

CHAPTER 5: CEASE AND DESIST POWERS

Background

The present position

Under section 80(1) of the Act, the Federal Court may grant an injunction where it is satisfied that there is a breach or threatened breach of certain parts of the Act, including Part IV. The injunction may be granted on the application of the ACCC or any other person and may be in such terms as the Court determines to be appropriate. Under section 80(2) the Court may grant an interim injunction pending the determination of the application under subsection (1). The term interim injunction in subsection (2) includes an ex parte interim injunction as well as an interlocutory injunction upon notice. Where the ACCC is the applicant for an interim injunction, it is not required to give the normal undertaking to pay damages for any damage which the respondent may suffer as a result of the granting of the injunction.¹

The granting of an injunction under section 80 is in accordance with equitable principles and, although it is discretionary, an injunction will ordinarily be granted if there is a serious question to be tried and the balance of convenience favours it.²

The powers sought

The ACCC seeks the amendment of the Act to confer upon it power to make an order that a corporation cease and desist from engaging in anti-competitive conduct. Its proposal is supported in some submissions and opposed in others. The amendment proposed by the ACCC would provide for the making of an order where it was satisfied that:

- (a) a corporation has a substantial degree of power in a market;
- (b) the corporation was engaging in conduct that: (i) involved a use of that power; (ii) was anti-competitive; (iii) was contrary to the public interest; and (iv) was likely to cause loss or damage; and

¹ Section 80(6) of the Act.

² *Australian Coarse Grain Pool Pty Ltd v. Barley Marketing Board of Queensland* (1982) Vol. 46 Australian Law Reports, p. 398.

(c) there was an urgent need to prevent such loss or damage.

It would make an order only after hearing any submissions from the corporation. The order would only operate for a limited time, for example, 90 days, and would expire at the end of that time or on the institution of court proceedings by the ACCC, whichever was the sooner. The ACCC would be able to seek penalties from a court for non-compliance with the order. It is said that the order would be subject to review by a court before or at the time of the proceedings to compel compliance with the order, but it is not apparent that there would be any appeal on the merits.

Why is the proposed amendment necessary?

The ACCC claims that the power to make cease and desist orders would enable it to address more expeditiously cases of the misuse of market power and to avoid irreversible damage to competition while those cases were being investigated in order to determine whether judicial proceedings should be instituted. The process involved in obtaining an interim injunction is, it is said, cumbersome and involves a degree of proof that is difficult to achieve at an early stage. Without early intervention, the ACCC observes, competitors might be eliminated from the market and left without a remedy.

Analysis

Constitutional difficulties

The exercise of federal judicial power is, under Chapter III of the Constitution, confined to a court constituted in accordance with that Chapter. The ACCC is not a court nor is it so constituted. There is a real question whether the proposed amendment would involve the ACCC in the exercise of judicial power and hence be invalid. The power to make binding orders (albeit temporary) based on a determination by the ACCC that there was a breach of the Act, even though the orders would be enforceable only by the Court, would appear to involve the exercise of judicial power.³ The proposed amendment seeks to overcome that by basing the proposed order on the ACCC's determination of 'anti-competitive' conduct rather than a breach of the Act, but that may only substitute one form of breach for another as the basis of

³ See *Harry Brandy v. Human Rights and Equal Opportunity Commission* (1995) Vol. 183 Commonwealth Law Reports, p. 245.

the order and, at that, an ill-defined breach described as 'anti-competitive' conduct which is not to be found elsewhere in the Act.

It is not possible for this Committee to resolve these difficulties. It is sufficient to note that they exist and would pose a real threat to the validity of the proposed amendment if it were enacted. However, the Committee is of the view that, even if the constitutional difficulties could be overcome, the proposed amendment is undesirable for other reasons as well.

The adequacy of existing powers

No material was placed before the Committee to demonstrate why the process of obtaining an interim, or temporary, injunction, particularly an *ex parte* injunction, is cumbersome. In appropriate cases injunctions can be obtained in hours rather than days. Elsewhere the ACCC has said that it can obtain *ex parte* injunctions at very short notice, its predecessor (the Trade Practices Commission) having done so, in at least one case, within 26 hours of becoming aware of conduct in contravention of the Act.⁴ Nor is it apparent that it is unduly burdensome to require an applicant for an injunction to establish that there is a serious question to be tried and that the balance of convenience is in its favour, particularly where the applicant is the ACCC, which is not required to give an undertaking as to damages.

