SUBMISSION TO TRADE PRACTICES ACT REVIEW COMMITTEE

by

Warren Pengilley

Dr Pengilley is Professor of Commercial Law at the University of Newcastle and Special Counsel to, and former Partner in, Sydney Lawyers, Deacons. He was formerly a Commissioner of the Australian Trade Practices Commission.

JUNE 2002

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14 June 2002

The Secretary of the Trade Practices Act Review
c/- Department of Treasury
Langton Crescent
PARKES ACT 2600

Dear Secretary

SUBMISSION IN RELATION TO THE TRADE PRACTICES ACT REVIEW

I enclose submission in relation to the Trade Practices Act Review.

I assume that the Committee wishes submissions made to be publicly available and, if possible, to be in a format which can be placed on the internet. I have, therefore, placed the material upon which I rely but which is currently unpublished on a disk and this disk is enclosed. The only other material upon which I rely to any degree is an article I recently wrote entitled "Competition Regulation in Australia: A discussion of a Spider Web and its Weaving." This article is republished in Vol. 8 No. 3 (April 2001) Competition and Consumer Law Journal.

Because this article is widely available, I have not included it in the material on the disk forwarded with this submission.

The time frame within which submissions have to be lodged is very short. It has thus seemed to me inappropriate to write a specific submission. What I have thus done is to forward material previously written and, in the basic submission which follows, make points by way of reference to such previously written material.

References to page numbers in my submission refer to Page Numbers at the foot of the attached material. References to CCLJ page numbers are references to the Competition and Consumer Law Journal article previously referred to.

My Background Particulars and involvement in Competition Law and Policy are set out at PAGE 1 of the attached materials.

In essence, the attached materials consist of:

- Warren Pengilley: Background Particulars (PAGE 1)

- Some Ramblings and Reflections of Un Commissar Ancien. This is a short philosophical piece which I was asked to write. It will be published in a forthcoming edition of The Trade Practices Law Journal. (PAGES 2-9)

- Copy of Submission to Senate Legal and Constitutional Committee for Committee's Inquiry into the Trade Practices Act 1974. This submission basically deals with the question of whether an "effects" test should be incorporated into s.46. (PAGES 10-33)

- The Ten Most Disastrous Decisions made relating to the Trade Practices Act

  - Speech as orally to be delivered to an IIR Seminar. This Speech is to be published in a forthcoming edition of The Commercial Law Quarterly (Journal of the Commercial Law Association of Australia). [PAGES 34-67]

  - Background Paper to be distributed to those attending the IIR Seminar. This Background Paper is to be published in a forthcoming edition of The Australian Business Law Review. [PAGES 68-141]

  The above Speech is, of course, a summary of what is said in the Background Paper and the Background Paper articulates the points made in the Speech in far greater detail. In my submission, I refer to the Background Paper to amplify points made rather than to the Speech. The Speech may, however, be a way of reading my overall view of the Ten Worst Decisions under the Trade Practices Act a little more speedily than reading the background paper.

This submission is made on my own behalf. It is made as a disinterested observer of the Trade Practices Act and its administration and is not made on the instructions of any business entity or on behalf of any organisation of which I am a member.

I claim confidentiality for no part of my submission and for no part of this letter.

I would be happy to give oral evidence to the Committee.

Yours faithfully

(Warren Pengilley)
Professor of Commercial Law,
The University of Newcastle.
Special Counsel, Deacons, Sydney.

Encl.

SUBMISSION TO TRADE PRACTICES ACT REVIEW COMMITTEE

by

Warren Pengilley

JUNE 2002

MY INVOLVEMENT WITH TRADE PRACTICES LAW AND POLICY

My own involvement with the Trade Practices Law and Policy is set out at Page 1 of the attached material.

OUTLINE OF MATTERS COVERED

This submission covers the following matters:

1. TECHNICAL AREAS IN WHICH THE ACT NEEDS AMENDMENT

(a) Exclusionary Provision: s.4D

(b) Misuse of Market Power: s.46

- *General Comments (other than predatory pricing)*
- *An effects test*
- *Predatory Pricing*

(c) Third Line Forcing

(d) Mergers

(e) Damages for s.52 Breaches

2. COMMENTS ON THOSE AREAS IN WHICH THE ACCC HAS FLAGGED THAT IT WANTS THE ACT AMENDED (other than covered above)

(a) Gaol Sentences

References in this submission to CCLJ pages are references to page numbers in the article W.J. Pengilley: "Competition Regulation in Australia: A discussion of a Spider Web and its Weaving" Vol. 8 No. 3 (April 2001) Competition and Consumer Law Journal.

References to other page numbers are references to the page numbers at the foot of the attached material.

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1. TECHNICAL AREAS IN WHICH THE ACT NEEDS AMENDMENT

(a) Exclusionary Provisions – s.4D

Section 4D of the Trade Practices Act is fundamentally flawed because the Parliamentary Draftsperson got it wrong in 1977. (PAGES 73-79) Our law did not accurately transpose the law of the United States nor the law proposed by the Swanson Committee in 1976. New Zealand, which initially copied our law, changed its Act in 1990 to overcome the drafting errors made by us. For the reasons set out in the attached material, there is simply no case for not amending the law along the lines there set out.

An amendment of s.4D would overcome the absurd decision in the South Sydney Case [PAGES 79-84]. This case should not have been a collective boycott case at all. It should have been a competition case, the test to be applied being whether standards were or were not applied in any arbitrary or capricious way (PAGE 83).

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It is obvious enough that the ACCC itself does not understand s.4D. (See PAGE 77 and fn.11 at that page.) The ACCC seems to think that s.4D relies on an anticompetitive purpose and that such purpose is "central to the conduct prohibited by s.4D". This should be the case but the ACCC is wrong on the law as it presently stands and the Kim Hughes Case (PAGES 76-77) clearly so holds. An amendment would bring the law into line with what the ACCC wrongly asserts that it is.

(b) Misuse of Market Power: s.46

General Comments (other than predatory pricing)

The major problem of s.46 is that no-one knows what it means. Thus business cannot make decisions with any degree of confidence. This is notwithstanding assertions by The High Court of Australia, Appeals Courts in the United States, The New Zealand Court of Appeal and The Privy Council that a cardinal principle of interpretation of s.46 is that it should give certainty so that business is aware, before embarking on conduct, of the legalities of what it is doing (PAGE 28).

My own view is that things went wrong in the High Court in Queensland Wire v BHP when the Court held that illegality was determined by "use" rather than "misuse" of market power. The United States "commercial reprehensibility" test has given rise to considerable more certainty than is the position in Australia. A reading of the transcript in the High Court of the Boral Appeal (argued 21-22 May 2002) indicates that various High Court judges are re-thinking the appropriateness of the "use" test.

No doubt there are many views as to how s.46 should be re-written. To provide that the section applies only to "misuse" of market power is, to me, the simplest solution. It would also re-instate what I believe to be the true original intent of the section.

A real problem in s.46 is whether it is to be interpreted in a "justice" or in an "economic" sense. One can take the simple termination of a dealer to illustrate the difference. The lawyer may say that a dealer termination is unfair because the dealer committed no sin. The economist would say that the best judge of whether a person is a good dealer or not is the person appointing the dealer and that freedom of choice of dealer is the best economic efficiency result. It is submitted that the economist is correct and judges should not second guess these types of decisions. Any such

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second guessing should be done under specific other "fairness" provisions and not under s.46. Yet the fundamental s.46 criteria of assessment have still to be articulated.

If an alternative building on the present drafting is thought to be the preferred course, it is essential that marketing decisions not be "second guessed" by courts years after the event on imprecise criteria and facts, many of which may not have been available to the decision maker at the time of decision. "Something more" than a simple refusal to deal or the termination of a distributor should be required if s.46 is to be breached. Decision makers need the assurance that this is the case. Therefore, if s.46 is to remain essentially in its present form, it should have additional subsections added to provide that no breach of the section occurs by reason only of:

- non-supply of a product
- termination of a distributor
- a supplier having restricted supply outlets in conformity with a distribution policy which it believes, on reasonable grounds, to be the most efficient method of distribution of its product; or
- the supply price charged for any product.

If amendments are made along the above lines (and the above is not meant to fulfil technical drafting requirements but set out the relevant points of principle), s.46 would have more certainty. Competition law would not suffer. The provision would still permit s.46 cases to be successfully brought when factors other than simple marketing decisions were involved. Thus terminations, pricing decisions and non-supply could not be used to cloak what may be conduct which should be condemned.

[See the arguments put in W.J. Pengilley: Misuse of Market Power – The Unbearable Uncertainties facing Australian Management Vol. 8 No. 2 Trade Practices Law Journal pp56-78. In that article, the various decisions under s.46 and the marketing uncertainties they cause are reviewed. The decisions are reviewed "from the

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viewpoint of a manager who has to decide what to do and wants to make that decision in light of what the courts have said s.46 means" (p.56).]

Amending s.46 is not a question of "going soft" on big business or of allowing small business to be exploited. An amendment of s.46 may result in a "tougher" s.46. What is needed is a s.46 which can be understood. In particular, courts should not conclude under s.46 that prices are "unreasonable" in circumstances where courts are quite unable to specify what is "reasonable" (see generally PAGES 84-89).

An "effects" test

An effects test added to s.46 would only add to its present uncertainty (see Senate Submission PAGES 10-33). "Purpose" is an important ingredient of s.46 – especially as "purpose" has been interpreted as "the real reason" for engaging in conduct [PAGES 22-23]. Not all conduct aimed at damaging a competitor should be illegal. Such conduct may be pro-competitive.

The ACCC bewails the fact that it cannot prove illegality before the courts in the case of some entities. It may well be that the ACCC has a view which is "conviction oriented" rather than "competition oriented". The ACCC, to my knowledge, has, to date, failed to specify the type of conduct of which it disapproves yet is unable to prosecute or to give any specific instances of those things about which it complains.

Unless the ACCC can specify and particularise the sort of conduct of which it complains, and which an "effects test" would remedy, its views should, in my view, not be given credibility.

Predatory Pricing

The particular question of predatory pricing and s.46 needs immediate attention. The difference between keen pricing is impossible to determine in light of the present Boral decision. Unless clear criteria are laid down, then competition will be blunted. It is quite absurd that one can be found to be predatorily pricing when one is making a profit. This implies that the court has ultimate control over the level of profit a company should make and presumably can order a party to increase price to assist a competitor to enter the market. I suggest adoption of the United States criteria for

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predatory pricing (see Liggett Litigation fn.37 to PAGE 91). The necessity to implement a changed test for predatory pricing because of the s.46 market power lower threshold since 1986 is not convincing (see PAGES 96-97 fn.55-56).

The Boral Case is a disaster because no guidelines are given as to the price levels which courts will find acceptable. [See PAGES 89-101]. It is also a disaster because it fails to recognise the realities of corporate group policies even though it is prepared to find one member of a group in sin for the reason that the corporate group to which it belongs has a deep pocket (see PAGES 97-100). There is much to be said for a provision that inter-company profits or losses on intra-group transfers should be discounted for purposes of predatory pricing evaluations. This is the situation in the United States and it makes obvious economic sense.

(c) Third Line Forcing

Let us either bless or condemn third line forcing [PAGES 102-104]. For the reasons stated in fn.62 at PAGE 104, I do not believe that third line forcing should be legalised or subject to a competition test (which would be the same thing). My suggested variation of the third line forcing provisions is set out at fn.62 on PAGE 104.

(d) Mergers

The changed Merger test based on the Cooney Committee Report was unconvincing (PAGES 105-111). Any changed test which the present Committee may suggest will be equally unconvincing for the same reason. What is required is a properly funded independent study of merger activity. This may take a couple of years. Rather than perpetuate knee jerk reactions, it would be a good idea to attempt to get this important area of our law right. If we can spend the millions of dollars currently being spent on another building trade union inquiry, it seems to me that we could allocate reasonable funds towards a merger inquiry. To my knowledge, no such in depth inquiry has ever been held in Australia. It is thus impossible to know whether the ACCC view or the contrary view of the Business Council of Australia is correct in relation to the frequent slanging matches in which they engage on this issue.

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(e) Damages for s.52 Breaches

If the Committee believes that the principles upon which s.52 damages should be assessed is a matter within its terms of reference, it could well do something to change the sad decisions of the High Court in Gates v CML and Henville v Walker [PAGES 111 to 121].

2. COMMENTS ON THOSE AREAS IN WHICH THE ACCC HAS FLAGGED THAT IT WANTS THE ACT AMENDED (other than covered above)

(a) Gaol Sentences

I have sympathy with the view that gaol sentences are appropriate for hard core offences by big business. However, before agreeing to this, the Committee should define in specific terms what is meant by "hard core" and "big business". The ACCC and the legislature are not known for their restraint and there is a real fear that the coverage of any gaol sentence provisions could very easily get out of control.

(b) "Cease and Desist" Orders

The Chairman of the ACCC advocates "Cease and Desist Orders" as a "temporary halt" in relation to the conduct the investigation of which may take "a lot of time". (Business Review Weekly Jan 24-30, 2002.) I should have thought that the inconsistency in this assertion is self evident. If urgent cessation is required the ACCC can obtain an interlocutory injunction. It has been able to do this in merger cases, for example. The ACCC, unlike private litigants, does not have to give a damages undertaking as a pre-condition of obtaining an interlocutory injunction. The provision of "cease and desist" orders may be unconstitutional in any event. Further, the ACCC, having obtained what it wants, may well have no incentive to bring cases on for trial and thus impartial assessment. There is, for example, evidence to suggest that the ACCC does not move with great rapidity when it has issued telecommunications competition notices which have an accrual penalty rate of $1 million per day (see CCLJ p.228-290). There is reason to believe that the ACCC would be even less expeditious in having matters heard before the court if it could issue "cease and desist" notices. The ACCC has everything to lose and nothing to gain in having the matter so listed.

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Cease and desist notices would also be contrary to the ACCC Chairman's publicly stated views as to ACCC accountability. In his commentary in The Business Review Weekly of Jan 24-30, 2002, Professor Fels asks the question:

> *"How can the ACCC be unaccountable when it cannot obtain a fine, injunction or court order without proving its case before the Federal Court?"*

One answer is that the ACCC would be less accountable were it given the power to issue its own "cease and desist" orders.

3. A SUGGESTION THAT THERE BE A REQUIREMENT IN ALL CASES FOR THE PLAINTIFF/PROSECUTOR TO ARTICULATE IN INJUNCTIVE RELIEF FORMAT THE PRECISE NATURE OF THE CONDUCT CLAIMED TO BREACH THE ACT

Many of the problems of the Trade Practices Act occur because of the inability of anyone to articulate just what sin is committed. I believe that in an early stage of all proceedings, there is much to be said for the plaintiff/prosecutor being required to articulate in injunctive form the breach of the Act complained of. If it is not possible to so articulate the breach then the matter should be considered for early dismissal on the basis that no such relief can be articulated. There is much to be said for the thought that such a requirement would have led to a different verdict in Queensland Wire, Boral and The South Sydney Case.

If this view is considered too radical, it may serve as a starting point from which another compromise solution based on it can be found.

4. LEGAL PROFESSIONAL PRIVILEGE

The Daniels Case is currently before the High Court and will, no doubt, be the subject of many representations to the committee. This writer has yet to hear an explanation as to why the ACCC needs access to legal advice of parties except that:

(1) On occasions, parties plead legal advice as to defence yet fail to produce such advice. This is, of course, no justification at all for carte blanche access to legal advice. If the advice is put in mitigation of penalty, then, of course, legal professional privilege must be waived in respect of it; and

(2) Lawyers should not be able to plead immunity for breach of the Act by hiding behind legal advice. As far as I have heard the ACCC articulate this point, it is

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that lawyers as participants in a breach should not be able to hide behind legal advice. As I understand the law, no lawyer can hide behind legal advice should that lawyer breach the law as a participant.

In short, the ACCC in public forums has failed to articulate any sort of a case for legal professional privilege being abolished. The ACCC should be heavily questioned in relation to the necessity to abolish legal professional privilege. My view is that the ACCC will fail to establish any sort of a persuasive case and that, therefore, the general law should apply in relation to legal professional privilege.

5. PLAIN ENGLISH DRAFTING OF THE ACT

The Trade Practices Act is a drafting abomination (PAGES 133-137). When the Act was much simpler, it was recognised that comprehending its terms was a major impediment to complying with the Act. Nothing has been done. It is time that something was.

6. THE FUNCTIONING OF THE ACCC

(a) Conflict of Interest and Power Aggregation

The ACCC has, or appears to have, vast conflicts of interest. This is not something which instils faith in the system. My belief is that the ACCC should be stripped of all functions apart from that of enforcing the Trade Practices Act. Other functions which the ACCC currently exercises should be exercised by independent specialist bodies. This would lead to better technical administration and abolish conflicts of interest, actual or perceived. (PAGES 5 to 9)

It is also contrary to good government for extensive powers over a variety of industries to be vested in one entity. Diversity of decision making places a safety net over the imperfections of human wisdom. A substantial reason for the enactment of competition law is that power aggregation is considered unwise. Competition law aims to diffuse decision-making power. The same principle applies just as much to governmental decision making as it does to private decision making (CCLJ pp.260-264).

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The solution to the problem of power aggregation (if divesting various ACCC functions is thought non-feasible) may well be the creation of a Supervisory Board to which the ACCC is answerable. This would make the ACCC subject to the same regulation as many other authorities and have it governed by a Board of Directors structure. Clearly this would diffuse the power of any one individual and bring the benefits of collective wisdom to the functioning of the ACCC. It may be possible both to implement a Supervisory Board and to divest the ACCC of some of its functions or institute some combination of each.

The above suggestions would not make the competition law any weaker. It would be the same law enforced by the same sanctions. However, conflicts of interest and the imperfections of human wisdom would be more closely guarded against.

(b) Arm Twisting

There seems to me to be little doubt that the ACCC has engaged in "arm twisting" in relation to a number of its activities. In particular, this has been engaged in where the ACCC has the power to issue notices which reverse the onus of proof or which set the penalty clock running in relation to penalties (see briefly PAGES 130-132 and in greater detail CCLJ p.284-295). Arm twisting is bad regulation. Partly it is possible because the ACCC has a considerable spread of functions and can thus "arm twist" one function (e.g. an enforcement function) to advance another (e.g. an adjudicative function). Industries can thus, for example, be advised that they will not be proceeded against if they apply for authorisation. Pursuant to the authorisation function, the ACCC can apply conditions to conduct (e.g. as to prices charged) and thus a regulatory solution can be imposed on something which should be a competition market oriented issue. Similar problems may also apply in relation to the ACCC imposing undertakings on business.

(c) ACCC Disclosure of Evidence

The ACCC in authorisation applications takes the view that its own investigations are not part of the public register. They are relied upon by the ACCC but other parties do not know of the existence of the material or what it says. There is much to be said for the ACCC having to disclose all such material.

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There is also much to be said for the ACCC having to pre-disclose matters in litigation which bear on the economic issues before the court. This can only assist in limiting litigation. The ACCC is prone to assert a stand which is not understood by outside parties yet fail to advise of the basis for its view. A case in the writer's experience was the Wattyl-Taubmans Merger. [See CCLJ pp.293-295.] In this case the ACCC had a view of the market and a theory of "co-operative behaviour" which Wattyl failed to comprehend and thought to be based on erroneous facts. The ACCC would not disclose the facts on which its market definition and its "co-operative behaviour" theory was based. The position was all the more unpalatable when the ACCC said its theories were based on an economic opinion. When this opinion was produced, it was a four page theoretical document with no relevance to the facts of the case at all. Worse still, it was dated three weeks after the conference at which the ACCC claimed to have the advice in question. This is hardly a satisfactory way in which to conduct either negotiations or litigation.

7. IN CONCLUSION

The Trade Practices Act and its administration is well overdue for "in principle" re-evaluation. Unfortunately, most Inquiries rarely make philosophical evaluations. They tinker with the present and do not think either long term or anew. I urge this Inquiry to do more than tinker with words. It should reconsider "what it's all about". What is required is fairly pragmatic in nature. Probably legal certainty is the most fundamental area in which the legislation needs reconsideration.

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WARREN PENGILLEY

BACKGROUND PARTICULARS

Warren Pengilley was admitted as a lawyer in 1963. He was a partner in a legal firm in Tamworth, a rural city in New South Wales, for 10 years. He was a Foundation Commissioner of the Australian Trade Practices Commission (the predecessor to the Australian Competition and Consumer Commission) and served in that position from 1975 to 1982. From 1983 to 1993 he was the Trade Practices Managing Partner in the Sydney legal firm of Deacons Graham & James (now Deacons). In 1993, he was appointed Professor of Commercial Law at the University of Newcastle. He currently holds that Chair together with an appointment as Special Counsel to Deacons.

