HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

VISY PAPER PTY LIMITED & ORS APPELLANTS

AND

AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION RESPONDENT

Visy Paper Pty Limited v Australian Competition and Consumer Commission
[2003] HCA 59
8 October 2003
S209/2002

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

N J Young QC with M H O'Bryan for the appellants (instructed by Minter Ellison)

B R McClintock SC with V F Kerr for the respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Visy Paper Pty Limited v Australian Competition and Consumer Commission

Trade practices – Restrictive trade practices – Exclusionary provisions – Exclusive dealing – Arrangements for waste paper collection – Where non-competition provisions have dual and composite character – Non-competition provisions preventing both the acquisition of goods from, and the supply of services to, particular persons – Both aspects of the non-competition provisions contravened s 45(2)(a)(i) of the *Trade Practices Act* 1974 (Cth) and one of those aspects would, but for s 47(10), have contravened s 47 – Whether s 45(6) precluded the application of s 45(2)(a)(i) to both aspects of the non-competition provisions or only that aspect covered by s 47.

Words and phrases – "provision", "by reason that", "give effect to", "condition".

Trade Practices Act 1974 (Cth), ss 4(1), 4D, 45(2)(a)(i), 45(6), 47.

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. This case arises out of attempts the first appellant ("Visy Paper") made to make an agreement with Northern Pacific Paper Pty Ltd ("NPP") under which NPP would have been prevented from acquiring goods from some third parties and would have been prevented from supplying services to those third parties. The respondent ("the ACCC") contended that these attempts contravened the *Trade Practices Act* 1974 (Cth) ("the Act").

2 Part IV of the Act contains a number of provisions dealing with what its heading describes as "Restrictive Trade Practices". Since the Act was first enacted, various amendments and additions have been made to the provisions of Pt IV. This appeal concerns the relationship between certain provisions of Pt IV, as they stood in 1996 and 1997. In particular, it concerns the relationship between provisions of ss 45 and 47. Section 45 dealt (among other things) with the making of a contract, arrangement or understanding which contained an "exclusionary provision"[1]. Section 47 dealt with "the practice of exclusive dealing".

3 The central issue debated on the appeal concerned the operation of s 45(6) of the Act. So far as relevant, that sub-section provided that:

> "The making of a contract ... does not constitute a contravention of this section by reason that the contract ... contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) ... constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract ... by way of:
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> (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) ... contravene, section 47".

4 Section 47(1) prohibited exclusive dealing. It provided that:

> "Subject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing."

Sections 47(2) to (9) identified various forms of dealing which constituted a corporation engaging in the practice of exclusive dealing. Sub-section (10) provided that sub-section (1) did not apply to identified forms of exclusive

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1 s 45(2)(a)(i).

dealing, unless engaging in that conduct had the purpose, or would likely have the effect, of substantially lessening competition[2].

5 The particular provision about exclusive dealing which must be considered in this appeal is s 47(4), in so far as it dealt with the acquisition of goods or services on condition that the person from whom they are acquired will not supply particular goods or services to a particular class of persons.

6 Section 4D of the Act defines an "exclusionary provision". It includes a provision of a contract, arrangement or understanding made, or proposed, between persons, any two or more of whom are competitive with each other, which has the purpose of preventing, restricting or limiting the *supply* of goods or services to, or the *acquisition* of goods or services from, particular persons or classes of persons, by all or any of the parties.

7 The word "provision" is used here and elsewhere in Pt IV in a comprehensive rather than any technical sense reflecting its usage in contract law. It invites attention to the content of what has been, or is to be, agreed, arranged or understood, rather than any particular form of expression of that content adopted, or to be adopted, by the parties. This is emphasised by the statement in s 4(1) that "in relation to an understanding" provision means "any matter forming part of the understanding".

8 It also should be observed that "condition", the word used in s 47(4), likewise has a meaning uncircumscribed by contract law notions. Section 47(13) stated in par (a) that, in s 47:

> "a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances".

9 The definition of exclusionary provision in s 4D encompasses more than that identified above but it is not necessary to consider those wider applications. What is important is that the definition of exclusionary provisions extends to provisions which deal with the supply or the acquisition of goods or services. Accordingly, s 45(2) prohibited corporations who are competitors from making a

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2 Section 47(13) gave further content to what was meant by the reference to competition.

contract, or arrangement, or arriving at an understanding, which had the purpose or effect of restricting or limiting the supply, or the acquisition, of goods or services, to or from particular persons. By contrast, the form of exclusive dealing said to be relevant in this appeal (that described in s 47(4)) does not deal with conditions which restrict both supply and acquisition. It deals with the acquisition of goods or services on the condition that the person from whom the goods or services are acquired will not *supply* goods or services to particular persons (as distinct from *acquire* goods or services from them).

The facts

10 In this Court, the parties accepted that collecting waste paper could be identified as providing a service to the person from whom it was collected (the service of waste collection) and as an acquisition of goods (the acquisition of title to the goods collected). This double characterisation reflected the market for waste paper. Sometimes, a collector paid to acquire the waste paper; sometimes a collector was paid to take it away. Sometimes no payment was made – the collector simply took it away. Sometimes the collector provided bins or other receptacles in which the waste paper was held pending its collection. In every case the collector took title to the waste paper, but in some circumstances it could be said that the collector provided a service to the person from whom it was collected.

11 Who paid whom, and how much, was, at the relevant times, affected by the price obtainable for exporting waste paper. If export prices were high, Visy Paper sometimes found it difficult to acquire waste at a suitable price; if export prices were low, it might have lowered its price or even charged for its collection.

12 Visy Paper conducts a vertically integrated business involving the collection of waste paper and cardboard, and the recycling of this material to produce paper and cardboard. At the relevant times, NPP conducted a business collecting waste paper which it sold to recycling companies, including Visy Paper. Visy Paper and NPP competed in collecting and acquiring waste paper; they dealt with each other as acquirer and supplier of goods when NPP supplied paper to Visy Paper.

13 Visy Paper sought to make an agreement with NPP which would not only provide for NPP to supply waste to it, but would also preclude NPP from acquiring waste from actual, or certain prospective, suppliers of waste to Visy Paper. It proposed that the contracts contain both a provision restricting the supplier from *acquiring* goods (waste paper) from particular persons (Visy Paper's customers and those with whom it had entered discussions or negotiations

to become a customer) and a provision restricting the supplier from *supplying* services to those persons (the service of waste collection).

14 There were six separate proposals in issue in the proceedings below, four relating to agreements described as "Exclusive Collection Agreements" and two relating to "Supply Agreements". In fact, no concluded agreement was reached, but the respondent alleged that Visy Paper and certain of its employees (the second and third appellants) had attempted to contravene s 45(2) of the Act. It was alleged that on each of the occasions that Visy Paper, or its employees, tendered a form of agreement to NPP containing provisions of the kind earlier described, it, or they, attempted to make, or attempted to induce NPP to make, a contract in contravention of s 45(2).

15 Section 45(2) stated, among other prohibitions, that a corporation shall not make a contract, arrangement or understanding containing an exclusionary provision (s 45(2)(a)(i)). Nor shall a corporation "give effect to" an exclusionary provision (s 45(2)(b)(i)). Here and in s 45(6), the expression "give effect to" included the doing of "an act or thing in pursuance of or in accordance with" a provision of a contract, arrangement or understanding, and the enforcement or purported enforcement thereof (s 4(1)).