These tests have been established by the courts in the interests of justice, having regard to the potential serious interference of an interim injunction with a respondent's rights. They have been found to afford the courts a flexibility of approach in the individual case, whilst maintaining a balance between the parties. These requirements have been satisfied by others in cases where a breach of section 46 has been alleged (see Box 5.1). Of course, where the applicant is unsuccessful in obtaining an interim injunction, the ultimate remedy of an award of damages or a permanent injunction remains available.

If the proposed cease and desist order were to be made on the basis of something less than the existence of a serious question to be tried and the balance of convenience, there could be a risk of injustice if a breach of the Act were not eventually made out. The risk would be the greater in that the proposed cease and desist order would be made by the regulatory body without the independent intervention of a court.

⁴ Australian Law Reform Commission (ALRC) 1994, *Compliance with the Trade Practices Act 1974*, Report No. 68, ALRC, Sydney, p. 134.

Box 5.1: Interim injunctions granted where misuse of market power was alleged

Interim injunctions have been granted where a misuse of market power has been alleged, as demonstrated by the following examples. It is noteworthy that the 'serious question to be tried' test was made out in these cases, even though the allegation of a misuse of market power was not necessarily upheld by the court.

In *Australian Rugby Union Ltd v. Hospitality Group Pty Ltd*,⁵ as a part of a cross claim, an interim injunction was granted against the Australian Rugby Union, for alleged breaches of Part IV (including section 46) in threatening to dishonour Bledisloe Cup tickets sold wholesale to companies that arranged hospitality packages. The court found against Hospitality Group Pty Ltd in its final decision. The claims under Part IV were lost because Hospitality Group Pty Ltd failed to call evidence from its own ranks in support of its definition of the market.⁶

An interim injunction was granted against the Queensland TAB when, allegedly in breach of section 46, it wanted to reduce the number of bets per minute the TAB central computer accepted from punters via an on-course betting agency that also ran an on-line betting service in competition with the TAB.⁷

An interim injunction was granted against BP when, allegedly in breach of section 46, it changed its pricing for the supply of fuel to a wholesaler and retailer that was competing with BP's own retail outlets.⁸ The action was eventually settled, after the Trade Practices Commission had been allowed to intervene in the court case.

A significant reason for the ACCC seeking the power to make cease and desist orders is that, upon the commencement of court proceedings, the powers of the ACCC to obtain information and documents under section 155 of the Act

5 Federal Court of Australia 1136th decision of 1999 (19 August 1999).

6 *Australian Rugby Union Ltd v. Hospitality Group Pty Ltd* (2000) Australian Trade Practices Reports, para. 41-768.

7 *Racecourse Totalizators Pty Ltd v. Totalisator Administration Board of Queensland* (1995) Vol. 58 Federal Court Reports, p. 119.

8 *O'Keeffe Nominees v. BP Australia Ltd* (1990) Australian Trade Practices Reports, para. 41-057.

cease.⁹ It must then avail itself of the court processes for compelling the other party to discover relevant documents and disclose relevant information. These processes include interrogation, discovery and notices to admit or produce and subpoenas. The commencement of proceedings for an injunction is the commencement of court proceedings.

The powers of the ACCC to obtain information under section 155 are compulsive and wide reaching. They extend to authorising an officer to enter premises and inspect documents. Non-compliance is an offence punishable upon conviction by a substantial fine. Whilst these powers may be appropriate to enable the ACCC to gather evidence to determine whether a case can be made out, they are not appropriate, as has been held, once civil proceedings have been commenced. Proceedings for a breach of Part IV the Act are civil proceedings, even where a pecuniary penalty is sought.

It has been submitted that the Act could be amended to continue the ACCC's powers under section 155 after the commencement of proceedings. This could be done, but it would involve one party to civil litigation (the ACCC) having compulsive powers to extract information from its opponent, even by the entry of its premises, not subject to the supervision of the court in the action. This would be a serious inroad upon the court's ability to maintain a balance between the parties during the pre-trial stages of the action and would risk one party being placed at an unfair disadvantage to the other. Moreover, it has not been demonstrated that the court's processes for compelling the disclosure of evidence are inadequate. Parties are subject to continuous and close supervision by the court, with the aim of enabling each party to present its case speedily and fairly.

It is true that in actions for a pecuniary penalty an individual may claim privilege against exposure to a penalty, but such a claim is not available to a corporation.¹⁰ The privilege should not, therefore, impede the effective gathering of information through interrogation, discovery and other court processes.

⁹ *Brambles Holdings Ltd v. Trade Practices Commission* (1980) Vol. 32 Australian Law Reports, p. 328.

¹⁰ Section 187 of the *Evidence Act 1995* (Commonwealth).