Professor Pengilley has given seminars and lectures in all States of Australia, in South Africa, the United Kingdom, Ireland, the West Indies, New Zealand and the United States of America, primarily on competition and consumer issues. He has published extensively around the world. He has held positions as Adjunct Professor at the University of Technology, Sydney and as Visiting Overseas Fellow at the Wharton Business School of the University of Pennsylvania and at Canterbury University, New Zealand. In 1996, he was Visiting Professor of Law at Sheffield University, England.

He holds the degrees of B.A., LL.B (Sydney University); J.D. (Vanderbilt University); M.Com, D.Sc. (Newcastle University). His Doctor of Science Degree was conferred in the Faculty of Economics and Commerce at Newcastle University in recognition of his original research and writing in the area of Competition Law. He is also a Fellow of the Australian Society of Certified Practising Accountants and a Fellow of the Australian Institute of Company Directors.

SOME RAMBLINGS
AND REFLECTIONS OF
UN COMMISSAR ANCIEN

SOME RAMBLINGS AND REFLECTIONS OF UN COMMISSAR ANCIEN

by

Warren Pengilley*

The Editor of this journal has asked me to do some rambling and make some reflections on aspects of the Trade Practices Act about which, perhaps in a private moment, I have spent a little time pondering. Regrettably, but sensibly, the editor has also insisted that my treatise be reasonably brief.

I have always been a student of history and one thing I continue to believe is that it is easy to have knowledge of events. But it is those who actually live contemporaneously with events who really understand their impact. Past actions are too easily judged by present perceptions.

The correlative of this may well be that those whose experience is based in what some may regard as a bygone geological era may not readily accept present thought.

I may be in both positions. I look unbelievingly at those who currently assert, in essence, that there was no decent Trade Practices Act administration prior to about 1990, and especially that this was so in the latter half of the 1970's. I look, with apprehension, however, at what we currently have and wonder if, in fact, we have not taken a wrong turn in our trade practices legislation and, more particularly, in its administration.

Lest I be misunderstood at this early stage, I am not advocating a "soft" competition law as being what is now appropriate. I am, however, saying that the law which we currently have may well not bring about the best result even for the "tough" law advocates.

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* Dr. Pengilley was admitted to legal practice in 1963. He was a partner in the firm of Newman & Pengilley and practised in Tamworth, N.S.W. from 1964 – 1975. In 1975, he was appointed as a Foundation Commissioner of the Australian Trade Practices Commission, serving in this position from 1975 – 1982. He joined Sydney Lawyers, Deacons, (then Sly and Weigall) in 1983 and was the Sydney Trade Practices Managing Partner of that firm until 1993. In 1993, he was appointed Foundation Professor of Commercial Law at the University of Newcastle. He currently holds this position together with the position of Special Counsel with Deacons. Professor Pengilley has been a well-known national and international lecturer and commentator on trade practices issues for 25 years.

The Commission in the 1970's: Perceptions of weakness

In February 1975, the Trade Practices Act was fully born. It was a product of the Labor administration and, in particular, a project of Senator Lionel Murphy as then Attorney General. In December 1975, the Coalition came to power after the Whitlam dismissal. On April Fool's Day 1976, the Swanson Committee was commissioned to enquire into the operation of the Act. The truth was that the Act had hardly had any "operation" at all at that time.

The Coalition had previously had a policy of registration of restrictive agreements and the establishment of a Monopolies Commission along United Kingdom lines. Most of those around at the time were concerned that the restrictive trade practices provisions, which came into full effect less than a year before the coalition attained government, would simply be gutted. This did not happen, but until July 1977 the Act was still under constant political debate and subject to intense political lobbying. Business was antagonistic. Any thought that business, at that time, had learnt to live with the Act is simply fantasy. One view which possibly represented a wide spectrum of community attitude to the Trade Practices Act was expressed in a letter received by the TPC Chairman when an authorisation for a small business trade association "recommended price" arrangement was turned down by the Commission. It read:

> *"Most of us do not wish for your advice on how to conduct a business. That you and members of your department are working a 36 1/2 hour week (whilst we work 40 hours or more) should be sufficient evidence that not only are we supporting ourselves but yourselves as well"*[1]

If small business is now thought to support the Trade Practices Act, it was among its most vehement opponents in earlier days.

The Trade Practices Commission (TPC) had the power to grant interim authorisation to restrictive trade practices pending their public benefit evaluation. The TPC exercised this power generously. So, most practices did not face automatic illegality in February 1975.

The TPC has been criticized for this. To do otherwise would, however, have meant in effect, that there would have been a wholesale dismissal of authorisation applications without consideration and without reasoning. In effect, the TPC would have been engaging in

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[1] Letter from Master Painters, Decorators & Signwriters Association of Queensland to Trade Practices Commission 27 March 1979 (on Public Register File A13313)

legislation - something which Parliament itself was not prepared to do. Business, politicians and the community generally believed that an opportunity had to be given for authorisation applicants to prove whether or not their arrangements had public benefit. Business believed that even the most restrictive arrangements had such benefits. After all, it had traded this way for at least half a century and really knew no other way. To have dismissed authorisation applications peremptorily would have meant the loss of support of both business and the community for the Act. Undoubtedly this lack of support would have been reflected politically.

Most authorisation applications were unsuccessful (as were most competition clearance applications under a procedure initially permitted in the Act but abolished in July 1977). But the educative function served by the TPC's decisions was a huge factor in both the understanding and the acceptance of the legislation. This education factor was far more speedily carried out by a series of TPC decisions than it would have been by the court process alone. Indeed, it is fair to say that the TPC decisions also educated a good number of the judges at the time. The Authorisation and Clearance procedure also showed that change in business trading patterns was clearly inevitable. Business could no longer simply assume the Act would have no impact at all and do nothing.

The TPC would not have been serving competition law any favours if it had regarded the Trade Practices Act as other than long-term legislation. Had the TPC, in the mid 1970's, adopted a "zero tolerance" enforcement approach, the long-term viability of the Trade Practices Act would not have been assured. Those who still think that there was no effective Trade Practices Act administration prior to 1990 are drawing what they think are clear conclusions but are basing these on less than knowledgeable premises.

The present day consumer watchdog: It has teeth but does it have too much to watch?

What was wise policy in the initial days of the Act is, no doubt, distinctly other wise now. This does not necessarily mean that either policy is wrong. It simply means that each took place against a different attitudinal backdrop. It is now appropriate that we have the Australian Competition and Consumer Commission ("ACCC") as a "Consumer Watchdog" with "teeth", although I reject the notion that, even in early days, the TPC was toothless. Certainly, however, in the late 1970's we would not have media quipping, as did the Backberner TV satirical show on *11 September 2000, only four days prior to the opening of the Sydney Olympics, that:*

"The word 'Olympic' was mentioned 3.000 times in the press this week. This was just behind mention of the word 'the' and only marginally in front of the phrase ' The ACCC commenced proceedings to-day against…' "

The more high profile role of the ACCC is a result of the functions it is now called upon to perform. And this raises questions of philosophy as to what the Trade Practices Act is all about and how it should be administered.

In the initial days, the philosophy was simple. We had a background law against which business had to function and a TPC to enforce this law in the courts. The TPC had nothing to do with setting prices or determining the terms and conditions on which access to certain national facilities would be granted. It had no industry specific regulatory role such as that the ACCC now exercises in relation to telecommunications. It had no quasi- political role as in the case of the ACCC's enforcement of price ceilings as the result of amended taxation legislation. All but the TPC's competition functions were considered "regulatory" or quasi-political in nature and not properly exercisable by a competition authority. Indeed the TPC itself rejected an invitation in the late 1970's of the Fraser Government to take over the Commonwealth's then existing price justification and prices surveillance activities. This was because the TPC believed that there was an inherent philosophical conflict of function and interest in one body enforcing competition principles which gave rise to market outcomes on the one hand and controlling prices, a regulatory function unrelated to market outcomes, on the other.

But it is now more complex.

Over time, the Commonwealth Government has come to treat the Trade Practices Act as if it were the North Sea. The analogy may need some explanation. Whenever the Soviets had a problem in disposing of spent nuclear fuel from their submarines, they simply dumped it in the North Sea. Similarly, whenever our government has a problem with competition, consumer protection, telecommunications, franchising, small business, access to facilities, prices surveillance or price exploitation, it simply dumps the problem into the Trade Practices Act and to the always-accommodating ACCC. The result is that it is almost impossible in any one place to ascertain precisely what the totality of the ACCC's functions is. Similarly, at the

political level, as best I can evaluate it, the ACCC, in exercising its functions, reports to at least seven Ministers.[2]

The ACCC's overall charter is aimed at consumer protection. Some of its specific functions are prosecutorial, some adjudicative, some educative and some arbitral. Further, it should be noted that the ACCC also exercises important functions outside the parameters of the Trade Practices Act. So, for example, it has important functions under the Broadcasting Services Act in relation to new licences, under the Moomba-Sydney Pipeline System Sale Act in relation to the arbitration of disputes and under the Australian Postal Corporation Act in relation to postal rates. Its functions, conceptually, are both de-regulatory and regulatory, and in some cases, quasi-political in nature. Adjudication and policy are intertwined. Policy is no longer conceptually separated from enforcement. The ACCC is involved in it all.

Exercise of these multi-functions can involve significant actual or potential conflicts of interest. Even in basic administration this is apparent. Take a simple case. Is a telecommunications market participant likely to obtain a reasonable ACCC judicial evaluation of access prices and conditions to its facilities when the ACCC has, in relation to its telecommunications administration, effectively declared it, as in the case of Telstra, the "enemy"? Is this adjudication likely to be impartial when consumer protection is seen as the major rationale of the ACCC's existence yet this is only one factor to be balanced against others when the ACCC is exercising a judicial function? And will the ACCC adjudicator apply the criteria of legislation independently of the political wishes of the government of the day?

There is an old saying of law that "justice must not only be done but must appear to be done". This is not some quaint aphorism. It is a fundamental principle of the long trumpeted "fair go". With inherent conflict of interest in its charter, is it possible for the ACCC to give the appearance of justice being done?[3]

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2 See W.J. Pengilley: "Who administers our competition and consumer protection laws? Is the Petronius Principle applicable?" 6 CCLJ p.258. The Ministers are: The Treasurer, The Minister for Financial Services and Regulation; The Assistant Treasurer; The Minister for Industry and Science; The Minister for Transport and Regional Services; The Minister for Communications, Information and the Arts; and The Minister for Employment, Workplace Relations and Small Business.

3 The ACCC hardly helped the perception of Justice not being done in the case of Telstra by issuing a Press Release on the day of its decision headed "$250 MILLION WIN FOR TELECOMMUNICATIONS CONSUMERS" (See ACCC Media Release 27 April 2000). The ACCC was required by the Trade Practices Act to take into account a number of factors in

Some checks in relation to the ACCC's role have assisted to date in justice being seen to be done. There are rights of appeal in relation to certain ACCC decisions. ACCC Chairman, Professor Fels, is anxious to point out that these checks make the ACCC accountable.[4] Sad it is, however, that even here, the trend is to water down such accountability as presently exists. An April cabinet decision, for example, has approved legislation to abolish presently existing appeals in relation to ACC decisions on prices to be paid for access to facilities. This is an immensely important area – to be governed in future, apparently, by the doctrine of ACCC infallibility.

Whether the ACCC is or is not biased in its decision-making is, in the ultimate, however, probably beside the point. A perception of bias necessarily follows, in the view of many, from the myriad of roles the ACCC is now called upon to perform. Necessarily if we have perceptions of bias in a regulator, it follows that we cannot implicitly trust the regulator or the impartiality of its decisions. Given this, there is a rapid erosion of respect for the whole system and its administration. The abolition of presently appeal rights, as discussed above, cannot do other than further debase our faith in the ACCC's regulatory currency.

It certainly should be considered whether there is not benefit in restoring the ACCC's role to one which necessarily can have no conflicts of interest and which necessarily can create no perceptions of bias. To do this, all roles other than those of prosecutor of Trade Practices Act infringements would have to be hived off.[5] This would free the ACCC of the perception of conflict in its quasi-judicial, prosecutorial and policy roles. There are no unique ACCC specific skills which a separate body or bodies exercising the various "hived off" activities could not easily acquire. A "hiving off" of the ACCC's non prosecutorial functions would also do much to answer the concerns expressed in a recent Parliamentary Report that many believe that the ACCC, with its varied and perceivedly conflicting functions, "increasingly seems to be accountable to no-one"[6].

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reaching its decision. Does its Press Release give the impression that anything but consumer interests has been seriously evaluated?

4 See A. Fels "Law is Power, not the ACCC" Business Review Weekly 24 – 30 January 2002.

5 In this regard, many would include public benefit authorisation decisions as a role which should be "hived off" even though this was originally a TPC function. As stated earlier, the TPC performed a valuable educative role by its quasi-judicial decisions. However, this educative role has now probably been exhausted.

6 Competing Interests: Is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000 (House of Representatives Standing Committee on Economics, Finance & Public Administration (D.Hawker: Chairman)] Sept 2001

Thesis; Anti-Thesis and Synthesis

Community attitudes start with thesis. There then develops an anti-thesis. Finally we reach synthesis. The mid 1970's thesis may, even given the explanatory circumstances I have outlined, have been somewhat conservative. The new and varied powers and functions given the ACCC may well, however, be creating problems which cannot go unaddressed. A philosophical evaluation of what the Act is all about and who should administer the various parts of it is clearly necessary. Even if this evaluation rejects everything I suggest, I believe it should, nonetheless, take place. After this evaluation, we may reach an appropriate synthesis. This, no doubt, is where we should aim to be.

Unfortunately, official enquiries rarely make philosophical evaluations. They tinker with the present and do not think either long term or anew. The enquiry announced by the Prime Minister in 2001 is probably unlikely to be any different. In all likelihood, it will tinker with words. But will it reconsider "what is it all about"?

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p.5 See also the comment in the above Report (p.5) citing judicial observations (Electricity Supply Assoc. of Aust. Ltd. v ACCC [2001] FCA 1296) that the ACCC's actions could, in some cases, have been taken as threats made in an effort to stifle debate. The Committee noted (Report p.57) that the ACCC has been subject to considerable criticism for its tactics and in some cases of a heavy handed approach. The Committee (Report p.47) also expressed concern that justified questions about the ACCC's performance were being similarly dismissed. The abolition of any existing appeal rights, as discussed in the text, must, one would think, exacerbate ACCC non-accountability.

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL REFERENCE COMMITTEE FOR THE COMMITTEE'S INQUIRY INTO THE TRADE PRACTICES ACT 1974

Professor of Commercial Law at the University of Newcastle; Special Counsel to, and formerly partner in, Sydney Lawyers, Deacons ; formerly a Commissioner of the Australian Trade Practices Commission

OVERVIEW SUMMARY

This submission is aimed primarily at a discussion of the effect test as an addition to s.46 though it also deals with other s.46 issues. It is motivated by the submission put by the ACCC favouring a reversal of the onus of proof provisions of s.46 and strongly recommending the addition of an effect test to s.46.

This submission argues that the real problem of s.46 is that it is uncertain and has no real standards by which it is evaluated (Pars 3.1 and PARTS 10 and 11). However, there seems to be no desire to examine these fundamental issues. For this reason, the submission accepts s.46 in its current drafting and discussed the issues raised by the ACCC in relation to it.

The basic points put in the submission are:

(i) It should not be assumed that the ACCC axiomatically has the "best" view as to what the Trade Practices Act is all about. The ACCC argues for changes in the law which will make its task easier. The Cooney Committee in 1991 made a big error in uncritically accepting Trade Practices Commission arguments on the basis that this body best represented the view most beneficial to the community. This present Committee should not repeat this fundamental error. (PART 4).

(ii) There have been six Enquiries since 1989 which have rejected an effect test. The ACCC in its present submission does not even refer to these let alone find fault with the reasoning on any of them (PART 5).

(iii) The ACCC bewails a trend of greater difficulty in proving s.46 infringements. Yet in evidence elsewhere, the ACCC has pointed out that hurdles which it has to overcome have recently become lower. There is obvious inconsistency in the ACCC's approach to s.46. (PART 6).

(iv) The ACCC complaint about the increasing lack of "smoking guns" to prove purpose is without credibility. "Smoking gun" memoranda constitute a very shallow and uncertain basis upon which a relevant "purpose" can be concluded. In any event the ACCC has very powerful legal weapons to force disclosure of relevant facts from which it can prove the relevant "purpose" (PART 7).

(v) The law in relation to purpose has not been set out at all by the ACCC. This law states that "purpose" can be inferred from conduct. Explanations have to be given by defendants for conduct which is, on its face, illegal if they are to escape liability under s.46. So, much runs in favour of the ACCC on the "purpose" issue. But the retention of a purpose test to the exclusion of an effect test is of importance. The High Court has held that the "purpose" test is retained in s.46 to preserve competition and this is aimed at benefiting consumers (PART 8).

(vi) There is no case for a s.46 "reverse onus of proof". Amongst other things the present onus of proof provisions prevent ill-conceived or frivolous actions being brought by the ACCC. The ACCC has brought such actions in the restrictive trade practices area in the past. It should not be aided in doing so in the future by a "reverse onus of proof" (PART 9).

(viii) As stated, the greater difficulty in s.46 is uncertainty as to what it means. Some examples of the difficulty of s.46 interpretation are given from the Queensland Wire and Boral decisions. Even the most elementary questions as to what the section is aimed to achieve have yet to be answered. It would be a useful task for this Committee or some other Committee to provide such answers. Until this is done, any extension of the scope of s.46 must be expected to meet with business resistance. In any event, it would be premature to be recommending changes to the section when the Boral Case is before the High Court and this case involves the definitive interpretation of the section (PARTS 10 and 11).

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL REFERENCE COMMITTEE FOR THE COMMITTEE'S INQUIRY INTO THE TRADE PRACTICES ACT 1974

by

Warren Pengilley

2. PERSONAL BACKGROUND PARTICULARS

2.1 Because the Committee is, in all likelihood, not aware of my background and my interest since the 1960's in competition law and policy, I have set out my brief background particulars.* My interest in competition law and policy has been as a Commissioner of the Trade Practices Commission, as a practitioner in trade practices law and as a teacher and commentator in the field.

3. BACKGROUND TO THIS SUBMISSION

3.1 This submission is lodged with the Committee largely in response to the February 2002 submission of the Australian Competition and Consumer Commission (the "ACCC"). The ACCC submission deals primarily with the necessity for an "effect" test to be added to s.46.

3.2 The desirability, or otherwise, of the addition of an "effect" test to s.46 is not a term of the Committee's reference. The ACCC has, nonetheless, extensively addressed this issue. There is, therefore, a danger that the Committee will draw conclusions in relation to the ACCC's submission on the effect test and that the ACCC's views will be accepted by default because other parties with views contrary to those of the ACCC will not address the point.

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* These particulars are set out at PAGE 1.

3.3 A reverse onus of proof in s.46 cases is one of the terms of the Committee's reference. The ACCC embraces this concept saying that it would be preferable to the present way in which s.46 is administered. However, it continues in relation to this issue that:

> *"… in the ACCC's view, a better approach would be to amend s.46 so as to incorporate an 'effect' test".*

The ACCC then devotes most of its submission to justifying its view.

3.4 For the above reasons, this submission is essentially addressed to commenting on the "effect test" although other aspects of s.46 are also commented upon. The question of a "reverse onus of proof" and the undesirability of this is discussed in PART 9.

3.5 This submission is written as an expression of my own views. It is not written in my capacity as a member of any organisation nor have the contents of this submission been the result of a brief from any client for whom I may have acted.

4. ALLIGATORS

4.1 (1) In management, there is a well known saying that:

> *"When you are up to your armpits in alligators, it is hard to remember that your first advice was to drain the swamp"*

By this submission, I do not wish to be taken as agreeing with the present drafting of s.46. Consistency and certainty are hardly outstanding aspects of the present interpretation of s.46. Indeed, in a recently published article, I suggested that the courts had applied in a fairly arbitrary way the quite different criteria of "fairness", "efficiency" and "business justification" to s.46 evaluations. In that article I concluded that:

> *"In s. 46, it does help to have economics on your side and it is essential that any analysis be based on economic concepts and verbiage. But a pack of tarot cards and a lot of righteous indignation may well be the key to ultimate success".* [1]

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[1] W.J. Pengilley: "Misuse of Market Power in Australia: Are the tests not those of fairness, efficiency or business justification?"(2001) 8 Canterbury Law Review 70 at 98. See also PARTS 10 and 11 and in particular n.45 , n.46 and related text.

