

THIRD LINE FORCING: HAS THE PROBLEM GONE AWAY?

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This special issue of the UNSW Law Journal is focused on amendments to the *Trade Practices Act 1974* (Cth) ('*TPA*'). A number of inquiries and reviews have been held over the last 35 years into the utility of various provisions of the *TPA*, and numerous amendments have been made.¹ A substantial number of new provisions have been added over that period of time. Some amendments have been worthwhile; the effectiveness of others is more questionable. Some provisions such as those prohibiting misuse of market power contained in section 46 have been very contentious and subject to multiple amendments.² The international approach to other areas such as the treatment of cartel conduct have changed over time and new approaches to dealing with them will be reflected in the *TPA*.³

Third line forcing is one area of the *TPA* which has been the subject of review and recommendation for amendment to include a competition test on more than one occasion. There has been government commitment to amend. However, substantive amendment has not eventuated although some procedural 'tinkering' has occurred. The issue of amendment to include a competition test seems to have dropped off the current amendment agenda in the face of significant lobbying and discussion about other more contentious areas of the *TPA*.

This brief paper will argue that there is no justification for imposing a per se test on third line forcing; that the continuing failure to introduce a competition test is a mistake; and that the current position of the Australian Competition and Consumer Commission ('ACCC') as 'gatekeeper' in the process is unjustified in competition terms and terms of cost. It is argued that the ACCC has better things to do than to review numerous third line forcing notifications annually, when

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1 See, eg, Committee of Inquiry into a National Competition Policy, Parliament of Australia, *Report by Independent Committee of Inquiry into a National Competition Policy* (1993) ('Hilmer Report'); Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('Dawson Review').

2 See, eg, amendments made to s 46 by *Trade Practices Legislation Amendment Act (No 1) 2007* (Cth); *Trade Practices Legislation Amendment Act 2008* (Cth).

3 See, eg, *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (Cth).

most are in relation to conduct which is unobjectionable in competition terms, and few revocations, in fact, occur.⁴

I THIRD LINE FORCING: PROHIBITION AND IMPLICATIONS

‘Third line forcing’ is the supply of goods or services, or the supply of goods or services at a discount,⁵ on condition that the acquirer also acquires the goods or services of another person (a third party) (section 47(6)). The refusal to supply without agreement to such a condition is also third line forcing (section 47(7)). Third line forcing is prohibited under section 47(6) and (7) absolutely, that is, without consideration of the purpose, effect or likely effect of the conduct in the market. Third line forcing is the only type of vertical conduct within section 47, ‘Exclusive Dealing’, which is prohibited absolutely.

By way of contrast, where a person supplies goods or services to an acquirer on condition that more of its own goods or services are also taken by the acquirer, the conduct is not illegal *per se* but is subject to a competition test. This means that this type of ‘tying’ conduct is only prohibited if it has the purpose, effect or likely effect of substantially lessening competition in a market.⁶

The main problem with the current approach to third line forcing is that it fails to distinguish between efficient bundling and bundling which ‘leverages’ (relies on and extends) existing market power. It does not recognise that the impact of bundling may be neutral or even beneficial to consumers. The *per se* nature of the current provision means that there is no excuse for engaging in the conduct – it simply is not allowed, regardless of its outcome in terms of efficiency, low anti-competitive impact or benefit of the conduct to consumers.⁷ This means that whether you are a supplier forcing a captive acquirer to take the products or services of a particular third party, which may or may not be needed or required, or you are a supplier who is offering an optional advantageous deal to a consumer on the basis of some existing arrangement, you are likely to be involved in third line forcing. In both these circumstances, absent compliance with the notification procedure, businesses involved in third line forcing are at risk of proceedings, penalty and damages.

To avoid possible enforcement action by the ACCC or private action for breach by others, those involved in third line forcing conduct may seek

4 The author notes that similar points have been made before in various reports and articles, some of which are mentioned here. See, eg, Warren Pengilley ‘Thirty years of the Trade Practices Act: Some Thematic Conclusions’ (2004) 12 *Competition and Consumer Law Journal* 1, 30; R Ian McEwin ‘Third line forcing in Australia’ (1994) 22 *Australian Business Law Review* 22, 114. The concern is, however, that the issue has slipped off the amendment agenda.

5 The wording of s 47 refers to granting a ‘discount, allowance, credit or rebate’ on various conditions.

6 *TPA s 47(10)*. This difference in treatment is despite the fact that tying conduct may have serious effects on competition: see, eg, *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd (No 2)* (2008) 170 FCR 16.

