Speech to the Queensland Press Forum

Issues in competition law: A perspective of the Australian Competition and Consumer Commission

12 June 2003
Brisbane

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Introduction

It is a great pleasure to be here today.

This is my last official public speech in Queensland before I retire as Chairman of the ACCC on 30 June.

After 12 years of enforcing the Trade Practices Act it is difficult to resist the temptation to reminisce, and Queensland provides such good material for retrospection.

Queensland has provided some of the most important Trade Practices work in the country, and some of my most cherished memories as Chairman of the TPC and ACCC since 1991.

Law Enforcement

A feature of the 1990s has been vigorous enforcement of Parts IV and V of the Trade Practices Act. The Trade Practices Commission and then the ACCC (which was formed from the merger of the Trades Practices Commission and the Prices Surveillance Authority in 1995) stepped up enforcement heavily. In 1990 approximately five cases were initiated per year nationally, whereas, at present, ten times as many cases would be initiated. Substantial results have also been obtained.

Maximum fines under the Act were increased from $250,000 to $10m per offence in 1993.

In more recent years there has been no falling off in litigation and it has extended to such new areas of legislation as secondary boycotts, unconscionable conduct with respect to small business and to GST matters.

The Act has also become far more visible and better known. Publicity has been an important instrument. Education is an important means of securing compliance with the law, but education without enforcement cannot work.

The combination of strong enforcement and high publicity has had a powerful effect on corporate behaviour, as well as raising public awareness of the Act.

The Commission strongly believes that compliance is assisted by the public promotion of the meaning and enforcement effect of the law. In this, we are not alone. As David Knott of ASIC has publicly stated: 'Without visible enforcement, regulation can never be fully effective.'[1]

Enforcement of the TPA in Queensland

In Queensland we have seen the law applied vigorously and successfully. The ACCC's Queensland office is one of the most professional and successful within the organisation, and they have produced very good results for the people of this State, including the uncovering and eradication of some serious cartel activity.

Cartels

In 1995 the Commission uncovered and prosecuted the Brisbane concrete cartel involving Boral, CSR and Pioneer. This was a particularly blatant cartel in which the suppliers met regularly to share out tenders, to collude on prices for tenders and to ensure that each participant achieved an agreed market share. Tenders were firstly allocated on the basis of "pet customers" and then on tender size to ensure the agreed market shares were achieved. The poor customers were oblivious to this collusion and literally paid the price. Penalties of over $21M were imposed, which were record penalties at the time.

Since then the Commission has also broken up Queensland cartels in the foam industry (penalties of $2.9M), the foundry industry (penalties of $2.75M along with compensation of $1.23M), the ice industry (penalties of $155,000) and the fire protection industry (penalties of $14.79M). That is over $41M in penalties for cartels alone in this State in less than a decade.

[1] Knott, D.: Corporate Governance – Principles, Promotion and Practice. Speech to Monash Governance Research Unit, 16 July 2002, p.6. (www.asic.gov.au,)

I believe the highly publicised fines have had some effect on discouraging cartels, but they have not eliminated them. The gains can be very large and the risk of detection low. That is one reason for the ACCC successfully advocating the introduction of gaol sentences for hard-core collusion

Mergers

Throughout my term as Chairman of the TPC/ACCC, we have monitored merger activity closely to ensure no anti-competitive mergers were allowed through, but one Queensland case stands out from the rest. The Commission's approach to mergers is quite simple. We seek to prevent mergers that would substantially lessen competition. In fact, a major change was the adoption for mergers of a "substantial lessening of competition test" in place of "a dominance test" in the 1990s.

S.50 is the one section of the Act that directly influences industry structure. If we can prevent illegal mergers, we can do much to preserve competitive structures. In the entire history of the TPA there has only been one merger where penalties were sought instead of injunctions, and it happened in Queensland in 1996.

The case involved the acquisition of the assets of a vigorous competitor in the south Queensland concrete masonry market by Pioneer International Limited and its Queensland subsidiary. In a clandestine arrangement, Pioneer acquired the assets of A Class Blocks Pty Ltd thereby eradicating it as a competitor. A Class had led prices in the market down, but prices increased sharply after the competitor closed down. The acquisition clearly led to significantly higher prices for consumers.

The Court imposed pecuniary penalties and costs amounting to $5M.

This case highlighted and continues to highlight the fact that normal enforcement strategies can be employed successfully if companies fail to notify the ACCC of any acquisition. Despite the dangers of midnight mergers, no legislative mechanism for mandatory merger notification has been enacted.