16 The appellants described the issue thus presented in the appeal as being how did s 45(6) apply to the attempted making of a contract containing an express provision, where giving effect to that provision would fall within both s 45(2)(a)(i) and s 47(4)?

The proceedings below

17 The primary judge (Sackville J) dismissed the proceedings brought by the ACCC, holding that, had any of the proposed agreements been made, s 45(6) would have applied to remove the making of the contract from the prohibition in s 45(2)(a)(i)[3]. It is desirable to say something about the reasons the primary judge gave for reaching that conclusion for they are reasons that closely reflect the way in which the ACCC put its case at trial.

18 The ACCC conceded at trial (and it has not since been in issue) that Visy Paper's conduct could not be shown to have had a purpose, or the effect, of substantially lessening competition in a relevant market. No doubt that

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3 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 at 757 [129].

concession reflected the importance of the presence of one other large participant in the market – Amcor Ltd. It followed, therefore, that the making of any of the proposed agreements would not have constituted a contravention of s 47. Section 47(10) would have operated to take outside the prohibition of s 47(1) the conduct of making or giving effect to any of the agreements which it was proposed should be made with NPP.

19 The ACCC contended that to make an agreement containing non-competition provisions of the kind proposed would have contravened s 45(2). It submitted that the non-competition provisions not only prohibited NPP from acquiring goods, but also prohibited it from supplying services. The ACCC submitted that, having regard to this so-called "dual operation" of the proposed non-competition provisions, s 45(6) applied neither to the making of the agreements, nor to any conduct by Visy Paper constituted by its giving effect to them, "in so far as the [non-competition provisions] prevented NPP from acquiring goods from third parties"[4]. That is, the submissions of the ACCC sought to take the proposed non-competition provisions and break them up into what were described as "discrete legal obligations"[5]: separate obligations not to supply services to, and not to acquire goods from, actual or prospective customers of Visy Paper.

20 The primary judge did not accept that the non-competition provisions could be divided into discrete components without doing violence to the language in which they were couched[6]. That being so, he rejected the contention that the words "by reason that", when used in s 45(6), were to be understood, as the ACCC had contended, as equivalent to "if and in so far as". Support for that rejection was found[7] in the apparently deliberate choice of different words in ss 45(5) and 45(7) ("in so far as") from those used in s 45(6) ("by reason that"). Further support was found[8] in the explanatory memorandum for amendments to the Act made in 1986[9]. That explanatory memorandum suggested that the

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4 (2000) 186 ALR 731 at 747 [82].

5 (2000) 186 ALR 731 at 754 [118].

6 (2000) 186 ALR 731 at 754 [118].

7 (2000) 186 ALR 731 at 756 [126].

8 (2000) 186 ALR 731 at 756 [127].

9 By the *Trade Practices Revision Act* 1986 (Cth).

purpose of changes to be made to the Act at that time was to prevent the prohibition, imposed by s 45(2), on making agreements containing exclusionary provisions, from applying to arrangements of the kind dealt with by s 47. This would leave the latter section to operate according to its terms, and thus import the competition test provided for by s 47(10).

21 An appeal by the ACCC to the Full Court of the Federal Court was allowed[10]. The majority of the Court (Hill and North JJ) concluded that "by reason that" should be read as equivalent to "if and in so far as"[11]. In their Honours' opinion[12] this was not inconsistent with the substitution in 1977[13], in s 45(6), of the expression "by reason that" for the expression "in so far as". Further, they considered that to read the sub-section in this way avoided what otherwise would be the unintended results that would follow from attaching significance to whether particular contractual stipulations found expression in one or two clauses of a written agreement[14]. The third member of the Court (Conti J) would have dismissed the appeal, essentially for the reasons given by the primary judge[15].

The construction of s 45(6)

22 In order to construe s 45(6) it is necessary to begin by identifying the place that the sub-section has in the scheme of s 45 and in Pt IV as a whole. In the courts below it would seem that most attention was given to the relationship between s 45 and other provisions in Pt IV. In particular, the parties emphasised that s 45(6) serves to prevent overlapping between s 45(2) and s 47. So much may be accepted, but it does not reveal what is to be understood as constituting some relevant overlap. That depends upon the operation which is to be given to s 45(6).

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10 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2001) 112 FCR 37.

11 (2001) 112 FCR 37 at 55 [71]-[75].

12 (2001) 112 FCR 37 at 54 [68].

13 By s 25 of the *Trade Practices Amendment Act* 1977 (Cth) which repealed ss 45, 46 and 47 of the Act and substituted new provisions.

14 (2001) 112 FCR 37 at 54 [69].

15 (2001) 112 FCR 37 at 57 [82].

23 In identifying the operation to be given to s 45(6), it is not useful to adopt a description of the relevant arrangement as "horizontal" or "vertical". There are at least three related reasons why that is so.

24 First, the Act does not adopt a classification which uses those terms. Adopting them confuses the task of construing the Act's provisions. It is necessary to pay attention to the text of applicable statutes in preference to judicial or other glosses on that language[16]. Not only does adopting these terms distract attention from the language of the Act, it does so by introducing terms which are, so it seems, intended to convey value or other judgments about the social or economic consequences that are assumed or expected to follow from the making of or giving effect to the arrangement to which one of these descriptions is applied. Much turns, therefore, on both the content given to the terms and the validity of the assumptions about consequences that their use entails.

25 Secondly, and no less importantly, employing the descriptions of "horizontal" and "vertical" appears intended to adopt, or at least runs a serious risk of inviting the adoption of, the usage of such terms in the wholly different statutory context of United States antitrust law. In particular, the use of these terms invites attention to the distinction drawn in the antitrust law of that country between arrangements which are to be condemned as "per se" violations of antitrust law and arrangements which are to be tested against the so-called "Rule of Reason". As Judge Posner rightly has written[17], "[t]hese are not illuminating terms. What they *gesture at* is the distinction, fundamental in law, between a rule and a standard." (emphasis added) It is unhelpful to use the language of gesture in preference to construing the statute.

26 Even in the United States, "horizontal" and "vertical" are not terms having agreed or fixed meanings. They are jargon, used as shorthand descriptions, sometimes conveying different meanings to different readers. Moreover, it is not accepted in that country that their use necessarily entails any conclusion about the economic consequences of the arrangement. As Professor Hovenkamp points

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16 cf *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46] per Kirby J; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249] per Kirby J.

17 Posner, *Antitrust Law*, 2nd ed (2001) at 39.

out[18], "[s]imply to conclude that an agreement is horizontal establishes nothing about whether it is competitive or anticompetitive".

27 These are reasons enough to conclude that the adoption of these terms is not useful in the present context. There is, however, a third point of particular application to this case. The non-competition provisions proposed restricted the acquisition of goods and restricted the supply of services. They can, therefore, be said to reflect a dual and composite relationship. Describing the effect of those provisions as a "horizontal" or a "vertical" restraint states a conclusion which masks that dual character. Moreover, it inverts the proper order of inquiry because the argument proceeds from classification to a conclusion about the application of the Act, rather than beginning with the proper construction and application of the relevant provisions.

