Speech to New South Wales Legal Aid Commission Civil Law Conference

Protecting competition and consumer rights: a perspective of the Australian Competition and Consumer Commission

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1. Introduction

Ladies and gentlemen.

I want today to outline some issues associated with Australian competition and consumer protection law and the operation of the *Trade Practices Act 1974*.

In doing so I want to leave you with four key messages.

The first is that consumer rights are best preserved by a combination of vigorous competition in the marketplace and effective consumer protection laws.

The second is that the review of the competition provisions of the Act provides the opportunity to canvass issues about the Act, its administration and its improvement. If we have a better Act, then consumers will be the beneficiaries.

Thirdly, the Commission should be energetic and diligent in informing consumers of their rights under the law. We have a responsibility to be transparency and clear and public in our administration of trade practices law.

Finally, in the context of the Dawson review of the competition provisions of the Act, I want to outline why the Commission believes that criminal sanctions should apply to hardcore collusion by big business.

2. The role of the Australian Competition and Consumer Commission

After this introduction, let's now make a start.

The role of the Commission is to apply the Act in full, without exemption, and without fear or favour. That is, we work to ensure compliance with the law and we work to enforce the law. As an institution we are scrupulously even-handed. We apply the Act to all, and for the benefit of all – and are unconcerned by notions of power, position or influence.

The Commission also has a role to encourage competitive market structures and informed market behaviour.

In this, the Commission is empowered by the provisions of the *Trade Practices Act 1974*.

Part IV prohibits practices such as anti-competitive agreements (including price fixing and primary and secondary boycotts), misuse of market power, exclusive dealing, resale price maintenance and anti-competitive mergers

In **Part IVA** unconscionable conduct is prohibited.

Part V safeguards the position of individual and business consumers in their dealings with producers and sellers. Part V deals with unfair practice, including misleading and deceptive conduct, product safety, country of origin claims and information standards.

Other parts of the Act that are perhaps of less direct interest to you today include **Part IVB** (corporations and applicable codes of practice); **Part VII** (the authorisation of anti-competitive conduct); **Part IIIA** (a framework for access to infrastructure facilities, such as electricity transmission and distribution networks); and **Parts XIB** and **XIC**, which are specific telecommunications provisions.

In addition to the Trade Practices Act, the Commission has responsibility for the administration of the *Prices Surveillance Act 1983*, and other sundry Acts of Parliament.

3. Competition protects the consumer

Ladies and Gentlemen.

Before talking about specific aspects of consumer law, I would like to discuss the link that exists between competition and competition law and consumer rights.

To put things in full and proper context, it's worthwhile to recall the motivation of the Parliament of Australia when it passed the Act almost thirty years ago. The then Attorney General made the following remarks:

> 'The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices…These practices cause prices to be maintained at artificially high levels…they interfere with the interplay of market forces which are the foundation of any market economy; (and) they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries.'

In this context, a necessary condition for consumer benefit is effective competition in the market. A well functioning market empowers consumers. It enables consumers to choose the products and services they want. It provides opportunities for those with good business ideas, and provides a fertile environment of innovation. Competition energises, to the benefit of consumers, companies already operating in the marketplace. Finally, a well-functioning market calibrates pricing to meet supply and demand. Consumers benefit from cost-efficient prices and enjoy the benefits of business efficiencies.[1]

For Australians, one major benefit of a national competition policy – from the perspective of both efficiency **and** equity - has been a reduction in prices paid for important services. Since the early 1990s, real prices paid for electricity, national rail freight, standard letter postage, international, long distance and mobile telephone calls all declined.

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[1] For a full discussion see: Powell, M.K.: *Consumer Policy in Competitive Markets*. Speech to the Federal Communications Bar Association, Washington D.C., 12 July 2001.

More generally, a well functioning market enhances productivity and employment growth and provides the economic means for citizens to satisfy their material wants and needs.

