

COMPETITION CORRS

FEBRUARY 2008

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RESALE PRICE MAINTENANCE IN 2007

A review of the ACCC's activities in 2007 shows that resale price maintenance (RPM), which is suppliers imposing "price floors" on resellers of their products, continues to be a problem in businesses, large and small. As always, RPM is driven by suppliers' concern that discounting causes channel conflict amongst resellers, adversely affects brand reputation and lowers consumer perceptions of quality.

In the United States, RPM was, until this year, treated by the courts as a "*per se*" – or automatic – contravention, but now it will fall to be analysed by reference to the effect of the conduct on competition.¹ The case that changed this position was one where the party successfully argued that using RPM to protect a brand's image and value in fact had competitive benefits.

In Australia, RPM remains a *per se* contravention of the TPA, and is illegal regardless of its effect (if any) on competition. RPM is a vertical arrangement between a supplier and reseller, and differs from price fixing, which is a horizontal arrangement between competitors.

RPM is an area of enforcement activity for the ACCC, which in 2007:

- obtained judgments in six cases (against Jurlique Pty Limited, Tooltechnic Pty Limited, Dally M Publishing and Research Pty Ltd, TEAC Australia Pty Limited, Netti Atom Pty Limited and Navman Australia Pty Ltd);
- settled two matters by Court enforceable section 87B

undertakings (concerning Jaggad Pty Limited and Kwala Skateboards Pty Ltd);

- settled one matter by agreement (concerning Pandora Jewellery Pty Ltd); and
- commenced one matter which is yet to be determined (concerning Hobie Cat Australasia Pty Limited).

WHAT IS RESALE PRICE MAINTENANCE?

RPM is prohibited by section 48 and defined by sections 96 and 96A of the TPA. The RPM prohibition covers bald statements, attempts and potentially "nods and winks". Specifically, RPM may consist of a supplier:

- telling a reseller the minimum specified price below which products must not be resold;
- inducing or attempting to induce a retailer to not sell below a specified price or to stop discounting;
- setting a price which resellers are likely to understand is the price below which sales must not be made;
- agreeing with resellers that they will not advertise products below a specified price;
- withholding supply to a reseller because the reseller will not agree to stop advertising or selling products below the supplier's specified price; or
- refusing to supply, or a threat of refusing, for the reason that the reseller has not agreed to sell at the specified price, has sold or is likely to sell at less than the specified price or has not agreed not to sell below the specified price.

The price need not be identified in dollar terms as a specific figure – a formula for determining pricing is sufficient. Approximation is sufficient.

¹ US Supreme Court *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, No. 06-480

RPM potentially exposes a corporation and its employees to the same penalties that apply to cartel conduct. The maximum penalty per contravention for an individual is \$500,000 and for a corporation is the greatest of:

- \$10 million;
- three times the value of the benefit obtained from the contravention; or
- if the value of the benefit can't be determined, then 10% of the annual turnover of the body corporate (not just the business unit) in the 12 months preceding the conduct.

These penalties apply not only to a contravention carried into effect; they also cover attempted contraventions, inducing or attempting to induce another person to contravene the prohibition, and being directly or indirectly knowingly concerned in a contravention.

WHAT DO THE SIX CASES SHOW?

First, the fines can be substantial, even for conduct that may not have extended over a long period of time, and even if the prices were not "maintained":

- **Jurlique International:** fines totalling \$3.2M against four companies in the Jurlique group and \$200,000 against the managing director were imposed for 30 contraventions during the six year period for which penalties could be imposed.
- **Navman:** fines of \$1.25M for the company, \$80,000 for a director and \$30,000 for a sales manager were imposed for ten episodes of conduct over a three year period in relation to two products. The conduct was statements discouraging discounts, and actual and threatened termination of dealerships. The Judge accepted the penalties agreed between the parties with great reluctance, and was happier to impose higher penalties.
- **TEAC Australia:** a fine of \$175,000 was imposed on the company in respect of ten acts of RPM on three separate occasions, which occurred over a three week period. As a result of TEAC's actions, the reseller did not advertise the goods below the "go" price for four months. The National Sales Manager, who sent the relevant letters and made the statements, was fined \$15,000.
- **Tooltechnic Systems:** a fine of \$125,000 was imposed in respect of three contraventions even though the prices were not maintained. The conduct was telling resuppliers that they had to supply according to the price list and a threat that a resupplier would receive a smaller wholesale discount if they sold below the specified price.

- **Netti Atom:** fines of \$110,000 for the company and \$11,250 for the National Sales and Purchasing Manager were imposed in respect of one episode of RPM. The conduct was an attempt to induce resuppliers to sell at the list price and a threat (never acted on) to terminate supply arrangements.
- **Dally M:** fines of \$30,000 for the company and \$10,000 for the sole shareholder director were imposed for RPM over a three month period and an attempt to arrive at an arrangement with 100 funeral celebrants to set prices.

Secondly, RPM can occur in very obvious ways (such as a term in a distribution agreement which prohibits sales below a price list) and in less obvious ways (such as an email accompanying a new price list which says *"the new products are going to be so good and priced so well that discounting them will be simply 'bad business'"*).

Thirdly, the desire to manage a brand's value or premium status by focussing on price can lead to dangerous or illegal strategies.

Fourthly, they demonstrate the importance of trade practices compliance programs. The conduct in each of the six cases occurred in organisations where there had been no, or limited, trade practices training. Training may well have prevented the contraventions, demonstrated a culture of compliance within the organisation, and would almost certainly have led to smaller penalties.

Fifthly, reputational damage is often even more harmful than the penalties imposed. Many of the corporations were required to publish advertisements publicising their wrongdoing and to write directly to their customers, informing them of their illegal conduct and reminding them that they are free to independently set prices and offer whatever discounts they wish.