7 Subject to the provisions allowing notification discussed below.

administrative protection by notifying the conduct under the *TPA* to the ACCC.⁸ This notification protection is usually granted and rarely withdrawn by the ACCC on the basis of the detriment of the conduct, leading to the conclusion that very little of third line forcing conduct notified is actually detrimental to the market or consumers.

A Why is Third Line Forcing Treated Strictly under the *TPA*?

The *TPA* was enacted in 1974 and modelled at that time to a significant extent on US antitrust law and the economic thinking of the time. The prevailing economic view was that of the Industrial Organisation School of Economics ('Harvard School'), which focused in its analysis of antitrust on structure–conduct–performance, and which saw bundling as the leveraging of power from one market into another market.⁹ Although economic theories in competition law have moved on in the US and Australia, the treatment of third line forcing in Australia has not changed.

It is now generally accepted by economists that not all vertical restrictions are anti-competitive, and some can actually be pro-competitive.¹⁰ It is recognised, however, that aspects of third line forcing conduct may have a significant anti-competitive impact. This may be the case where, for example, the conduct involves 'kick-backs' or secret commissions to the third party whose products or services are bundled.¹¹ Other negative impacts of third line forcing may occur where there is a disparity of information between the parties to the transaction or a misrepresentation by the supplier about the nature and value of the individual products, or where the conduct involves an abuse of market power in the sense of leveraging.¹²

Not all conduct which falls within section 47(6) and (7) exhibits these features. Indeed, with the growth of bundled marketing offers, having regard to the broad implications of the wording of 'refusal' in section 47(7) of the *TPA*, many bundled offers involving discounts, which are actually beneficial to consumers and are not compulsory at all, are prohibited per se. There are also a

8 *TPA* s 93.

9 The memorable quote from the influential *Standard Stations* case is that '[t]ying agreements serve hardly any purpose beyond the suppression of competition': *Standard Oil Company of California v United States*, 337 US 293, 305 (1949).

10 The views of the subsequent economic schools of thought known as the 'Chicago School' because of the links of those economists with the University of Chicago and prominent in the 1980s focussed particularly on the goal of efficiency and welfare. See, eg, Eleanor M Fox and Lawrence A Sullivan, 'Antitrust – Retrospective and Prospective: Where are We Coming From? Where Are We Going?' (1987) 62 *New York University Law Review* 936. What is known as the 'post-Chicago School' also values efficiency but places greater emphasis on the strategic behaviour of firms. The idea that not all vertical restrictions are anti-competitive was accepted by the High Court in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, which recognised the distinction between the restrictions placed on interbrand and intrabrand competition in the context of product distribution.

11 See, eg, *Trade Practices Commission v Queensland Aggregates Pty Ltd* (1982) 61 FLR 52, where an offer to supply work was bundled with the purchase of a truck and a secret commission.

12 Conduct of this kind may also breach s 46, 'Misuse of Market Power', where the forcing party has a substantial degree of market power.

number of other valid reasons for seeking to impose third party restrictions, such as quality control in some (but not all) circumstances.

Australia is the only country which prohibits third line forcing per se. New Zealand and Canada apply a competition test, while the US and EU do not treat third line forcing separately from other vertical arrangements.¹³

B Processes of Review and Recommendation

The rationale for the implementation of per se prohibitions was originally the perceived severity of the consequences of third line forcing, based at that time on a different economic view of vertical conduct. This issue was addressed in two of the most significant inquiries into the *TPA*.

The Swanson Committee originally recommended per se status for third line forcing in 1976 based mainly on the view it took of the forcing of third party products at that time in the finance and insurance industries. The influential Hilmer Report in 1993 noted that the particular concern of the Swanson Committee had been the common requirement of building societies in the mid-1970s for property or life insurance to be required, generally from one or a small group of third parties, as a condition of granting a loan. The Hilmer Report also noted that significant changes had occurred in the system of financial regulation by 1993, such that, in its view, the practice of requiring insurance was not substantially anti-competitive if there was a list of insurers who were prepared to enter into concessions agreements with lenders and were approved by the Insurance Commissioner.¹⁴

The Hilmer Report in 1993 summed up its views on per se prohibitions and third line forcing in the following way:

Per se prohibitions are appropriate where conduct has such strongly anti-competitive effects that it is almost always likely to lessen competition. Third line forcing does not fall within this category.¹⁵

Clearly the effect of third line forcing on competition in this context will depend upon a range of factors such as the size of the list of insurers, the ability of other insurers to get onto the list, industry practice and the availability of alternative sources of loans generally.