Would a cease and desist order be speedier than an injunction?

In the view of the Committee, it is far from clear that, if the ACCC were given the power to make cease and desist orders, that process would be speedier than that of obtaining an interim injunction. It would be necessary to establish to the satisfaction of the ACCC that the conduct of the respondent was anti-competitive, involved the use of market power, was contrary to the public interest, was likely to cause loss or damage and that there was an urgent need to prevent such loss or damage. In determining those matters the ACCC would be required to afford procedural fairness to the respondent and in many cases the requisite satisfaction could only be reached after extensive investigation.

The ACCC can, of course, at present inform a respondent of its view that a breach of the Act is occurring and this may result in the voluntary cessation of the conduct complained of. It may also lead to the settlement of the matter by the respondent giving an enforceable undertaking under section 87B of the Act. Recourse to cease and desist orders is not necessary for this purpose. The advantages of cease and desist orders over injunctions as a speedier interim remedy for breaches of the Act are not evident.

Previous consideration

In 1993, the Hilmer Committee concluded that there was no need for an interim remedy in addition to interim injunctions. It expressed the view that cease and desist orders 'effectively reverse the onus of proof, which could be particularly harsh where complex economic matters are involved, as is often the case in competition cases'.¹¹ In 1994, the Australian Law Reform Commission (ALRC) concluded that cease and desist orders are not as quick and efficient an enforcement measure as is suggested.¹² It did not consider that the ACCC's predecessor should be given the power to make such orders. In 2001, the House of Representatives Standing Committee on Economics, Finance and Public Administration recommended against conferring such a power.¹³ And, in the context of telecommunications, the Productivity Commission in 2001 considered the power to make cease and desist orders and, despite supporting competition notices under Part XIB of the Act, was not

11 Independent Committee of Inquiry into Competition Policy in Australia 1993, *National Competition Policy*, AGPS, Canberra, p. 168.

12 ALRC 1994, *op. cit.*, p. 135.

13 House of Representatives Standing Committee on Economics, Finance and Public Administration 2001, *Competing interests: is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000*, Parliament of the Commonwealth of Australia, pp. 51-53.

persuaded the power should be given to the ACCC.¹⁴ In its submission to this Review, the Productivity Commission maintained that view and concluded that the case for a general power under Part IV to issue administratively based cease and desist orders is difficult to substantiate.¹⁵

Alternative proposal

Another suggestion was made to the Committee, as an alternative to cease and desist orders. It was proposed that a provision be inserted in Part IV of the Act similar to the now repealed section 75AW. This would provide that, where the ACCC considered that a breach of the Act may be occurring, it could issue a warning notice. If a breach was subsequently made out, the notice would be taken into account by a court in determining a penalty.

The Committee does not consider that this formalisation of the ACCC's existing administrative practice of sending warning letters would contribute to a better operation of the Act. A court is still likely to take an ACCC warning letter into account in determining any penalty.

International context

The ACCC points to competition regimes overseas, which it contends have provisions for cease or correct orders which are analogous to the orders which it seeks power to make. However, in other countries the judicial and administrative structures are sufficiently different to render comparisons unhelpful and in most cases they do not appear to require a lesser standard than that required for an interim injunction or provide a speedier response.

European Union

In Europe the European Commission's Directorate-General for Competition may, either on its own initiative or in response to complaints, order interim measures to bring an end to anti-competitive conduct.¹⁶ However, interim measures may only be ordered where there is a *prima facie* case that the conduct in question is anti-competitive and action is urgently required, either to address a situation likely to cause serious and irreparable damage to the

14 See Productivity Commission 2001, *Telecommunications Competition Regulation: Inquiry Report*, Report No. 16, Productivity Commission, Melbourne, pp. 190-192.

15 Productivity Commission, Submission No. 125, p. 39.

16 Article 3(1) Regulation 17 and *Camera Care Limited v. E.C. Commission* (1980) Vol. 1 Common Market Law Reports, p. 334.

complainant or to address damage that would be intolerable in the public interest.¹⁷ The measures ordered must be temporary and must be proportionate to what is necessary to conserve the status quo.¹⁸ Decisions may be immediately appealed to the Court of First Instance and then to the European Court of Justice.

United States

In the United States, the FTC may issue a 'cease and desist' order where there is a 'reason to believe' that a corporation or individual is acting anti-competitively. However, the procedure for issuing such an order is lengthy. The party against whom the order is to be made must be given 30 days notice of a FTC hearing before orders are made. Then, if there are no appeals, the order may take effect after 60 days. Violation of a FTC order renders a party potentially liable to a civil penalty.¹⁹ However, since 1973, the FTC has been empowered to address breaches of the law by seeking preliminary and permanent injunctions in the United States District Court²⁰ and this is now the preferred method of enforcement for the FTC.