Research by the Organisation for Economic Co-operation and Development indicates that anti-competitive market restrictions may act to reduce the employment rate by three percentage points from the OECD average. That is, anti-competitive restrictions cost jobs.[2]

We can therefore legitimately claims that competition law acts to create consumers, aw well as serving consumers.

Let me cite some examples where anti-competitive practices harmed, and competition law benefitted, the consumer.

Recently, following action by the Commission, the Federal Court ordered penalties of $14.5 million against **Schneider Electric (Australia)**, **Wilson Transformer Company** and **AW Tyree Transformers** for their involvement in price-fixing and market-sharing arrangements in the power transformer and distribution transformer markets. **Alstom Pty Ltd** was previously fined $7 million for price fixing.

The transformer market is a significant Australian market, estimated to be worth $160 million per annum. The unlawful conduct by these companies, and by these executives places upwards pressure on prices – directly disadvantaging producers and businesses and families in regional areas.

(In this, I note that the Schneider matter is under appeal).

In this case, efficient small businesses, amongst others, were fleeced so that these firms could unlawfully line their pockets.

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[2] Organisation for Economic Co-operation and Development: *Product and Labour Markets Interactions in OECD Countries*, OECD Working Paper, Working Party No.1 on Macroeconomic and Structural Policy Analysis, ECO/CPE/WP1(2001)16, 12 September 2001.

Last year, the Federal Court imposed penalties recommended by the Commission of $26 million against **Roche Vitamins Australia**, **BASF Australia** and **Aventis Animal Nutrition**. These companies were major players in a cartel that met in secret, and agreed to put up vitamin costs.

They made admissions to the court of engaging in price fixing and market sharing conduct in Australia involving animal vitamins A and E and pre-mix containing these vitamins. This behaviour was a breach of section 45 of the Act.

The arrangements set floor prices for all sales of animal vitamins A and E and of pre-mix containing these vitamins.

The three respondents controlled approximately 90 per cent of the relevant market. Customers had limited alternative sources of supply as the relevant corporate groups are the predominant global manufacturers of these vitamins.

Restaurateurs, food processing and manufacturing companies, small and large butchers and consumers – all paid additional costs because of this unlawful behaviour.

To enforce the Act we also investigate and prosecute industry associations and trade unions.

Just last week, the Federal Court made orders by consent finalising action by the Commission against **three obstetricians** for a boycott of 'No-Gap' billing. 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.

Almost $97,000 will be repaid to affected patients in and around the Rockhampton region. The orders included findings that all three obstetricians engaged in conduct in contravention of the *Trade Practices Act 1974* and/or the Competition Code of Queensland.

The Commission also instituted proceedings against the **Western Australian Branch of the AMA** and **Mayne Nickless** for price fixing and primary boycott conduct. As a result, the Federal Court ordered the AMA to pay a penalty of $240,000, and the President, and the Executive Director a penalty of $10,000 each. The Commission's case against Mayne Nickless is continuing.

This was the first time the Federal Court imposed penalties on a professional association for price-fixing and primary boycott conduct. I think it important, because it sends a clear message to the medical profession and its association, as well as to all other professional associations, that they do not stand above the law.

The issues here were not about the ethical obligations of the professions or standards or the quality of medical treatment. Instead the issue here the abuse of market power, the purpose of which was to unlawfully increase doctors' incomes.

In 2001 we successfully took action in the Federal Court against the **Maritime Union of Australia**. In this case, we alleged that the MUA and a number of senior officials breached s.45DB – we alleged the MUA unlawfully hindered and prevented – or made the attempt - to hinder and prevent vessels from sailing unless the owners/charterers agreed to use the MUA to clean vessels' holds. Basically, the ship didn't sail unless it was cleaned by MUA. Workers who considered releasing ships were called 'dogs, slimes and scabs'.

The court ordered the MUA pay penalties and costs totalling $210,000, and declared that the conduct constituted undue harassment and coercion in breach of the Act.