HOW TO PLAY IT SAFE

A supplier must allow a reseller the right to determine the price at which it will resell, subject to three exceptions:

- a supplier may specify a maximum selling price;
- a supplier may specify a "recommended retail price" provided that this is not understood by the reseller as a price floor; and
- a supplier may withhold supply from a reseller who has, within the preceding 12 months, on-sold goods obtained from the supplier at less than their cost, for the purpose of promoting the reseller's own business, or attracting custom. This conduct is referred to as "loss leading".

Importantly, a supplier does not engage in RPM where the reseller is acting as the true agent of the supplier or where the

goods are truly provided to the reseller on consignment from the supplier. For instance, many luxury brands avoid the risk of brand damage resulting from discounting by owning the retail outlets or operating concessions in department stores.

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CARTEL CRIMINALISATION

Swift on its promise to criminalise cartel conduct, the Rudd Government released an exposure draft Bill for comment and discussion on 11 January 2008.

The draft Bill creates both criminal offences and civil penalty provisions. There are two types of offending conduct for the civil provision:

- making a contract, arrangement or arriving at an understanding, which contains a "cartel provision"; and
- giving effect to a contract, arrangement or understanding which contains a "cartel provision".

"Cartel provisions" are defined as provisions to fix prices, restrict output, divide markets (by allocating customers or areas) or rig bids by parties that are, or would otherwise be, in competition with each other. The criminal offence will be satisfied if this conduct is undertaken "with the intention of dishonestly obtaining a benefit". The proposed penalties are:

	Corporation	Individual
Civil	Penalty which is the greater of \$10 million, or three times the value of the benefit obtained from the cartel, or where that cannot be determined, 10% of the annual turnover in the 12 months preceding the cartel conduct	\$500,000 fine
Criminal	Fine, as above	5 years imprisonment and/or a \$220,000 fine

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YOUR INPUT IS SOUGHT

Submissions have been, or will be, sought on four important issues:

(1) DRAFT CRIMINAL CARTEL BEHAVIOUR BILL

The Government is seeking submissions by 29 February, on the following issues:

- What elements should differentiate criminal cartel behaviour from civil cartel behaviour (ie what is the appropriate "test" for criminal conduct)?
- Should telephone interception warrants should be available in relation to the new criminal cartel offences?

(2) GROCERY INQUIRY

On 22 January 2008, the Government instructed the ACCC to hold a public inquiry into the competitiveness of grocery prices pursuant to Part VIIA of the TPA. The ACCC expects to release an issues paper shortly and will call for public submissions on the issues raised in the paper.

(3) CARBON OFFSET CLAIMS

On 16 January 2008, the ACCC released an issues paper regarding the regulation of carbon offset claims (that is, the use of claims such as "carbon neutral" in marketing materials). The ACCC is seeking submissions by 15 February 2008.

Corrs' Competition & Trade Practices Group has extensive experience assisting and representing a wide range of clients in making submissions to regulators. Please do not hesitate to contact us if you have any questions regarding any of these inquiries.

(4) REVISED MERGER GUIDELINES 2008

On 8 February 2008, the ACCC released the *Merger Guidelines 2008* draft which once finalised will replace the *Merger Guidelines 1999*. The ACCC is seeking submissions by 28 March 2008.

LEGISLATIVE ROUND-UP

2007, THE YEAR THAT WAS...

The following key new provisions commenced operation during 2007:

- **Predatory pricing** – New provision prohibits a corporation with a substantial share of a market from pricing below relevant cost for a sustained period.
- **Formal merger clearance** – New clearance regime incorporating strict timelines and a right of appeal to the Australian Competition Tribunal.
- **Merger authorisation** – Amendments to the existing merger authorisation process allow applicants to proceed directly to the Australian Competition Tribunal.
- **Collective bargaining notification** – Small businesses may now apply for immunity using the quicker and easier notification process instead of the existing authorisation process.
- **Joint venture defence for boycotts and price fixing** – New defence to exclusionary and price fixing provisions for the purposes of a JV that do not have an anticompetitive purpose, effect or likely effect.
- **Dual listed company arrangements** – New prohibition on making, or giving effect to, dual listed arrangements that have an anticompetitive purpose, effect or likely effect.
- **Search and seizure powers** – New regime governing the entry of ACCC personnel onto premises, either with consent and under a search warrant.
- **Third line forcing** – Third line forcing between related bodies corporate no longer a *per se* breach of the TPA.
- **Penalties** – Maximum penalties for corporations increased to the greater of \$10 million, three times the benefit obtained from the contravention or (if the benefit cannot be determined) 10% of annual turnover.
- **Anticompetitive deals** – The Government is considering amendments to the prohibition on anticompetitive agreements, arrangements or understandings. The ACCC is pushing for the inclusion of a definition of “understanding” that would more clearly encompass an expectation that has been engendered by the parties.
- **Creeping acquisitions** – Possible amendment to the merger provisions would allow the ACCC to take into account the cumulative effect of recent acquisitions made by the buyer.
- **Extension of investigatory powers** – ACCC may be granted new powers that are able to be relied upon in lieu of cease and desist orders.
- **Misuse of market power** – Amendments may seek to clarify the meaning of “taking advantage” and the importance of recoupment.
- **Predatory pricing** – The new provision is already under review.
- **Petrol commissioner** – The introduction of a petrol commissioner has been foreshadowed.

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2008, THE YEAR THAT MIGHT BE...

The Labor Government has indicated that the following are on the agenda:

- **Criminal sanctions for cartel** – Draft Bill released that would impose criminal penalties for serious cartel conduct of up to 5 years imprisonment and/or fines of up to \$220,000 for individuals and \$10 million for corporations.

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