

2003

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This article was originally published as:

Evans, P. J. (2003). Primary boycotts and medical services. *Legal Issues in Business*, 5, 51-55.

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Primary Boycotts and Medical Services

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Abstract

The *Trade Practices Act 1974* (Cth) (the *TPA*), prohibits the making of, or the giving effect to, contracts, agreements or understandings between competitors which purport to prevent the supply of goods or services to persons. These arrangements are known as exclusionary provisions or primary boycotts. This article discusses the role of the Australian Competition and Consumer Commission (ACCC) in enforcing the prohibition of the making of exclusionary provisions and the application of the relevant legal principles. An understanding of these principles is important to all those involved in allied health professions. The article further discusses two recent examples where medical practitioners were found to have breached the exclusionary provisions of the *TPA* by entering into arrangements to boycott bulk billing and restrict the provision of after-hours medical services to patients.

Introduction

Recent court actions initiated by the ACCC have made it clear that peer group pressure from doctors or professional associations, which induce or attempt to induce a boycott of bulk billing or restrict access to health care services, is a serious breach of the primary boycott provisions of the *TPA*. It is clearly a matter of high priority for the ACCC.¹ Allied health professionals who work in association with medical practitioners should be aware of the impact of this legislation on the delivery of their services in the health care area.

Before considering the legal elements necessary to prove the existence of an exclusionary provision, the role of the ACCC in enforcing the provisions of the *TPA* will be discussed.

The role of the ACCC

The ACCC is a Commonwealth statutory authority responsible for the enforcement of the *TPA*, which deals with the two areas of restrictive trade practices and consumer protection. With respect to consumer protection, its role complements that of the state consumer affairs agencies, which administer the consumer protection mirror legislation enacted by the states.²

The objectives of the ACCC are to:

- improve competition and efficiency in markets;
- foster adherence to fair trading practices in a well-informed market;
- promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective; and

¹ 'Federal Court Finds Rockhampton Obstetricians' Boycott of "No-Gap" Billing Breached Competition Laws.' ACCC Media Release MR264/02 (31 October 2002).

² In Western Australia, the relevant legislation is the *Fair Trading Act 1987*.

- inform the community about the *TPA* and its specific implications for both business and consumers.³

Exclusionary provisions

Section 45 of the *TPA* prohibits contracts, arrangements or understandings between competitors that give effect to what are known as exclusionary provisions. An exclusionary provision, which is also known as a primary boycott, is a provision in an agreement between two or more parties who are in competition, which has been made with the purpose of preventing or restricting the supply of goods or services to, or the acquisition of these goods or services from, another person or class of persons.⁴

To establish the existence of an exclusionary provision, two elements are necessary:

1. a contract, arrangement or understanding (CAU) made between persons, any two of whom are in competition. (This is described as the horizontal element.); and
2. the CAU must have the purpose of preventing, restricting or limiting the supply of goods or services to or from a particular person (this is described as the vertical element).

These types of arrangement are prohibited outright (known as *per se* prohibitions) by the *TPA* regardless of the effect of competition in the relevant industry or profession.

Before section 45 can have any application, it is necessary for the ACCC to show that a CAU has been made or given effect. This in turn raises two separate issues. Firstly, the definition of a CAU, and secondly

the evidence necessary to show the existence of a CAU.

Contracts, arrangements and understandings

In the context of trade practices prohibitions it would be highly unusual for competitors to enter into a formal contract to pursue an illegal purpose. It is more usual for competitors to enter into general discussions about the state of the particular market, industry or profession. These discussions may lead to more subtle informal types of agreements or understandings where one or more parties indicate what action they propose to take with respect to the market in the near future.⁵

Mutuality

It is not necessary that each party to the agreement make a mutual commitment to act in particular way. It is sufficient that the parties have communicated with one another and have come to an understanding that only one party is expected to act in a particular way.⁶

In reality, whether or not there is any requirement for mutuality is perhaps insignificant because it is difficult to envisage a situation where one competitor would make a commitment to act in particular way without some similar commitment from another competitor.⁷

Evidence of a CAU

It is rare for direct evidence of the existence of a CAU to be available and reliance is usually placed on circumstantial evidence. For example, in situations where there is some sudden uniform market behaviour by competitors, unless there is some plausible commercial reason for the uniform behaviour, the courts will presume the existence of a CAU.