The Hilmer Report also recognised the wide variety of vertical agreements in the marketplace, and stated:

Economic analysis provides no simple rules for the treatment of vertical restraints, including such tying arrangements as 'third line forcing'. As a consequence, a test which enquires into the effects of individual prohibitions is required.¹⁶

As to the rationale for a per se provision generally, the Dawson Review of 2003 stated:

13 See Dawson Review, above n 1, 126.

14 Hilmer Report, above n 1, 52–3.

15 Ibid 52. It should be noted that this was in contrast to the views expressed in the Report on price fixing, eg, which were that price fixing agreements are unambiguously detrimental to economic efficiency and there are 'sound reasons for prohibiting price fixing agreements per se, without any inquiry into the competitive effects of such agreements': at 34.

16 Ibid 49.

[the] rationale behind a per se prohibition is that conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.¹⁷

The Dawson Review noted that none of the submissions made to it supported continuing the per se treatment of third line forcing under the *TPA*.

Both the Hilmer Report and Dawson Review recommended that third line forcing should be made subject to a competition test. The ACCC agreed with the Dawson Review that third line forcing covered a very wide range of conduct which could be beneficial to consumers or pernicious in its effect on competition and the public interest. It also indicated that in its view enforcement in relation to the provision would be more difficult with the removal of the per se prohibition.¹⁸ The Government responded to the Dawson Review by adopting its recommendation that the conduct be made subject to a competition test, but at the last moment the amendment was withdrawn from the amending Bill and not put, reportedly because it was not supported by a number of backbenchers.

The bulk of legal opinion is therefore against a continuation of the per se test, and favours the introduction of a competition test.

C The 'Tinkering' Amendments

In recognition of the difficulties resulting from the per se approach and the range of conduct potentially prohibited by section 47(6) and (7), a number of procedural amendments have been made in relation to third line forcing. A separate process for notification of third line forcing, discussed above, was implemented in 1997. Immunity for notified conduct begins 14 days after lodgment of the notification documentation, if the ACCC has not objected at that point.¹⁹ The test for immunity is whether the ACCC considers that the likely public benefit of the conduct outweighs the public detriment.²⁰ Additional assistance was given to the large numbers of applicants under these provisions when the application fee for notifications for third line forcing was reduced from \$1000 to \$200 in 1998.²¹

Following amendment in 2006, the nomination by a supplier of its own related body corporate as the supplier of the forced goods or services does not constitute a breach of section 47(6) and (7). This removes some transactions from the scope of third line forcing, and brings the provisions into line with the rest of

17 Dawson Review, above n 1, 123.

18 One might argue that it would be surprising were that not the case, but that does not appear to be a justification for the harsh treatment of all third line forcing conduct.

19 This is by way of contrast to notification for other categories of s 47 conduct, where protection begins immediately after the conduct is notified. This distinction appears to be in recognition of the fact that only third line forcing is prohibited absolutely.

20 This is by way of contrast to notification for other exclusive dealing conduct which has immunity from the time of lodgment until the immunity is withdrawn by the ACCC. The usual consultation processes exist where the ACCC is proposing to revoke protection. The fee for lodging a notification in respect of third line forcing was reduced from \$1000 to \$200 by *Trade Practices Amendment Regulations 1998 (No 1)* (Cth).

21 *Trade Practices Amendment Regulations 1998 (No 1)* (Cth).

the *TPA* in that it really assesses the effect of the conduct of related bodies corporate similarly.²²

D Third Line Forcing in Practice: Examples of the Conduct

It is productive to illustrate the problem by outlining a number of diverse examples of the conduct potentially caught.

The leading High Court case on third line forcing is the decision of *Castlemaine Tooheys Ltd v Williams and Hodgeson Transport Pty Ltd*.²³ There, a competitor transport company complained because Castlemaine Tooheys insisted on supplying publicans in north Queensland with beer delivered by a nominated contractor. This was alleged to be third line forcing in breach of section 47(6) – put simply, it was argued that Castlemaine Tooheys would only supply beer if the publican also took delivery services from a nominated third party. The High Court found that there was no ‘supply on condition’ in the circumstances because there was only one contract. Castlemaine Tooheys, in effect, supplied delivered beer – the publicans had no separate contract with any transport company. The publicans had one contract with Castlemaine Tooheys for delivered beer.²⁴ There was in truth no condition imposed. If the brewer had insisted on delivery by separate contract with a carrier the conduct would have been third line forcing.