28 It is necessary to consider the place which s 45(6) has in s 45 itself. It is evident that s 45(6) qualifies in two distinct steps the operation of other provisions of s 45: "[t]he making of a contract ... does not constitute a contravention *of this section* ... and *this section* does not apply to or in relation to the giving effect to a provision of a contract" (emphasis added). Accordingly, the inquiry must begin by identifying the prohibition contained in s 45(2) that is said to be engaged. Is it the *making* of a contract, arrangement or understanding (s 45(2)(a)(i)), or is it the *giving effect* to a provision of a contract, arrangement or understanding (s 45(2)(b)(i))? If it is of the former kind, attention must be directed to the first part of the introductory words in s 45(6), which refer to the *making* of a contract, arrangement or understanding. If it is of the latter kind, the focus will fall upon the second part of those introductory words: "this section does not apply to or in relation to the *giving effect* to a provision ...".

29 What was alleged here was that there had been an attempt to make, or induce the making of, a contract containing an exclusionary provision. The question presented under s 45(6) was whether the contravention alleged was "by reason that" the contract would contain a "provision" meeting the description given in s 45(6) – a provision the giving effect to which would, or would but for the operation of s 47(10), constitute a contravention of s 47. That question, and in particular the use of the expression "by reason that", invites attention to whether the contravention meets the description given in s 45(6). It does not invite or permit any distributive application of that part of the sub-section in which giving effect to the contract in some ways falls within the sub-section and giving effect to it in other ways does not.

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18 Hovenkamp, *Antitrust Law*, (1998), vol 11, ¶1901b at 186.

30 If giving effect to the agreed provision *would* constitute a contravention of s 47, or would do so but for the operation of s 47(10), it meets the statutory description and s 45(6) is engaged. This construction of s 45(6) gives effect to its text. Although not advanced by the ACCC in the courts below, it was not submitted that the course of proceedings precluded the ACCC from now relying on it. It is a construction which does not depend upon substituting, for the statutory expression "by reason that", an expression like "if and in so far as", or even, as the appellants submitted, the single word "if". It is, therefore, a construction which takes a different course from that proposed by the ACCC at trial. Instead of taking a particular term of the contract, arrangement or understanding as the starting point, and working out the extent to which that term meets the criterion stated in s 45(6), it is a construction which begins with the prohibition of s 45(2) and treats s 45(6) as a qualification to that prohibition. The question is whether the criterion for engaging the qualification is met, not the extent to which the parties' agreement can have an operation of the kind which meets that criterion.

31 That requires the identification of whether the making of the contract, arrangement or understanding in question would contravene s 45 because it contained a provision of the specified kind. If it would contravene s 45 for either of two reasons – first, because it contained a provision of the specified kind but, secondly, because it contained a provision which would otherwise contravene s 45 – s 45(6) is not satisfied.

32 The answer to the inquiry just described is not dictated by the particular drafting adopted by parties. There may be no written record of an agreement, let alone of any arrangement made by, or understanding reached between, the parties. Where there is no written record, there could be no resort to drafting. Further, and no less importantly, it is necessary to recognise that "contract, arrangement or understanding" encompasses such a wide range of consensual arrangements that the word "provision" and cognate expressions cannot be understood as confined to what might appear as a single clause of a written agreement. "Provision", when it is used in s 45(6), directs attention to the content of the agreement, arrangement or understanding rather than the manner of its expression.

33 That conclusion is reinforced when due account is paid to the use of the expression "the giving effect to which". That is an expression of wide meaning and its use requires consideration of the various kinds of conduct which it encompasses. As has been indicated above, s 4(1) of the Act requires that "give effect to", in relation to a provision of a contract, arrangement or understanding, "includes do an act or thing in pursuance of or in accordance with or enforce or

purport to enforce". Necessarily, then, the relevant inquiry is about what may be done under the contract, arrangement or understanding, not how it is drafted. That is, the inquiry must focus upon the content of the stipulations which the parties have made or agreed. Thus, upon analysis, the one verbal composite may contain stipulations each of which is a "provision" in the statutory sense, and with different statutory characteristics. Do the stipulations which cause a contravention of s 45(2) meet the criterion in s 45(6)?

34 In the present case, the admittedly dual significance of the non-competition stipulations is important. The parties intended both to restrict NPP's freedom to supply services to others, and to restrict its freedom to acquire goods from them. Making a contract with non-competition provisions to that effect would have constituted a contravention of s 45(2). But for the operation of s 47(10) the former provision would have contravened s 47(1). It would have been conduct of the kind described in s 47(4). The latter provision would not have contravened s 47.

35 It follows that s 45(6) was engaged in respect of the former but not the latter provision. The limited effect of s 45(6) in the present case was as follows. The making of the contract would not have constituted a contravention of s 45 by reason that the contract contained the former provision. However, the making of the contract would have constituted a contravention of s 45 for other reasons, specifically because it contained the latter provision, the giving effect to which would not have contravened s 47. In respect of the latter provision, the criterion for engaging the qualification in s 45(6) to the prohibition imposed by s 45(2) was not met. In those circumstances, s 45(6) provides to Visy Paper no answer to the case made against it by the ACCC.

36 The appeal should be dismissed with costs.

37 KIRBY J. This appeal concerns the proper interpretation and application of provisions of the *Trade Practices Act* 1974 (Cth) ("the TPA"). The point of construction in issue relates to the allocation of regulatory responsibilities to different sections of the Act that forbid anti-competitive arrangements. The point arises in a factual and commercial context in which potentially more than one of the statutory provisions is applicable.

38 The facts and the history of the proceedings are described in the reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ ("the joint reasons")[19]. Also set out there are the relevant statutory provisions[20]. I will not repeat any of this detail. I agree that the appeal must be dismissed. However, I wish to add some observations of my own.

39 My observations relate to the preferable course to be followed in exercising the dual tasks of (1) characterising the contracts alleged to contain anti-competitive provisions, which were adopted by Visy Paper and attacked by the ACCC, and (2) identifying the statutory provisions potentially applicable to them. Those tasks should be carried out in a manner that enables the clarification of the intended operation of the proposed contracts in their commercial context and that is consistent with the scheme, contained in the TPA, for regulating anti-competitive practices. In my opinion, consideration of the categories of vertical and horizontal arrangements[21] assists in the performance of this task. Only when that task is carried out correctly is it possible to determine the controversy in issue: namely whether the qualification contained in s 45(6) of the TPA applies so as to take the proposed contracts out of the *per se* prohibition provided in s 45(2)(a)(i) of the TPA.

Characterising the parties' arrangements

40 *A dual and composite relationship*: In the present appeal, a number of unusual features of the commercial relationship between Visy Paper and NPP, the different markets in which they participated and the industry itself, posed difficulties for the task of characterising the arrangements for the purposes of applying ss 45 and 47 of the TPA to them.

41 One such difficulty concerned the commercial practice in the waste collection industry of obtaining used paper as an input in the process of

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19 Joint reasons at [10]-[21]. The same designations will be used to describe the parties and principal actors as appear in the joint reasons.