³ Australian Competition and Consumer Commission *Summary of the Trade Practices Act 1974* (Canberra: AGPS, 2002).

⁴ See section 4D of the *TPA* for a definition of the term 'exclusionary provision.'

⁵ See *TPC v Nicholas Enterprises Pty Ltd* (1979) 40 FLR 83; *Morphett Arms Hotel v TPC* (1980) 3 ALR 88; *TPC v David Jones (Australia) Pty Ltd* (1986) 13 FLR 446.

⁶ See *TPC v Nicholas Enterprises Pty Ltd* (1979) 40 FLR 83.

⁷ See Lockhart J in *TPC v Email Pty Ltd* (1980) 31 ALR 53 at 66.

For example, in *TPC v Nicholas Enterprises Pty Ltd*,⁸ it was held by the court there was an understanding evidenced by circumstantial evidence. The circumstantial evidence which proved the existence of an agreement, was a luncheon attended by a number of hotel owners at which one owner indicated that he was going to reduce his discount on beer from 16 to 14 per dozen and within a short time the same discount was offered by the other owners who had attended the meeting.

Similarly in *TPC v David Jones (Australia) Pty Ltd*⁹ (the *David Jones* case), at a meeting between three retailers and a distributor of manchester, it was found by the court that the parties arrived at an understanding that the retailers would sell the manchester at certain prices set out in a list prepared by the distributor. While there was no direct evidence of the existence of a CAU, the inference was that the retail competitors were parties to an understanding. The court placed considerable significance on the similar pricing structure which the retailers adopted shortly after the meeting. Even though the retailers did not price the manchester to accord with the distributor's price list, in the light of their previous practices there was significant uniformity in their conduct following their meeting.

By comparison in *TPC v Email Ltd*,¹⁰ two manufacturers of electricity meters, Email and Warburton, issued identical price lists, submitted identical tenders, adopted the same price variation clauses in contracts, and sent to each other their respective price lists. The court determined however that there was no arrangement or understanding which contravened s 45 of the *TPA*. There was no expectation that the party receiving the price list would be induced to change its prices. The conduct of the competitors was explained by rational commercial considerations

based on market forces, competition and commercial necessity.

Summary of legal principles

From the above it can be seen that there are three elements in establishing whether the agreement between competitors is a CAU for the purposes of the *TPA*:

1. the parties have met or communicated with each other;
2. the meeting or communication has raised an expectation amongst the parties that a particular conduct or action will follow; and
3. each party accepts that they will behave in some agreed manner.

Having established that the agreement was a CAU for the purposes of the *TPA*, the evidence of the existence of the CAU will be inferred if there is some uniformity in conduct following the meeting or communication.

Competition

Section 45 is directed towards regulating what are termed horizontal restraints on competition, that is, the prevention of the making of exclusionary arrangements between competitors. In order to satisfy the element of 'competition' only one party is required to be a corporation.¹¹ It is not necessary that all the parties need be in direct competition with each other but at least two must be. These two competitors must be in competition with each other with respect to the type of goods or services to which the exclusionary provision (boycott) relates.

While there is no difficulty in the interpretation of what might constitute competition between medical or health services providers, there have been instances where the courts have had to determine if the parties to the agreement were in fact in competition with each

⁸ (1979) 40 FLR 83.

⁹ (1986) 13 FCR 446.

¹⁰ (1980) 31 ALR 53.