Ladies and gentlemen.

Under s.50, the Commission considers applications for mergers.

In a modern economy, mergers play a crucial role. They allow firms to achieve efficiencies such as economies of scale and scope; they created synergies and they act

to spread risk. Furthermore, mergers facilitate an active 'market for corporate control' whereby underperforming firms and incompetent managers are replaced. These are positive developments that, indirectly, benefit consumers.

Most mergers do not raise any competition issues. However, in s.50, mergers or acquisitions that would have the effect or likely effect of substantially lessening competition are prohibited.

The experience of the Commission, however, is that most mergers do not raise any competition issues. Around 1,200 mergers have been investigated over the last six years by the Commission. Only 69 were opposed – just over five per cent.

In 2001-2, the Commission considered 237 mergers, asset sales and joint ventures.

The Commission objected to just nine.

In recent times, the largest mergers by value in this country have been **BHP** with **Billiton**; **Optus** and **Singtel**; **Commonwealth Bank** and **Colonial**; **RioTinto** and **North**; **TCNZ** and **AAPT**; **Smorgon** and **Email**; **Woolworths** and elements of **Franklins**; and the failed **Woodside/Shell** bid, which was approved by the Commission, but rejected in another, separate process.

The fact is that the Commission opposes very few mergers - on average, between four and five per cent.

In pointing to the benefits that accrue to consumers from competition law, it is important to acknowledge that not all consumer interests are protected by competition.

It is sensible that, even in competitive markets, minimum demands be made of participants.

As citizens and consumers, we expect that health and safety standards be met; we require that advertising neither mislead nor deceive; we insist that conduct not be

unconscionable; we want to proscribe misrepresentation. In summary, consumers have rights in the market place, and these rights are protected by consumer law.

4. Enforcing the law: consumer provisions

Ladies and gentlemen. I want now to report to you on the structure and practice of federal consumer law. The Commission works hard to ensure compliance with the law. It is our major business and the area of our greatest efforts.

Currently, over 80 matters are before the courts and Australian Competition Tribunal, of which 43 matters deal with consumer protection.

The rights of consumers and corporations that qualify as consumers are protected in Parts IV and V of the Act.

Section 51 prohibits both unconscionable conduct in both commercial dealings and consumers transactions.

The relevant sections of Part V prohibits unfair practices such as: misleading or deceptive conduct (for example, false or misleading representations, s.53; bait advertising, s.56; harassment or coercion, s.60; pyramid selling, s.61; or demanding payment for unsolicited goods or services, s.64)

Part V contains provisions that address matters of product safety. These include sections that:

? define compulsory consumer product standards, ss.65C, 65D, 65E

? ban unsafe goods, s.65C(5)

? give the relevant minister power to issue public warning notices, or compulsorily recall consumer goods that have safety-related defects s.65F

As well, Part V, Division 2, protects the rights of consumers by implying various conditions and warranties into transactions; and Part VA provides rights to compensation against a manufacturer whose product is defective and damages property or injures a person.

To make these provisions more concrete, let me give a few examples.

Unconscionable conduct

Last year the Commission obtained court orders against **National Australia Bank**. The Commission alleged the NAB had engaged in unconscionable conduct in obtaining and enforcing personal guarantees for $200,000 from a woman, as security for a business loan to a company of which her husband was a director. At the time the guarantees were executed, the woman's husband was seriously incapacitated.

As a result of Commission action, the Federal Court made orders declaring the NAB had acted unconscionably and restraining the bank from obtaining guarantees without properly explaining their nature and the need to obtain independent legal advice before the guarantee was signed. Orders also required the NAB to notify all lending staff in Australia of new lending requirements. NAB paid $28,500 in damages to the aggrieved parties, and repaid monies recovered in excess of amounts owing on the mortgage.