The bundling of goods and services from third parties into a contract for supply by the forcing party has since that decision been an effective tool to avoid the per se harshness of section 47(6) and (7), but it is not always a suitable way of arranging a transaction. Where, for example, there is a need for the acquirer to have a contractual relationship with the third party it is not a workable solution. This often occurs in finance, insurance or warranty arrangements where a separate contract with the financier, insurer or manufacturer is obviously essential. This means that some conduct may be rearranged so that third line forcing law does not apply, while other very similar conduct may not. The impact of both categories of conduct in the marketplace is, however, likely to be the same.

Two cases involving car loans in the mid-1990s refocused attention on the broad application of the provisions after a long period during which there had been no cases. *Kam Nominees Pty Ltd v Australian Guarantee Corporation Ltd*²⁵ involved approval by a financier of a car loan on condition that the borrower acquire the car from a dealer on a list of dealers nominated by the financier. *Trade Practices Commission v Tepeda*²⁶ involved a car deal where the acquirer was given a particular trade-in allowance on his old car subject to the condition that the finance would be obtained from Ford Credit. If the acquirer used a

22 *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth). See, eg, ss 45(8), 46(2).

23 (1986) 162 CLR 395 (*‘Castlemaine Tooheys’*).

24 There are a number of other cases which rely on this rationale: see, eg, *Australian Automotive Repairers’ Association (Political Action Committee) Inc v Insurance Australia Ltd (No 6)* [2004] FCA 700 (Unreported, Lindgren J, 2 June 2004); see also *Paul Dainty Corporation Pty Ltd v National Tennis Centre Trust* (1989) ATPR ¶40-951.

25 (1994) 51 FCR 338.

26 (1994) 16 ATPR ¶41-319.

different finance company, the trade-in allowance would have been less. Third line forcing was found to have occurred in both cases. Although each of the judges at first instance took a different view of the need for actual specification of 'another person' for the purposes of the provisions, the two cases reinforced the way in which the third line forcing provisions could apply in a practical context.²⁷ In the former case there was arguably a reasonable and not anti-competitive rationale for limiting the sources from which a second hand car could be purchased on the grounds of quality control. The anti-competitive impact would not have been high if the list was broad, there were no 'kick-backs' and reputable car retailers could apply for and be added to the list following an objective certification of the quality of their stock. This was not, however, an option given the per se nature of the provision. The broader application of the provision using the approach taken to the meaning of 'other person' in *Kam Nominees Pty Ltd v Australian Guarantee Corporation Ltd*²⁸ showed the significant impact of the law on any number of similar situations.

Loyalty schemes often fall within third line forcing because a discount or other benefit is not available to an acquirer unless the acquirer has also made an acquisition from a third party. This type of conduct might, for example, involve a discount on a product or service if a consumer brings a docket showing a purchase of goods to a certain value from another store. A person who seeks the discount without the third party acquisition is refused or told that they can only have the discount or other benefit if they acquire the third party goods or services. Once there is a refusal without the acquisition of the third party products or services the contravention of section 47(7) is complete. The prohibition on third line forcing is thus wider in respect of a refusal, because there is no compulsion or futurity involved in the arrangements. By way of contrast, 'supply on a condition' requires an element of compulsion or futurity in relation to the deal before section 47(6) will apply.²⁹

The Dawson Review looked at loyalty schemes and noted that 'many customer loyalty schemes and shopper docket discounts such as the grocery/petrol discount schemes' were in the category of third line forcing, which had a beneficial outcome for consumers.³⁰ Examples of loyalty schemes are many and numerous notifications have been made to the ACCC in respect of them. For example, a corporation offered VISA card holders discounts on selected flights, hotels and special holiday packages if they used their VISA cards to pay for them.³¹ Warner Village Theme Parks offered VISA Platinum or Infinite payment card holders a discount, bonus gift and/or entry into a free prize draw on condition that they use their VISA card to purchase the relevant products

27 The wider interpretation of 'another person' appears to be the correct view, given the wording in other parts of s 47.

28 (1994) 51 FCR 338, 340–2 (Drummond J).

29 See *SWB Family Credit Union Limited v Parramatta Tourist Services Pty Ltd* (1980) 48 FLR 445. For a full consideration of these types of arrangements, see OECD Directorate for Financial, Fiscal and Enterprise Affairs Competition Committee, *Policy Roundtable: Loyalty and Fidelity Discounts and Rebates* (4 February 2003).