20 Joint reasons at [2]-[9].

21 See eg Posner, *Antitrust Law*, 2nd ed (2001) at 39.

production for recycled paper. Waste could be collected either in the form of *acquiring goods* (that is, waste purchased from customers) or *providing services* in the form of waste (or rubbish) removal services to customers at some or no charge. The form of obtaining waste used by a collector depended upon the quality and quantity of the waste generated[22]. It also depended upon the current export prices for waste product[23].

42 The fact that obtaining waste by collectors may be characterised as the *supply* of waste collection services, at least in some circumstances, is said to take on a particular significance in this appeal on the footing that it engaged s 47(4) of the TPA[24]. However, a number of observations should be made about that feature of the waste collection industry, particularly in the context of the relationship between Visy Paper and NPP.

43 First, whilst it is true that the collection of waste had a dual and composite character, it is also true that the underlying purpose of any activity to collect used paper was to obtain a resource for producing recycled paper by manufacturers such as Visy Paper. Secondly, NPP itself never provided rubbish collection services. While it did receive waste from rubbish collectors for a fee, this was not the major source of the waste paper that NPP obtained and on-sold to Visy Paper[25]. Thirdly, from the time that its processing and decontamination plant at Silverwater closed, NPP received no payment from any customer for the removal or acceptance of waste[26]. Fourthly, it was the attempt by NPP to *purchase* waste paper from the Local Government Recycling Co-operative Ltd and subsequently from other Visy Paper customers that prompted Visy Paper to renegotiate its relationship with NPP by reference to the non-competition provisions[27].

44 *Nature of the parties' relationship*: The second factual point of difficulty encountered in characterising the arrangements concerns the nature of the relationship between Visy Paper and NPP. To the extent that both Visy Paper and NPP, at least initially, participated in the waste collecting industry as waste collectors, they were competitors. However, NPP was also a supplier to Visy

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22 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 at 736 [23].

23 *ACCC v Visy* (2000) 186 ALR 731 at 737 [24].

24 See also the joint reasons at [5].

25 *ACCC v Visy* (2000) 186 ALR 731 at 737 [27]-[28].

26 *ACCC v Visy* (2000) 186 ALR 731 at 737 [29].

27 *ACCC v Visy* (2000) 186 ALR 731 at 738 [33].

Paper, which was a manufacturer of recycled paper. While NPP did not produce recycled paper, it initially had a plant for sorting and processing waste, as did Visy Paper[28]. Even after NPP shut down its processing facility, both Visy Paper and NPP continued to participate in the business of collecting waste as competitors. At the same time, Visy Paper had an existing contract for the purchase of waste paper products from NPP[29]. Accordingly, Visy Paper and NPP were in a vertical (supplier-purchaser) relationship, which they were negotiating to continue. It was in that context that the contracts, subsequently attacked in the Federal Court by the ACCC, were proposed by Visy Paper.

45 *The applicable characterisation*: The legal question that emerges from these arrangements relates to the proper characterisation of the anti-competitive clauses and the role they played, or were intended to play, in structuring the Visy Paper-NPP relationship and the proposed arrangements. That question may be answered by reference to the concepts of vertical and horizontal arrangements. Did the proposed contracts (all of which included a non-competition clause) attempt to put in place an exclusive dealing arrangement as an aspect of the *vertical* (supplier-purchaser) relationship? Or were the proposed contracts to be characterised as forming a *horizontal* arrangement (as between competitors), containing an exclusionary provision to lessen the competition between them? To the extent that the proposed contracts could fall within both the vertical and horizontal arrangement categories, did s 45(6) of the TPA operate to absolve Visy Paper of any violation of s 45?

46 At this point, the concessions made by the ACCC need to be considered. Given the ACCC's concessions about the purpose and effect of the arrangements, if no violation of s 45(2)(a)(i) occurred, the making of the proposed contracts would not constitute a violation of the TPA.

The submissions of the parties

47 *Submissions of Visy Paper*: Before this Court, Visy Paper pointed to the finding of the primary judge that the reference to the "collection" of waste in the non-competition clauses of the proposed agreements was wide enough to encompass *both* the acquisition of goods from, and the provision of services to, its customers[30]. The majority in the Full Court of the Federal Court held that the non-competition clauses had a dual character on the basis that they were intended to restrict both the acquisition of waste paper goods and the provision of waste

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28 *ACCC v Visy* (2000) 186 ALR 731 at 737 [26].

29 *ACCC v Visy* (2000) 186 ALR 731 at 737-738 [30]-[32].

30 *ACCC v Visy* (2000) 186 ALR 731 at 754 [118].

removal services[31]. On this footing, Visy Paper submitted that giving effect to the non-competition clauses would restrict the supply of services by NPP to Visy Paper's customers. Relevantly to the relationship between Visy Paper and NPP, this would operate, in effect, as a condition for the acquisition of goods by Visy Paper from NPP and, as such, would be an "exclusive dealing" arrangement that would constitute a contravention of s 47(4), but for the operation of s 47(10). It followed, Visy Paper argued, that s 45(6) was engaged so that the making of the proposed contracts did not amount to a violation of s 45(2)(a)(i) of the TPA. This was so despite the fact that the non-competition clauses also purported to restrict NPP from acquiring waste (goods) from Visy Paper's customers.

48 *Submissions of the ACCC*: For the ACCC, the latter restriction on the acquisition of waste paper goods was highly significant. The ACCC pointed to the breadth of the meaning of the term "provision" in the TPA[32]. It submitted that this word should not be narrowly construed, for example, to mean "clause"[33]. Thus, the ACCC argued that:

> "because of its dual character, [the non-competition clause] encompasses both a prohibition on NPP supplying services to Visy customers (the third element of s 47(4)) and a prohibition on NPP acquiring goods from Visy customers (which forms no part of s 47(4))".

It followed, so the ACCC submitted, that giving effect to the prohibition on restricting the acquisition of goods from a class of persons, namely Visy Paper's existing and potential customers, had nothing to do with s 47 of the TPA. It was to be governed by s 45 of that Act.

49 *An apparent incongruity*: The argument of the ACCC provides one answer to Visy Paper's invocation of s 45(6) of the TPA in this appeal as a defence to its alleged violation of the TPA. However, in certain respects, that answer is curious. It implies that, because the non-competition clauses only contained a restriction upon the supply of waste removal services by NPP to Visy Paper's customers, they might be treated as falling outside s 45. The reasons for such a differential consequence are not immediately apparent[34]. Both restrictions have a similar purpose and effect. Each aims to remove competition between

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31 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2001) 112 FCR 37 at 52 [60].

32 See TPA, s 4(1) cited in the joint reasons at [7].

33 *ACCC v Visy* (2001) 112 FCR 37 at 54 [67].

34 This may explain the hesitation of the primary judge to give the two aspects of the clauses a differential treatment: *ACCC v Visy* (2000) 186 ALR 731 at 754 [118].

Visy Paper and NPP. The "victims" of either restriction would be customers of Visy Paper which might, for whatever reason, decide either to sell waste products to NPP rather than to Visy Paper, or to engage NPP, rather than Visy Paper, for waste removal services.