The Commission commenced proceedings in 2001 in the Federal Court alleging unconscionable conduct, and undue harassment and coercion towards an intellectually impaired couple to secure the sale of a **Lux** vacuum cleaner. The trial is continuing.

In the matter of **ESANDA Finance Corporation** we commenced action in court alleging the use of physical force, undue harassment and coercion, and unconscionable conduct relating to the payment for goods and services by a consumer. We also allege some individuals engaged in harassment and coercion in contravention of s. 23 of the *Fair Trading Act 1987 (WA).* The Commission seeks declarations, injunctions, corrective notices, compensation, undertaking of a trade practices compliance program and costs.

Misleading and deceptive conduct

Misleading and deceptive advertising continues to be the Commission's enforcement priority in the protection of consumers. Particular attention is paid by us to the misuse of fine print and deceptive pricing.

For example, this year we investigated the advertising practices of **Qantas** and **Virgin Blue**. We were concerned to see that consumers understood the full direct cost of flights, and to this end required undertakings from both airlines that they would include additional taxes, levies and charges in advertised flight prices.

In other matters, the Federal Court made orders that:

? **Chubb Security Australia** correct inaccurate claims made about the price of a particular security system

? **Quality Bakers**, which sold Buttercup bread products, correct an inaccurate promotion that ran in the Canberra Region. Basically, the misleading claim was that 30 cents would be donated to The Canberra Hospital for each product sold. The reality was that the promotion and donation was limited to sales that were made above the average number of products sold in the distribution area over the preceding eleven weeks. In settlement, Buttercup undertook a review of trade practices compliance and made a $40,000 donation to Canberra Hospital.

We also commenced action against **Wizard Mortgage Corporation** alleging that Wizard advertised a mortgage product, at a particular price with particular features (such as direct salary crediting, and the ability to change repayment schedules), when, in fact, such features were available only at loans at higher interest rates. Last month, Wizard was found in the Federal Court to have engaged in misleading or deceptive conduct.

Misleading and deceptive conduct in telecommunications services was also an area that demanded the Commission's attention.

Just last month, we instituted proceedings against **Telstra** over the pre-paid long distance calling card product called 'Say G'day'.

We alleged misleading and deceptive conduct, and false and misleading representations on the Say G'day cards and vouchers, website and associated marketing materials.

In this matter we are seeking court orders including:

? declarations that Telstra has breached the relevant provisions of the Act

? injunctions restraining Telstra from engaging in the same conduct in the future

? refunds for consumers;

? an order requiring that Telstra improve its current trade practices compliance program for Part V (consumer protection) provisions of the Act, and

? costs.

As well, last year the Commission obtained interim orders against **Telstra** in relation to its conduct following the collapse of **One.Tel**. The Commission alleged that Telstra had misled former One.Tel customers about the transfer of mobile services to Telstra, including that customers would be liable for early termination fees if they did not switch their service to Telstra before a certain date. The Federal Court made orders against Telstra for the partial repayment of minimum monthly access fees and costs to about 3000 former One.Tel mobile phone customers.

Lat year, the Commission also commenced proceedings in the Federal Court alleging that the **Woolworths** 'Beefing up the Economy' advertisements published in regional newspapers in New South Wales were false and misleading. Claims were made that all

the beef sold in Woolworths regional supermarkets were sourced from cattle suppliers in the north-west and New England regions and that the cattle were fed on locally produced grain. The Federal Court declared that Woolworths had made false or misleading representations about the place of origin of cattle ultimately sold as beef in some of its regional supermarkets, and that it had engaged in misleading or deceptive conduct concerning this beef and the grain used to feed the cattle.

I hope that it is clear that the Commission makes strong efforts to enforce the law, and to see wrongdoers held to account.

But that said, we can always do with assistance. I would therefore make this appeal: if, in the course of your business, you come across behaviour that breaches the Act – unconscionable, misleading or deceptive or anti-competitive behaviour – then please, don't hesitate to contact us.