30 See Dawson Review, above n 1, 125.

31 Australian Competition and Consumer Commission, *Zuji Pty Ltd – Notification to ACCC* (15 April 2008).

or services.³² The AFL and various clubs offered their members \$50 credit on their 2005 membership fee if they were contracted to certain named energy companies until the end of the year.³³ 7-Eleven allowed a discount on the cost per litre of its petrol if a purchaser had purchased goods to a specific value from particular supermarkets.³⁴ A fitness centre offered members of particular health funds discounts off its products and services.³⁵ A mobile provider offered discounts on phone modems when connecting to a nominated broadband account.³⁶

The notifications listed above are not particularly significant in themselves but provide a small sample of the many loyalty schemes which are notified annually. At this stage there have been few revocations in respect of loyalty schemes; however, several have been withdrawn following a draft notice foreshadowing withdrawal of protection.

Other examples of third line forcing conduct commonly notified involve terms of franchise agreements. Often there is a requirement that a franchisee obtain an essential trade mark licence from a third party because the franchisor is not the owner of the mark,³⁷ or that goods or services which are necessary to produce the franchise goods or services be acquired from a third party (sometimes, but not always for reasons of quality control).³⁸ Numerous examples of franchise notifications to cover third line forcing conduct occur. In other franchises, however, the distribution arrangements are structured so that all third party goods and services are received through the franchisor (that is, there is only one contract in the same way as *Castlemaine Tooheys*) to avoid the application of third line forcing laws. Ironically the effect of such artificial restructuring may be to deny the franchisee the protection of the implied warranties under the *TPA*, which would otherwise be available against the supplier. In reality there is no real distinction between the impacts on consumers of the two types of conduct, but the former is prohibited absolutely as third line forcing and requires notification, while the latter is prohibited on the basis of the competition test. Most franchise

32 Australian Competition and Consumer Commission, *Warner Village Theme Parks – Notification to ACCC* (12 October 2007).

33 Australian Competition and Consumer Commission, *Adelaide Football Club – Notification to ACCC* (22 January 2004).

34 Australian Competition and Consumer Commission, *Warner Village Theme Parks – Notification to ACCC* (15 October 2004).

35 Australian Competition and Consumer Commission, *Fitness First Australia Pty Limited – Notification to ACCC* (10 February 2009).

36 Australian Competition and Consumer Commission, *Hutchinson 3G Australia Pty Ltd – Notification to ACCC* (10 March 2009).

37 See, eg. Australian Competition and Consumer Commission, *Krispy Kreme Doughnut Corporation – Notification to ACCC* (17 May 2002). Of course, if the trademark holder is a corporation related to the franchisor, as it sometimes is, the 2006 amendments will mean that notification is not now necessary.

38 See, eg. Australian Competition and Consumer Commission, *Harvey World Travel Franchisees Pty Ltd – Notification to ACCC* (30 August 2002), where it supplied a franchise system to franchisees on condition that the franchisees used a particular computer reservation system; Australian Competition and Consumer Commission, *Cartridge World Australia Pty Ltd – Notification to ACCC* (18 December 2008) (goods from particular suppliers); Australian Competition and Consumer Commission, *Poolwerx franchisees – Notification to ACCC* (8 December 2008) (goods from particular suppliers).

arrangements pass a competition test because franchise arrangements rarely have the capacity to substantially lessen competition.

There are many notifications involving distribution agreements which specify a source for the goods which are distributed. Many of the conditions are based on quality control reasons. Levi Strauss, for example, offers distributorship agreements on the condition that the distributor acquires certain branded products only from nominated suppliers specified in the distributor agreement.³⁹ It is unlikely that these types of arrangements would substantially lessen competition for the same reasons as those involved in franchises.

Reciprocal membership and accreditation agreements are problematic for many organisations because they may breach the prohibitions on third line forcing. James Cook University required enrolling students to join and continue membership of the student association. The ACCC originally proposed to revoke this notification but was ultimately persuaded of the public benefit and allowed the notification to stand.⁴⁰ More recently a notification of St Vincent's Private Hospital required certain medical staff be accredited to the St Vincent's Public Hospital before they could be accredited to the Private Hospital.⁴¹

It is not argued that the types of arrangements outlined above are never anti-competitive and should always be allowed. It is, however, argued that many of them are not anti-competitive or detrimental to consumers and yet the per se rule on third line forcing means that these arrangements all require parties to protect themselves by notifying the ACCC.

E Revocation of Notifications

A large number of notifications are lodged with the ACCC each year in respect of third line forcing conduct. This process involves completion of forms by many businesses, in most cases following legal advice. More than 200 notifications were lodged annually in 1999 and 2000. In 2001–03, between 100 and 200 were lodged annually. Since 2004, more than 300 notifications have been lodged annually. Approximately 70 notifications had been lodged by mid-April 2009, and most had been allowed to stand. Since 1999, there have been only a small number of revocations by the ACCC, although some notifications have been withdrawn for a variety of reasons, including that a draft revocation notice was issued to the notifying party by the ACCC.⁴²

The test for revoking a notification is that the public benefit of conduct will not outweigh its anti-competitive detriment.⁴³ When assessing the anti-

39 Australian Competition and Consumer Commission, *Levi Strauss (Australia) Pty Ltd – Notification to ACCC* (22 January 2009).