50 Before this Court the parties did not elaborate two issues that could have been relevant to the resolution of the questions presented for decision and to the apparent incongruity just mentioned. The first concerns the legislative policy that informs the statutory definition of "exclusive dealing" within s 47(4) of the TPA as the acquisition of goods and services on condition only that the seller "will not *supply* goods or services" to a particular person or class of persons[35]. As Hill and North JJ[36] pointed out in the Full Court, the Swanson Committee, reviewing the TPA[37], recommended that the definition of exclusive dealing in s 47 of the TPA should include the acquisition of goods and services on the condition that the seller will not acquire goods and services from, or supply goods and services to, particular persons or classes of persons. Given the final form in which s 47(4) was enacted, that recommendation was clearly not accepted in its entirety.

51 The second, related issue is whether, in order to establish the practice of "exclusive dealing" as that practice is defined in s 47(4) of the TPA (and by analogy the other sub-sections in s 47), there is any necessary nexus between the "goods or services" acquired by the purchaser and the "goods or services" that the seller is restricted from supplying to particular persons or classes of persons. It is here that the concepts of vertical and horizontal arrangements are of assistance. Is the reference to a restriction on the supply of goods and services by the seller at large? Or is it necessarily related to the "goods or services" acquired by the purchaser[38] and therefore an aspect of their vertical (supplier-purchaser) relationship? To answer these and the other questions, it is helpful to determine whether the restrictions contained in the anti-competitive clauses in the contracts proposed by Visy Paper are more an aspect of the horizontal than the vertical relationship between Visy Paper and NPP. This requires close analysis of the statutory provisions in the context of the legislative scheme contained in Pt IV of the TPA.

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35 TPA, s 47(4) (emphasis added).

36 *ACCC v Visy* (2001) 112 FCR 37 at 53 [63].

37 Australia, Trade Practices Act Review Committee (T B Swanson, Chairman), *Report to the Minister for Business and Consumer Affairs*, (August 1976); cf *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926 at 939-940 [71]-[72]; 197 ALR 153 at 172.

38 See TPA, s 47(4)(a) and (b).

Anti-competitive arrangements and the TPA

52 *United States analogue*: Part IV of the TPA appears under the heading "Restrictive Trade Practices". It contains a detailed scheme for the regulation of anti-competitive practices. Specific provisions in Pt IV prohibit joint[39] and unilateral[40] conduct on the part of corporations, where such conduct would tend to impede the competitive process.

53 The approach adopted by the Parliament in Pt IV of the TPA may be contrasted with §1 of the Sherman Act[41], which prohibits any "contract, combination … or conspiracy, in restraint of trade or commerce". The application of §1 is not confined to parties to a contract, combination or conspiracy who are in competition. It therefore includes arrangements between parties at the same level in the supply chain which are competitive in the same market (*horizontal* arrangements), as well as agreements between parties at different levels in the supply chain (*vertical* arrangements). Partly as a consequence of the broad language of §1, the development of antitrust doctrine in the United States of America has been largely left to the courts. Over time, those courts have relied upon screening mechanisms to assist in the identification of the types of arrangement that were inimical to the competitive process and that should therefore be subjected to the prohibitions contained in the Sherman Act. Such mechanisms became necessary because of the breadth of the prohibition appearing on the face of the statute.

54 The TPA was enacted in Australia many decades after its United States counterparts. In its original form, s 45(2) prohibited arrangements "in restraint of trade and commerce"[42]. It appears that Pt IV, both in its original terms and as subsequently amended, borrowed from the United States experience of applying the Sherman Act to particular commercial arrangements. For example, those types of arrangement identified as inherently damaging to the competitive process were subjected to prohibition without further inquiry[43]. This category of prohibition corresponded to the *per se* rule of illegality developed in United

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39 eg TPA, ss 45, 45A, 47.

40 eg TPA, ss 46, 48.

41 15 USC §1.

42 See the discussion of the legislative history by the primary judge in *ACCC v Visy* (2000) 186 ALR 731 at 751-752 [103]-[109].

43 eg TPA, s 45(2)(a)(i) and s 45A(1) read with s 45.

States jurisprudence[44]. In contrast, other types of restrictive arrangements were subjected by the TPA to less rigorous restriction, out of recognition that such arrangements could have legitimate justifications or were otherwise favourable to competition. Such arrangements were prohibited only if they had the *purpose* or *effect* of "substantially lessening competition"[45]. This latter inquiry calls for consideration of the design of the arrangement, as well as its effects or likely effects on competition and the competitive process in the relevant market, reflecting the "rule of reason", developed in United States antitrust jurisprudence[46].

55 *Overlapping provisions*: The detailed scheme of regulation of restraints on trade appearing in the TPA has the consequence that a variety of arrangements, occurring in different commercial contexts, must be tested against the criteria in the several sections of that Act. It follows that an arrangement may fall within the scope of more than one section of the TPA. The question of which section applies to an arrangement may be determinative of whether or not the arrangement constitutes a violation of the TPA, as different sections impose different legal consequences. That there would exist such overlap was recognised by the Parliament in enacting the TPA: for example, s 45(6) has the purpose of ensuring the proper allocation of regulatory responsibilities for a given arrangement that may fall within the scope of ss 45 and 47 of the TPA.

56 In applying s 45(6) to particular factual circumstances, a court must give effect to its language. However, it should be recognised that the different sections in Pt IV of the TPA are not intended to work in a mechanical or artificial way. The scheme adopted in Pt IV therefore should be interpreted and applied in a manner that allows the provisions to work together so as to give effect to the identified legislative policies[47]. More than once in recent cases[48] I have had

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44 See *United States v Socony-Vacuum Oil Co Inc* 310 US 150 (1940). On the use of United States jurisprudence see *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 646-648 [158]-[163] per Gaudron, Gummow and Hayne JJ; 195 ALR 609 at 639-641. See also *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157 at 185-186 [115]-[117] in my reasons.

45 eg TPA, s 45(2)(a)(ii) and s 47(10).

46 See eg *Broadcast Music Inc v Columbia Broadcasting System Inc* 441 US 1 (1979).

47 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

48 eg *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 677 [323]; 195 ALR 609 at 682; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926

(Footnote continues on next page)

occasion to insist upon the application to the TPA of the purposive approach to legislative construction. That approach has now been generally adopted as the usual approach of this Court to problems of statutory construction[49].

57 *Adopting a contextual approach*: The problem presented by this appeal should not, therefore, be resolved by consideration of the words of s 45(6), read in isolation from the two sections in issue or separate from the rest of Pt IV. Nor should attention be confined to semantics or a search for a judicial paraphrase for the statutory language[50]. Rather, it is necessary to take a contextual approach, by identifying the legislative policy behind the applicable sections (s 45(2)(a)(i) when read with s 4D, as well as s 47 of the TPA), in an attempt to ascertain the role that the sections play in the overall scheme of regulating arrangements that restrict competition in the particular market. Such an approach requires consideration of the statutory context in which the terms, "exclusionary provisions" and "exclusive dealing", are found. The concepts of *horizontal* and *vertical* arrangements are useful in locating the respective fields intended to be covered by the terms "exclusionary provision" and "exclusive dealing".