NSW Legal Aid has officers in country and regional areas where the Commission has no permanent presence. Your comments, therefore, and your experience could be of great assistance to us in enforcing competition and consumer law.

5. Public comment by the Commission

Ladies and gentlemen.

I believe that our rights should not be kept under a bushel.

We all benefit if there is a clear public understanding of our rights as consumers, and of our responsibilities as producers or sellers.

I want therefore to talk about how the Commission speaks to the Australian community.

You will be aware of criticism of the Commission that we should go quiet and that we should make little or no comment about unlawful anti-competitive activity or behaviour that breaches the consumer provisions of the Act.

Well, we think that public discussion is necessary if consumers are to have a clear understanding of important consumer rights.

And if companies themselves are to comply with the law.

I believe that the Commission must be transparent and open. Moreover, procedures must be fair and efficient.

The Commission starts from the reasonable premise that the Australian public deserves an account as full as possible of the activities of the Commission. Moreover, we believe that the Australian public is capable of determining its own views according to the facts of particular arguments. The Commission therefore believes in disseminating information about the Act and about its activities as widely as possible.

There are a number of reasons why this is the case.

The first is that we are required to do so by the Parliament of Australia.

In s.28 of the Act the Commission is required to make general information about the Act available to those engaged in trade or commerce, the general public, and consumers.

In addition, the GST legislation explicitly provided for the release of public notices by the Commission in cases where we considered overcharging occurred.

By publishing our activities the Commission explains actions against those alleged to have breached the Act and those penalised by the courts for breaches, and detailed court enforceable orders to prevent any future breaches.

To provide information the Commission engages in a public discourse on a number of levels.

We make comment to the media.

Commissioners and staff give speeches.

We issue discussion and technical papers and make available detail of our technical modelling.

To better inform small business about their rights and obligations, the Commission's Small Business Unit operates a successful Outreach program. To inform rural businesses and consumers the Small Business Unit runs a 'Competing Fairly' forum, which involves satellite broadcasts to over 60 towns throughout Australia.

We maintain over twenty public registers that detail matters arising from the operation of the *Trade Practices Act 1974*, the *Prices Surveillance Act 1983* and the *ASIC Act 1989* (to the extent of our minor involvement in it). We also maintain a number of 'voluntary' public registers.

Of course, the Commission has more formal lines of accountability. Our most important accountability is to the courts.

We are also obliged to provide an annual report to the Parliament of Australia, and we are held accountable for enforcement activities through appearances before a number of Parliamentary Committees.

In 2000-01, the Commission appeared before the Senate Economics Committee three times, and twice before the House of Representatives Standing Committee on Economics, Finance and Public Administration, which reviews the Commission's annual reports.

In addition, the Commission is subjected to the scrutiny in Senate Estimates hearings.

The Commission also provides information to numerous ad hoc committees, and considerable resources are dedicated to providing answers to Senate orders. For example, the Commission has produced reports for the Senate on anti-competitive practices by health funds and insurers, and has just completed a report on prices paid to suppliers by retailers in the grocery retail industry.

Accountability for the Commission's enforcement activities is also provided by the ability of parties to complain to the Commonwealth Ombudsman. The Ombudsman is empowered to consider and investigate complaints from parties who believe that they have been treated unfairly or unreasonably by the Commission.

In addition to the Commonwealth Ombudsman, decisions by the Commission can be reviewed under Freedom of Information, by the Australian Competition Tribunal (if the matter is to do with authorisation) and by the Administrative Appeals Tribunal

Ultimately, however, as an enforcement agency, the Commission needs to prosecute and prove cases in court, under tight evidentiary rules. In this country, the law and the courts keep us all honest. To succeed we need to prove the allegations we make. As a consequence, we are cautious, careful and considered.

Nothing could be simpler, fairer and more accountable.

Now I understand that comment by the Commission about investigations or cases is unpopular with the businesses. Some claim this should not happen and that it is 'trial by media'.