(2) As will be elaborated later (See PARTS 10 and 11), I firmly believe that the major problem of s.46 is not whether or not it needs to be "beefed up" but the complete uncertainty of what the law means. This uncertainty is not fair to business decision-makers and leads to considerable inefficiencies. It is not fair to small business or consumers either because unpredictability of result can involve unreal or non-achievable expectations and the futile expenditure of significant resources.

(3) I believe that s.46, when enacted, was enacted in the belief that American monopolization law would be applicable to it. Indeed Senator Lionel Murphy, when drafting the legislation, took specific advice from a leading United States academic as to the impact of the law. The uncertainty in the law, in my view, commenced with the High Court Decision in Queensland Wire[2]. In Queensland Wire the High Court rejected the United States doctrine that the applicable test was one of misuse of market power (notwithstanding the title given to s.46) and instead said that the mere "use' of market power was enough to make conduct illegal. We have thus lost in Australia that certainty of the law which the United States has.

(4) Having said the above, there does not seem to be any will at all to engage in a fundamental re-think of s.46. All current thinking, so far as I can gauge it, seems to accept the drafting of s. 46 and only wants to vary the verbiage or add bits to it. I will not in this submission expand, except in passing, my thoughts as to the fundamental re-think of s.46 which I regard as so important. I will accept the present drafting and argue the impact of adding an "effect' test to it.

5. THE STATUS AND ROLE OF THE ACCC IN RELATION TO SUBMISSIONS ON THE LAW

5.1 There is, in my view, an unfortunate tendency to give undue weight to views expressed by the ACCC.

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[2] Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co. Ltd (1989) (1989) ATPR 40-925 (High Court)

5.2 The ACCC's prime concern is to advocate changes in the law which make those cases it brings easier to win. It would be surprising for its interest to be otherwise. It is thus perfectly predictable that the ACCC would be happy with a reverse onus of proof. It is also perfectly predictable that the ACCC would support the addition of a further test to s. 46 which gives it a second barrel to its enforcement shotgun.

5.3 Because of its function, the ACCC is not overly concerned with the problems of business decision making or with certainty of application of the law. Indeed it can be argued that the ACCC's interests are best served by a wide and uncertain law as it is in these circumstances that the ACCC has the greater leverage.

5.4 There is also, in my view, an unwarranted assumption that the ACCC is axiomatically and necessarily serving the interests of the community whereas those who have views which do not agree with the ACCC are necessarily serving only self-interest.

Sometimes ACCC attitudes can appear quite illogical and misplaced in relation to its role. This fact has to recognised by any independent evaluative committee. The point has, indeed, surfaced in the s.46 area. In the Safeway Case[3], Safeway was found not to be in breach of s.46 after an infringement action had been brought against it by the ACCC. The General Manager of Woolworths, Safeway's parent company, said, after the ACCC had failed in its case against Safeway, that the ACCC had been "irresponsible" in bringing the case and that the ACCC had involved Woolworths in unnecessary legal expenses of some $8 million.[4] Rather than answer the criticism (which presumably was addressed to the fact that the evidence simply showed no breach of the Act and should have been better evaluated) the ACCC response was to take the high moral ground proclaiming that Woolworths was brow beating it and that the ACCC:

> *"will not be brow beaten or deterred from taking difficult cases. It will continue to act against large well-resourced companies where it believes the Trade Practices Act has been contravened. Consumers and small business deserve no less"*[5]

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3 ACCC v Australian Safeway Stores Pty Ltd [2001] FCA 1861 (21 December 2001) The ACCC is appealing this decision to the Full Federal Court.

4 Australian Financial Review 3 January 2002

5 Australian Financial Review 4 January 2002

Business should be able to be critical of the ACCC. The ACCC should evaluate such criticism on its merits. It is sad that criticism, no matter how genuinely made, sometimes results in an ACCC response along the above lines.

It is probably not unreasonable in evaluating the submissions of the ACCC to put in a discount factor for proselytizing.[6]

The ACCC's role is important. But the views of others who disagree with it are not necessarily contrary to the public interest. Neither is the ACCC necessarily the best judge of the public interest. It may be that business decisions makers face problems about which the ACCC has not heard or which it simply fails to recognise as a difficulty in the law.

5.5 (1) In particular, the present Committee should not follow the reasoning of the Cooney Committee in reaching its conclusions[7]. The Cooney Committee was strongly pressed by the then Trade Practices Commission and its then recently appointed Chairman, Professor Fels, to change the merger test to bring more mergers into the Trade Practices Act net. The Committee acceded to the Trade Practices Commission's request. It noted, however, that:

> *"the empirical evidence on the effect of mergers is conflicting and not conclusive…"*[8]
>
> *"There is a poor bank of available studies based on empirical research into the Australian economy. There is no work of which the Committee has been made aware which would compel it to come to a particular conclusion.*[9]

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6 It is also probably not unreasonable to note the comments of a recent Parliamentary Committee that the ACCC has "an intolerance of criticism even when it is well founded". Competing Interests: is there a balance? Review of the Australian Competition and Consumer Commission Report 1999-2000 (House of Representatives Standing Committee on Economics, Finance and Public Administration [The Hon. D. Hawker: Chairman September 2001] p.47. This comment was rejected by the ACCC Chairman as simply picking up "business criticisms over the Commission's pro-consumer role" (Australian Financial Review 25 September 2001)

7 Senate Standing Committee on Legal and Constitutional Affairs: Report on Mergers, Monopolies and Acquisitions – Adequacy of Existing Controls (Senator B. Cooney: Chairman) (December 1991)

8 n.7 Par 3.25 and 3.112

9 n.7 Par 3.124

Nonetheless, the Committee recommended a changed test. The reason for this was that the Trade Practices Commission "lacked the authority to carry out its function in a way most beneficial to the community" and that it should be given such authority[10].

(2) The decision of the Cooney Committee to recommend a change in the law – effectively because the then Trade Practices Commission wanted it to – is not a precedent to be followed.

The Cooney Committee's decision:

- was in the face of the evaluation of the Committee itself that there was no reason for change;
- gives a singular lack of credibility to the status of the Committee as an independent reviewer of evidence; and
- has not quelled the controversy. Because the Cooney Committee took its decision without the ability to back this by evidence, it is not surprising that its findings are not respected and still contested a decade later.[11]

Great heat and little light is the only result which follows if Committees of Inquiry simply agree with ACCC submissions on the basis that the ACCC needs authority to carry out its functions and that, by definition, its views reflect the most beneficial solutions to community problems. The fact that the merger test controversy still rages is because the Cooney Committee made the decision it did for the reasons it did.

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10 n.7 Par 3.123

11 Assertions by bodies such as the Business Council of Australia to the contrary of the Cooney Committee's decision continue. They are frequently not met by anything other than impassioned ACCC rhetoric notwithstanding the fact that there was in 1991 no real evidence of the need for change to the merger test. The ACCC stance now is that:

> *"The Business Council of Australia has at all times opposed any strengthening of merger law…their agenda is to emasculate merger law, even though that would be highly damaging to the Australian economy…" House of Representatives Standing Committee on Economics, Finance and Public Administration Evidence of Professor Fels, 30 March 2001 Transcript p 12.*

The Business Council of Australia, of course, simply asserts that there was no reason to change prior law and that it is this change that is damaging the Australian economy. The BCA argues that there is no virtue in strengthening the merger law – something the ACCC regards as axiomatic but for which it can be argued that there is not a great deal of objective evidence.

5.6 Lest they be misunderstood, the comments in Pars 4.1 to 4.5 above are not aimed at suggesting that the ACCC's views should be discarded because of the ACCC's interest in putting them. Of course, the ACCC, like everybody else, should be entitled to put its views and have them evaluated.[12] My observations in relation to the ACCC's views are simply aimed at pointing out the obvious – something so obvious that it can be overlooked - that the ACCC represents and necessarily has a viewpoint in relation to the Trade Practices Act which is not universally shared. Other views should be considered by any evaluative committee.

In particular, my comments are made because a prior Senate Trade Practices Committee, the Cooney Committee, suggested changes to the law essentially because the then Trade Practices Commission wanted such changes. This is not a proper reason for recommending changes. It is submitted that the reasoning of the Cooney Committee demeaned the stature of that Committee and that should the present Committee recommend changes for akin reasons, this too would demean its stature.

6. PRIOR ENQUIRIES IN RELATION TO AN "EFFECT" TEST

6.1 (1) The ACCC submission to the present Committee does not point out that no fewer than six previous enquiries since 1989[13] have rejected the addition of an effect test to s.46. In fairness, I believe the ACCC, if it is to establish its case, should not only draw the present Committee's attention to these enquiries and their results but should also highlight their reasoning and state where such reasoning is, in the ACCC's view, erroneous. It seems to me that the ACCC has put nothing which was not available to prior enquiries. The ACCC is simply continuing to re-assert prior arguments which have been, without exception, rejected. Surely it is for the ACCC to bring new light to bear or to dissect the reasoning of prior enquiries and substantiate where such reasoning is wrong. It is simply not good enough not even to draw the

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12 It is noted, in passing, however, that Professor Fels believes that the ACCC is "not in general involved in advocacy of changes of the law" n.11 Transcript p.2

13 In short reference terms these Enquiries are The Griffiths Committee (H of R 1989) ; The Cooney Committee (Senate 1991); The Hilmer Committee Independent Committee of Inquiry (1993); The Reid Committee (H of R 1997); The Baird Committee (H of R 1999) and The Hawker Committee (H of R 2001) (n.6.)

Committee's attention to the existence of these prior enquiries let alone fail to discuss their reasoning.

(2) The last of these Committees[14] recommended in 2001 that there be no change to the law until the outcome of further cases under s.46 was known. There is no reason why any change in the case law since the date of this Inquiry would merit any review of this decision.[15]

7. GENERAL OBSERVATIONS BY THE ACCC AS TO THE TREND OF S.46 LAW

7.1 In general terms, the ACCC complains that:

> *"the difficulties the ACCC and private litigants have experienced with enforcing s.46 have weakened the competitive process in various sectors of the economy"*[16]

The above calls for a value judgment as to the desirable competitive processes and the ACCC's views are not necessarily self-evident. For example, as was found in the Safeway Case,[17] a finding in favour of the ACCC would have meant that a bread retailer would be unable to refuse to stock a bread manufacturer's product if its purpose in doing so was to force such manufacturer to supply it at the same price as it supplied competitive retailers. To my way of thinking, seeking to prevent this conduct is hardly enhancing the "competitive process" in the economy. Not only did the ACCC lose this case but it is appealing the decision.

In any event, notwithstanding the protestations of the ACCC in its submission to the present Committee of Inquiry as to the inadequacy of s.46 law, the ACCC has

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14 The Hawker Committee (n.6)

15 The cases of Melway v Hicks (2001) ATPR 41-805; ACCC v Boral (2001) ATPR 41-803 and Rural Press (2001) ATPR 41-833 had all been decided at the time of the Hawker Committee Report (n.6). Since the Hawker Committee Report, ACCC v Universal Music Australia Pty Ltd [2001]FCA 1800 has been decided in favour of the ACCC although it is understood that the defendants intend to appeal this decision. The case of ACCC v Australian Safeway Stores [2001] FCA 1861 has been decided against the ACCC. The ACCC has appealed this decision. Special leave to appeal the Boral decision to the High Court has subsequently been granted. It is submitted (See Par 10.6) that it would be premature to recommend changes in the law until s.46 is definitively interpreted in at least this case.

16 ACCC Submission Feb 2002 p7

17 n.3

elsewhere expressed a more sanguine view. Thus, the ACCC said in 2001 in evidence to the Hawker Committee that:

> *"The High Court (has) adopted a more expansive view of s.46 than in the past. The hurdles that have to be got over have been lowered significantly by the High Court"*[18]

7.2 One is compelled to the conclusion that ACCC complaints as to the inadequacies of s.46 as set out in its submission to the present Committee of Inquiry are not totally consistent with the somewhat rosier s.46 picture it paints elsewhere.

8. THE ACCC "PROBLEMS" IN BRINGING S.46 CASES

General Comments

8.1 The ACCC submission asks the Committee to accept that the ACCC has not been able to bring cases "concerning a number of industries". The ACCC asks the Committee to assume, in essence, that the parties involved in such cases are at least morally guilty but evidence of guilty purpose cannot be obtained. I suggest that assertions of such generality have to be accepted with a certain degree of cynicism. What the ACCC might regard as moral guilt is conduct which the parties involved might quite properly consider to be non-objectionable. For example, the view of the ACCC that it is wrong for an entity to force the same supply price as its competitor is receiving is, to my way of thinking, quite unfounded. Yet the ACCC alleged this in the Safeway Case and is now appealing Safeway's acquittal to the Full Federal Court (See PART.4 and 6.1 above).

Surely there is an onus on the ACCC to particularise the types of cases of which it speaks rather than assert generality which has to be accepted on its face and is quite unable to be verified. In at least the Safeway Case, there is, in my view, no competitive sin whatsoever. One suspects that other cases may well be in the same boat.

"Smoking guns"

8.2 The ACCC complains at the absence of "smoking gun" documents and how, in the absence of these, it is difficult to prove "purpose". It also complains that there is a

"current increasing trend of corporations to avoid creating potentially incriminating documents".

8.3 (1) It is obvious enough that companies do not wish to create incriminating documents. The ACCC's complaint, however, is perhaps as much semantic as anything else. The ACCC interprets the sales hype language engaged in by companies as evidence of purpose and seems to have had some success in convincing the court as to this. So the philosophical view expressed at a sales conference that a company's sales force should aim to "kill the bastards" (i.e. the competitive opposition) is regarded by the ACCC as evidence of intention to exclude competitors from the market. Of course, it is not necessarily this any more than the same injunction issued to me by my rugby coach (in previous days of youth) was extolling me to commit murder.

The desire of companies not to create incriminating documents is a quite proper reaction by those who wish to ensure that inferences adverse to them are not drawn from loosely worded sales hype used to promote action by their sales force. If such documents are to form the basis of ACCC proceedings, it is not surprising that companies will in future word documents in less dramatic language (language probably also not as effective in arousing salespersons' competitive instincts). Policies such as "We will have to compete strongly to-day as we do not wish to lose this sales" will be the future expression of company policy. Presumably the ACCC will not object to a marketing policy expressed in these terms and this will be the reason for their adoption.

(2) It is absurd in my view that the ACCC should put such emphasis on smoking gun documents. If the emphasis is as strong as claimed and proceedings cannot be mounted because documents are increasingly being phrased in neutral terms, then this shows that the ACCC's enforcement of the law is based on very shallow conceptions of what is legal and what is not. There is no reason why this should be. The ACCC has a huge enforcement armoury which is not available to other

(3) litigants including:

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[18] Hawker Committee Report (n.6) p.50

- Penalty provisions of up to $10 million per offence determined on a non-criminal onus of proof basis.

- Extensive powers to seek documents and examine witnesses on oath, there being no right to refuse to answer questions; and

- As the law currently stands, the right of access to all legal advice given to parties.

The last two above powers can be used to determine the true "purpose" of conduct before the ACCC has even instigated court proceedings. If there were any improper purpose in a company's conduct, one would think that the ACCC should be able to establish this without too much reliance on the somewhat superficial semantics of company memoranda.

"Smoking gun" terminology is only one superficial part of establishing the true purpose of conduct. To change substantive law because "smoking gun" memoranda may become less frequent in future is an absurd suggestion.

The ACCC misstates the necessity for "smoking guns' in order to establish "purpose"

8.4 The ACCC seems to suggest that proof of purpose depends upon "smoking gun" memoranda and, without these, a s. 46 case cannot be established. This is not the law and never has been. The ACCC misstates the position when it suggests that contrary. (See PART 8 following)

9. THE IMPORTANCE OF "PURPOSE"

The law in relation to "purpose"

9.1 The ACCC in its submission does not set out at all (let alone set out completely or accurately) the law in relation to "purpose".

9.2 It is not possible here to go into the whole of the law relating to "purpose". Suffice it to say as follows:

(i) Although the purpose of a party involves an evaluation of subjective factors, nonetheless it involves a consideration of "the real reason" why something has been done. Even though the assessment is subjective in nature, the courts have to reach a conclusion as to the "effect which (conduct) is sought to

achieve…the end view" or "the result aimed at"[19]. The point of examining the "purpose" of a transaction is to look at the factors which influence it. As has been said in the Full Federal Court:

> *"The factors which influence a transaction will be relevant to casting light upon the transaction within (s.46) notwithstanding that, if purely objective criteria were examined, the transaction might appear not to breach the section. The thinking behind a transaction may clarify what the transaction was designed to achieve and was likely to achieve. But, ordinarily those matters can be inferred from the terms of the arrangements made, from the way in which they were implemented and from the existence or absence of monopoly type conduct such as predatory pricing."*[20]

(ii) "Purpose" can, pursuant to s.46(7) of the Trade Practices Act be established:

> "*notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances"*

(iii) Inferences can be drawn from allegations. If allegations are made which would demonstrate, on their face, an infringement of s. 46 and these allegations are not refuted by evidence which establishes a non-infringing purpose in the conduct involved, then an infringing purpose may be established by the allegations alone.[21]

(iv) Under s.4F of the Trade Practices Act, a purpose does not have to be the sole or a dominant purpose of the conduct. The "purpose" test is satisfied if it is demonstrated that the purpose of conduct included a proscribed purpose and the proscribed purpose was a substantial one.

(v) By s.84 of the Trade Practices Act, if it is necessary to establish the state of mind of a corporation for purposes of s.46, it is sufficient to show that a

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19 See General Newspapers Pty Ltd v Telstra Corporation (1993) ATPR 41,274 at p 41,698 citing Newton v Federal Commissioner of Taxation (1958) 578 CLR 1,8.

20 General Newspapers (n.19) at p.41698. This statement of the law clearly means that a "purpose" evaluation can work both ways. In its submission to the Committee, the ACCC strongly presses that an application of the "purpose" test will always work to the benefit of a defendant. But, as the case states, a purpose test may bring light on the transaction "notwithstanding that if purely objective criteria were examined, the transaction might appear not to breach the section".

21 Su v Direct Flight International Pty Limited and Anor (2000) ATPR 41-750.

director, servant or agent of the corporation acting within their actual or apparent authority had the relevant state of mind.

The importance of a defendant being able to demonstrate that it had no s.46 proscribed purpose.

9.3 (1) It is obvious from Par 8.2 that the ACCC does not lack statutory assistance in establishing a relevant proscribed purpose. If there were an effect test, then, seemingly, s.46 proceedings would but rarely involve issues of purpose. The "true reason" for conduct would, in these circumstances, be unable to be explained if conduct, on its face, produced a certain effect. This is quite wrong. In competition, there will almost always be some intent to cause a detrimental impact to a competitor. In the words of the High Court:

> *"competition by its very nature is deliberate and ruthless…competitors almost always try to 'injure' each other…"*[22]

(2) If an effect test were introduced as a basis of s.46 illegality, conduct which, on its face, resulted in injury to a competitor would be illegal. The High Court, having commented as above (Par 6.3(a)) on the ruthless and injury intent oriented nature of competition specifically noted that the "purpose" provisions in s.46 were designed to preserve the ruthless nature of the competitive process and that this process was of benefit to consumers. Abolish the ruthless nature of the competitive process and consumer detriment necessarily follows.[23]

(3) Obviously explanations of purpose must be permitted if the competitive process is not to be throttled by s. 46 – as it would be were an effect test the relevant criterion of evaluation.

What "purposes" may justify s.46 conduct?