The TPA: "exclusionary provisions" and "exclusive dealing"

58 *Two legislative constructs*: "Exclusionary provision" and "exclusive dealing", as these terms are defined and used in the TPA, are legislative constructs. They do not have any particular or technical meaning, nor do they correspond to any specific type of anti-competitive conduct. Yet the Parliament has attached different consequences to arrangements according to the type of provision they contain, thereby pronouncing a stronger legislative condemnation of certain kinds of restrictive arrangements. The characteristics of those arrangements and the reasons they are subject to that stronger condemnation shed light on when and how the relevant provisions of Pt IV should be applied. To steer the mind safely through the relevant words of the TPA (which constitute a less than perfect example of the drafter's art), regard must be had to the reasons for the enactment of the statutory provisions; their potential intersection; and the intended field for their operation within the statutory scheme.

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at 938 [65]; 197 ALR 153 at 170; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157 at 186-187 [120].

49 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Eastman v Director of Public Prosecutions (ACT)* (2003) 77 ALJR 1122 at 1148-1149 [137]; 198 ALR 1 at 37-38.

50 cf *Aktiebolaget Hässle v Alphapharm Pty Ltd* (2002) 77 ALJR 398 at 425-426 [146]; 194 ALR 485 at 522.

59 *Exclusionary provisions*: The TPA gives effect to special vigilance about certain types of arrangements among competitors. For example, s 45A(1) of the TPA prohibits any arrangement among parties "in competition with each other" containing a provision for the "fixing, controlling or maintaining … the price for, or a discount, allowance, rebate or credit" by deeming such an arrangement of itself to have the purpose or effect of "substantially lessening competition"[51]. Similarly, agreements among competitive parties containing an "exclusionary provision" are subject to an outright prohibition in s 45(2)(a)(i) of the TPA. The definition of "exclusionary provisions" in s 4D(1)(a) confines attention to arrangements between persons "any 2 or more of whom are competitive with each other". Such arrangements restrict output in the relevant market with effects substantially equivalent to the elimination of price competition. Experience (and economic theory) suggests that such horizontal arrangements are inherently harmful to the competitive process. They are "socially inefficient"[52] and without legitimate justification.

60 *Exclusive dealing*: Section 47 of the TPA defines and regulates the practice of "exclusive dealing". Unlike s 4D, s 47 does not restrict attention to arrangements where the parties are competitive with each other. Thus, the focus of the section is not upon horizontal arrangements among competitors, but on vertical non-price restrictions[53] between parties that are at different levels in the supply chain, in a supplier-purchaser relationship. Importantly, exclusive dealing is prohibited only to the extent that it has the *purpose* or *effect* of *substantially* lessening competition[54].

61 Before an arrangement will be found to violate the TPA on the basis of "exclusive dealing", it is necessary to consider the purpose and likely effect on the level of competition in the market of the arrangement (and, in particular, the restrictions it imposes on some or all of the parties). That such an inquiry is required reflects legislative recognition that vertical non-price restraints are not necessarily anti-competitive. Nor do they necessarily have an exclusionary purpose and effect. Whether or not a likely adverse effect on competition would result from such arrangements depends upon a number of factors. These include

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51 TPA, s 45(2)(a)(ii).

52 Posner, *Antitrust Law*, 2nd ed (2001) at 39.

53 The practice of resale price maintenance is prohibited (reflecting the legislative policy against price fixing): s 48, read with Pt VIII. However, this is done only to the extent that the supplier seeks to enforce a minimum price below which the acquirer cannot on-sell the goods or services: ss 96, 96A.

54 TPA, s 47(10).

the reason for, and nature of, the restriction imposed; the state of competition in the upstream and downstream markets; the duration of the arrangement between the parties; the relative size of the parties; and the degree to which the arrangement forecloses access to the market for other traders[55]. In circumstances where the level of competition is not under threat, such vertical restraints may have legitimate justifications. In a particular case they may even enhance competition.

62 *A horizontal or vertical arrangement?* The common element in the definition of an "exclusionary provision" in s 4D of the TPA and some of the types of "exclusive dealing" identified in s 47, is the restriction on the supply of goods and services to (or the acquisition of goods and services from) a person or a particular class of persons. The key difference between the sections is that s 4D of the TPA is aimed at arrangements between parties "competitive with each other". In contrast, s 47 focuses on supply-acquisition relationships. Therefore, not every arrangement that falls within the "exclusive dealing" definition in s 47 will also fall within the scope of s 4D.

63 In that statutory context, s 45(6) of the TPA performs one of two functions. First, it ensures that a vertical "exclusive dealing" arrangement is governed by s 47, given the broad definition of parties that are "competitive" for the purposes of s 4D. Secondly, where competitors in a market come into a supplier-purchaser relationship, any non-price restrictions that are an aspect of their vertical relationship (and that can fall within the definition of "exclusive dealing") are to be governed by s 47. Section 45(6) of the TPA is clearly *not* intended to remove from the *per se* prohibition in s 45(2)(a)(i), exclusionary restraints which are an aspect of the horizontal relationship between competitors, and which are designed to restrict supply or eliminate price competition. A provision in an arrangement that envisages the supply of goods or services from one of the parties to the other will not of itself attract the operation of s 45(6) so as to preclude the application of s 45(2)(a)(i).

64 Characterisation of the arrangements between Visy Paper and NPP as either horizontal or vertical enables an evaluation of whether the restrictive provisions in the contracts proposed by Visy Paper are protected by the operation of s 45(6). Only then is it possible to conclude whether the restrictive provisions are "exclusionary provisions" within s 4D. On my analysis, the making of an arrangement does not constitute a violation of s 45 by reason of a restrictive provision being characterised as an element of a *vertical* "exclusive dealing" arrangement between the parties. However, the provision will be prohibited by s 45(2)(a)(i), regardless of the actual effect of the provision on competition in the market, if it restricts the supply of goods or services to the customers or potential

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55 Posner, *Antitrust Law*, 2nd ed (2001) at 230-232.

customers of the parties. This is because such a restriction would become an aspect of the parties' *horizontal* relationship as competitors and thereby restrain competition between them.

Conclusion: a case of horizontal restraint

65 Given the character of the commercial relationship between Visy Paper and NPP, it is impossible to avoid the conclusion that the non-competition clauses in the contracts proposed by Visy Paper, which restrained NPP from acquiring waste paper products from or providing waste removal services to Visy Paper's existing or potential customers, were primarily referable to the horizontal relationship between those two corporations as competitors, rather than to their vertical supplier-purchaser relationship.

66 As part of the vertical relationship, Visy Paper could impose certain valid restraints on NPP's conduct that would also protect any investment in NPP's operations funded by Visy Paper[56]. For instance, Visy Paper could prevent NPP from supplying waste paper products to Visy Paper's manufacturing competitors, within s 47(4). The original 1995 contract provided for such a relationship[57]. Similarly, the draft supply agreements proposed by Visy Paper provided that NPP would sell exclusively to Visy Paper the whole of its stocks of certain categories of waste paper[58]. This would have imposed a restriction on NPP not to supply waste paper products to any of Visy Paper's competitors in the paper recycling industry that might also have been interested in purchasing such products. That restriction would not violate the TPA, to the extent that it did not have the purpose or effect of "*substantially* lessening competition"[59].