I believe, however, that the Commission should report on the commencement or outcome of a trade practices case at court.

Journalists have the role of informing the public of how justice is administered. The court audience extends far beyond those in the courtroom and it is important to alert potential offenders as to what may await them. In addition, there is a substantial public

interest in the enforcement activities of regulators, all of which buttresses the need for open court proceedings and media releases.

This is a proposition recently expressed by the Victorian Supreme Court in Australia:

> 'Since everybody cannot visit (a courthouse), citizens in a democracy depend to a substantial extent upon accurate and published reporting of what takes place in an open and truly democratic society, the right of various forms of the media to be present (at court proceedings) and publish is generally regarded as being in the public interest…'[3]

More generally, outside a courthouse, the availability of accurate information makes it possible for citizens to discriminate on important issues and act to their own benefit - and to the benefit of their fellows.

There are a number of adverse consequences that would result if the Commission failed to provide this kind of information to the public.

Essentially the public would be poorly informed because the media and other sources of information to the public would perform the task poorly. Court proceedings are often technical or cryptic and difficult to comprehend and complex. During œurt hearings, it is often not obvious to reporters what is happening.

Moreover, given limited time and resources, the media, on occasion struggles to master, understand and report the substance of proceedings accurately. The Commission works to provide accurate information.

Ladies and Gentlemen.

An additional reason for the Commission communicating to the media is that it helps promote compliance with the law. It also help achieve desirable economic objectives

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[3] *Herald and Weekly Times Ltd v Medical Practitioners Board of Victoria* [1999] 1 VR 9 per Hedigan J at 278-9.

such as a more competitive economy characterised by a greater degree of fair trade. This is a fundamental objective of the Trade Practices Act and for that to happen compliance is needed.

Explaining the law and illustrating its various uses and applications spreads the word amongst business and consumers and helps bring about lawful behaviour and helps to eradicate unlawful behaviour. It also demonstrates to those who fail to comply with the law that there could be a heavy price to pay.

The unfavourable publicity surrounding those who breach the law is a further means of inducing other firms to comply rather than face such publicity themselves.

A third reason is that publicity helps build a general culture, understanding and support of competition and understanding of and support for the law and its administration and, more generally, for the application of competition policies across the whole economy.

Because, there is more to competition policy than competition law, such a policy also promotes discussion on critical evaluation of competition policy generally.

The fourth reason for communicating with the media is that it counters the tendency of many businesses to provide misleading information publicly and privately about how the law works.

This might come as a shock to you, but there is a systematic tendency for businesses, often behind closed doors, to give inaccurate and biased information to politicians about the workings of the law. This is done sometimes in the hope of getting the law changed or weakened by legislative amendment or in the hope of having the budget for the Commission reduced.

Often the Commission does not know what is being said to politicians, bureaucrats and other important decision-makers behind the scenes. We do not know exactly how our praises are being sung – although we have a fair idea.

Accurate publicity about the Commission's actions is an important antidote to whispering campaigns.

I see no problem whatsoever in countering, in public, arguments that have been made by self-interested parties or agents or organisations, often very well funded, and often not overly concerned with presenting a balanced and accurate account of an issue.

Finally, on occasions publicity directly assists in the proper and effective enforcement of the law. Sometimes an announcement that an issue is being investigated brings forward new witnesses who help get to the truth.

Ladies and gentlemen.

Despite the fact that public discussion leads to a clearer understanding of important issues, the Commission is careful in its handling of investigations.

We think procedural fairness essential.

As a general rule, when there is an investigation or when there is a complaint made to the Commission against a particular company by a person or a competitor, the Commission does not make that matter public.

Sometimes the complainant does.

Occasionally there is a leak from within a firm, which wants to make matters public for reasons of its own.

Occasionally, when the Commission is conducting investigations, people who are being questioned let the press know. These are matters the Commission does not control.