9.4 What on its face would be illegal if an effect test were introduced, might be quite defensible conduct if its "purpose" were to be explained. The "real reason" why

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22 Queensland Wire n.2 p 50010

23 Queensland Wire n.2 p 50010. Said Mason CJ and Wilson J:

> *"(Injury is) the inevitable consequence of the competition s.46 is designed to foster. In fact, the purpose provisions in s.46(1) are cast in such a way as to prohibit conduct designed to threaten that competition".*

something is done or the "end in view" (See Par 8.2(I)) may be quite different to the effect of the conduct involved. A refusal to supply, for example, may be anticompetitive in effect but may be able to be justified on the basis that its purpose was to ensure efficient distribution by establishing a restricted and technically well-trained dealer network.[24]

9.5 Parties should be permitted to explain whether they have a rational business reason for doing what they did and what this reason is. A rational business reason for doing something at a minimum shows that the purpose of conduct is not wholly one of the proscribed purposes under s.46. A rational business reason for conduct surely prevents a proscribed purpose being drawn from conduct alone. A legitimate business purpose clearly can show that a party has a purpose other than a purpose which involves detriment to another. Even it there are detrimental effects on others, surely a rational business purpose can at least show, on balance, that it is not a substantial purpose to produce those detrimental effects. All of these issues are relevant to the question of whether conduct should be illegalised under s.46. An effect test would result in illegalisation without the opportunity to explain the reason for engaging in the relevant conduct. This would obviously threaten the competitive process itself and the consequent consumer benefit which it brings.[25]

Conclusions in relation to "purpose"

9.6 It is obvious enough that the ACCC in complaining about the absence of "smoking gun" memoranda (See Pars 7.1 to 7.3) has put a hugely simplistic view. Companies will naturally write instructions and memoranda in ways which protect them. They are quite justified in doing so when "sales hype" memoranda will, it appears, be misunderstood by both the ACCC and the courts.

9.7 Breaches of s.46 depend upon much more than "smoking gun" memoranda though the ACCC in its submission to the Committee mentions virtually nothing else. The ACCC submission does not fully inform the Committee as to the legal position. Nor does it inform the Committee of the very strong legal position which it enjoys under the Trade Practices Act.

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[24] As in Melway v Hicks (n.15) for example

[25] See comments of Mason CJ and Wilson J in the High Court in Queensland Wire (n.23)

9.8 The ACCC enjoys substantial litigation procedural advantages by which it should be able to prove a proscribed illegal purpose if one exists (See Par 7.3 (b))

9.9 The law enables inferences to be drawn against defendants as to improper "purpose" if no satisfactory explanation of conduct is given. A "purpose" test enables a defendant, however, to give an explanation of "the real reason" for conduct. The ability to do this is crucial to the maintenance of competition itself (See Pars 8.2 to 8.3)

9.10 Parties can frequently give explanations quite consistent with competition principles which justify the "purpose" they have in engaging in certain conduct (See Pars 8.4 and 8.5).

9.11 An effect test would negate the potentiality of explanation of conduct. Much pro-competitive conduct would, therefore, be illegalised because of the lack of opportunity to justify it.

9.12 Although perhaps a purpose test might remain in s.46 even if an effect test were introduced, de facto the section would be enforced, in nearly all cases, with only an effect test in mind. This is clear from the ACCC's desire to introduce an effect test. Competition would be the worse for this.[26]

10. REVERSE ONUS OF PROOF

10.1 (1) It is clear enough that the ACCC does not fully put the onus of proof position before the Committee. The law is that inferences as to illegal purpose can be drawn if conduct is not satisfactorily explained.[27]In one sense the legal position presently is what many may regard as, in essence, a reverse onus of proof being placed on defendants.

(2) It is still, however, a matter for a court to be satisfied (after taking into account the adequacy of any explanation for conduct or the lack of such an explanation) that a breach of s.46 has occurred. This may mean, on some occasions, that a defendant gives no explanation but is found not in breach

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[26] n.25

[27] n.21 and related text.

because the ACCC's case is so weak that no explanation is necessary. Findings along these lines have occurred in a number of restrictive trade practices proceedings instituted by the ACCC[28].

It is appropriate that the ACCC retain the overall burden of proof of its case. Even here, however, the ACCC has significant procedural advantages. Even though the penalty for breach of s.46 is up to $10 million per offence, for example, the onus of proof borne by the ACCC is the lower non-criminal one i.e. the ACCC does not have to prove its case beyond reasonable doubt. As noted also, (See Par 7.3(b)), the usual criminal protections of the law (e.g. the right to silence and the right of a client to claim legal professional privilege) do not apply to ACCC proceedings.

(3) Whatever procedural litigation advantages the ACCC enjoys in relation to enforcement of the Trade Practices Act, it is important that the ACCC retains an overall burden of proof and that this not be placed on defendants. The ACCC is not a disadvantaged litigant. A fundamental principle of justice is that a party making an accusation should prove what it asserts. A reversal of the onus of proof will involve the assumption that traders are prima facie acting illegally on a mere allegation to this effect. There is nothing in competition policy which justifies this view.

10.2 The fact that an overall burden of proof remains on the ACCC is protection to traders against ill-conceived and frivolous cases being brought. The ACCC no doubt will always allege that this does not occur. However, the track record is that such cases have been brought in the past[29] and will, no doubt, be brought in the future.

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28 See, for example, TPC v Leslievale Pty Ltd 91991) ATPR 41-132; ACCC v Mobil Oil Australia Ltd (1997) ATPR 41-568; ACCC v Amcor Printing Papers Group (2000) ATPR 41-749. All of these cases involved the inability of the TPC/ACCC to prove a relevant "contract, arrangement or understanding". In Mobil Oil, the ACCC's bringing of proceedings was described as an "abuse of process of the Court". In Amcor, the Court found that the facts alleged fell well short of establishing an inference of illegal arrangements and were consistent with a number of alternative explanations. In Amcor the ACCC's case was so weak that the defendants were entitled to an acquittal without being required to give evidence.

29 n.28

10.3 There is no case for an effect test in s.46. Equally there is no case for reversing any onus of proof in the section so that proof of exculpation lies on the defendant rather than proof of breach lying on the ACCC.

11. LEGAL UNCERTAINTY: THE GREATES PROBLEM OF S.46

11.1 It is not the purpose of this submission to suggest a total re-think of s.46. (See comments Par 3.1(d)) However, when the ACCC calls for the "beefing up" of s.46 an adverse reaction of business is to be expected. It is not so much that business objects to a "beefing up" of the law. It objects far more to the fact that the law is uncertain and any extension of its provisions only adds to this uncertainty.

11.2 I have no doubt that many businesses believe that an effect test will only add to their already complex problems in s.46 compliance. So that the Committee may have some feel for these problems, it is appropriate to instance briefly some of the difficulties involved in compliance with s.46. The commentary on this issue is necessarily brief. It is illustrative only of a much greater business compliance difficulty.

Principles which courts have held to be guiding in relation to the interpretation of s.46

11.3 Business primarily wants certainty in the law. With certainty business can adapt to most things. Without certainty, business must carry out its activities shrouded in a trade practices fog. In relation to s. 46, it has thus been held by the courts that:

(i) A monopolist, like anyone else, must be entitled to compete.[30]To hold otherwise would be to hold an umbrella over inefficient competitors.

(ii) The question of injunctive relief is important. An injunction which begs the major issue in the case, is inappropriate[31].

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30 Queensland Wire Industries Pty Ltd v BHP (1989) ATPR 40-925 (Australia); Telecom Corp of NZ Ltd v Clear Communications [1995], NZLR 385 (Privy Council on Appeal from New Zealand); Union Shipping NZ Ltd v Port Nelson Ltd [1990] 2 NZLR 662; New Zealand Magic Millions v Wrightson Bloodstock Ltd [1990] 1 NZLR 731 (New Zealand); Olympic Equipment Leasing v Western Union Telegraph Co 797 f.2d 370 (USA)

31 Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) ATPR 41-805 (High Court). In Melway the appellant, in the High Court, withdrew its application for an injunction in relation to the conduct involved. The court majority said that "it may be convenient, but it is unsatisfactory to treat the question of relief as inconsequential. A conclusion that the present

(iii) The Act must be interpreted in such a way as to give certainty so that business, before embarking on conduct, is aware of the legalities of what it is doing[32]; and

(iv) What the Act is about is the protection of "competition" not the protection of "competitors"[33].

How have the above principles of interpretation been applied in fact: Queensland Wire and Boral.

11.4 In terms of overall philosophy, factors *(i)* and *(iv)* in Par 10.3 are crucial. In terms of business assessing what it is to do, factors *(ii)* and *(iii)* in Par 10.3 are basic to compliance with the law. Business, at the time it takes decisions, needs at least a buoy, if not a beacon to assist it on the seas of commerce. The courts proclaim the necessity of this. A number of major Trade Practices Act decisions under s.46 have, however, been woefully inadequate in that breaches of the Act have been found but the courts have contributed nothing by way of guidance to decision-makers who seek to comply with the Act. Further, I believe that judges have rarely put themselves in the decision-maker's seat and evaluated what they would have done in their circumstances. This is crucial to any evaluation of the legality of conduct. Ex Post facto rationalisation is not good enough.

Let us look at two of the major s.46 cases and consider the illegality found by the Court from the decision-maker's viewpoint.

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case involved a contravention of s. 46 would necessitate consideration of how the legislation was intended to operate in practice. That would require consideration of the available remedies. An injunction expressed in terms which leave unclear the form of the conduct which will expose a party to the consequences of a breach of a court order, and which beg the major questions in issue, is inappropriate." If it is not possible to draft an injunctive order (a civil remedy) specifying and defining the conduct in breach and to be restrained, then it is even less appropriate for non-definable conduct to be subject to a quasi criminal penalty of up to $10 million per offence. Surely those seeking a quasi-criminal penalty should be called upon to specify the sinful conduct involved with greater precision than those seeking injunctive relief.

32 Telecom Corp of NZ Ltd v Clear Communications [1995] 1NZLR 385 at 403 where the Privy Council said:

> *"In their Lordship's view s.36 (the New Zealand equivalent of s.46 of the Australian Trade Practices Act) must be construed to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful."*

33 Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (n.15)See also Brunswick Corp v Pueblo Bowl-O-Mat 429 US 477 (1977) (US Supreme Court)

(1) Queensland Wire[34] involved the non-supply of Y-bar by BHP to Queensland Wire except at prices variously described as "unrealistically high" or as not "reasonable". What was BHP's sin? Was the Court to declare what was a "reasonable" price? Justice Pincus at trial thought he could not do so.[35] What about terms such as quality, quantity, credit terms and the myriad of other factors which make up a commercial deal? And what about the admonition of the U.S. Supreme Court in Trenton Potteries [36] that:

> *"the reasonable price fixed to-day may through economic and business changes become the unreasonable price of tomorrow"*

Is the Court to be some sort of price monitoring authority? Business does not know what a reasonable price is. Neither does Mr. Justice Pincus. The High Court does not enlighten us. Yet the High Court believes that supply should be on the basis of a "reasonable price". How is business to comply with s.46 given the judicial fog surrounding the essence of the High Court's judgment?

Justified cynicism of the inability to comply with a court mandated "reasonable price" is found in the Pont Data Case. Without doing into elaboration of the principles in this case, the trial judge found that the "reasonable price" was $100 per annum. The Full Federal Court found the "reasonable price" was $1.45 million per annum.[37]Somewhere between the two is, apparently, the "reasonable price" How does the businessperson know, at the time of decision –making, what this is?

(2) In Boral[38] the Full Federal Court determined that an entity could be in breach of s. 46 by pricing predatorily even if it made a profit on sale[39]. Predatory

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34 n.2

35 (1987) ATPR 40-810(Pincus J).

36 U.S. v Trenton Potteries 273 US 392 (1927)

37 See W.J.Pengilley: Misuse of Market Power; The Unbearable Uncertainties Facing Australian Management 8 TPLJ p.56 pp. 64-65

38 ACCC v Boral Limited (2001) ATPR 41-803 (Full Federal Court) Special leave to appeal to the High Court from this decision has been granted.

39 This conclusion was reached to some degree in light of The Explanatory Memorandum to the Trade Practices Revision Bill of 1986 which read:

pricing, said Justice Finkelstein, was no more than a price set at a level to keep potential competitors from the market.[40]How does a decision-maker determine what this price is? How much profit does the entity have to make so that its price is no longer "predatory"? How can an injunction be framed in specific enough terms to prohibit pricing at a level which keeps a competitor out of the market? What assessment is to be made of how brave or cowardly a market competitor may be? If an injunction specifically describing the illegal conduct cannot be framed, is it appropriate for a pecuniary penalty to be extracted for breach of non-desirable conduct? Is one now required to price at a level which permits, or even welcomes, a competitor into the market? Does this mean that the monopolist can no longer compete? What is the difference in Australia between keen pricing (encouraged by competition law) and illegal predatory pricing? [41] The U.S. position is, comparatively, quite clear.[42] From a viewpoint of "competition" as distinct from the protection of "competitors", have we now, in Australia, fallen into the ironic trap about which U.S. courts have warned that:

> *"the standards for predatory pricing liability (can become) so low that antitrust suits themselves (can become) a tool for keeping prices high"?*[43]

> *"It is not the intention of s.46 that pricing, in order to be predatory, must fall below some particular cost. The prohibition in the section may be satisfied notwithstanding that it is not below marginal or average variable cost and does not result in a loss being incurred."*

In this writer's view, "below cost" (however defined) is a basic element in predatory pricing. It is crucial to predatory pricing evaluations in the United States. To hold the contrary means that the court must determine the relevant profit, a task it is singularly ill equipped to do. The above interpretation in the Explanatory Memorandum should be repealed. It is submitted, however, that in Boral there were a variety of relevant factors which left it open to the court to conclude that the above statement in the Explanatory Memorandum was not controlling as to the legality of the conduct of the defendants.

40 n.38 at p 42697 per Finkelstein J.

41 The United States view (that one must not only price "below cost" but that one must also have the intention of "recouping" below cost expenditures once a competitive entity has been forced out of the market) was expressly rejected in ACCC v Boral. For the leading United States decision see Brook Group v Brown & Williamson Tobacco 509 US 209 (1993)

42 "Recoupment" is a major difference between the law of Australia and that of the United States. Selling "below cost" (necessary in the United States but not in Australia) is the second major difference – see n.41. However, these tests were rejected in ACCC v Boral.

43 Brook Group v Brown & Williamson Tobacco (n.41)

Boral also has the strange result that a retailing company in a corporate group may be regarded as selling at an illegal predatory price even though its corporate group as a whole makes a significant profit on its combined functions (in the case of the Boral Group) of mining, manufacturing and selling. If the separate companies in the group were to be collapsed into one entity, there would appear to be no predatory pricing involved.

Are business decisions now to be governed by the structure adopted by companies in a corporate group rather than by the economic actuality of result? Surely the U.S. situation which looks at substance in group transaction is to be preferred.[44] Are we now to look in Australia at injunctions which prohibit conduct on structural grounds rather than on an assessment of actual economic impact? Boral would lead to this conclusion. If it is so, such a result has nothing to commend it in terms of policy, economic reasoning or as furthering competition principles.

Uncertainty: Summing it up

11.5 A major problem of compliance with s.46 lies in court rulings which give no certainty to business as to what it can and cannot do. It is little wonder, particularly in terms of s. 46, that the businessperson often regards his or her changes of complying with the Trade Practices Act as little more than a punt, the odds against the business decision-maker, by a vast amount of ex post facto rationalization, being made considerably shorter after the running of the event.

Business must have certainty of standards by which to judge what it does. Not surprisingly, business will resist extension of s. 46 provisions when even the present laws do not enable it to know what it cannot do. This resistance is quite understandable. Any extension of the scope of s.46 simply exacerbates the businessperson's problem in that not only does he or she have difficulties in

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[44] See for example, the U.S. Supreme Court Copperweld Decision 1984 2 Trade Cases 66,065. The U.S. Supreme Court said:

> *"a parent and its wholly owned subsidiary must be viewed as that of a single enterprise under s. 1 of the Sherman Act. Their objectives are the same, not disparate, their general corporate actions are guided or determined not by two corporate consciousnesses but one..."*

compliance with the current law but the scope of this law is extended without regard to these difficulties.

Boral is on appeal: Some of the uncertainties of s.46 may be ironed out by the High Court in this case. Given this, now is not the time to be suggesting amendments to the section.

11.6 Section 46 will be subject to definitive interpretation in the Boral Case in respect of which special leave to appeal to the High Court has been granted. Questions of new tests to be put Into the section and/or whether the onus of proof in the section should be varied have all to be evaluated in light of the general impact of the section and the certainty, or otherwise, which it delivers. It would, I believe, be premature to be recommending amendments to the section when issues involving the more general questions of its overall impact are subject to final High Court interpretation and may well be clarified by such interpretation. It is to be noted that the view of the Hawker Committee in 2001 was that there should be no change to the law until the outcome of further cases under s.46 was known (See Par 5.1(b)). Boral is the leading case in the area. This Senate Committee should not recommend changes in the law until the outcome of at least this case is known.

12. THE FUNDAMENTAL INTERPRETATIONAL PROBLEM: THERE IS NO AGREED STANDARD BY WHICH S.46 CONDUCT IS JUDGED

12.1 Although I do not expect it to happen, I submit that it would be an excellent idea for this Committee, or some other Committee, at least to establish what we want s. 46 to do. In a recently published article[45] I have described the basic problem in s.46 in the following words:

> "*There is, in s.46, considerable doubt even as to the most fundamental standards to be applied. The section itself leaves open a vast possibility for the application of different sets of values. Perhaps the main problem is whether courts should apply standards of "fairness", the traditional way in which lawyers see problems, or whether the courts should apply objective criteria of efficiency which is the traditional approach of the economist. In the simple case of the termination of a dealer, for example, the economist will say that the hardship caused to that dealer does not matter. If it is more efficient to terminate the dealer in question, the dealer should go. The lawyer may well feel this is "unfair" to a dealer who has done a faithful job during his dealership. Such a dealer can, the lawyer may argue, be terminated only because he is the weaker party. This is unjust, the lawyer may believe, and*

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[45] See n.1 at p71.

the law should offer its protection. Which evaluative criteria are the correct ones to apply? I doubt if we have really even squarely faced this issue, let alone solved it, in interpreting s.46"[46]

12.2 It is the above issue which should be faced and which means that s.46 is presently vague and, therefore, ineffective. Until the above issue is squarely faced and certainty is put into s. 46, there are significant reasons why its scope should not be extended. In more limited horizons, there is certainly no case for any extension of s.46 either by reversing the onus of proof in the section or by adding an effect test to it.

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[46] In this article (n.1), I argued that Queensland Wire (n.2) was a "fairness" case in that the Court believed a smaller company was entitled to product supply from the BHP behemoth even though BHP had never dealt previously with the company requesting supply. Melway (n.15) had a quite different rationale. In this case, the Court reached conclusions based on economic market analysis. Business marketing arguments were upheld to validate the restraints involved. Boral (n15) was a "fairness" case. The tactics of BBM, the relevant Boral subsidiary, resulted in the exit of various companies from the market. The Court initially approached its reasoning on the basis of economic logic but failed to take this reasoning to its logical conclusions in light of the fairness it thought should be extended to those companies experiencing difficulty as a result of BBM's pricing policy.

THE TEN MOST DISASTROUS DECISIONS MADE RELATING TO THE TRADE PRACTICES ACT

by

Warren Pengilley

A SPEECH GIVEN AT A SEMINAR CONDUCTED BY IIR LIMITED AND HELD IN SYDNEY ON 25 JUNE 2002

SPEECH AS ORALLY DELIVERED

THE TEN MOST DISASTROUS DECISIONS MADE IN RELATION TO THE TRADE PRACTICES ACT[*]

by

Warren Pengilley[**]

The topic of my talk had its genesis in a gathering in vino veritas. It was put to me in this gathering:

- **that the Inquiry into the Trade Practices Act announced by the Prime Minister on 15 October 2001 needed some analysis of those areas in which the Act had gone most tragically wrong;**
- **that "ten" was an appropriate number to limit the prolixity of my fulminations; and**
- **that no-one could really take offence at being associated with the ten worst decisions. When one analyses "the ten greatest political clangers", opined one member of the group, many of them involve a certain amount of panache. And if Britney Spears is included in the list of "the 10 worst dressed women", one must say that there**

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[*] A speech given at a Seminar conducted by IIR Limited and held in Sydney on 25 June 2002. Some footnote references have been added here to the text of the Speech for publication purposes. A detailed background paper was distributed to Conference participants prior to the delivery of this Speech.

[**] Professor of Commercial Law at the University of Newcastle; Special Counsel to, and former partner in, Sydney Lawyers, Deacons; formerly a Commissioner of the Australian Trade Practices Commission.

is a strong element of attraction in a group which is supposed, by definition, to be singularly unattractive.

I hope all these factors give some rationale to my choice of topic. Despite the frivolous circumstances in which the topic choice was hatched, it is meant to have a serious side.

