

Third Line Forcing Provisions Given a Wider Reach

Corporations should take care not to inadvertently breach the “exclusive dealing” provisions of the *Trade Practices Act* (Cth) 1974 in light of a recent decision of the Federal Court. Particular care should be taken in relation to third line forcing, which is per se illegal.

Whereas most of the exclusive dealing provisions contained in the *Trade Practices Act* are subject to a “substantial lessening of competition” test, third line forcing is not subject to any competition test. It occurs when a corporation engages in certain vertical restraint practices, including where it:

- supplies goods or services on the condition that the purchaser acquires goods or services directly or indirectly from a third party; or
- refuses to supply goods or services because the purchaser refuses to acquire other goods or services directly or indirectly from a third party.

It is illegal for a person to aid, abet, procure, counsel or induce any corporation to engage in any of the conduct referred to above. A breach can result in the imposition of pecuniary penalties of up to \$10,000,000 for corporations or \$500,000 for individuals in addition to damages, injunctions and remedial orders.

In determining whether third line forcing has occurred, the acquisition of goods or services “indirectly” has previously been interpreted by the courts to mean an acquisition of goods or services from an agent of that person. In the recent decision of *ACCC –v- IMB Group Limited (In Liquidation)*, the Federal Court took a broader view that the term “indirectly” should not be limited to an acquisition from an entity that is a legal agent of the other person. The court held that the

facts of each case should be considered to determine whether an acquisition of goods or services from the same supplier can be said to be an acquisition indirectly from a third party within the ordinary meaning of that expression.

In making his decision, Justice Dowsett acknowledged the legislative intent of the *Trade Practices Act* to have a wide reach. The decision indicates that in future the courts are likely to find that an arrangement involves an indirect acquisition of goods or services in a wider range of circumstances than they have done in the past. Prohibited arrangements may not be limited to those that require the purchaser to acquire goods or services from a second supplier. Arrangements where purchasers are provided with goods or services on the condition that they acquire additional goods or services produced by a third party from the same supplier may be prohibited. Examples that are common in the market place are distribution arrangements, especially in areas such as franchising. Whether or not such arrangements are in breach of the *Trade Practices Act* will depend on the facts of the particular arrangement.

As a corporation proposing to engage in conduct that may amount to third line forcing may avoid liability by lodging a notification with the ACCC, further advice should be obtained if there is any doubt that a corporation may be about to engage in this type of conduct.

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THE KEMP
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BRIEF

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THE KEMP STRANG BRIEF IS INTENDED TO KEEP READERS ABREAST OF CURRENT LEGAL AND FIRM DEVELOPMENTS. IT IS NOT TO BE USED OR RELIED UPON AS A SUBSTITUTE FOR PROFESSIONAL ADVICE. BEFORE ACTING ON ANY MATTER, READERS SHOULD CONSULT WITH THEIR ADVISERS.

A look at a recent High Court Ruling dealing with client/lawyer confidentiality.

High Court Makes Important Ruling Regarding Legal Professional Privilege

The High Court of Australia has recently given a ruling which ends two years of legal uncertainty regarding a client's right to maintain the confidentiality of communications with their lawyers created in the course of seeking and obtaining legal advice.

The High Court has allowed an appeal by Daniels Corporation International Pty Limited ("Daniels"), ruling that the solicitors for Daniels were not required to produce documents that were properly the subject of legal professional privilege to the Australian Competition & Consumer Commission ("ACCC"). The ACCC had issued a notice pursuant to Section 155 of the Trade Practices Act to Daniel's solicitors requiring them to produce documents. The terms of the notice were argued to extend to documents the subject of legal professional privilege.

Section 155 of the Trade Practices Act gives extremely wide powers to the ACCC to require information and documents to be provided to it for the purpose of its investigation. The ACCC argued legal professional privilege could not be raised in response to a notice under Section 155.

The Full Court of the Federal Court had earlier held that the solicitors for Daniels were not entitled to refuse to produce documents to the ACCC on the ground of legal professional privilege. The High Court's judgment overturned the earlier Federal Court decision on this point.

It is important to note that the High Court has confirmed that legal professional privilege will not extend to documents brought into existence

to further a breach of the law. In Daniels case the majority of justices said:

"The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Trade Practices Act should not be accepted. A communication, the purpose of which is to seek help to evade the law by illegal conduct, is not privileged."

'...the High Court has confirmed that legal professional privilege will not extend to documents brought into existence to further a breach of the law.'

The Court has confirmed that, in the absence of a statutory provision to the contrary, legal professional privilege may be availed of to resist the giving of information or the production of documents in accordance with statutory investigatory procedures of the kind provided by Section 155 of the Trade Practices Act.

The matter has been returned to the Federal Court to determine what documents are properly the subject of legal professional privilege.

The message for clients is that they may still have confidence that, in the absence of an express statutory provision in a statute, communications with their lawyers for the purpose of obtaining legal advice will remain confidential provided that the advice is sought and given for a proper purpose.

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Bankruptcy Trustee Side Steps Family Court Orders

In *Official Trustee in Bankruptcy –v- Higgins* (“Higgins”) the Official Trustee in Bankruptcy (“Trustee”) was able to successfully obtain an order declaring a transfer of property from the bankrupt to the bankrupt’s spouse void, even though the transfer had been made pursuant to Family Court orders. The Court was prepared to make the Orders declaring the transfer void without the Family Court orders being first set aside. In *Higgins*, Kemp Strang acted for the Trustee.