I would not claim to you that everything the Commission does is perfect. But the onus is now on critics – the critics who claim the Commission is not accountable and that the

Commission's public manner is 'unfair, unjust and immoral' – to propose a credible, and coherent alternative.

6. Criminal sanctions and pecuniary penalties

Ladies and gentlemen.

Having discussed the importance of a transparent public discussion of trade practices issues, I would like to identify one area of competition law that can be improved.

The Commission believes that the Act should be amended to introduce criminal sanctions for hardcore collusion by big business.

Hardcore collusion in the form of secret price-fixing agreements, bid rigging and market sharing is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

There has been a significant rise in international concern about collusion as reflected in recent resolutions by the OECD Council of Ministries concerning hard core collusion by big business, including apparent growing global collusion.

We believe that hardcore collusion is ethically objectionable, a form of theft and little different from classes of corporate crime that already attract criminal sentences. The possibility of criminal sentences is therefore appropriate for this kind of behaviour.

We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. In my view, it is only a matter of time before we do this. I hope we do it as a result of this review.

The Commission believes that the present system is not properly based. The penalty regime is based on imposition of pecuniary penalty and does not allow for criminal

sanctions. Pecuniary penalties – or 'fines' - are not a deterrent sufficient to prevent highly profitable 'hard-core' collusion.

Given the nature and effect of collusion, reliance on civil penalties is not appropriate.

The view of the Commission is that the possibility of gaol is a far more effective deterrent for the wrongdoer who is considering wrongdoing – even more so, when leniency practices are working well.

Prior to 1993 the pecuniary penalties applicable to breaches of the Act were low. The maximum penalty per offence was $250,000 for a corporation and $50,000 for an individual. Moreover, in no case until then had the total penalty exceeded $250,000.

In 1993, the penalty was increased to a maximum of $10 million for a corporation for an offence and to $500,000 for an individual.

Shortly afterwards in early 1995, penalties of around $15 million were imposed on **TNT**, **Ansett Freight Express** and **Mayne Nickless** for conduct that occurred under the previous penalty regime (of $250,000 maximum).

Individual penalties were also imposed. For example, the CEO of **Mayne Nickless** was personally subjected to pecuniary penalties for behaviour prior to his becoming CEO.

$21 million fines were applied in 1995 under the new penalty regime to **Boral, CSR and Pioneer** for price fixing for ready mixed concrete in South Eastern Queensland.

It could be argued that since 1993 penalties have risen sufficiently to deter hard core collusion.

It is now clear that the new fines, although having had a significant effect, are still not sufficient. There has been a considerable number of price-fixing cases since then:

? Australian executives were involved in the international vitamin price-fixing cartel well after 1993. Fines of around $26 million were imposed by the Federal court on the companies and executives, and

? There has been extensive price fixing in the power transformers industry. Fines of $20 million have already been collected and the case has not concluded at this point. The behaviour persisted until 1999. That is, the behaviour persisted even after fines were increased.

In a recent judgment in the transformers matter[4], Justice Finkelstein stated:

> 'Generally the corporate agent is a top executive, who has an unblemished reputation, and in all other respects is a pillar of the community. These people often do not see antitrust violations as law breaking, and certainly not conduct that involves turpitude…There are, however, important matters of which the sentencing judge should not lose sight.
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> 'The first is the gravity of an antitrust contravention. It is not unusual for anti-trust violations to involve far greater sums than those that may be taken by the thieves and fraudsters, and the violations can have a far greater impact upon the welfare of society…
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> 'Secondly, there is a great danger of allowing too great an emphasis to be placed on the "respectability" of the offender and insufficient attention being given to the character of the offence. It is easy to forget that these individuals have a clear option whether or not to engage in unlawful activity, and have made the choice to do so.'

Tax cheats who defraud the Commonwealth of revenue may be subject to criminal liability, depending upon the seriousness of their offence. Similarly, those who manipulate Australian stock markets may, upon conviction, be imprisoned. Why

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4 *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 559, at para.28.

should executives who deliberately enter secretive arrangements to defraud their customers be treated any differently?