I have not limited my discussion of "decisions" to court decisions. Decisions may be political, administrative or judicial and there are examples of all of these in my choice of the ten worst decisions made. I have, however, fundamentally limited by subject matter to PART IV and PART V of the Act as these are the most usually encountered areas, and those familiar to most. Thus, I have not attempted to cover some of the more disastrous Authorisation decisions or decisions taken in connection with industry-specific legislation and administration – such as, for example, that relating to telecommunications.

I also add, lest it be thought otherwise, that I well recognise that my views may be scorned by some. Further, I obviously believe that many highly meritorious decisions have been made under the Trade Practices Act. It is simply that it is not my brief here to discuss these meritorious decisions. My brief here is to identify, and comment on, what I will hereinafter refer to as "the disasters". Further, I do not rate the disasters in some sort of "disaster pecking order". All are disasters. I do not imply that disaster number one is greater than disaster number

ten. I leave it to my audience to make this evaluation, which is, no doubt a personal one varying with each individual's philosophy of competition law.

Basically, I have arranged the disasters in the order in which the sections of the Act relating to them appear. Hence, I start with collective boycotts (illegal under s.45 and s.4D) then discuss decisions under s.46 relating to misuse of market power and so on.

Disaster Number One: The drafting of the collective boycott law – s.4D (illegal under s.45)

The first disaster is administrative. It is the drafting of s.4D of the Trade Practices Act illegalising what are commonly known as collective boycotts but which in the Act are termed exclusionary provisions.

Collective boycotts involve a group of competitors ganging up usually to deny supply to another party. Under judge made law in the United States, this conduct is illegal per se (i.e. regardless of its anticompetitive effect). There is good reason for this in United States law as such conduct involves the acquisition of, and joint exercise of, market power against a competitor, the exclusion of market entry and the inhibition of individual decision making. Sociologically such conduct may be regarded as bullying and, because it is a low down social practice, it should be banned perhaps for this reason as well as for any other. Whatever the logic, collective boycotting, as that term has been

interpreted in U.S. law, has all the classic hallmarks of anticompetitive conduct. Because it is conduct which must necessarily be condemned, it is accorded per se illegality thus obviating the need to make a detailed competition analysis on every occasion it occurs.

We have attempted to do the same thing in s.4D of our Act. But we have mistranslated the U.S. Sherman Act downunder. Crucially, the United States law requires that a boycott by competitors be of *other competitors, actual or potential*. The Australian Act has no such requirement. The target boycotted entities in Australian can be anyone at all. The Kim Hughes Case[1] made this clear. In this 1986 decision, the Western Australian Cricket Association (the "WACA") rules forbade Western Australian cricket clubs engaging Kim Hughes as a player. The reason for this was that Kim Hughes had led a "rebel" cricket tour to South Africa in defiance of the then Australian cricket ban on that country because of its apartheid policies. The judgment in the case specifically found that the WACA ban was not anticompetitive. It was just that the drafting of the Act led, as a matter of statutory interpretation, to the conclusion that the boycott was per se illegal.

In the United States, a per se ban could not follow on these facts. Kim Hughes was not a competitor of the various cricket clubs. If the

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1 Hughes v Western Australian Cricket Association 1986 ATPR ¶ 40-736.

Parliamentary draftsperson had got the United States law straight or if the Parliamentary draftsperson had accurately drafted the recommendations of the 1976 Swanson Committee Report[2], the Kim Hughes Case could not possibly have received the per se ban treatment which it did.

Of course, public benefit authorisation from the Australian Competition and Consumer Commission (the ACCC) is always available. But I can imagine no less suitable a body to determine Australia's sporting policy towards South Africa than the ACCC, multi-skilled as this body may consider itself to be.

The result is that, in Australia, much commendable and socially useful activity is per se banned. If, for example, drug companies, for safety reasons, decide not to distribute various drugs to certain classes of outlets, this is per se banned. Presumably, if competitive hoteliers agree not to supply liquor to a group of persons defined as "drunks", this too has the potential of being per se banned.

It is notable that the ACCC itself apparently does not understand the law on this fundamental issue. The ACCC has said on many occasions that medicos entering into roster arrangements as to how they will service hospitals do not breach the Trade Practices Act. It recently said so in a

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2 Trade Practices Review Committee Report (T.B. Swanson (Chairman)) Aug. 20, 1976.

submission to an inquiry in relation to the impact of the Act on rural medical practitioners[3]. In doing so, it said that contrary legal advice from Blake Dawson Waldron was wrong. But it was right. The ACCC, in asserting the contrary, wrongly interprets the law and wrongly applies it to the roster arrangements of medical practitioners. Hopefully, in due course, the true position will surface and the constant assertions of the ACCC that medical roster arrangements are legal will be exposed as simply being incorrect.

Two more brief closing comments should be made:

- **First, the fact that something is not <u>per se</u> banned does not mean that it is legal. The arrangement still has to pass the competition test in the Act. A <u>per se</u> ban, however, necessarily illegalises the conduct involved and so an evaluation of whether or not such conduct is anticompetitive is academic.**

- **Secondly, it is of relevance that New Zealand, having initially copied our law in all respects, amended its <u>Commerce Act</u> in 1990 to enact the US position in that country. I think I can fairly claim to have had some input into the New Zealand government reasoning[4]**

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3 See <u>ACCC Submission to Inquiry into the impact of PART IV of the Trade Practices Act on the retention and recruitment of medical practitioners in rural and regional Australia</u> – 29 November 2001, p.22.

4 W.J. Pengilley: <u>The Exclusionary Provisions of the Commerce Act in light of United States Decisions and Australian experience</u>. [A paper given at a Trade Practices Workshop in

but I am a voice crying in the wilderness in this regard in my own country.

Reform of s.4D is an urgent priority. Its initial misdrafting, and subsequent governmental deafness on the question of its reform, rates s.4D as Disaster Number One of my ten disasters. Even more tragic is the fact that the ACCC does not understand the law and has misstated the position at least to the Inquiry into Medical Practitioners and the Trade Practices Act[5], and possibly elsewhere as well.

Disaster Number Two: s.4D and the South Sydney Case[6]

The Full Federal Court admitted the South Sydney Rabbitohs to the NRL competition on the basis that the exclusion of Souths was a breach of s.4D. All of what I have just said is applicable to the case. The case could not involve a per se breach in the United States or New Zealand because the competition organisers are not competitive with the competing clubs.

But there is more than this which makes the South Sydney Case a disaster. There were clearly articulated criteria for the admission of

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Auckland, New Zealand (March 1987): Published in The Canterbury Law Review Vol. 3 No. 3 (1988).

5 n.4.

teams to the competition. It was not argued that these criteria had been applied other than fairly. However, the competition was to consist only of 14 teams as this was the desirable number in the view of the competition organisers. It let every team play one "home" and one "away" match over the competition period.

Initially, there were 22 teams in the ARL and the "Superleague" competitions. These were reduced to 15 by mergers and dropouts. South was number 15 in accordance with the admission criteria. It missed out as the competition was to accommodate only 14 clubs.

The Full Federal Court held that even though Souths had not been the identified target of the arrangement but had been excluded as the result of the fair application of selection criteria, nonetheless it had been illegally boycotted pursuant to s.4D. The result of the case is, of course, that no competition organiser can ration places if it is desired to reduce participants. It matters not how fairly the criteria for rationing are set or applied. In the United States, a per se ban is not applicable and the application of fair criteria which are impartially administered is the benchmark by which competition principles are evaluated. The South Sydney Case would have been differently decided there. Since 1990, it would also, in my view, have been differently decided in New Zealand.

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[6] South Sydney District Rugby League Football Club Ltd v News Ltd (2001) ATPR ¶ 41-824 (Full Federal Court). At the time of writing, special leave to appeal this decision to the High

What is a competition organiser to do? I do not know. I always thought that they had the right to set the number of participants and that any bullying in this regard was guarded against by a requirement in a competition analysis that there be a proper setting of, and fair administration of, appropriate standards. The court has struck down these principles but put nothing in their place.

Justice Merkel, in his judgment in favour of South Sydney, specifically said that a 16 team competition would not have offended s.4D as everyone who wanted to play could then do so. On the facts before him he may well have been correct. But let us assume that the number of teams had been set at 16. At the time of decision as to the number of teams which were to participate in the competition, there were 22 teams playing. Would the case be differently decided if it eventuated that there were 18 teams bidding to enter a 16 team competition? There is no logical reason why it would even though Justice Merkel comments that a 16 team competition would have been acceptable to him.

The scary aspect of the <u>South Sydney Case</u> is that the judiciary, apparently, now feels that it is qualified to determine the number of teams which is best for rugby league. For myself, I do not think that elevation to the bench is any qualification at all for making fundamental decisions for the conduct of rugby league. But perhaps I do not give full

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Court has been granted.

credit to the wisdom of those who have judged themselves multi-skilled and fully competent in this regard.

The problems in the South Sydney Case may be solved by the High Court as special leave to appeal has been granted.

Section 4D should be redrafted. This would take the facts of the South Sydney Case out of per se condemnation. The test of competition and exclusion would then be determined by an evaluation of whether fair and non discriminatory standards have been set and whether such standards have been applied in an impartial and non-capricious manner.

Disaster Number Three: s.46 and Queensland Wire[7]

The well known Queensland Wire decision in the High Court imposed on BHP an obligation to supply product (Y-bar rod) at a reasonable price to a company (Queensland Wire) with which it had never dealt before. Neither had BHP supplied Y-bar rod to any other company. All its rod product had been used by it internally to produce a further product – Y-bar fence posts, which it sold at retail.

The case involved misuse of BHP's market power under s.46. BHP undoubtedly had market power. Its sin was that it used its market power because it refused supply other than at a price which was variously

described by the court as "excessively high" (Mason CJ and Wilson J), not "competitive" (Dawson J) or "unrealistically high" (Deane J).

The problem in Queensland Wire is that the High Court reached its conclusion without hearing any evidence from BHP as to its reason for non supply. Even worse, perhaps was the problem that, if BHP's supply price was "unrealistic", then what supply price would be regarded as "realistic"? Because there had been no supply by BHP to anyone else, there was no established market price with which any comparisons could be made. Thus the court would have to establish the "reasonable price". At the time of setting its supply price, BHP necessarily would have no idea as to what a price acceptable to the court might be as this could be ascertained only in subsequent litigation if BHP's pricing decisions were challenged.

The court and, perhaps more relevantly, the ACCC presumably believe that they have a role in setting supply prices. Yet this is the very antithesis of competition. In any event, it is extremely difficult to credit that the judiciary has any competence in the field. We may all respect the wisdom of our judges but, quite consistently with this, believe that the judiciary has no skills at all in relation to the running of the Australian Steel Industry.

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[7] Queensland Wire Industries v BHP (1989) 167 CLR 177.

Queensland Wire is a disaster because business has interpreted it to mean that all parties in a position of substantial market power have an obligation to supply virtually on request. Many of the efficiencies of selective distribution, well recognised under overseas competition regimes, have probably not, therefore, been realised in this country. Further, the court has mandated supply at a "fair price" – something which the court itself is unable to define[8]. The business executive is, therefore, entitled to ask how he or she can comply with the law and what sort of pricing arrangements will be acceptable in the sight of judiciary and the ACCC.

Disaster Number Four: Boral[9]

Boral is about predatory pricing. It is the first judgment specifically on this issue and it is important, for this reason, that the courts get the principles right. My view is that the Full Federal Court has got it quite wrong – hence the disaster rating of the case.

The principles of pricing and competition law are, I think, fairly simple. People are in business to make a profit. Thus business entities should

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8 The position has been ameliorated somewhat in the decision of the High Court in Melway v Hicks (2001) ATPR ¶ 41-805. In Queensland Wire, the trial judge, Justice Pincus, said that he was unable to draft a supply injunction based on a "reasonable price" (see (1987) ATPR ¶ 40-810). The High Court simply referred the matter back to Justice Pincus, without any guidance to draft the injunction which he had at trial intimated he was unable to draft.

not be punished for doing this. Likewise, as we all know, businesses, sadly, make losses. They do not deliberately try to do so. Businesses, therefore, cannot be punished simply because they make a loss. Making a loss can be punished only if it is made deliberately. In only one set of circumstances will this occur. This is if the business makes a deliberate loss in order to drive a competitor out of the market thus leaving it in a greater position of market power. But even this is not enough. Business, in order to profit by this tactic, will have to be in a position after the demise of its competitor to increase its prices by more than the losses it has incurred in forcing the competitor's exit. Only in the circumstances of deliberate loss selling and the recoupment of lost profits by increased prices after a competitor's demise is there any economically rational scope for competition law to be transgressed. The transgression, if it occurs, is a breach of s.46 in that a company uses its substantial market power for the purpose of excluding market entry.

In Boral, the ACCC took proceedings against BBM, a Boral subsidiary, for predatory pricing. The judgment deserves a disaster rating for two primary reasons:

- **First, the court did not define any test of "cost" below which pricing might be illegal. Justice Finkelstein said that it could be**

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[9] ACCC v Boral (2001) ATPR ¶ 41-803 (Full Federal Court). At the time of writing Special Leave to appeal this decision to the High Court has been granted.

illegal to set prices at a level which would keep a potential competitor from the market. I always thought that there was nothing in competition law which compelled, or even encouraged, an entity to price at a level which permitted or invited the new market entry of competitors. Indeed, the fierce and rugged competition of which the High Court spoke in Queensland Wire would clearly encourage the opposite pricing tactics. But apparently the Federal Court thinks differentially.

Now in Australia one can even make a profit on a transaction yet still be engaged in predatory pricing[10]. This simply makes no sense unless we accept the somewhat strange logic that courts under competition law have the power to order parties to increase their prices so as to encourage the market entry of others.

- **Secondly, the Full Federal Court says that recoupment of lost profits is irrelevant to predatory pricing. Yet, of course, loss recoupment is of the essence of predatory pricing. Deliberate below cost selling simply makes no sense unless it is rewarded by profits exceeding losses after the demise of the targeted competitor.**

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[10] It is to be noted that the Explanatory Memorandum to the Trade Practices Revision Bill 1986 states that the legislative intention is that predatory pricing could be engaged in even if a loss is not incurred. In Boral, the court used this statement in its reasoning. The statement is

There are a number of other issues in Boral which are of concern. BBM, the selling company in the Boral group, made a loss on its sales because of the arms length transfer prices charged by other group members for product supplied to it. Yet the group, overall, made a profit on the mining, manufacturing and sale of the product in question. The court refused to look at the issue from the viewpoint of the profitability of the group as a whole and refused to eliminate inter-company transfer profits in assessing the relevant product "cost" to BBM, the sales entity in the Boral group. The decision is thus also a disaster because it looks at economic issues from a legal structuralist viewpoint. Had but one company, instead of three, been involved in the mining, manufacturing and selling of the product involved, it may well have been the case that no predatory pricing was involved at all. Surely an economic law should be interpreted against an economic background. In the United States this is so.[11] One wonders why it should not be so in Australia. More particularly, the Boral decision was something of a no-win case for the Boral group as a whole. The court said that BBM was backed by a deep pocket group and this fact was relevant in finding a predatory purpose. It refused, however, to look at the profitability to the group as a whole

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somewhat strange economic logic to say the least. In Boral, the court could, however, have overcome this point had it been minded so to do.

[11] See U.S. v Copperweld 1984 2 Trade Cases 55065 (U.S. Sup Ct); Brown v Hansen Publications 1977 – 2 Trade Cases 61553; Schaben v Samuel Moore & Co 1979 – 2 Trade Cases 62927; see also Report of U.S. Attorney-General's Committee to study Antitrust Laws (1955).

when assessing the reason for what BBM had done and concentrated instead only on BBM's sales losses.

The Boral Case is currently on appeal to the High Court. This disaster may, therefore, still be able to be salvaged.

Disaster Number Five: Third Line Forcing [s.47(6) and 47(7)] and non-decision making

Third line forcing involves a supplier requiring a supplied entity to take a second product from a third party nominated by the supplier. The chief complaint in the 1970's was that of a financier, as a condition of finance, requiring a borrower to take insurance from the financier's nominated insurance company.

The practice is per se illegal, no matter how powerful or how weak the entity engaging in the conduct. There has been a considerable lobby to legalise third line forcing (or at least make it subject to a competition test which, in my view, would be the same thing) because of market difficulties which the per se ban causes.

We have the worst of all worlds. The practice is per se banned. As from 1995, however, if you lodge a Notification with the ACCC, the practice is de facto legal because the ACCC interprets the practice as one subject to a competition test. How this interpretation comes about is unknown. There is no warrant under the Act for it.

Put simply, this is ridiculous. There is no consistent philosophical approach at all to the third line forcing issue. Personally, I find it quite wrong that totally different tests are applied depending upon the lodgment of a piece of paper and the payment of a fee.

Perhaps third line forcing conduct should be legal in certain circumstances only. If so, these should be specified.

Our present law is neither fish nor fowl. It should be one or the other. It is surely absurd under any rational competition law both to prohibit and, at the same time, to bless identical conduct.

Disaster Number Six: Section 50 and the Cooney Committee

In 1991, a Senate Committee under the Chairmanship of Senator Barney Cooney[12] recommended, accepting a number of submissions of the then Trade Practices Commission under its recently appointed Chairman, Professor Allan Fels, that the then merger test of market dominance should be replaced by a "substantial lessening of competition" test. To put the matter in context, this recommendation was contrary to that of the immediately preceding Griffiths Committee Report and contrary to the views of the two immediately preceding Chairmen of the Trade Practices Commission, Professor Bob Baxt and Mr Bob McComas.

I will not here canvass the arguments mounted by the Trade Practices Commission to achieve its ends other than to say that they were, in my view, somewhat less than Kosher[13]. I simply comment on the somewhat amazing conclusion of the Cooney Committee that:

- **it found the empirical evidence on the effect of mergers conflicting and inconclusive; and**
- **there was no bank of empirical research which enabled it to come to a particular conclusion.**

Notwithstanding this, the Cooney Committee believed that the merger test should be changed because the Commission argued that it lacked the necessary authority to carry out its function in the way "most beneficial to the community" and it should be given that authority.

The Cooney Committee thus recommended changes in the law, which were subsequently enacted, because the Trade Practices Commission wanted them. This is a far cry from finding any rational reason for change. Indeed, as the Committee itself found, there was no such rational reason for change.

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12 Report on Monopolies and Acquisitions – The Adequacy of Existing Controls (August 1991 (Senator Barney Cooney: Chairman)).

13 These arguments have been canvassed in detail in W.J. Pengilley: Merger Policy: Why did the Cooney Committee answer the Trade Practices Commission's Prayers? 22 University of Western Australia Law Review pp300-321 (Dec. 1992).

The tragedy of the Cooney Committee is not that it recommended as it did. The tragedy is that its recommendations had no basis.

Ever since the Cooney Committee's Report, the merger law threshold issue in Australia has not been one of logical debate. It has been a slanging match.

The Business Council of Australia has argued that the ACCC is attempting to "atomise" Australian business and prevent it punching above its weight in world markets. Professor Fels responds that the BCA's agenda is:

> **"to emasculate merger law, even though (this) would be highly damaging to the Australian economy, because it would make it into a group of monopolies, which are highly inefficient and anticompetitive and would harm the capacity of our exporters and importers internationally."[14]**

So far as I am aware, no study has been done to support either view. The Cooney Committee's Report, however, cannot be cited as authority for the view of Professor Fels that the merger test of "substantially lessening competition" is an appropriate one. Indeed, the Cooney Committee Report cannot be cited as authority for anything.

It is appropriate, therefore, that bodies such as the BCA be permitted to revisit previous thresholds when the case for their change has simply

not been proven. It is also appropriate that this re-visitation be able to be carried out without ACCC overtones that it is virtually an un-Australian activity to want to do this.

The Cooney Committee should not have found as it did simply to placate the Trade Practices Commission. It simply laid the groundwork for the generation in the past decade of much heat and very little light on the merger issue. As such, this issue has not been evaluated by way of rational fact finding and discussion. Our competition law is much the poorer for this. In my view, this result would not have occurred had the Cooney Committee not found as it did for the reason it did.

One wonders now how we will ever get rational debate or rational evaluation in relation to merger policy. The ACCC relies upon the Cooney Committee as giving a reason for no fundamental change to the merger law. The BCA sticks to its view that the present test atomises Australian business. No-one appears to want to do that which is needed – that is, to make a factual analysis of the relevant issues and problems and come up with something resembling a rational merger policy based on what is found as a result of such analysis.

