with.

The court found there was not the requisite meeting of the minds for there to be an arrangement or understanding between the union and the company. The judge found there were a range of possibilities open to the company in order to “fix” the situation; termination was not the only option.

Example 4 focuses on agreements between unions and companies that provide for the union to hinder the company’s competitors.

This was the case with the recent TWU/Toll agreements identified by the Royal Commission into Trade Union Governance and Corruption. In these agreements, Toll agreed to make annual payments to the Transport Education Audit Compliance Health Organisation Limited (TEACHO), subject to the TWU meeting certain key performance indicators. The KPIs related to the TWU conducting audits, wage inspections and other compliance measures of

competitors of Toll, and TEACHO providing compliance training for Toll's employees and contractors.

The Royal Commission into Trade Union Governance and Corruption received evidence about confidential deeds entered into by Toll and the TWU, in the context of negotiations for the Toll-TWU Enterprise Agreement in 2011 and 2013.

The ACCC then commenced an investigation. It was a thorough investigation, in which we used our compulsory information gathering powers, conducted market enquiries and obtained legal advice from senior counsel.

We ultimately concluded that the relevant provisions did not have the purpose of substantially lessening competition (they were not given effect to). This was in part because Toll faced many competitors in the market, and the competitors targeted were small companies.

Many people were outraged by the Toll/ TWU arrangement. I totally understand this; nevertheless the CCA only applies in a case like this when there has been a *substantial* lessening of competition.

3. Raising some issues

Last week the Productivity Commission (PC) released its draft report on the Workplace Relations Framework. As the PC observed, the workplace relations system is "largely exempted from Australian competition law" although some provisions of the CCA still apply.

The PC's view was that regulation of IR matters should continue to be carved out from the CCA, observing:

> "There is a strong policy rationale that the regulation of labour markets should continue to be separated from the regulation of other markets for goods and services. Competition policy and the workplace relations system have both complementary and competing objectives that must be balanced."; and
>
> "the social policy grounds for retaining a separate WR regime are clear:
>
> - There are ethical and social factors that separate the labour market from more conventional markets.
> - Collective action, which is generally limited by competition policy, is a core principle of the workplace relations system."

Some certainly do question these conclusions when they read about particular alleged behaviour. They could well argue that some behaviour is highly detrimental to the economy, and that it should be prohibited under competition law and not just assessed in terms of industrial relations issues.

Making this determination is, of course, rightly an issue for Parliament. Further, how such behaviour is prohibited and by whom would also need to be considered, with a number of considerations to be kept in mind, but I will mention only two of these today.

First, we already have IR-specific laws.

Second, before any regulator steps in, some form of hurdle must be jumped. The CCA, for example, should not apply where there is only a lessening of competition, whether or not the behaviour seems outrageous. The hurdle for the CCA should be a *substantial* lessening of competition or substantial loss or damage.

As it happens, the ACCC has many related issues on its plate; indeed, the ACCC may currently have more union-related major investigations than ever before.

Last year, in a major matter, we instituted proceedings against the CFMEU and others alleging 12 cases of breaches of the secondary boycott provisions, one case of an attempted breach of section 45E, and one instance of a breach of section 50 of the ACL (undue harassment or coercion).

We currently have two further in-depth secondary boycott investigations underway, one at an advanced stage.

In response to findings from the Royal Commission hearings in Canberra, the ACCC is investigating instances of alleged cartel behaviour in the ACT construction sector.

There may be more investigations to follow in other locations.

Immediate areas for possible law reform

While there may be more longer term issues, the Royal Commission's discussion paper canvasses a number of immediate areas for law reform. The ACCC will be making a submission to the Royal Commission raising some difficulties with the law for consideration in five key areas.

Scope and complexity of the boycott provisions

The secondary boycott provisions are complex and open to differing interpretations. Clarifying the law and removing some ambiguity would provide certainty for businesses, unions and others. In addition, the boycott provisions are the only anti-competitive conduct provisions in the CCA which require both a purpose and effect test to be proven. This sets a high threshold and does limit the scope of the operation of the provisions.

Section 45E nominally covers conduct where parties enter into an agreement to stop the supply or acquisition to a particular person. As discussed above, this section only applies in circumstances where the contract, agreement or understanding targets a particular person, not a class of people. For example, if there were a CAU stating that a business will not acquire services from, or supply services to, businesses that don't have an enterprise bargaining agreement, this conduct would, in the ACCC's view, be outside the scope of section 45E as it isn't targeted at a particular person in an existing supply or acquisition relationship with the party to the CAU

Telecommunications interception

As I have said some of the conduct in this area may involve serious cartels. It has been identified both in Australia and internationally, that to effectively combat covert conspiracies such as cartels there is a need for investigatory authorities to have access to telecommunication interception material. The ACCC needs the ability to use the product of telecommunication interceptions in its own investigations of cartels.

Whistle blowers

The ACCC will be recommending that there be appropriate mechanisms which will protect whistle-blowers or other parties who provide information to assist with ACCC investigations. Many parties are reluctant or unwilling to provide information to regulators like the ACCC as there are inadequate mechanisms in place to protect these individuals from the range of commercial and safety concerns that may arise as a result of providing information to the regulator.

Compliance with compulsory information gathering powers

Section 155 of the CCA is a central investigative tool for the ACCC. Parties can be issued with a notice to provide information and documents as well as provide evidence.

In the ACCC's experience, witnesses to covert activities including secondary boycott activity are often reluctant or unwilling to provide information to the ACCC, even in compulsory section 155 examinations. In some cases, businesses, unions or individuals may be less fulsome in their response to compulsory notices and the legal remedies currently available to compel a party to comply with a validly issued notice are weak.

The ACCC, through the Harper Competition Policy Review Inquiry, has raised concerns about the adequacy of penalties for non-compliance with section 155 notices. Non-compliance with section 155 notices is a criminal offence with a maximum fine of $3,600. The very small monetary sanctions may tempt some corporations to conceal evidence rather than put themselves at risk of prosecution and much higher penalties.

Final comment – doing more

As I just stated, in response to findings from the recent Royal Commission hearings in Canberra, the ACCC is investigating potential cartel behaviour in the ACT construction sector. The allegations, however, appear to involve a wide range of restrictive behaviour beyond the specific allegations of price fixing.

It is possible that in the past the ACCC has not looked sufficiently into such additional restrictive behaviour that could amount to a contract, agreement or understanding that has the purpose or effect of substantially lessening competition, thinking such matters were covered by the carve outs and exemptions discussed above.

The alleged behaviour in Canberra may provide an avenue to do so in the context of investigating the alleged cartel behaviour.

Thank you for your time tonight.