Concrete and concrete masonry markets – Successes and failures

For those who enjoy coincidences, it should be remembered that the recent Boral case, which the Commission lost in the High Court, involved abuse of market power in the concrete masonry market in Victoria. In the Boral case the High Court had to consider questions of predatory pricing, but concluded that Boral did not have a substantial degree of power in the market. In 1992 the TPC instituted proceedings against Pioneer Concrete (Qld) Pty Ltd alleging predatory pricing of pre-mixed concrete in the Queensland city of Warwick. This was the first time the Commission had used the abuse of market power provision after it was substantially amended in 1986. The case eventually settled with injunctions and compensation. Our success in Warwick was unfortunately not repeated in Victoria.

Consumer protection

The Commission has also been extremely active in the consumer protection field in Queensland.

Aboriginal insurance

One of the most exacting and successful series of actions taken by the Commission was the aboriginal insurance cases of 1992. The best known case was the Colonial Mutual case in which company agents lined up and signed up aboriginal people in remote communities in Queensland. They sold long term policies with high commission and fee structures which were of little benefit to the unemployed aboriginal people in these remote communities. They also engaged in twisting, and made a series of misrepresentations about the benefits of the policies.

The Commission obtained full refunds with interest for all consumers (over 2000 people). CML also paid $715,000 into a trust fund for aboriginal education.

Similar cases followed with some other life insurance companies.

Corporate failures to service

Queensland has also produced a number of cases involving corporate failures to provide contracted services. The failure to service fire protection systems by Tyco and three other companies was one example where companies were prepared to put profits ahead of public safety. Tyco were supposed to undertake ongoing maintenance checks of the fire protection system at the PA Hospital, but they did not undertake the necessary checks. Commission staff found that a hydrant system that was supposed to pump water to the top floors of the Main Acute Block did not work. Had there been a fire, the hospital's Cardiac Care Unit, Burns Unit & Plastic Surgery, Critical Care, transplant Unit, Intensive Care Unit and Operating Theatres would have been without water.

The Commission has also taken action in relation to missed mobile security services and security pendant services for consumers in which compensation was ultimately paid and system rectification ordered. Mobile guards who were supposed to do a series of checks on Queensland businesses were not able to complete their rounds. The security pendant, which was supposed to provide security and help for aged, infirm and ill people, simply did not work for much of the time and while corporate management knew this, they did nothing to rectify it, until the ACCC stepped in.

Get rich quick schemes

Queensland is rightly seen as a land of great opportunity for business people, but unfortunately the sun, sand and sea also attracts the fast money dealers who offer questionable business deals. The ACCC's Queensland office has been extraordinarily busy dealing with these merchants of poverty.

Franchise cases and computer betting schemes

Successful actions have been taken against franchising corporations and business opportunities, such as:

- The Great Australian Ice Creamery who gave potential franchisees misleading data about earnings expectation;

- Europark, a company operated by a gentleman the Judge described as a glib grandiloquent rogue who sold franchises for a parking device when he knew there were serious legal questions about his rights to the intellectual property;

- The Michigan Group who sold fresh orange juice vending machines by falsely claiming they had contracts to site the machines in retail outlets;

- Goldseal who sold franchises for a waterproofing product by making misleading representations to the effect that it had the sponsorship or approval of housing bodies and was responsible for the invention of the product; and

- Acepark who misled consumers into paying many thousands of dollars for a computer betting system they falsely claimed helped people to pick winners.

Pyramid selling schemes

Frequent among the fast money people are the promoters of pyramid schemes who promise untold riches to those willing to drag their family and friends into a Ponzi scheme. The cases against the My Life Scheme, and the World Netsafe scheme operated by Terry Butler are good examples of our work in this field in Queensland, but the recovery of money from Vanuatu in the Golden Sphere case was something of a first. Vanuatu is a very difficult jurisdiction in which to recover money, but the Commission managed to extract about $300,000 which was later included in refunds to consumers.

Small business issues

The Government has used the Trade Practices Act to provide protection to small business. The commission has been extremely active in Queensland in this regard.

One of the Commission's earliest unconscionable conduct cases was against the previous owners of Hamilton Island. The facts of that case are quite complex, but in basic terms we were concerned that Hamilton Island forced a concessionaire on the island to trade at a loss and would not allow her to sell her business. Eventually she went broke and Hamilton Island resumed her business. The matter was eventually settled out of Court with a substantial compensation package for the concessionaire.

In another case, the Commission alleged that Daewoo signed an agreement appointing a firm as Queensland distributor when it was, at the same time, negotiating to appoint a national distributor who would take over distribution in Queensland. Daewoo settled the matter ahead of trial.

The Commission successfully took action against the Institute of Taxation Research and its promoter Mr Wayne Levick who were misleading people into believing that they could avoid paying tax by using a legal argument that the Australian Constitution was invalid and therefore the collection of taxes was equally invalid at law.