Whatever the result reached by the present Committee of Inquiry, I pray that it will not be a re-run of Cooney Committee logic. Given the short

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[14] Evidence of Professor Fels to House of Representatives Standing Committee on Economics,

time within which the Committee has to report, I feel that it will not, however, be able to do much more than express gut reactions. Its views on mergers, whatever they may be, will probably, therefore, be "Cooney II" rather than a well reasoned and logical analysis of the issues and a suggested policy based on this analysis.

Disaster Number Seven: The High Court decision in Gates: s.52 and s.82[15]

By and large, I think the provisions of PART V of the Trade Practices Act have worked well. It is not the substantive law which needs re-evaluation but the method of calculation of damages for its breach. There are two High Court decisions in point. Each merits a disaster rating. The first is Gates v CML[16] which I now discuss. The second is Henville v Walker[17] which is discussed as Disaster Number Eight.

Mr Gates took out an insurance policy which was represented to him as giving full entitlement if he was rendered unfit to carry on his usual occupation. In fact, the full entitlement was payable only if Mr Gates was unable to be gainfully employed. He was injured. He was able to be gainfully employed but was unable to carry on his usual occupation.

Finance and Public Administration 30 March 2001 – Transcript p.12.

15 Gates v City Mutual Life Assurance Society Ltd (1986) ATPR ¶ 40-666.

16 n.15.

17 Henville v Walker (2001) ATPR ¶ 41-841.

Misleading or deceptive conduct in breach of s.52 was established against CML. CML, however, refused to pay. The sole question for the High Court to determine was whether Mr Gates was entitled to the amount of his represented claim.

Common sense, I would suggest, clearly leads to the conclusion that Mr Gates was entitled to his claim. The High Court held, however, that damages had to be assessed under s.52 on the basis of tort not contract. Tort damages were calculated on the basis of the difference between what Mr Gates paid and the value of what he received. The Court held that Mr Gates received appropriate value for what he paid in that there was no evidence that the cover received of $20,000 was worth less than the $2 per month premium paid by him.

To the non-lawyer, and indeed to many lawyers, such a decision is simply unjust. The value of an accident policy is nothing at all until a claim is made and then its value to the insured is what the insured thought to be covered by it. The court simply seems to have ignored the fact that PART V of the Trade Practices Act is aimed at assisting consumers yet the decision has precisely the opposite effect in that it does nothing to discourage such blatant breaches of the Act. Further, Mr Gates surely did suffer a loss as a result of the insurance company's conduct and one would think that only the astonishing narrowness of vision of a court could not see this. Finally, the law in other

jurisdictions, which the High Court chose not to apply, would clearly have provided a remedy to Mr Gates.

The Law Reform Commission has suggested amendment to s.82 of the Trade Practices Act to remove damages calculations from the constraints of common law.[18] Nothing, however, has been done in this regard. The introduction of s.13 of the Insurance Contracts Act after the Gates decision may give an insured a remedy in that it implies a duty of good faith into all insurance contracts. But remedy in the circumstances of the Gates Case is still doubtful.[19] In any event, a remedy under the Insurance Contracts Act does not cover the position of any person in a similar position to Mr Gates where no insurance contract is involved.

The Gates Decision is a self evident tragedy. It tragically fails to carry out the consumer protection provisions of PART V of the Trade Practices Act and permits blatant breaches of that Act to be committed without providing any consumer redress.

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18 Law Reform Commission: Report on Compliance with the Trade Practices Act 1974 (ALRC 68 – May 1994).

19 In Gates, the court held that the pre-representations were not part of the contract. Therefore, Mr Gates could not cover pursuant to a contractual assessment of damages. Under contract, damages are assessed on the basis that a party is entitled to the bargain made. On this basis, Mr Gates would have been entitled to damages for non-fulfilment of his bargain and would have recovered in full.

Disaster Number Eight: The High Court decision in Henville v Walker[20]*: s.52 and s.82*

The High Court overcompensated for Gates in Henville v Walker. In this case misleading conduct by an agent in breach of s.52 was admitted. The agent estimated the selling price of certain project developed units at $750,000. Their actual realised selling price was $545,000. The difference was thus $205,000. One would have thought that this must be the maximum amount for which the agent could possibly be liable. It was the only amount related to the agent's representation and the only sum within the agent's control.

But the developer overestimated his costs as well. One would have thought that these costs had nothing to do with the agent – even more so in the case because the developer was, in fact, an architect. The developer's overrun costs were $313,000 (estimated costs being $551,000; actual costs being $864,000). The result of all of this was that the project, instead of returning an estimated profit of $199,000 (agent's estimated proceeds of sale of $750,000 less development costs of $551,000) in fact returned a loss of $319,000 (actual proceeds of sale of $545,000 less developer's actual costs of $864,000).

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[20] n.17.

The High Court held that the whole loss on the development project, that is $319,000, was recoverable from the agent and flowed from the agent's misrepresentation as to the selling price of the post development units.[21]

The majority of the High Court held that damages should not be assessed on the basis that what the agent said was true. The compensation to be awarded should cover the developer's loss. Said the majority, any contributory negligence on the part of the developer was not relevant in reducing the amount of his loss. All actual losses caused by the developer embarking on the course of conduct of developing the units were thus recoverable.

The disaster of Henville v Walker lies in the impact that the decision necessarily must have. It holds parties liable for damages caused by matters they did not warrant and over which they have no control. A developer, it appears, can now "charge up" its own costing mistakes to another party who may misrepresent something quite unrelated to these mistakes. At best, irresponsibility is encouraged by this principle. At worst, one can see the encouragement of fraud being the result of it.

The method of calculation of damages following from a breach of s.52 needs urgent legislative attention. Put simply, it is a tragedy that

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[21] In fact, the court found that only $205,000 was claimable because this is all that was claimed. However, the majority held that, had $313,000 been claimed, this amount would have been recoverable.

Mr Gates lost and equally it is a tragedy that Mr Henville was held to be entitled to recover the whole of the loss on his development project, even that part of the loss for which he was solely responsible.

Disaster Number Nine – The Price Exploitation Legislation: PART VB

The legislation which attempted to control the impact on prices of Goods and Services Tax legislation will cease to have effect on 30 June 2002. One is tempted, therefore, to breathe a sigh of relief and simply forget about it. I think this would be wrong. Such legislation deserves its place in the top ten tragedies – "Lest we forget".

The legislation was drawn with imprecision. It spoke about a breach if prices charged were "unreasonably high" having regard to, amongst other things, the New Tax System. It gave the ACCC power to issue Guidelines which it did with gusto. These Guidelines were minute in their detail and application. They applied to even the smallest business in the nation. The ACCC consistently (but wrongly) "talked up" the sanctions in the Act by stating that all businesses in the nation ran the risk of the ACCC imposing a $10 million penalty if they breached its Guidelines. Special legislation was introduced giving misleading conduct about the new tax system in connection with the supply of goods or services a penalty 50 times greater than any comparable provisions in the Trade Practices Act.

There are a number of matters which cannot help but cause concern about the manner in which the price exploitation laws were enforced and justified. Some of these are:

- **A claim by the ACCC Chairman that oversees experience suggested that there were benefits in price oversight laws whereas there seems to have been no such overseas experience. Indeed, the relevance of overseas experience was negated subsequently by Dr David Cousens, the ACCC chief price exploitation enforcer, who stated that such experience did not cast much light on the desirability or otherwise of such laws.**

- **Claims by the ACCC that its Guidelines were fully enforceable at law when they were not.**

- **Claims by the ACCC that it could fine parties $10 million for breaching its Guidelines when the ACCC had no such powers at all.[22]**

- **The general view that the ACCC created fear and "bullying" in its enforcement of the Guidelines. This view was held not only by the Australian Retailers Association, the Australian Chamber of Commerce and Industry, Australian Business Limited and former**

ACCC Chairman, Professor Bob Baxt, but also by small business organisations. Thus the Council of Small Business Organisations of Australia, a body generally supportive of the ACCC, was critical of its approach to small business under the New Tax System arrangements.[23]

- **The reaction of the ACCC Chairman to comments on the administration of the price exploitation laws which suggested an intolerance of criticism even when this was well founded. This is not my conclusion. It is that of a House of Representatives Committee of Inquiry.[24]**

There are, basically, two ways to control prices. One is actually to believe in competition law and trust the competitive processes. The second is to have bureaucratic regulations which impose various forms of price restrictions by way of pricing formulae. The latter necessarily involves bureaucrats prying into a host of market decisions which should be left to individuals.

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22 The ACCC has no power to fine anyone. This power is that of the Federal Court. Also the ACCC's Guidelines are not the law. They have prima facie application and constitute matters which may be considered by the Court in determining if a party has breached the Act.

23 Report of House of Representatives Standing Committee in Economics, Finance and Public Administration on ACCC 2001 p.4.

24 n.23 p.47.

Both methods, no doubt, have their imperfections. But relying upon competition theory does at least have one advantage. It would have saved Australian taxpayers $56 million!

At the very least, price exploitation law should have been confined to those areas which might be considered less affected by competition. Companies with a substantial degree of market power or with a substantial turnover would appear to be the only ones where price exploitation control might be appropriate. There can be no justification at all for bureaucratic interference in the costing and marketing decisions of even the smallest sandwich shop in the nation.

There does not appear, in the ultimate, to be any evidence that price exploitation legislation achieved any beneficial results. Australia would have been much better without it. It deserves a disaster rating for record purposes and the lessons it has taught as to the futility and cost of such legislation, and the impracticality of its enforcement in an acceptable manner. "Lest we forget."

Disaster Number Ten: The 1976 Swanson Committee's Decision Not to Answer Reference Number Two

On April Fools' Day 1976, the Swanson Committee was given its terms of reference. These were, broadly, to ascertain whether the Trade Practices Act was achieving its purpose.

Reference Number Two to the Swanson Committee required it to pay particular attention to the need to ensure that the Act was drafted in terms sufficiently certain in its language to enable persons affected by it to understand its operation and to be able reasonably to comply with its provisions in the ordinary course of business.

The Swanson Committee said not one word in relation to this term of reference. The reference, given by John Howard as then Minister for Business and Consumer Affairs, thus remains completely unanswered. One would think that it should not be beyond the capacity of Mr Howard in his present role now to complete the task which he set the Swanson Committee over a quarter of a century ago.

I do not here dwell on this point. My view is that there is simply no need for alphabet soup in the labelling of the sections of the Act. The Act is, for example, following the worst drafted legislation in the nation in this regard – The Income Tax Act – in introducing sections such as Section 44ZZQ.

It may also surprise most to know that simple price fixing is covered by provisions of s.45A which consist of 4 sentences containing in toto 581 words and having 89 commas. Moreover, its drafting is obfuscated by a generous sprinkling of double negatives (a contract, arrangement or understanding shall "not be taken not to have the purpose, or not to have … the effect") which make it even more incomprehensible.

This is communication in its worst possible form.

One of the greatest improvements in business compliance with the Act would be drafting which can be understood. Adding the complexity of incoherent grammatical construction to the already difficult enough concepts in the Act is inexcusable.

The Swanson Committee's Second Term of Reference should be answered. It is fundamental to the impact of the Act that it be drafted in comprehensible terms. Disaster Number Ten is that the Second Term of the Swanson Committee's Reference is still unanswered a quarter of a century after the reference was given.

What follows?

A prime problem with the Trade Practices Act is the inability of the legislation to prescribe with reasonable certainty what it forbids. Queensland Wire, Boral and South Sydney would, in my view, all have been decided differently in the United States and, in my view, logic demands that they should be differently decided in this country as well.

It is bad law which forbids conduct yet is unable to prescribe with reasonable certainty what is allowed. Both Queensland Wire and Boral, for example, condemn prices charged but fail to articulate what the legal prices in those cases might be.

I believe that there may be a good argument that, in all restrictive trade practices cases and regardless of the remedy sought, the applicant should be required at an early stage in proceedings to draft with precision details of the conduct which it specifically alleges to be illegal and the terms of the injunction which it would, if successful, want the court to issue. If the applicant cannot do this, then consideration could be given, at an early stage of proceedings, to the dismissal of the case on the basis that no restrainable breach can be articulated. I suggest that this exercise would, of itself, have given a different outcome to Queensland Wire, Boral and South Sydney because, as the High Court said in Melway[25]:

> **"An injunction expressed in terms which leave unclear the form of conduct which will expose a party to the consequences of breach of a court order, and which begs the major question in issue in the case, is inappropriate."**

I also suggest that there are three major specific legislative amendments which are necessary:

- **Section 4D is classically misdrafted. It should be amended to bring our collective boycott law into line with that of New Zealand and the United States. Much socially and competitively acceptable**

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[25] Melway Publishing Co v Hicks (2001) ATPR ¶ 41-805 at p.42760.

conduct is wrongly condemned in Australia because of this misdrafting.

- **It is time we either condemned or blessed third line forcing; and**

- **the damages issue should be clarified to overcome the disastrous decisions in Gates v CML and Henville v Walker.**

Finally, I think that there are some attitudinal matters which deserve reconsideration but which are unlikely to find themselves into any Inquiry Report.

- **The whole text and findings of Parliamentary Reports have to be looked at and the recommendations of such Reports not given more value than they deserve. The Cooney Committee Report found no reason to change the merger test and, although it did recommend such a change, it is wrong to rely upon that Report as definitively deciding the issue. Unfortunately, this seems to be the attitude of the ACCC and real debate on the merger issue has thus been stifled.**

- **The Price Exploitation legislation is a lesson for history. Those who ignore the lessons of history are bound to re-live them. In relation to the price exploitation provisions, the motto, adopted from the lessons of war, should be:**

"We will remember them. Lest we forget."

No future government should enact similar legislation.

- **Finally, we have completely failed to see the Trade Practices Act as a document of communication. Its turgid prose surely must have had its genesis in the Soviet Union at the height of that country's bureaucratic control. The problem of this lack of communication was recognised a quarter of a century ago. It has become far worse since then. It is time to make a start in solving this long standing difficult problem of business in complying with the law. The Act drastically needs "plain English" re-drafting.**

Any inquiry into the Trade Practices Act has much to consider. Some of the matters referred to are within the Inquiry's terms of reference and I hope that the Inquiry will consider them. Sadly, however, I think, official inquiries rarely, however, make philosophical evaluations. They tinker with the present and do not think either long term or anew. I would hope, but in all likelihood will be frustrated in my hope, that the Inquiry announced by the Prime Minister in October 2001 will do more than tinker with words. Hopefully, it will reconsider "What it's all about".

THE TEN MOST DISASTROUS DECISIONS MADE RELATING TO THE TRADE PRACTICES ACT

by

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This article is a Background Paper to a Seminar conducted by IIR Limited and held in Sydney on 25 June 2002. It is written as at 15 February 2002.

OVERVIEW SUMMARY

With the announcement of yet another inquiry into the Trade Practices Act, (a seemingly periodic Australian ritual), questions arise as to where mistakes in relation to the Act may have been made to date. The selection of the ten most disastrous decisions discussed in this article is, of course a subjective one. Some decisions are those of courts – notably in relation to misuse of market power, collective boycotts and the assessment of damages for misleading or deceptive conduct. But disastrous decisions are not only those of courts. One disastrous decision discussed (the drafting of s.4D) is a decision apparently made by the Parliamentary draftsperson. Another relates to the Swanson Committee's refusal to answer one of its terms of reference. The result of this refusal is that we have an Act drafted in an inexcusably obfuscatory manner. A third relates to the logic of a Senate Committee in recommending a change to the merger law test when its own Report conceded that it had no basis for its view. The result has been acrimony of debate for a decade with no real evaluation of the real issues. Two disasters discussed are simple failures of policy. One such policy failure relates to third line forcing. Do we want third line forcing to be banned or allowed? No-one seems to be able to decide the answer to this seemingly simple question. The second policy failure relates to attempts to control price exploitation. These attempts resulted in the ACCC prying into the pricing of every sandwich shop in Australia and in the ACCC making quite improper representations as to its rights and powers. The failure of price exploitation control is a history lesson for Australia as illustrating the kind of economic policy which should never again be attempted.

*Whether or not the writer's selection of disasters is agreed or whether or not his views find favour, it is hoped that this article will provide food for thought. It may even be of some interest to the Trade Practices Committee of Inquiry when the constitution of that Committee and its Terms of Reference are announced (the intention to hold an Inquiry was announced on 15 October 2001. Since then the whole issue has seemingly sunk without trace.**

*** On 9 May 2002 (after the writing of this Paper but prior to the Seminar at which it was presented) the Treasurer announced the terms of reference for this Inquiry and the Inquiry personnel. The Inquiry is to be chaired by Sir Daryl Dawson, a former Justice of the High Court from 1982 to 1997. The Inquiry is to report to the government in November 2002.**

Warren Pengilley
15 February 2002

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THE TEN MOST DISASTROUS DECISIONS MADE RELATING TO THE TRADE PRACTICES ACT[*]

by

Warren Pengilley[**]

I. INTRODUCTORY COMMENTS: REASON FOR, AND SCOPE OF, THIS ARTICLE

The genesis of this article

There is to be another Inquiry in 2002 into the Trade Practices Act. It was announced by the Prime Minister on 15 October 2001 in a Press Release entitled "Securing Australia's Prosperity".

The mere sniff of a Trade Practices Act Inquiry (which are matters of ritual every one to two years in Australia) brings about discussion and debate – sometimes *in alcoholis* as well as cooly cerebral. In one *in vino veritas* discussion, it was put to me that I should scribe a piece which collected in one place where I thought the Act had gone most wrong. The limitation of ten issues was placed upon me in an attempt to control what might otherwise have been a far too fulsome diatribe. It was also a limitation imposed because ten seems to be a magical number. At year's end, there seems to be, for example, a multitude of collections of "the 10 worst performing companies", "the 10 greatest political clangers" and so on. Wisely, one person in the gathering which mounted the challenge to me pointed out that anyone who made one of the decisions included in the condemned list should not be slighted. Sagely such person opined that if Britney Spears was one of the 10 worst dressed women in 2001, no-one should ever take offence at being included in a scorned list of 10.

It is on the basis of the above learned discussion and the challenge posed by it that I now pen this piece.

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[*] This article is a Background Paper to a Seminar conducted by IIR Limited and held in Sydney on 25 June 2002. It is written as at 15 February 2002.

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What is a "decision" for purposes of this article?

I have taken an initial view as to what I should here consider. The view taken leads to both an expansion and contraction of what constitutes a "decision" for purposes of this article.

First, I take the view that the term "decision" is not limited to a court decision. A "decision" may be judicial, political or administrative. Secondly, I will basically confine my subject matter to the general provisions of PART IV (Restrictive Trade Practices) and PART V (Consumer Protection) of the Trade Practices Act. I think that it is also reasonable to include PART VB relating to Price Exploitation and PART VI relating to Remedies.[1]

There is no doubt that excellent decisions under the Trade Practices Act have been made. However, they are not discussed here.

I must by way of introductory comment, state that my challenge is to write on the ten worst decisions. There is no doubt that a considerable number of quite excellent decisions have been made. It is simply not part of my brief to discuss these.

Order in which "decisions" discussed

I will deal with the decisions broadly in the numerical order in which the sections under which they were made occur in the Act. I do not attempt to assess what I call hereafter "**the disasters**" in any particular calamity order. Each is, in my view, a disaster. The overall importance of each disaster is, however, difficult to assess on any objective criteria. Where each observer stands on this issue will, no doubt, depend upon where she or he sits.

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[1] I have thus consciously excluded from consideration PART IIIA (the Access Regime), PART IVA (Unconscionable Conduct), PART IVB (Industry Codes), PART VA (Liability for Defective Goods), Authorisation (PART VII), the Competition Code (PARTS XIA and XIAA), Telecommunications specific legislation (PARTS XIB and XIC) and the International Liner Cargo Shipping provisions (PART X). It is not that I believe that there have been no bad decisions made under a good number of these PARTS. It is just that the limitation to PARTS IV and V is one which concentrates on the more general types of conduct encountered under the Trade Practices Act and this, hopefully, gives greater relevance to what is said.

I have tried to be tolerably objective in my selection of disasters. However, no doubt, we all have differing views on what competition law is all about. Thus not only the degree of disaster will be disputed by many. The selection of the disasters themselves may well be hotly contested. The reader may well conclude that I am no better judge of trade practices disasters than are the judges evaluating the ten worst dressed women in the world. (See comments under heading *"The genesis of this article"* above.)