¹¹ 'Corporation' is defined in section 4 of the *TPA*.

other. The issue of competition was considered in *Hughes v Western Australian Cricket Association (Inc)*¹² (the *Hughes* case).

Kim Hughes, a former Australian cricket team captain, had led a 'rebel' cricket team to South Africa in defiance of the 'Gleneagles Agreement' between Commonwealth nations which prohibited sporting contact with South Africa. When he returned, Hughes was prevented from playing Test, Sheffield Shield, district or club cricket in accordance with the Cricket Council rules. These rules had been amended following meetings between the Western Australian Cricket Association (WACA) and the local cricket clubs.

The Federal Court found that the district clubs were in competition with each other for the services of cricketers. The court held that the amendments to the rules were an exclusionary provision which prevented Hughes from playing cricket and earning a living.

The purpose

The exclusionary provision in the CAU between competitors must also have the purpose of restricting supply of goods or services to a particular person (as in the *Hughes* case) or class of persons (such as manchester purchasers in the *David Jones* case). The purpose of the boycott must be common to all parties to the CAU. In *Carlton & United Breweries v Bond Brewing New South Wales Ltd*,¹³ it was held by the court that the purpose of a boycott must be common to all parties to the CAU before s 45 will apply. For example where two competitors enter into a CAU and one party wishes to harm the subject group or person (the target), and the other enters into the CAU for some legitimate commercial purpose, there will be no

'common purpose' to restrict supply and s 45 will not be contravened.¹⁴

Particular person or class of person

While the exclusionary provision in the CAU may be directed at a particular person,¹⁵ it is more usual that the exclusionary provision is directed towards a class of persons without persons being specifically named.

Enforcement and remedies

The *TPA* prescribes a number of remedies for breaches of s 45. These include pecuniary penalties, injunctions, damages and a broad range of ancillary orders.¹⁶ Examples of typical ancillary orders are mentioned below in the discussion of the two cases referred to above. With respect to pecuniary penalties, s 76(1)(A) of the *TPA* provides that if a contravention of Part IV (the Anti-Competitive Provisions) is established, the penalty for a corporation is \$10,000,000 for each contravention, and in the case of a person, \$500,000 for each contravention.

Recent examples of cases involving boycotts

Case 1: Boycott of 'No-Gap' billing

In April 2002, the ACCC instituted proceedings against three Queensland doctors who provided hospital obstetric services in the Rockhampton area. The ACCC alleged that there was a provision in an agreement between them boycotting the 'No-Gap' billing arrangements offered by a number of health insurance funds.¹⁷

The ACCC further alleged that the three doctors entered into agreements (in December 2000 and January 2001) that none of them would provide 'in-hospital' obstetric services to their patients on a 'No-

¹² (1986) 69 ALR 660.

¹³ (1987) ATPR 40-820.

¹⁴ Note also the exclusionary purpose must be a 'substantial' purpose. That is, it must be a considerable or large part of the agreement between the parties. See *News Limited v Australian Rugby Football League* (1996) 64 FCR 410.

¹⁵ See *McCarthy v Australian Rough Riders Association Inc* (1988) ATPR 40-836.

¹⁶ See ss 76, 80, 82 and 87 of the *TPA*.

¹⁷ See footnote 1.

Gap' billing basis. The result of the boycott was that approximately 200 patients were required to pay a gap for the in-hospital medical expenses associated with the birth of their child. These expenses would not have been incurred in the absence of the agreement between the three doctors.

This type of agreement is clearly prohibited by the primary boycott provisions of the *TPA* which prohibits persons in competition with each other from collectively agreeing to prevent, restrict or limit the provision of services to particular persons or classes of persons. The conduct by the three doctors resulted in substantial financial costs to the respective consumers of the medical services.