40 Letter from Australian Competition and Consumer Commission to James Cook University, 27 December 2001.

41 This notification was withdrawn before any Australian Competition and Consumer Commission draft decision was issued: Australian Competition and Consumer Commission, *St Vincent's Private Hospital – Notification to ACCC* (7 November 2008).

42 These figures are approximate and were sourced from the ACCC website: <<http://www.accc.gov.au>>. Some notifications filed involve more than one notification for similar conduct, so it is likely that the actual numbers are higher.

43 See *TPA* s 93(3A).

competitive effect of third line forcing conduct, the ACCC has stated that it distinguishes between different types of third line forcing conduct. The ACCC has stated that it is more concerned with the anti-competitive impact in situations where customers are denied the opportunity to choose ‘on a normal commercial basis whether or not to buy’ the second product. Where there are alternative suppliers of the first product the anti-competitive detriment in this context is less. Where the second purchase is from one of a number of suppliers, and there is scope to choose on price or quality, the anti-competitive effect is less. Where the purchase of the second product is optional, as is the case with many loyalty schemes, the detriment is less, although loss of transparency may be an issue.⁴⁴

The ACCC has also recognised that public benefits may result from third line forcing conduct, such as fostering business efficiency, improving product quality and promoting competition in relevant markets, stating:

In particular, third line forcing conduct under which customers can save by buying the package of products A and B instead of buying the products separately in competitive markets, can have positive benefits in terms of competition and consumer welfare.⁴⁵

F Brief Look at Revocations and Withdrawals

It is useful to briefly consider a few of the small number of revocations and withdrawals, grouped by similar conduct where appropriate.⁴⁶

1 *Loyalty schemes*

The ACCC has allowed notifications for the vast majority of loyalty schemes to stand.

In January 2009, the ACCC issued a draft notice proposing to revoke in relation to a notification by Woolworths Ltd and Independent Retailers Ltd.⁴⁷ The notification related to a proposed Woolworths branded credit card supplied by HSBC.⁴⁸ The card would allow cardholders to pay at the pump for fuel if they used the card. Other cardholders would not have had that convenience. In its draft revocation notice, the ACCC accepted that there was some public benefit arising from the scheme in terms of convenience and efficiency. The ACCC found, however, that considerable public detriment would result from the scheme, as the arrangement distorted the competitive process between card issuers, reduced consumer choice and had a negative effect on the payment system. For those reasons public benefit did not outweigh public detriment. The

44 See Australian Competition and Consumer Commission, *Guide to Exclusive Dealing Notifications* (2006) 8. The loss of transparency in the two products may prevent customers from making an informed decision on the supplier’s offer, where, eg, customers are unable to obtain competitive pricing information about individual products.

45 Ibid 10.

46 Not all revocations and withdrawals are discussed comprehensively here.

47 Australian Competition and Consumer Commission, *Draft Notice in respect of notifications lodged by Woolworths Limited and Australian Independent Retailers Pty Ltd*, 29 January 2009.

48 Australian Competition and Consumer Commission, *Woolworths Limited and Australian Independent Retailers Pty Ltd – Notification to ACCC* (17 October 2008).

applications were subsequently withdrawn⁴⁹ and replaced by similar notifications of more limited duration (until August 2010) which were allowed to stand. The ACCC found that exclusivity underpinned the new and innovative payment technology involved and noted that Woolworths had committed to negotiate in good faith with other card suppliers after that time.

The ACCC also issued a draft revocation in respect of a notification by the Sydney Cricket Ground and Sports Ground Trust in relation to use of specified credit card facilities supplied by its sponsor, Macquarie Bank, and another nominated card, to pay for food and drink at its sporting venues. The arrangement also involved provision of premium service for food and drink to customers holding the nominated cards. In its draft revocation notice, the ACCC found that the proposed conduct impacted on the card payment system generally, and on the supply of payment services both generally and at the relevant grounds. It affected the provision of consumer credit and debit service cards generally, and at the relevant grounds, and also the supply of credit/debit network services to issuers and acquirers. Public detriment resulted from foreclosing other payment providers during the term, reducing the utility of card payment products to both issuers and consumers. If a broad range of merchants adopted this approach, consumers would need more cards at additional cost, which was a public detriment. The ACCC was not satisfied the conduct was necessary to support technological development at the grounds, so there was no recognised public benefit. The notification was subsequently withdrawn.⁵⁰