Overall setout of discussion

My ten most disastrous decisions and the **PARTS** of this article in which they are covered are:

DISASTER NUMBER	RELEVANT DECISION	PART OF ARTICLE IN WHICH DECISION DISCUSSED
One	**The drafting of s.4D of the Trade Practices Act**	**II.1**
Two	**The South Sydney Decision (Full Federal Court)**	**II.2**
Three	**The Queensland Wire Decision (High Court)**	**III.1**
Four	**The Boral Decision (Full Federal Court)**	**III.2**
Five	**Various policy decisions in relation to Third Line Forcing**	**IV**
Six	**The Cooney Committee and Mergers**	**V**
Seven	**The Gates Decision (High Court)**	**VI.1**
Eight	**The Henville v Walker Decision (High Court)**	**VI.2**
Nine	**Decisions taken in relation to the enactment and enforcement of Price Exploitation legislation (PART VB of the Act)**	**VII**
Ten	**The Swanson Committee decision not to answer Reference 2**	**VIII**

II. COLLECTIVE BOYCOTTS

1. Disaster Number One: The drafting of the collective boycott provisions under s.4D of the Trade Practices Act (illegal under s.45): The Parliamentary Draftsperson's drafting decision

The fundamental mistake

A dramatic and fundamental error occurred in Australia in relation to the drafting in s.4D of the Trade Practices Act of the collective boycott (in Australia called "an exclusionary provision") ban. Collective boycotts are banned *per se* i.e. irrespective of their effect on competition.

The Australian legislation was meant to follow that of the United States. This is that collective boycotts are deemed illegal because they necessarily have a pernicious

effect on competition. They are arrangements between competitors as to those with whom they will not deal. As such they involve the exercise of joint market power, the exclusion of entry into a market, inhibition on individual discretion and these factors are regarded as necessarily adversely affecting competition.

The United States position is that a collective boycott must be a boycott by competitors *of other competitors actual or potential*. The following criteria must be satisfied in the United States in order for *per se* illegality to follow:

> *"The conduct must be a concerted attempt by a group of competitors to protect themselves from competition at that level. The emphasized words are important. So, a concerted refusal of airline operators to list a tour operator is not a group boycott for purposes of per se illegality where the tour operator is not competitive with the airlines. Similarly, a collective refusal of professional football clubs to employ a player who wagers on games is not per se illegal because the clubs are not in competition with the excluded player."*[2]

From October 1974 (when the Australian Trade Practices Act was enacted) to July 1, 1977, there were no *per se* illegalities under Australian competition law. Conduct was illegal if it was in restraint of trade or commerce, the applicable test being whether there was a significant effect on competition. Perhaps it was assumed, though it was by no means certain that it was so, that the Australian courts would follow the United States *per se* illegalisation of collective boycotts of competitors and that other arrangements would be subject to a competition analysis, akin to the United States "rule of reason" approach. The actuality will never be known, as adequate litigation to prove the point never resulted. The *de facto* position accepted by most commentators was, however, that the quite reasonable United States position ran in Australia. It is not known whether or not the courts would have backed this up.

In August 1976, the governmentally established Swanson Committee to review the Trade Practices Act reported to the Minister for Business and Consumer Affairs[3]. The Committee thought that the test of significant effect on competition was "confusing and unnecessarily complex" and argued for a *per se* ban of certain collective boycotts. This ban was legislated with effect from July 1977. In relation to collective boycotts, the Swanson Committee was of the view that such conduct should be

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2 See Sullivan, Handbook of the Law of Antitrust, cited in Smith v Pro Football Inc., 1978-2 Trade Cases ¶ 62,338. The airline case cited by Sullivan is E A McQuade Tours v Consolidated Air Tour Manual Comm., 1972 Trade Cases ¶ 74,125.

3 The Trade Practices Review Committee Report (T B Swanson (Chairman) Aug 20, 1976).

banned *"if it has a substantial adverse effect on competition between the parties to the agreement or any of them or competition between those parties or any of them and other persons"*.[4]

The points to be noted from the Committee's recommendations are:

(1) It adopted a test of the anticompetitive effect of arrangements on competition *between parties* rather than, as did the rest of the Act, a test of anticompetitive effect of arrangements *in the market as a whole*.

(2) The competition effects would be measured by the anticompetitive effect on parties to the agreement or on *"competition between those parties or any of them and other persons"*. In short, the specific treatment would be limited to boycotting parties *who are boycotting their competitors*.

This suggested modified *per se* approach would be one which could sit quite consistently with what has come from United States case-by-case evaluations and evolved into the *per se* rule.

The problems all started, apparently, when the Australian Parliamentary Draftsperson got to work. Either the Government changed its mind or the Parliamentary Draftsperson did not get the drafting instructions straight. We will never really know because the sole statement made on the Parliamentary floor during debate was that "boycotting the commercial activities of particular persons is generally undesirable conduct, and … the Trade Practices Act should take a firm line on these matters".[5]

The statutory creature which emerged in 1977 in Australia was a far different proposition from that recommended by the Swanson Committee or that which is the product of United States case-by-case analysis. The legislation as enacted in 1977 illegalised *per se* the making of, or giving effect to a provision of, *"a contract, arrangement or understanding"* entered into, etc., between persons *any two or more of whom are in competition with each other*, which has "the *purpose of preventing, restricting or limiting* … the supply of goods or services to, or the acquisition of goods

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4 n.3 Par. 4.116.

5 The Hon. John Howard, Minister for Business and Consumer Affairs, Second Reading Speech to the Trade Practices Amendment Bill, Parliamentary Debates (Hansard) H of R 1476 (May 3, 1977).

or services from, *particular persons*[6] *… in particular circumstances or on particular conditions"*.

It should be noted that in these statutory provisions there is no requirement that the boycotted party be a competitor, actual or potential, of those conducting the boycott. This is quite fundamentally different from United States law. It is also quite fundamentally different from the recommendations of the Swanson Committee. Despite the importance of the difference, there has been no reason given for it. Also it should be noted that it is not the purpose of being anticompetitive which is relevant. It is the purpose of *preventing, restricting, or limiting* the acquisition or supply of goods or services which is relevant.

The Kim Hughes Case

Section 4D was first judicially interpreted in the Kim Hughes Case[7]. In this case Kim Hughes was the subject of a collective boycott of cricketing clubs imposed by the Western Australian Cricket Association ("WACA") rules and this boycott denied him the ability to play club cricket. The boycott had been imposed because Hughes had led an Australian cricket "rebel tour" to South Africa contrary to the then Australian sporting boycott of South Africa as a result of that country's then apartheid policies. The plea of the WACA was that it was imposing the boycott to ensure the proper regulation of cricket. Hughes pleaded that the direct purpose was to exclude him and others from playing club cricket and the ultimate purpose or object of the WACA was irrelevant to the question. Mr Justice Toohey followed the interpretation of "purpose" reached in the s. 45D secondary boycott cases[8] and found that there was "no doubt that a substantial purpose [of the WACA conduct] was to disqualify the applicant … from playing cricket". Therefore the WACA had engaged in illegal exclusionary conduct.

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6 The legislation was extended in 1986 to cover particular "classes of persons" in addition to "particular persons".

7 Hughes v Western Australian Cricket Association (the "WACA") 1986 ATPR ¶ 40-736.

8 For example Wribass v Swallow 1979 ATPR ¶ 40-101; Barneys Blu-Crete Pty Ltd v Australian Workers Union 1979 ATPR ¶ 40-139; Mudginberri Station Pty Ltd v Australian Meat Industry Employees' Union 1985 ATPR ¶ 40-598. These cases held that the direct "purpose" was what was relevant not the long term object (in trade union secondary boycott cases the long term object was said to be the betterment of working conditions. The damage caused to the targeted entity was a necessary ingredient in achieving this end).

The position in Australia is, therefore, reached (with the addition in 1986 of a prohibition of boycotts of "a class of persons"),[9] that any collective action by competitors restricting or limiting supply of goods or services to a person or a class of persons, whether competitive or non-competitive with the parties engaging in the conduct and regardless of the reasons for their so doing, is illegal *per se*. Thus (subject to the possibility of public benefit authorisation – see below) drug companies, perhaps for genuine safety reasons, cannot agree not to supply certain products to supermarkets; hoteliers cannot agree not to supply liquor to drunks (who presumably constitute "a class of persons"); and trade associations cannot agree to provide services only to certain classes of outlets. Contrary to the United States position, it would be *per se* illegal for credit card companies to agree not to provide services to adult entertainment outlets. Such conduct is not *per se* illegal in the United States because there is no conspiracy to put competitors to a disadvantage and there is no suggestion that the credit card companies gain any competitive advantage by virtue of the arrangements.[10] Doctors cannot agree as to hospital rosters in Australia – though the Australian Competition and Consumer Commission (the "ACCC") seems to have put the contrary position and, clearly enough, does not itself understand the effect of s.4D on such arrangements.[11] Every trade association quality control,

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9 See n.6.

10 Alpha-Sentura Business Services Inc. v Interbank Card Association, 1979-2 Trade Cases ¶ 62,960.

It is understood that things have moved on, rightly or wrongly in the last two decades and that credit card facilities are now freely provided to adult entertainment outlets. The position remains, however, that the issue is a freedom of speech or religious issue not a competition issue. As set out below the ACCC can authorise such an arrangement on competition grounds. However, the ACCC is hardly an appropriate body to determine such matters.

11 A hospital roster agreed between doctors is clearly an arrangement between them to restrict services or provide them only to a limited extent. The ACCC complains that the Australian Medical Association has raised concerns with the Minister for Health and Aged Care about the effect of s.4D on, in particular, rural practitioners. The ACCC states:

> *"The AMA did not approach the Commission before developing (its trade practices compliance) programme, but received legal advice from Blake Dawson Waldron that roster arrangements were likely to breach the primary boycott provisions of the Act. The Commission does not agree with this advice because it states that an anticompetitive purpose is not a relevant element in s.4D. In fact, the need to show an anticompetitive purpose (i.e. of preventing restricting or limiting the supply of service) is central to the conduct prohibited by s.4D."*

standards certification program, and membership provision seems to be potentially *per se* illegal as a result of this ill-conceived legislative overkill.

Authorisation by the ACCC on "public benefit" grounds

The ACCC can authorise collective boycotts on public benefit grounds. Yet there could surely be no more inappropriate body than the ACCC to determine the rights and wrongs of a South African sporting boycott or the morality issues involved in whether or not credit card companies may determine not to provide facilities to adult entertainment outlets.

Not banning conduct per se does not necessarily legalise the conduct

Saying that various trade association activities should not be *per se* condemned does not mean that they are necessarily condoned. It merely means that there should be a competition evaluation to see whether or not illegality flows in the specific instances. To say that something should not be *per se* condemned merely means that the conduct has not been proven to have such a necessarily pernicious effect on competition that certainty is given and litigation time is saved by the application of the *per se* rule. On this basis, by no stretch of the imagination should collective activities of competitors restricting supply to or acquisition from a particular class of persons, whether competitive or non-competitive and regardless of the reason for the restriction, attract the *per se* prohibition.

The 1990 New Zealand Amendments

It is noteworthy that the New Zealand Commerce Act, having initially followed the drafting of the Australian Trade Practices Act, was amended in 1990 to provide that there is no exclusionary provision unless

> *"the particular person or the class of persons to which the provision relates is in competition with one or more of the parties to the contract, arrangement or*

(ACCC Submission to Inquiry into the impact of Part IV of the Trade Practices Act on the retention and recruitment of medical practitioners in rural and regional Australia – 29 November 2001 p.22.)

The ACCC plays a three card trick here. The purpose of limiting services has to be shown but this is inherent in any roster system. Anticompetitive purpose does not have to be shown. A breach of s.4D is per se. The Blake Dawson Waldron legal advice is right and the ACCC explanation of s.4D is incorrect.

understanding in relation to the supply or acquisition of those goods or services."[12]

"Competition" includes actual or potential competition.[13]

The New Zealand 1990 provisions restore the United States and Swanson Committee collective boycott test. They do not, as some Australian critics misunderstanding the position have suggested, make exclusionary provisions the subject of a competition test.

The South Sydney Case

It would not be surprising, given the above *per se* ban in Australia, that some fairly strange decisions could well result. The strangest such decision is the South Sydney Rugby League Case which I regard as **Disaster Number 2**.

2. Disaster Number Two: The South Sydney Rugby League Case in the Full Federal Court – The Rabbitohs get admitted to the Australian Rugby League Competition

The Full Federal Court decision in the South Sydney Case[14] added to the previously noted s.4D disaster.

Facts of the Case

It is not necessary here to go into a lengthy explanation of the facts of the South Sydney Case. Put simply the ARL rugby league competition and the "rebel" Super League competition sought a reconciliation and reached agreement as to the terms of such reconciliation. There was to be one competition conducted jointly by the ARL and Super League. At the time the agreement was reached, there was a total of 22 rugby league teams involved in the two competitions then being conducted. A term of the reconciliation was that the single competition was to consist of no more than 14

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12 Commerce Act (New Zealand) s.29(1)(c).

13 Commerce Act (New Zealand) s.29(2).

14 South Sydney District Rugby League Football Club Ltd v News Ltd (2001) ATPR ¶ 41-824. (Heerey J [dissenting]; Moore and Merkel JJ). It is understood that application has been made for Special Leave to appeal to the High Court from this decision. It is important, in light of the emotions generated by the exclusion of South Sydney from the ARL competition to note initially that the disaster to which I here refer has nothing to do with any animosity to the South Sydney Rabbitohs. What is here commented upon is the law and, in particular, its future application.

teams on a 6/8 or 8/6 split between Sydney based and non-Sydney based clubs. In the event that more than 14 teams sought application to the merged competition, clubs were to be evaluated pursuant to a set of laid down criteria. These criteria were based on crowd numbers, competition results in the last five years, club receipts, sponsorships, other income and profitability. At no stage was it found that these criteria were applied other than objectively, fairly and impartially.

The reason for a 14 team competition was said to be that this was the best number of teams for the good of rugby league football as a whole. A report commissioned by the ARL in 1995 (i.e. prior to the present arrangements) had, in fact, recommended a 14 team competition as this enabled each team to play two complete rounds – one "home" and one "away" over the period during which the competition was conducted.

Because of a number of mergers and "drop outs" of clubs, there were not 22, but only 15 teams applying to join the merged 14 team competition. Someone had to be excluded. The South Sydney Rabbitohs were excluded by application of the selection criteria. The Rabbitohs claimed that the exclusion was illegal under s.4D and s.45 of the Trade Practices Act on the basis that it constituted an illegal "exclusionary provision".

Clearly there was a "contract, arrangement" or "understanding" between two rugby league competition providers who were "in competition" with each other. The "competition" aspect of s.4D was thus satisfied. The question was whether the other components of s.4D were made out.

The Trial Judge's decision

The trial judge, Justice Finn, held[15] that s.4D was not infringed. In essence he found that:

- the "purpose" of the arrangement was to promote rugby league in a number of identified ways. Indeed, there was no evidence which contradicted this. Thus, his Honour held, there was no "purpose" to exclude; and

- a "purpose" to be illegal had to be "aimed at" a particular person or class of persons. There were no "identifying characteristics" which could determine the

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15 South Sydney District Rugby League Football Club v News Ltd [2000] FCA 1541.

person or class of persons aimed at. The only way of determining exclusion was by the fact that, in due course, a particular club had to be denied admission to the competition pursuant to the application of impartial criteria.

The Full Federal Court decision

The Full Federal Court [Moore & Merkel JJ (Heerey J dissenting)] upheld the South Sydney Appeal and found an illegal exclusionary provision was involved in the Souths' exclusion. Moore J held that the purpose of the arrangement was to exclude services from some clubs which had previously been supplied such services. Merkel J held that the immediate purpose was to restrict relevant services even if the long term object of the arrangements was the betterment of rugby league. Both Moore and Merkel JJ thought that there was a "particular class of persons" which could be identified.

Justice Heerey dissented. He found that there was no exclusionary "purpose" because the fact of exclusion was not determined by the parties to the agreement but by the performance of the clubs measured against certain criteria. His Honour found that there was no "target" of the arrangement because there was no identification by the parties to the arrangement as to who would, in fact, be excluded. The only identification of any excluded club was by the fact of exclusion itself. However, control of such exclusion was not within the control of the parties to the agreement.

Perhaps of greatest interest in the case is the question of remedy. Was an injunction to be issued to admit Souths? The majority thought so. Merkel J spoke most on this point. The Court order in this regard was:

> *"that an injunction be issued prohibiting the ARL and Super League giving effect to the 14 team competition restriction."*

According to Justice Merkel:

> *"This relief does not require that Souths be included in the 2002 NRL competition nor does it require the NRL competition to be a 15 team competition. Rather the relief would remove the unlawful fetter on the 14 team term which led to Souths' exclusion from the 2000 NRL competition."*[16]

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16 n.14 p.43,169 per Merkel J.

His Honour also thought that a 16 team restriction would be in order.[17] This, he said, would include all top level rugby league clubs ready, willing and able to compete. On the facts before the Court, this would have been the case. But 22 clubs were top level clubs when the arrangements were made. If 6 clubs had been excluded because of a 16 team limitation, would Merkel J have held that a 16 team competition did not infringe s.4D?

The lessons from the case

The decision gives rise to a number of problems:

- Effectively the court is saying that the court, not those involved in the conduct of rugby league, is the most appropriate arbiter of what constitutes the best form of rugby league competition.

- Effectively the court held that there can be no lawful purpose involved when rationing is necessary to achieve an end. The submitted purpose was that of benefiting rugby league. The court held that the desire to benefit rugby league was genuine but that the purpose of the conduct involved was to exclude a club from a competition and this was unlawful. The clear industry evidence was that a 14 team competition was thought desirable in the interests of rugby league. Indeed, this was the only motivation in the restriction. There was no motivation at all to exclude any particular club. The case was thus quite unlike s.45D secondary boycott cases where there has been found to be a prime purpose of a trade union to injure a party with only a long term objective of furthering industrial relations agendas.

- The decision means that whatever criteria are used by a competition organiser or a trade association to determine questions of admission and expulsion, the body involved is open to legal action – and this, no matter whatever form of "due process" or fair hearing is adopted.

- As Heerey J in dissent noted, the relief granted, in reality, required a 15 team competition to be implemented. Any exclusion of Souths would axiomatically involve illegality. The exclusion of any other club would more clearly also involve

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[17] n. 14 p.43,170 per Merkel J.

illegality. Thus the injunction granted defies the laws of mathematics in that it judicially holds that "15 into 14 will go". At the very least the injunction granted is dramatically uncertain. It surely falls foul of the principles enunciated by the High Court in Melway[18] in relation to another injunction issued by Justice Merkel. The High Court said in Melway:

> *"An injunction expressed in terms which leave unclear the form of conduct which will expose a party to the consequences of breach of a court order, and which begs the major question in issue in the case is inappropriate."*[19]

A United States comparison

The South Sydney Case could not arise as a *per se* breach in the United States. Nor, since 1990, could it so arise in New Zealand. This is because the two competition organisers, the AFL and Super League, were not competitors of the clubs seeking to enter the competition. This interpretation of s.4D, as we have seen, is ruled out by virtue of the Parliamentary draftsman's drafting of the section and the decision in the Kim Hughes Case.[20]

The South Sydney Case would, in the United States and in New Zealand, be one for evaluation under a "rule of reason" or "competition test". The major factors to be considered in an application of this test would be whether or not the standards and criteria involved were being applied in a capricious or arbitrary way. If not, the exclusion of a club from a competition would not breach the United States antitrust law.

The comparative United States position may perhaps be best illustrated by Deesen v The Professional Golfers Association of America[21]. This case involved limitations on the number of golfing competition participants because of course capacity restrictions,

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18 Melway Publishing Co. v Hicks (2001) ATPR ¶ 41-805.

19 n.18 p.42,760. Merkel J's injunction at trial in Melway is set out at (1999) ATPR ¶ 41-668 p.42,527. In substance, it reads:

> *"… The respondent … be restrained from refusing to supply Melway street directories to the applicant where the purpose or substantial purpose of the refusal is to prevent the applicant from engaging in competitive conduct … in relation to the sale of such directories to retailers."*

20 See discussion **PART II.1** re **Disaster Number One**.

21 Deesen v Professional Golfers Association of America 1966 Trade Cases 71,706 (9 CCA).

such limitations on participants being on the basis of laid down objective criteria. The Court found as follows:

> *"The conduct (in order to be a collective boycott) must have the purpose of lessening competition … If there is a refusal to allow certain golfers to compete in a golfing competition because only so many entries can be taken, and the system of selection is impartially administered, there is no per se illegality. There is no anticompetitive purpose involved."*

3. Section 4D: Some Conclusions

Section 4D is wrongly drafted. The Australian Parliamentary Draftsperson mistranslated the United States law down under. This mistranslation has been recognised in New Zealand, which has amended the Commerce Act to accord with the United States position. Much unobjectionable activity in Australia is, however, wrongly banned *per se*. The position has been exacerbated by the South Sydney Case. At the very least the law should be changed to provide that a collective boycott ban applies only when the target of the boycott is a competitor, actual or potential, of those engaging in the boycott. The South Sydney Case should also be studied in detail so that the extended definition of "class of persons" as found in that case is limited at least only to persons who can be identified by the parties to the boycott and who are parties which the boycott knowingly attempt to target.