67 As part of the vertical relationship, Visy Paper could lawfully negotiate the price at which it would purchase waste paper products sold by NPP. Through negotiating the purchase price, Visy Paper was able to restrain the degree to which NPP could compete with Visy Paper for customers in the waste collection market. However, to the extent that Visy Paper remained in the waste collection market, and therefore remained competitive with NPP in that market, it could not lawfully negotiate restrictions about the price at which they would acquire waste products or the price at which they would supply waste removal services to customers. Nor could it lawfully restrict the customers from which NPP could obtain waste in either form. All such restrictions or attempted restrictions were a

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56 *ACCC v Visy* (2000) 186 ALR 731 at 741 [54].

57 *ACCC v Visy* (2000) 186 ALR 731 at 737-738 [31].

58 *ACCC v Visy* (2000) 186 ALR 731 at 742-743 [63].

59 See TPA, s 47(1) and (10) (emphasis added).

feature of the horizontal relationship between Visy Paper and NPP as competitors. They were therefore governed by s 45(2)(a)(i) of the TPA read with s 4D.

68 Competitors in a market cannot, by also engaging in a concurrent supply relationship, guard against the operation of a *per se* prohibition on certain types of arrangements deemed inherently inimical to the competitive process. By the operation of s 45(6) of the TPA, a contract may provide for the establishment of a vertical relationship of supply and acquisition subject to non-price restraints (that is, make provision for exclusive dealing) without constituting a violation of s 45 of the TPA. However, in the present appeal, the restrictive provisions created an exclusionary restraint on the competitive conduct of two parties which were, and continue to be, in competition with each other in the relevant market. Therefore, s 45(6) of the TPA was not engaged. The *per se* prohibition in s 45(2)(a)(i) of the TPA thus applied to the arrangement.

Principled and consistent applications of the TPA

69 The language of the provisions of the TPA applicable to this case is obscure. Indeed, it represents a significant challenge for interpretation. It is in need of redrafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and courts with the responsibility of assigning meaning to, and applying, its provisions.

70 It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purposes of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by the statutory language. Even then, there is a substantial danger of losing one's way in the encircling gloom.

71 The approach to the construction of s 45(6) of the TPA that I favour is consistent with the language of the Act. It has the benefit of treating in a substantially similar way restrictive provisions that have the same purpose and effect. It also promotes the apparent legislative policies of according greater vigilance towards, and scrutiny of, horizontal arrangements among competitors, which are aimed at restricting output and competitive conduct in a market. When competitive parties enter into a supply and purchase agreement, subject to a restrictive provision that can be characterised as establishing an "exclusive dealing" arrangement within s 47, the making of such an agreement will not constitute a violation of s 45 by reason of such restrictive provision alone.

72 However, in this appeal, the contracts proposed by Visy Paper, apart from an exclusive *supply* relationship, also sought to impose non-competition arrangements that were primarily referable to the *competitive* relationship between Visy Paper and NPP in the waste collection market in which Visy Paper continued to participate. As such, those provisions were subject to the *per se* prohibition provided in s 45(2)(a)(i) of the TPA. The Full Court was correct to so conclude.

The duty to provide a clear criterion

73 The joint reasons in this Court express disagreement with the approach that I favour[60]. I agree that it would be a mistake to import uncritically into the TPA extra-statutory concepts. Doing that could, in some circumstances, distract attention from the task of interpreting the provisions of the TPA[61]. I said as much in my reasons in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*[62]. The identical point was made once again in *News Ltd v South Sydney District Rugby League Football Club Ltd*[63]. This Court there warned against the use of the concept of a "boycott" to limit the scope of an "exclusionary provision" as defined in s 4D of the TPA. It would be especially inappropriate to introduce extra-statutory concepts that amounted to nothing but empty labels that neither aid the process of reasoning nor illuminate the interpretation of the TPA.

74 Statutory construction is a text-based activity. But where the wording or structure of the statutory provisions is neither clear nor elegant, the duty of a court, and particularly of this Court, is to attempt to understand and explain the policy of the statute as it applies to the problem in hand[64]. Doing so helps in the task of statutory interpretation. It is not impermissible. It is essential.

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60 Joint reasons at [23]-[27].

61 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 642 [126] per Gleeson CJ and Callinan J; 195 ALR 609 at 633.

62 (2003) 77 ALJR 623 at 685-686 [380]; 195 ALR 609 at 694.

63 (2003) 200 ALR 157 at 163 [19] per Gleeson CJ, 176-177 [77]-[78] per Gummow J (McHugh J agreeing), 184-185 [113]-[114] of my own reasons. See also *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 43-45, 51-52, 55.

64 *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 827 per Lord Diplock.

75 Reliance upon the writings of legal scholarship[65], other disciplines (such as economic science in the context of the TPA[66]), the law of other countries, or international law, represents an intellectual contribution to judicial reasoning and judgment. It is not normative. Nor is it prescriptive. But such learning can help a court better to understand the nature of the problem presented for its decision[67].

76 For example, in *Boral*, members of this Court were of the opinion that the concept of "recoupment", as developed in antitrust decisions and literature in the very different statutory context of the United States, could be used to shed light on the circumstances in which, in this country, a corporation "take[s] advantage" of a substantial degree of market power for the purposes of s 46 of the TPA[68]. In *Boral*, the joint reasons of Gaudron, Gummow and Hayne JJ[69] even made reference to "*horizontal* price-fixing arrangements". Knowledgeable readers of *Boral* would have understood what their Honours were getting at by their use of that expression. Such readers would not have mistaken that reference to *horizontal* arrangements for jargon or slogans. I am willing to assume that readers of my reasons in this case would bring the same appreciation to my use of the same adjective.

77 In the present appeal, it is the TPA itself that makes a distinction between arrangements amongst parties that are competitive with each other (*horizontal*)[70], and arrangements among parties in a supplier-acquirer relationship (*vertical*)[71]. Thus, in the context of the TPA, the words *vertical* and *horizontal* are not jargon. Nor are they foreign or otherwise suspect. They are useful shorthand descriptions of concepts firmly rooted in the text of the Australian Act. It is that

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65 Kirby, "Welcome to Law Reviews", (2002) 26 *Melbourne University Law Review* 1 at 6-10.

66 *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 661 [247] per McHugh J; 195 ALR 609 at 659-660.

67 cf Posner, "Pragmatic Adjudication", (1996) 18 *Cardozo Law Review* 1 at 5.

68 (2003) 77 ALJR 623 at 642 [130], 652 [191], 666-667 [278]-[281], 670 [292], 689-691 [399]-[413]; 195 ALR 609 at 634, 648, 667-669, 672, 699-702: Gleeson CJ and Callinan J expressed the view that the prospect of recoupment was of evidentiary importance, as did Gaudron, Gummow and Hayne JJ, while McHugh J went so far as to argue that recoupment was an essential element of a s 46 claim.

69 (2003) 77 ALJR 623 at 646 [158]; 195 ALR 609 at 639 (emphasis added).

70 See TPA, ss 4D(1)(a) and 45A.

71 See TPA, s 47.

Act, the TPA, which imposes an outright prohibition on some contracts or arrangements, while treating others in accordance with a more flexible standard.