2 *Sporting conduct*

A number of revocations have involved sporting organisations. The ACCC revoked restrictions imposed by the National Association of Speedway Racing ('NASR') and a number of speedway racing organisations who sought to restrict their licensed drivers from competing only at approved tracks and venues. Some made membership conditional on obtaining a licence from NASR. The ACCC recognised the public benefit in safety standards for speedway tracks and venues, but stated that there was significant public detriment in preventing licensees from racing at non-approved tracks and venues which met safety and insurance

49 These original notifications were replaced with similar notifications having a more limited application until August 2010: see Australian Competition and Consumer Commission, *Woolworths Limited & Australian Independent Retailers Pty Ltd – Notification to ACCC* (25 March 2009).

50 Australian Competition and Consumer Commission, *Sydney Cricket and Sports Ground Trust – Notification to ACCC* (19 December 2008). Arrangements relating to the use of contactless Visa credit cards at Stadium Australia were the subject of a similar notification which was allowed to stand, despite the Australian Competition and Consumer Commission issuing an initial draft notification proposing to revoke, on the grounds that the exclusivity arrangement was required for three years to enable investment in credit card facility infrastructure: see Australian Competition and Consumer Commission, *Stadium Australia Management Limited – Notification to ACCC* (29 January 2009).

standards.⁵¹ The ACCC also revoked a notification involving a marketing program run by the Australian Baseball Federation ('ABF'). The ABF notified in 2001 in relation to a marketing scheme aimed at promoting a unified image for the sport and raising and distributing funds for member associations and clubs. It offered services on the condition that participants wore uniforms bearing its logo, bought from licensed third party suppliers. Any supplier of baseball clothing could become a licensee at no cost. License fees paid to ABF by the third party suppliers were paid back to State members, although benefits had been disappointing until near the time of revocation. The ACCC revoked the notification after five years on the basis that administrative costs of the program meant that public benefit did not outweigh the detriment caused by the lessening of competition between suppliers.⁵²

In another sporting revocation, the ACCC revoked a notification lodged by Racing and Wagering Western Australia ('RWVA') nominating a workers' compensation insurer as a condition of a thoroughbred horse trainer's licence. RWVA claimed that the nomination of one insurer would discount premiums, facilitate an industry risk management program and ensure that all trainers had the coverage required by law. The ACCC found that the benefits did not outweigh the anti-competitive detriments because of decreased competition between providers of insurance for horse trainers. The ACCC also stated that the benefits which RWVA were seeking to achieve could be achieved in other ways.⁵³

Harness Racing Victoria ('HRV'), a statutory body, notified regarding a 'race field approval agreement' with Centrebet and other off-course bookmakers. HRV offered six bookmakers a rebate on fees otherwise payable for the supply to them of certain race field data if they 'laid off' bets on harness races within Australia with the Victorian TAB. HRV also required the bookmakers to hold certain licences. Gambling regulations in Victoria gave control of race field data to HRV, which charged fees to persons who wished to use it, such as bookmakers. The ACCC issued a draft revocation notice on the basis that although fees paid by bookmakers were reduced, the structure of the rebates was likely to result in the transfer of funds from one State to another. Public benefits did not outweigh this anti-competitive detriment. HRV's notification was subsequently withdrawn.⁵⁴

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- 51 Certain of the notifications based on other issues were allowed to stand: Australian Competition and Consumer Commission, *National Association of Speedway Racing Inc – Notification to ACCC* (12 February 2008) revoked; Australian Competition and Consumer Commission, *Sprintcar Control Council of Australia Inc – Notification to ACCC* (12 February 2009) revoked; Australian Competition and Consumer Commission, *Placide Pty Ltd and Corio Park Ltd – Notification to ACCC* (12 February 2008), allowed to stand, 27 August 2008.
- 52 Australian Competition and Consumer Commission, *Australian Baseball Federation Inc – Notification to ACCC* (4 September 2006).
- 53 Australian Competition and Consumer Commission, *In respect of a notification lodged by Racing and Wagering Western Australia* (20 December 2007).
- 54 Australian Competition and Consumer Commission, *Harness Racing Victoria – Notification to ACCC* (withdrawn 15 November 2007). See also Australian Competition and Consumer Commission, *Sleepy's Pty Ltd – Notification to ACCC* (16 June 2003) in which notification in respect of purchase from approved suppliers was withdrawn where circumstances had changed after the initial notification.