GST issues

When the Government introduced the GST in 2000, it called upon the ACCC to ensure its introduction was not compromised by exploitation. The first case taken by the Commission was in Queensland where Australian Taxation Services sent forms to tens of thousands of small businesses up and down the eastern seaboard of Australia. The forms looked like Australian Taxation Office forms, and asked the small business people to send $175 for one year's registration or $295 for two years registration to ATS. We got a Court order allowing interception of their mail and were flooded with a mountain of forms. The Commission was able to refund approximately $250,000 to small businesses which represented full refunds to everyone.

Secondary boycotts

The Government also amended the Trade Practices Act to strengthen provisions prohibiting secondary boycotts by unions. The stoush between Patricks and the MUA is generally remembered, as was our role in ensuring compensation was paid to the

many small businesses crushed by the conduct. Queensland has also been at the forefront with two cases against the Transport Workers Union, one against the CEPU and a court enforceable undertaking from the BLF.

Regulation

Since the mid 1990s a very substantial extension to the role of the ACCC has been that it regulates monopolies where there are national issues, in such fields as telecommunications, electricity, gas, airports and rail. In fields such as electricity and gas State issues are left in the hands of State regulators. A very large part of this regulation consists of dealing with access issues, that is a competitor may be granted access to use facilities that a monopolist may have in order for that competitor to be able to compete with the monopolist upstream or downstream. Also, there is some direct price control associated with this regulation. Basically, the Act tended, pre 1990s, to target relatively more competitive sectors. This is necessary, but now it also targets areas of high monopoly power. In such cases, price regulation is often necessary.

Hilmer Review of National Competition Policy

The earlier Hilmer Report led to the Competition Policy Reform Act of 1995. This Act, with the agreement of the States, extended the jurisdiction of the Act to cover all areas of business without exception. In particular new areas such as the professions, agricultural marketing boards, and the utilities were covered.

It was this extension of the law that enabled the Commission to bring proceedings against obstetricians in Rockhampton. The ACCC alleged that three obstetricians made arrangements that none of them would provide private in-hospital obstetrics services to their patients on a 'No-Gap' billing basis. The outcome of the boycott was that approximately 200 affected patients were required to pay a gap for the in-hospital medical expenses associated with the birth of their child that they would not have been required to pay if the conduct had not occurred. As a result of Commission action, almost $97,000 was repaid to affected patients in and around the Rockhampton region.

The Dawson Review

The recent Dawson Report has supported in principle the introduction of criminal sanctions to enforce the collusion provisions of the Trade Practices Act. It supported no change to the misuse of market power provisions of the Trade Practices Act, an area in which the Commission has had little success in litigation. There has only been one case since 1991 which it has won and that is on appeal. It is unlikely that there has been only once case in that time when there has been abuse of market power by business, and this suggests section 46 of the Act is not working well.

The Dawson Report also upheld the current merger test but has introduced a number of procedural changes with greater emphasis on access to the Australian Competition Tribunal both as a means of appealing merger decisions under Part IV by the Commission and also for granting authorisations for anticompetitive mergers. It is difficult to support the proposal that there should be direct access to the Tribunal for mergers. The Tribunal is a legal body, with QC's representing parties. It is unlikely to give consumers and small business a good go.

Some facilitation of collective bargaining by small business is also proposed.

Proposals by business for greater oversight of the Commission by an Inspector General or by a Review Board were rejected and in place a consultative mechanism that already exists is to be strengthened. We await the Uhrig report which will discuss similar issues.

There was considerable discussion of the role of the Commission in dealing with the media and it was proposed, with the agreement of virtually all parties including the ACCC, that there should be a media code of conduct.

A number of other detailed changes concerning joint ventures and collective boycotts and so on were also proposed by the Committee.

The government has adopted the report and the next step will be the introduction of legislation.

Lessons of experience

What are the lessons of experience? What is the future for competition law?

The first lesson of experience is that a certain proportion of people in business will want to profit from anticompetitive behaviour or unfair trading. The potential gains are large. We need laws, properly enforced, to curb this.

The second is that the economy is constantly changing because of such forces as globalisation, new technology and deregulation. On the one hand this not only benefits consumers and business but reduces the need for competition law to be applied in some areas eg merger law where globalisation means more import competition.

On the other hand, economic changes can give rise to new forms of anticompetitive conduct, market power and consumer scams. An example is that with the increase in globalisation there are more international cartels. The result is an ongoing need for competition law.

Third, there will be continual pressures on competition law mainly from interest groups. On the whole, the big business lobby, in practice, gives little support to anything that strengthens competition law or its enforcement if it affects even a few members of that lobby. Small business wants the law strengthened. So do farmers and consumers. The result is a somewhat unstable political situation with politicians trying to juggle these competing interests, hopefully putting the public interest first.