There is often a difficult tension between the interests of the bankrupt’s spouse in a matrimonial property, and the interests of unsecured creditors of the bankrupt, particularly when the bankrupt has transferred property pursuant to Family Court orders. The decision in *Higgins* addresses the issue of the Trustee’s right to recover the property under sections 120 and 121 of the Bankruptcy Act 1996, and the bankrupt spouse’s interest in the property as a result of Family Court orders.

Facts

In September 1999, Mr Higgins as a company director, was issued with a director penalty notice by the Deputy Commissioner of Taxation for \$136,616.22. Mr Higgins failed to comply with the notice, and became personally liable for the debt. Subsequently, in October 1999, Mr Higgins and his wife, filed consent orders in the Manly Local Court transferring Mr Higgins’ interest in the matrimonial home (“the Property”) to his wife pursuant to section 79 of the Family Law Act (“Family Court orders”). Mr Higgins’ wife did not pay any money for the transfer. At the time the Manly Local Court exercised its jurisdiction under the Family Law Act 1975 (Cth) and made the Family Court orders, Mr Higgins was unable to pay his own debts, including the director liability debt. In February 2000, Mr Higgins became bankrupt upon filing a debtor’s petition.

Trustee Claim

The Trustee applied to the Federal Court to set aside the transfer of the Property pursuant to sections 120(1) and 121(1) of the Bankruptcy Act. The Trustee argued that, despite the Family Court orders, the Trustee was entitled to have the transfer set aside pursuant to the Bankruptcy Act. Mrs Higgins argued that no such order could be made unless the Family Court orders were first set aside, but admitted that the elements of sections 120 and 121 of the Bankruptcy Act were present.

Accordingly, the only issue for determination in *Higgins* was whether the Family Court orders had in fact to be first set aside.

Decision

The matter was initially heard in the Federal Court by His Honour Justice Tamberlin who considered that the Trustee was entitled to an order having the transfer declared void pursuant to sections 120 and 121 of the Bankruptcy Act. However, to avoid any possibility of conflicting orders between the Family Court orders and any order of the Federal Court, Justice Tamberlin transferred the matter to the Family Court. The matter was heard before Her Honour Justice Moore in the Family Court.

Her Honour held that the Trustee did not have to apply to set aside the Family Court orders, before the Trustee could obtain orders declaring the transfer of the Property void under the Bankruptcy Act. In effect, a transfer of property pursuant to Family Court orders is good against other parties, but is void as against a bankruptcy trustee (provided that the elements of section 120 and 121 of the Bankruptcy Act can be proved).

The decision in *Higgins* establishes that a bankruptcy trustee has power to apply to the Federal Court for orders declaring a property transfer void as against the trustee, despite the transfer having occurred pursuant to existing Family Court orders. The decision should make it easier for a trustee in bankruptcy to recover property for a bankrupt’s creditors, without having to first apply to have Family Court orders set aside.

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Our December interview is with Jim Eager, a partner practising principally in our Commercial Property and General Commercial areas. Jim talks about his work life and "out of office" existence.

How long have you been at Kemp Strang?

I joined Kemp Strang just before my first child was born which I remember as if it were yesterday but Sarah is about to turn 14. I must say the last 14 years has flown by which is probably an indication that I generally enjoy my life, both at work and at home.

Why did you decide to move here?

Before joining Kemp Strang I had worked at a small firm, a mega firm and a medium size firm and I had come to the view that I wanted to be in a firm that was large enough to have a depth of experience to call upon but small enough to be able to keep that personal touch with a broad range of clients. As practising law is to help people, I believe my

role is to resolve a client's commercial problem, not just answer a legal question in a vacuum.

What type of clients do you act for?

That can be answered in two ways. I act for huge multi-nationals and for individuals and for all types of clients in between.

The other

answer to the question is that everyone I act for is an individual because no matter who your client is, you are dealing with individuals who have an interest in the result.

You are also an associate of the Australian Property Institute?

Yes, I became an Associate of the Australian Institute of Valuers and Land Economists (AIVLE) about 6 or 7 years ago. The AIVLE changed its name to the Australian Property Institute several years ago and represents people in the valuation and property areas. It was an honour to be appointed recently as a New South Wales counsellor of the API and I have enjoyed my time there with a good number of my friends in the valuation and property industry who I have met over the last 20 years.

What are your outside interests?

With three children between 8 and 14, I can say I have developed an interest in watching (and driving to) sport every weekend. I also must say I like eating and enjoy a good meal at a good restaurant with family and friends. In my next life I could quite happily be a restaurant reviewer! My wife, Lynda, and I also enjoy art, for enjoyment not for profit, and we try and get out to see a play with friends as often as possible.

B e h i n d t h e
S c e n e s . . .

Welcome to new
solicitors

Julian Walsh, Auspen Chia and
Sarah Yap.

Green Building Council
of Australia

Kemp Strang acted as Legal Counsel to the Green Building Council of Australia which was launched in Sydney in late October and advised on all aspects of its establishment. The Council is a joint initiative of the Australian property sector and the NSW, Victorian and Federal Governments. Its initial primary focus is to develop an environmental ratings tool for commercial property.

Wishing you a very
happy Christmas

The partners and staff take this opportunity to wish you all a very happy and peaceful Christmas and a prosperous New Year.

To break with tradition we have decided not to send Christmas cards to our clients. This year, instead, we will donate the costs we would have incurred on postage and the printing of our cards to two charities, The Starlight Foundation and The Salvation Army.

If you do not wish to receive future mailouts or would like to receive this newsletter electronically, please email us at info@kempstrang.com.au or telephone Marianne Slocombe on +61 2 9225 2578

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