3 *Franchising and distributorship*

In a determination involving franchise obligations, the ACCC revoked the notification of a mobile refrigeration seal replacement service. Franchisees under this service were required to acquire the two goods used in the manufacture of refrigeration seals from nominated approved suppliers. The ACCC recognised that franchisors often require franchisees to purchase stock or equipment from nominated suppliers, but found that in the situation under consideration there was little public benefit from the notified conduct. Sometimes such restrictions gave rise to higher-quality end products, consistency across the franchise or cost savings to franchisees. There was no evidence that this was the case here.⁵⁵

4 *Exclusive payment option*

A notification by eBay proposed that almost all payments made for goods sold on its site should be through PayPal to ensure better payment security. The ACCC argued that the conduct allowed eBay to use its market power in the online market place (where it was the Australian market leader) to substantially lessen competition in the market in which PayPal operated. There would be no competition in that market for the supply of those services to buyers and sellers using eBay. The benefits of increased buyer protection did not outweigh the anti-competitive effect of the conduct. Following a pre-decision conference the notification was ultimately withdrawn.⁵⁶

5 *In-store demonstrations*

It is arguable that a notification lodged by Coles Supermarkets ('Coles') had important implications for the ongoing treatment of third line forcing conduct. Coles lodged a notification requiring product suppliers who wished to conduct in-store promotions to use the services of CPM Australia Pty Ltd to carry them out. Coles argued that this would assist it to deal with the increased focus on occupational health and safety within stores and also lift the calibre of in-store presentations, which were said to be of variable quality. Suppliers were generally unhappy with this approach, and the ACCC conducted a comprehensive process of market inquiries in relation to the proposal. Coles subsequently withdrew the application. At that time the ACCC noted that little information had been provided by Coles to substantiate claims of efficiency and other benefits, despite the strong opposition to the conduct by suppliers, and 'the detriment likely to flow to some of Coles' suppliers from a loss of choice of demonstrator and potential marketing cost increases.'⁵⁷ This notification occurred around the time

55 Australian Competition and Consumer Commission, *Seal-A-Fridge Pty Ltd – Notification to ACCC* (6 October 2006); Australian Competition and Consumer Commission, *Seal-A-Fridge Pty Ltd – Notification to ACCC* (25 October 2006). Other notifications not involving third line forcing were allowed to stand: see Australian Competition and Consumer Commission, *Notices in respect of notifications lodged by Seal-A-Fridge Pty Ltd and others* (14 September 2007).

56 Australian Competition and Consumer Commission, *eBay – Notification to ACCC* (11 April 2008, withdrawn 3 July 2008).

57 Australian Competition and Consumer Commission, *Coles Supermarket withdraws in-store demonstrations notification* (Press Release, 1 August 2005).

amendments to the *TPA* to introduce a competition test were proposed. These detriments were emphasised by opponents of the amendments. It is likely that the situation had a significant impact on support for the proposed amendments.

6 *Other withdrawals*

There are also a number of withdrawals of notifications listed on the ACCC website where there is no draft revocation notice and which provide no indication of the reasons for the withdrawal.

II CONCLUSIONS

Detailed consideration of third line forcing conduct and the current test by a number of influential reviews has indicated that the *per se* treatment of the conduct under the *TPA* is unwarranted. The enactment of the notification process has provided those involved in third line forcing conduct with protection from proceedings in the great majority of cases. While this is clearly a good thing in one respect, whether this is the most appropriate way to deal with third line forcing is clearly open to question. If the harsh treatment of the conduct is unjustified, the notification process is overkill. The ACCC investigates all of the notifications lodged to apply the statutory test. Each of the notifying parties must submit documentation, usually prepared by its legal advisers. Other interested parties may be consulted and will also require their own legal advice. Given the number of notifications lodged and the numbers actually revoked, the process appears to involve a significant amount of work, expense and administrative activity for a small result.

Without analysing the individual revocations in significant detail, the conduct in many of these examples would be likely to breach a competition test if one existed within the third line forcing provisions. This would involve only a small number of cases, however, as the ratio of revocations to the actual number of notifications is quite small. If a competition test existed in respect of third line forcing, proceedings could be commenced against participants by the ACCC or those affected by the conduct. Authorisation and notification could be available similarly to other Part IV conduct, and would allow conduct if public benefit outweighed anti-competitive detriment. The test would be the same as that currently applied to other types of exclusive dealing. Only those who suspected that their conduct would breach the competition test would be required to lodge an authorisation or notification. The small number of revocations currently being made reinforces the view that little real justification exists in terms of anti-competitive detriment for the harsh treatment of third line forcing and the degree of administrative scrutiny under the current arrangements. The provision should be amended urgently.