78 This Court should not shut its eyes to the intended operation and effects in the marketplace of the proposed arrangements, impugned by the ACCC. Nor should the Court run away from the complexity of the interpretive task involved. In a statutory context such as the present, where certainty is of great importance, and the potential consequences of breach significant, we should provide reasons that give guidance to those in the marketplace, as well as the ACCC, about the circumstances in which such arrangements will run afoul of the TPA. With every respect, this is the difficulty that I had with the joint reasons in this case. It was a difficulty that led me to attempt, in this concurrent opinion, to express a criterion for the operation of the TPA which I did not find in the joint reasons. Out of politeness, I would not have said this but for the criticism addressed to my endeavour, to which I adhere.

Orders

79 The orders proposed in the joint reasons should be made.

80 CALLINAN J. I am relieved of the necessity to set out the facts, the relevant legislation and the issues arising in this appeal because of the comprehensive statement of them in the joint judgment with which however I am unable to agree.

81 Instead I find myself in agreement in substance with the reasoning and conclusion of the primary judge Sackville J, and Conti J in dissent in the Full Court of the Federal Court, to the judgment of the former of whom I would wish to add little.

82 There is no doubt that the clauses of the proposed contracts have both a dual and composite character: they make no distinction between the acquisition of goods by the corporate appellant and the provision of services by it to its customers. The concession at the trial by the respondent should also be noted: that the corporate appellant's conduct could not be shown to have had the effect or purpose of substantially lessening competition in the market place.

83 The primary judge dealt with the respondent's submissions (which were repeated in this Court) by reference to the legislative history of the Act in terms which I would adopt[72]:

> "Section 45(2) of the TP Act, in its original form, prohibited the making of a contract, arrangement or understanding 'in restraint of trade or commerce'. In that form, s 47 dealt with what the Swanson Committee described as[73]:
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> > 'agreements, or potential agreements, for the supply of goods or services involving the vertical practices of exclusive dealing, product forcing and territorial or customer restrictions'.
>
> As the *Swanson Committee* observed, s 47, for the most part, dealt with restraints that otherwise fell within the general prohibition in s 45.
>
> At that time, the relationship between ss 45 and 47 was governed by s 45(5). It provided that s 45 was not to apply to a contract, arrangement or understanding in so far as the contract, arrangement or understanding was of the kind referred to in s 47(2) or constituted the practice of exclusive dealing as mentioned in s 47(3) and (4). Section 47(2) and (3) dealt with 'full-line forcing': that is, supply of goods

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72 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 at 751-752 [103]-[109].

73 Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, (August 1976) (the *Swanson Committee*), par 4.1.

or services on the condition that the person supplied would acquire other goods or services directly or indirectly from the supplier. Section 47(4) dealt with the practice of third-line forcing and was not subject to a substantial lessening of competition requirement.

The Swanson Committee considered that ss 45 and 47 created distinctions between certain kinds of agreement and conduct which were illogical and sometimes harsh: *Swanson Committee*, par 4.105. It identified the most important of these matters as the 'usual grant of an exclusive franchise'. The committee recommended that the most appropriate way of dealing with restrictions imposed in an exclusive franchise arrangement was in the context of s 47, which was generally to apply only if the lessening of competition test were satisfied: *Swanson Committee*, par 4.106.

The *Trade Practices Amendment Act* 1977 (Cth) (the 1977 Act) implemented some, although not all of the recommendations of the Swanson Committee. The 1977 Act dispensed with the concept of 'restraint of trade or commerce' and introduced ss 4D(1) and 45(2) in substantially their present form. The 1977 Act also introduced more elaborate exclusive dealing provisions in s 47, again in substantially their present form. In particular, s 47(4) dealt specifically with restrictions imposed by buyers on sellers of goods, a practice that had previously been left to the general language of s 45. Section 47(10) applied the test of substantially lessening competition to the vertical arrangements covered by s 47, except for third-line forcing (ss 47(6) and (7)) which remained 'per se' contraventions of the TP Act.

The relationship between the collusive conduct provisions of s 45 and the restrictions on vertical arrangements in s 47 was governed by s 45(6). The 1977 Act enacted s 45(6) in its present form, except that the subsection did not include the words 'but for the operation of subsection 47(10)'. Neither the explanatory memorandum to the Trade Practices Amendment Bill 1977, nor the second reading speech[74] further explain the manner in which s 45(6) was drafted.

The effect of the 1977 Act was that s 45(6) applied, generally speaking, only where the conduct giving effect to the relevant provision had the purpose or effect of substantially lessening competition as required by s 47(10). This was thought to create difficulties[75]. In order to

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74 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 December 1976 at 3531ff.

75 Callaway, "Section 45 or 47?", (1980) 54 *Australian Law Journal* 200 at 202-203.

address these difficulties, s 45(6) was amended by the *Trade Practices Revision Act* 1986 (Cth) (the 1986 Act), which added the words 'but for the operation of subsection 47(10)'. The explanatory memorandum gave this explanation for the insertion of the additional words:

> '3. This amendment extends the operation of the exclusion in subs 45(6) so that it prevents s 45, and in particular its prohibition on exclusionary provisions (s 4D) from applying to arrangements which, while coming within the definition of exclusive dealing in s 47, do not contravene that section because they do not have the purpose or the effect of substantially lessening competition (subs 47(10)).'

It should be noted that, although the 1986 Act was preceded by a Green Paper (*The Trade Practices Act: Proposals for Change*, (February 1984)), the Green Paper did not consider the scope or drafting of s 45(6)."

84 The core of his Honour's reasoning appears in the following passage with which I agree[76]:

> "In my opinion, there is no warrant for notionally breaking up the alleged exclusionary provision into … 'discrete legal obligations'. This approach receives no support from the statutory language or from the terms of any of the non-competition clauses themselves. Each of the non-competition clauses in the [exclusive collection agreements] and supply agreements prohibits NPP from collecting waste products from customers of Visy. None of them distinguishes between the acquisition of goods and the provision of services to Visy's customers. It would do violence to the language of the clauses to divide each single prohibition into 'discrete' components for the purposes of applying s 45(6)."

85 I would simply add this: that the conditions in the markets, particularly as to supply and demand from time to time might well dictate whether what one day might be regarded as an acquisition, might, on another, be properly viewed as the provision of a service. This was no doubt a factor relevant to the drafting of the provisions in the composite form in which they were evolving.

86 His Honour the primary judge continued[77]:

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76 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 at 754 [118].

77 *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731 at 754-755 [120].

> "In inquiring whether the giving effect to a provision *would* constitute a contravention of s 47, it is necessary to bear in mind the broad definition of 'give effect to' in s 4(1). The definition includes doing an act in pursuance of or in accordance with the provision or purporting to enforce the provision. If a provision restricts a seller of goods from supplying services to the buyer's customers (conduct caught by s 47(4)), the buyer acts in accordance with the provision by refusing to permit the seller to supply those services. This is so even though the provision also prevents the seller acquiring goods from the buyer's customers (something not within s 47(4))." (original emphasis)

87 I would further note, without commenting on it, that no argument was advanced in this Court in respect of the possibility that the respondent had not proved an "attempt" notwithstanding that the appellants may have always intended to seek legal advice on the final form and legality of any contract before its execution and implementation. That is sufficient to dispose of the appeal in the appellants' favour.

88 I would allow the appeal with costs. The respondent's application should be dismissed and the respondent should pay the appellants' costs of the trial and the appeal to the Full Court of the Federal Court.