Canada

The Canadian *Competition Act 1985* has been amended, with effect from June 2002, to enable the Competition Commissioner to make an ex parte application to the Competition Tribunal for an interim order preventing a corporation or individual from engaging in conduct that is alleged to be anti-competitive, for example, for abusing a dominant market position. The interim order is made for an initial period of 10 days. However, following 48 hours notice to a person affected, the order may be twice extended by up to 35 days. The Competition Tribunal may then grant a further extension of the order where the Commissioner needs more time to obtain information for the inquiry. A person affected by the order may, within the first 10 days after the order has come into effect, ask the Competition Tribunal to vary or set aside the order, but there is no appeal to other courts.²¹

17 The criteria to be applied were restated in *La Cinq SA v. E.C. Commission* (1992) Vol. 4 Common Market Law Reports, p. 449.

18 *Ford Werke AG & Ford of Europe Inc. v. E.C. Commission* (1982) Vol. 3 Common Market Law Reports, p. 673.

19 Section 5 of the *Federal Trade Commission Act 1914* (United States).

20 Section 13 of the *Federal Trade Commission Act 1914* (United States).

21 Section 103.3 of the *Competition Act 1985* (Canada).

The Competition Tribunal may make an interim order only if it considers that the conduct in question could be of the type otherwise prohibited by the Act and if, without such an order, 'injury to competition that cannot adequately be remedied by the Tribunal is likely to occur' or 'a person is likely to be eliminated as a competitor' or 'suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal'.²² This provision has not yet been used, and a similar one applying solely to the airline industry (introduced in July 2000) has been used only once. It is unclear whether the requirements of the Canadian test are less onerous than the requirements for an interim injunction, and given its recent introduction, it provides little useful experience.

New Zealand

Perhaps the law in New Zealand is the most instructive. The New Zealand *Commerce Act 1986*, which closely parallels the Australian Act, was amended in 2001 to provide Commerce Commissioners with the power to make a cease and desist order.²³ A Commissioner may only issue a cease and desist order if, after an investigation has been conducted and a hearing has been held, the Commissioner is satisfied that a prima facie case exists and it is necessary to act urgently to prevent a person or consumers from suffering serious loss or damage and to protect the public interest. The decision of the Commissioner is subject to an appeal on the merits to the High Court of New Zealand, but the order stands until the court has made its decision, unless the Court orders to the contrary.²⁴ Refusal to comply with an order may result in a court-imposed pecuniary penalty.

The Commerce Commission has not exercised the power to make cease and desist orders and there is no experience upon which to draw. However, since a Commissioner is obliged to assess a case in the same manner as a court would consider an application for an injunction, two part-time dedicated cease and desist Commissioners have been appointed to discharge that function if and when the need arises. These two part-time Commissioners stand apart from the rest of the functions of the Commerce Commission so as to ensure an independent approach.

²² Section 103.3(2) of the *Competition Act 1985* (Canada).

²³ Sections 74A to 74D of the *Commerce Act 1986* (New Zealand).

²⁴ Sections 91, 93 and 95 of the *Commerce Act 1986* (New Zealand).

There is little, if anything, to suggest that the New Zealand procedure for obtaining a cease and desist order would be an improvement upon the procedure for obtaining an interim injunction.

Conclusions

- No material was placed before the Committee to demonstrate that the existing process of obtaining an interim injunction is cumbersome or overly difficult, either in the context of section 46 or generally.
- As in previous reviews, the case for giving the ACCC cease and desist powers has not been substantiated.
- Under the Constitution, the exercise of federal judicial power is confined to properly constituted courts. There is a real risk that any use of the proposed cease and desist powers, by any body other than a court, would be unconstitutional.
- It is not clear that the proposed cease and desist powers, were they to be provided to the ACCC, would be any speedier or more efficient than the existing process of obtaining an interlocutory injunction.
- No case has been made out for the Act to be amended to continue the ACCC's powers under section 155 after the commencement of court proceedings. The existing court processes for compelling the disclosure of evidence are adequate. An extension of the section 155 powers would intrude upon the court's ability to control the pre-trial process and maintain the balance of fairness.

Recommendation

- 5.1 The Act should not be amended to introduce a power to make cease and desist orders or to extend the powers of the ACCC under section 155 of the Act so that they apply after the commencement of judicial proceedings.**