In finding that the doctors had engaged in conduct in contravention of the exclusionary provisions of the *TPA*, the Federal Court made a number of orders by consent finalising the action by the ACCC against the doctors. These orders, made in October 2002, included:

- the repayment of approximately \$97,000 to the affected patients;
- findings that all three doctors had engaged in conduct in contravention of the *TPA*;
- injunctions requiring two of the doctors to contribute to the cost of publishing a public notice in the local newspaper advising residents of the outcome of the matter; and
- an order requiring the doctors to contribute to the ACCC's legal costs.¹⁸

Comment

An interesting aspect of the action against the doctors was that even though one of the doctors had not provided his services on a 'No-Gap' basis at the time of making the arrangement with the other two and his patients had always been required to pay a gap and

were thus not affected by the agreement, the doctor's conduct in persuading his two colleagues to enter into the boycott arrangements had a detrimental impact on the other two doctors' patients.

The ACCC in its action noted that medical practitioners who oppose 'No-Gap' billing are free to act on their own behalf but should respect the right of fellow practitioners to conduct their own practices with 'No-Gap' billing if that is their preference. However medical and health service providers who are coerced or persuaded by others to engage in collective boycotts must resist succumbing to that influence as such arrangements are prohibited by the *TPA* and are a high priority area for the ACCC.

Case 2: Boycott of bulk billing and restrictions on after hours service

In December 2002, the ACCC instituted proceedings against a Melbourne doctor alleging the doctor attempted to induce a boycott of bulk billing and after-hours services by doctors wanting to practice at a suburban medical centre.¹⁹ The ACCC alleged that the doctor had insisted upon the incorporation of 'Rules' in any leases of the medical centre's suites. These rules imposed obligations on any general practitioners operating separate businesses in competition with him. These obligations were not to provide bulk billing services to patients (with the exception of pensioners, Health Card holders or the GP's immediate family members), and not to provide medical services to patients after 8pm Monday to Saturday or after 1pm on Sundays.

The ACCC alleged that it was the doctor's intention that by incorporating the 'Rules' into the leases for the medical centre suites, anyone who leased a suite would be subject to the 'Rules'. The Federal Court declared that the doctor (specifically the doctor's incorporated

¹⁸ Section 87 of the *TPA* confers a wide power on the Court to make remedial orders in appropriate cases relating to prohibited conduct.

¹⁹ 'Federal Court Finds Doctor Attempted to Induce Boycotts of Bulk-Billing, After Hours Service at Medical Centre.' ACCC Media Release MR 44/03, (7 March 2003).

company) by including these rules in the lease had attempted to make, and induce a contravention of the exclusionary provisions of the *TPA*.

The action was settled following mediation. No pecuniary penalties were sought by the ACCC against the doctor or his company but it was agreed that the doctor and his company would pay the ACCC's costs of \$10,000.

Comment

In referring to the decision, the Chairman of the ACCC, Professor Allen Fels, noted:²⁰

Peer group pressure from doctors or professional associations which induces or attempts to induce a boycott of bulk billing by competing medical practitioners is a serious breach of the Trade Practices Act 1974 and a matter of high enforcement priority for the ACCC.

and

Parliament has recognised the serious detrimental impact on competition and consumers of primary boycotts and attempted boycott arrangements and has prohibited such arrangements outright, that is, without having to establish the anti-competitive effects of the arrangements.

Conclusion

While the examples above address the specific context of prohibited conduct by doctors in the provision of medical services, the principles and outcomes apply equally to corporations, professional associations and individuals involved in the provision of health care services generally.

While the concern of the ACCC in each of the above cases was to ensure that consumers have adequate access to health care services, and not to pursue health care providers who are providing such services within the law, the *TPA* deems any boycott arrangement anti-

competitive due to the detrimental effect on competition, and any allegations of boycotts are a high priority for action by the ACCC.

Health care providers who are induced by competitors to engage in such boycotts must resist succumbing to those influences as these arrangements are expressly prohibited by the *TPA*, and the remedies which will be imposed by the courts for breaches of the boycott provisions are both extensive and onerous on the parties to such agreements.

²⁰ See footnote 19.