Aside from important considerations of equality before the law, criminal liability, including gaol, provides a deterrence not achievable under a civil regime. Work in the United States indicates that the optimal corporate fine would need to be extremely high if fines were to remove the prospect of profiting from participating in a cartel.

Because not all cartels are detected, to effectively deter a corporation from entering a cartel, the maximum fine should be six or seven times the profit arising from the illegal conduct.

Studies have calculated that had the optimal been imposed on more than 400 corporations founded to have participated in cartels in the US, it would have bankrupted more than 60 percent of the firms.

Let me give one example. It has been estimated that the total value worldwide of the commerce affected by the international vitamin cartel was in the order of $20 billion. Conservative estimates would imply a total gain to the three participants in that cartel of $1-2 billion.

Once the risks of detection is factored into the calculation, the optimal penalty is between $6 billion and $14 billion. Taking into account record penalties imposed worldwide and civil damages the participants have paid out in the order of $2 billion.

Executives have gone to gaol in the US for this cartel, but based on the penalties alone, you would have to ask whether the companies involved (and others observing from the sidelines) would think participation in the cartel was worth the risk.

Not only do large penalties jeopardise the continued existence of the majority of firms, they penalise innocent people - employees, shareholders and creditors.

Some have argued there is no evidence that criminal sanctions and the possibility of gaol will be more effective than pecuniary penalties. Of course there is no empirical evidence, how do you show that conduct that did not occur would have done had criminal sanctions not been in place.

Let me quote to you what James Griffin, the Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division said on a recent trip to Australia. When discussing the deterrent effect of gaol sentences he said:

> 'Of course, it is not possible to quantify the undetected. That is, cartel behaviour that does not occur because it is deterred by the perceived risk of incarceration. However, it seems clear that when the risk of gaol is introduced into the equation, the conventional businessman's risk/reward analysis breaks down, and it is that breakdown which is critical to the effective deterrent of anti-trust crime.'

I do not believe that the possibility of criminal sanctions should be of concern to the vast majority of businesses and business leaders in Australia.

Secret, unlawful collusion of a major kind is not the practice of the vast majority of Australian business.

When it occurs, however, it is very harmful, and business is most often the first victim. This is because in most price-fixing cases, the customer is a business, not a household consumer.

Most businesses regard price fixing as abhorrent.

Some businesses will argue that they are not opposed in principle to such a law, but they are concerned at the lack of safeguards.

This accurately describes my own view. I believe it essential that such provisions be accompanied by safeguards.

First, the forms of behaviour to which it would apply would need to be defined. For example, criminal sanctions would only apply to defined acts of collusion such as price fixing, market sharing and bid rigging agreements between big businesses. They would not apply to the rest of Part IV of the Act.

Secondly, proof beyond reasonable doubt would be required. At present the standard for Part IV of the Act is balance of probability.

Thirdly, the Director of Public Prosecutions, rather than the Commission, would conduct the case. Incidentally, New Zealand does not have a DPP system and instead has Crown Prosecutors. These are directed by agencies and do not act in the same way as a DPP. Of course, specific safeguards similar to those provided by the DPP could be built into any system.

Fourthly, the matter would be dealt with by a judge and jury, as the Constitution requires. For an indictable offence, that is an offence involving a gaol sentence of one year or more, a jury of twelve is required and, according, to High Court decisions, its verdict must be unanimous.

Finally, in the case of a guilty decision, a judge would then decide at his or her discretion whether or not someone should be fined or gaoled.

7. CONCLUSION

Ladies and Gentlemen, I want to conclude on this note.

Despite a very busy year, I believe that the Commission has retained a proper focus. And that we have paid close attention to our normal and usual business, which is the proper enforcement of Australia's competition and consumer law.

Thank you for your time today.