III. MISUSE OF MARKET POWER

Section 46 of the Trade Practices Act prohibits an entity with a substantial degree of market power from taking advantage of that power for a proscribed purpose or purposes. The relevant proscribed purposes can be here summarised as those of:

(a) eliminating or substantially damaging a competitor;

(b) preventing the entry of a person into a market; or

(c) deterring or preventing a person from engaging in competitive conduct in a market.

Some see s.46 as a provision which should be interpreted in a "David versus Goliath" manner. Given this, such persons see the correct application of the section to be to tilt the scales in favour of David. Others see the section as one to be applied using a test of economic efficiency. Such advocates believe that a large enterprise should not be deemed illegal if it is acting efficiently even if its conduct is detrimental to smaller entities. After all, it is not small business which the Act aims to protect but the consumer. Better efficiency gives

rise to consumer benefit regardless of whether the efficient marketer is big or small. Mixed up in these evaluations will also be one's views as to the proper role of the Courts and the question of what remedy the Courts can, or should, provide.

1. Disaster Number Three: The High Court decision in Queensland Wire[22]

Section 46 was first interpreted by the High Court in 1989 in Queensland Wire.

Facts of Queensland Wire

BHP produced Y-bar rod, all of which it used itself. Y-bar rod was then crimped, cut into lengths and had holes inserted into it to make a Y-bar fence post, a very popular rural fence post which was sold by BHP's subsidiary, Australian Wire Industries, by retail. Queensland Wire also sold fence posts by retail. Queensland Wire wanted BHP to supply it with Y-bar rod so that it (Queensland Wire) could do what BHP itself did i.e. convert the rod into fence posts. Queensland Wire then wanted to sell these posts at retail in competition with BHP. BHP had never previously supplied Y-bar rod outside its own company group. BHP was prepared to supply Y-bar rod to Queensland Wire but only at prices which were described by various judges of the High Court as "excessively high" (Mason CJ and Wilson J), not "competitive" (Dawson J) or "unrealistically high" (Deane J).

The trial judge and the Full Federal Court held for BHP. The High Court unanimously held for Queensland Wire.[23]

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22 The judgments of relevance in the present context are:

- Queensland Wire Industries v BHP (1987) ATPR ¶ 40-810 (Pincus J at trial); and
- Queensland Wire Industries Pty Ltd v BHP (1989) 167 CLR 177 (High Court).

The Full Federal Court held that, as there had been no trading in Y-bar, there was no "market" in it. Hence there could be no misuse of market power. The High Court disagreed with this view and its judgment is thus, in all relevant aspects, an appeal from the trial judgment, rather than an appeal from the Full Federal Court judgment. The Full Federal Court judgment is reported at (1987) ATPR ¶ 40-841.

23 See n.22.

At trial[24]

Pincus J followed United States authority to the effect that a refusal to deal, in order to be illegal, had to involve some reprehensible behaviour. A simple refusal to deal was not reprehensible under United States law. His Honour believed that this principle also applied in Australia and, on this basis, found BHP not to be in sin.

More particularly, Justice Pincus was concerned at the capacity of the court to frame any order for relief. He said that it would be absurd simply to enjoin BHP to supply Queensland Wire in accordance with s.46, leaving it to be decided in contempt proceedings whether an offer of supply should be held to comply with such an injunction on an *ex post facto* court assessment of its price, quality and other terms of dealing. His Honour also noted that if Queensland Wire succeeded, others may also be able to force supply. If this were so, how was available Y-bar to be rationed? If demand were raised, should the court force BHP to produce more product and, if so, how much? The same sort of problems, his Honour said, underlay any assessment of damages.

Because of the above factors, his Honour found no breach of s.46 by BHP.

The High Court decision[25]

The High Court decision was effectively an appeal from the trial judge's decision, rather than an appeal from the decision of the Full Federal Court.[26]

The High Court held that the question to be determined was one involving the "use" not the "misuse" of market power. The question was, therefore, not one involving "reprehension". The true test was whether BHP could have done what it did in a competitive market. The High Court, despite a total lack of evidence upon which to base the conclusion it reached, held that BHP, in a competitive market, would have had to supply Y-bar rod to Queensland Wire. It was only BHP's market power which enabled it to act as it did. The Court nowhere defined what it meant by a "competitive" market.

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24 n.22 (Pincus J at trial).

25 n.22 (High Court).

26 For the reasons for this see n.22.

On the question of remedy, the High Court said nothing. Somewhat unhelpfully to the trial judge, Justice Pincus, in view of the comments he had made as to the impossibility of drafting an order for relief, the High Court simply referred the matter back to him, without guidance, requiring him to draft that order which he had previously held to be a drafting impossibility. As the case was settled, we have no idea what the trial judge would have ordered or what the High Court would have done if the question of appropriate remedy had reached it for subsequent decision.

Why is Queensland Wire a disaster?

Queensland Wire was the first s.46 case to make its way to the High Court. It was the definitive s.46 law from 1989 until Melway in 2001.[27] Its influence on business decision making was immense.

The major problem of Queensland Wire was that it created in business an impression that there was an obligation to supply in virtually all circumstances in which a supplying entity had a substantial degree of market power. This was a reasonable conclusion to draw because the High Court ordered supply in Queensland Wire without requiring the plaintiff to produce any evidence as to what BHP would have done in an actual competitive market situation and without hearing any BHP evidence as to its marketing practices.

Perhaps more importantly, the High Court simply failed to address issues of remedy. How was the court to determine "a reasonable price"? What about other terms and conditions such as quality, quantity, credit terms, period of supply and the like? Did not the decision make the court a market regulator rather than an adjudicator? What competence did the court have in this area? Case law clearly shows that the courts are far from expert in the area of setting prices.[28]

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27 Melway Publishing Pty Ltd v Robert Hicks (2001) ATPR ¶ 41-805.

28 The following cases illustrate the problem:

1. ***ASX v Pont Data***

   At trial (1990) ATPR ¶ 41-007; (1990) ATPR ¶ 41-038

   This case involved the supply of stock exchange information. The direct question in the case (which the High Court managed to avoid in Queensland Wire Industries Pty Ltd v BHP) was the setting of a fair supply price by the Court. This, in a competitive market, was cost of production plus profit margin normally obtained. However, there was not a competitive market in existence so this method of price setting was not available. Given this, the Court found that the proper price to be charged was the marginal cost of connection to the stock exchange signal computer. This price was $100 per year. Pont Data thought the cargo cult had come to town.

Of course, not only could the courts act as a price regulators. The decision meant that the ACCC could allege that prices charged were "unreasonable" and threaten s.46 proceedings if such prices were not reduced to a more "reasonable" level. The capacity of the ACCC, as a competition regulator, to engage in quasi price control was, therefore, clearly open to it in light of the Queensland Wire Decision.

Enter Melway[29]: An amelioration of Queensland Wire

Melway was decided in 2001. Twelve years after Queensland Wire, it ameliorated some of the effects of that decision. Melway decided that the conduct of an entity with a substantial degree of market power had to be evaluated in light of a realistic, not a theoretical, market situation. Hence, if a party would not supply in a realistic competitive market, it should not be compelled to supply simply because it possessed a substantial degree of market power. The purpose of non supply could be taken into account. In Melway's case, supply to an outside entity would not have resulted in any further sales to it as it already had an effective and efficient dealer network. Hence its refusal to supply outside entities was justifiable.

Melway, however, does not clarify all the problems of Queensland Wire. Melway says nothing about a supplier's simple refusal to deal when there has been no prior established course of dealing. Given this situation, the court may still hold that it can

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***On appeal* (1991) ATPR ¶ 41-069; (1991) APTR ¶ 41-109**

On appeal the appropriate supply price was held to be a price "designed to obtain broad and substantial justice between the parties". This was held to be the pre-litigation negotiated price of $1.45 million per annum. It could not be varied for indexation. Neither would the Court consider that the pre-litigation supply price was probably set in the same circumstances as those about which Pont Data was complaining in the litigation itself.

The case shows the Courts hardly give great certainty to decision makers who have to decide at the time of supply what price will subsequently be acceptable to the Courts. Somewhere between $100 and $1.45 million is the benchmark!

2. Clear v N.Z. Telecom

(1993) NZLBC 99-321 (NZ Court of Appeal); (1994) NZLBC ¶ 99-337 (Privy Council)

The Privy Council was unable to determine the appropriate price of interconnection of Clear to the N.Z. Telecom network. However, it did record with approbation the fact that "the parties indicated that their negotiating positions are now coming closer together".

Each protagonist at that time had spent $NZ8-10 million on the litigation. Did they get good value? Did they get any value?

(New Zealand does not have industry specific telecommunications legislation. The case was brought under s.36 of the New Zealand Commerce Act which, for all present relevant purposes, is the equivalent of s.46 of the Trade Practices Act.)

[29] n.27.

mandate dealing in such a case. Thus all the problems of setting the terms of dealing created by Queensland Wire remain in some areas. Perhaps even here, however, Melway may have changed the Queensland Wire rationale because of the emphasis in Melway on the court being able to articulate with precision the precise conduct which is being restrained by it.[30] Post Melway, courts must, it seems, be able to articulate with precision the obligations of injuncted parties. Perhaps the High Court, post Melway, would not order a BHP supply of product to Queensland Wire simply because of the difficulty of articulating with precision what BHP was to do and the terms on which it was to do it.

Queensland Wire: The Legacy

Melway has ameliorated many of the Queensland Wire difficulties. However, the fact that Queensland Wire dominated the s.46 scene for 12 years makes the case a formidable influence on s.46 interpretation and business practices. The potential of the case for court and ACCC price and other regulatory controls merits the inclusion of Queensland Wire as a trade practices disaster. The fact that the business interpretation of Queensland Wire was, broadly speaking, that supply requests had to be complied with in virtually all circumstances meant that many of the economic efficiencies of selective or restricted distribution were not fully realised in Australia in the twelve year period between Queensland Wire and Melway. The ACCC was able, from Queensland Wire, to express the view that, if conduct was "facilitated" by market power, it was illegal.[31] The regulatory power of the courts and the ACCC, if this view had not been significantly circumscribed by Melway, was a threat to competition law. It was leading competition law down the regulatory path. It was leading to the conclusion that competition issues should be determined on the basis of whether the courts, or the ACCC as competition regulator, believed that goods or services were being supplied at a fair price. This is the antithesis of market decision making which is basic to the functioning of competition law.

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30 See n.19 and related text.

31 See, for example, the ACCC Submission in Melway (n.27). The ACCC was granted leave to appear in Melway in the High Court.

2. Disaster Number Four: The Full Federal Court Decision in Boral[32]

Whatever one's views on the appropriate test for s.46 infringement, it is surely basic that parties in a market should be entitled to some certainty in the law. If such certainty does not exist, then market participants cannot act knowing what the law demands. One significant criticism of Queensland Wire was that it gave rise to considerable uncertainty as to when parties with a substantial degree of market power had to deal and the prices they could charge for supplied goods and services. This uncertainty is considerably added to by the Full Federal Court decision in Boral[33].

Certainty of action is a basic building block upon which competition law is constructed. Thus, in Melway (which judgment was handed down sixteen days after the judgment of the Full Federal Court in Boral)[34], the High Court said, endorsing the words of the Privy Council in Telecom Corporation of New Zealand Limited v Clear Communications Limited[35], that:

> *"provisions such as s.46 should, if such a construction is fairly open, be construed 'in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful'."*

Boral fails the "certainty" test elaborated by the High Court in Melway but 16 days after the Boral Decision.

Predatory pricing: The principles

Boral is about predatory pricing. This is a controversial area of law so it is important that the precedent cases get it right. Again, there are questions of whether it is the function of the court to assist business when things get a "bit rough" or whether the courts should lay down some coherent economic logic to be applied and reach a logical solution by application of such laid down logic.

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32 ACCC v Boral Limited (2001) ATPR ¶ 41-803 (Full Federal Court). Application for Special Leave to appeal this decision to the High Court has been granted.

33 n.32.

34 The Full Federal Court judgment in Boral (n.32) was handed down on 27 February 2001. The High Court decision in Melway (n.27) was handed down on 15 March 2001.

35 [1995] 1 NZLR 385 at 403, 406.

The essential aspects of predatory pricing in the United States are that firstly there must be a policy decision to sell product at "below cost"[36] and, secondly, there must be a recoupment of profits lost by such selling tactics. Business, of course, does not logically sell below cost on any regular basis. So there must be a reason why this would be consciously done in particular cases. The reason why a business may choose to act in this way is that it can use its market power to drive out a competitor by its below cost pricing and, after the exit of such competitor from the market, lost profits may be recouped by charging so called "super profits" after such competitor's demise. "Recoupment" of the profits lost by under cost selling is thus an essential requirement in order to establish predatory pricing in the United States.

The two aspects of "below cost" and "recoupment" are not solely the creations of law. They are basic to the economic rationale of predatory pricing.[37] It is rational only to

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36 There are a number of views as to what constitutes "cost" for predatory pricing purposes. For simplicity of treatment, these issues are not discussed in this article other than to note the differing views expressed by the judiciary in Boral (see later).

37 Brooke Group Ltd v Brown & Williamson Tobacco 509 US 209 (1993); 1993-1 Trade Cases 70-277. [Brooke Group Inc. was formerly known as Liggett and was so referred to in the case and in the Court's judgment]. In the Liggett Litigation, the Supreme Court of the United States said:

> *"(A) prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under s. 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. … Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.*
>
> *That below-cost pricing may impose painful losses on its target is no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors'. … we (have) held in the Sherman Act s.2 context that it was not enough to inquire 'whether the defendant has engaged in 'unfair' or 'predatory' tactics'; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market". Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law or unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce'. …*
>
> *… If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have*

sell above "cost".[38] Business should not be penalised for making a profit. So, if profit is made, there can be no breach of competition law. Likewise, as we all know, businesses, sadly, make losses. However, they cannot be penalised under competition law for this. But losses deliberately incurred to drive out a competitor do attract competition law sanctions. In terms of s.46(1)(a), the purpose of making a loss in these circumstances is to eliminate or substantially damage a competitor. The conduct may also be illegal as preventing market entry (s.46(1)(b)) or deterring or preventing competitive conduct (s.46(1)(c)).

Australia has, however, legislatively impinged on this fairly restricted view as to what constitutes predatory pricing. The 1986 Explanatory Memorandum to the Trade Practices Revision Bill stated that:

> *"It is not the intention of s.46 that pricing must fall below some particular cost. The prohibition in the section may be satisfied notwithstanding that it is not below marginal or average marginal or average variable cost and does not result in a loss being incurred."*[39]

This expression of legislative intent complicated the judicial reasoning in Boral. But, it is submitted, the case merits its disaster rating for reasons not solely connected with this legislative view.

> *observed on a prior occasion, '[I]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices.'*
>
> *… These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high. '[T]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition …[;] mistaken inferences … are especially costly, because they chill the very conduct the antirust laws are designed to protect.' It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.' "*

(1993-1 Trade Cases pp.70,383-70,384 [case citations omitted].)

38 See n.36 for observations on the term "cost" as discussed in this article.

39 Parliamentary Explanatory Memorandum to the Trade Practices Revision Bill 1986 Par. 54.

Boral: The Facts

The ACCC alleged that BBM, a Boral Group member, had substantial market power in the concrete masonry market.[40] This was because the Boral Group, of which BBM was a member, had a significant market share, had ready access to natural resources necessary to compete in relation to the manufacture and supply of concrete masonry products and also had substantial financial resources. The ACCC alleged that BBM had engaged in predatory pricing conduct breaching s.46 between 1994 and 1996 and had expanded its plant capacity in that period with the purpose of excluding competitors or forcing them to exit the market. The ACCC relied for its allegations or prohibited "purpose" on a number of BBM internal "smoking gun" memoranda. The Federal Court, both at trial and on appeal, found that these memoranda established the relevant BBM purpose.[41]

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40 The relevant market found by the Full Federal Court on Appeal. The trial judge found a considerably wider market (ACCC v Boral (1999) ATPR ¶ 41-715 (Heerey J)). The writer believes that the reasoning of the trial judge is more persuasive but it is not intended here to discuss questions of market definition.

41 All judges in the Full Court were content to rely upon the trial judge's finding of fact that there was a proscribed purpose. The trial judge concluded this from BBM "smoking gun" memoranda. Some of these memoranda said:

> *"Part of our plan has been realised with Rocla and BTR Nylex withdrawing from the market …"*
>
> *"One of the (BBM) requirements (is) to make it more difficult for new entrants to gain a foothold."*
>
> *BBM viewed C&M "as a major frightening threat" and an instruction was given to "knock off C&M at any price".*
>
> *BBM believed that a "good level of profitability and volume is possible with three operators in the Melbourne market but beyond this number chaos is inevitable". Other documents revealed that BBM wanted to "drive at least one competitor out of the market".*
>
> *"BBM knew that it had to increase market share 'at the expense of the other operators, particularly Budget and C&M'."*

A finding of proscribed purpose was made by the trial judge in light of these documents notwithstanding evidence given by BBM executives, including the authors of the documents, that it was not IBM's intention to damage competitors or prevent anyone entering the market. BBM executives gave detailed evidence as to the "true" meaning of, or the "proper interpretation" to be given to, the documents. Their evidence was not accepted. Justice Finkelstein, echoing the views of other members of the Court, said:

> *"The finding that there was a relevant purpose for the conduct is consistent only with the rejection of the evidence of the witnesses on this issue. Although BBM now seeks to challenge the finding, it faces an impossible task. On the basis of authorities (cited by his Honour) … the trial judge's ruling is unassailable." (n.32 at p.42702)*

Boral: The Question of "Below Cost" Selling

The court gives a confusing picture as to what is the appropriate level of pricing which will attract the application of s.46.

Justice Beaumont refers to the concept of "below cost pricing" without explaining what he means by the term "cost".[42] Justice Merkel suggests selling "below cost" is a relevant factor but does not specify any specific level of cost.[43] Justice Finkelstein thought that predatory pricing should not be determined in accordance with any precise formula or definition.[44] His Honour said that it did not matter that the price charged might exceed either average total costs or average variable costs. In the

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Each judge in the Full Federal Court commented on the "purpose" of the BBM. So, Beaumont, J said:

> *"high level planning documents of a strategic kind should provide the best evidence of subjective intent … required by s.46". (n.32 at p.42682)*

Merkel J believed that the evidence accepted by the trial judge clearly established that:

> *"BBM's purpose was to drive rivals … out of the Melbourne market, as well as to prevent C&M from gaining a foothold in that market." (n.32 at p.42687)*

Finkelstein J said that:

> *"BBM's conduct … was for the purpose of eliminating or damaging its competitors … or preventing the entry of C & M." (n.32 at p.42702)*

He concluded that:

> *"The finding of purpose was made largely because of the 'smoking gun' documents found during discovery or in reliance on the Commission's statutory right to obtain the production of documents." (n.32 at p.42702)*

42 The relevant cost considerations were not discussed in the substantive part of his Honour's judgment (n. 32 at pp.42671-42682).

43 His Honour believed that the extent of below cost pricing (a term undefined in his judgment) and the likelihood of recoupment were relevant factors in inferring a proscribed purpose under s.46 and were factors also of relevance in assessing whether there had been a "taking advantage" of market power (n.32 at p.42686). When under cost selling and other factors were "considered cumulatively", it was clear that BBM had taken advantage of its market power (n.32 at p.42690).

His Honour did not specifically discuss what was meant by "below cost pricing".

44 n.32 discussion at 42691-42698. His Honour discusses cost issues in the context of predatory pricing generally. He concludes (p.42698) that there is no cost below which a per se finding of s.46 breach follows. He believed that, if a dominant firm persistently priced its goods below average total cost, predatory intent might be much stronger if pricing were below average variable cost. In such a case, a firm would have to show that there was a "legitimate purpose for its conduct" (p.42698). Nonetheless pricing above any particular cost level could still be

circumstances of a particular case, either of these prices may be a predatory price.[45] His Honour's conclusion is that:

> *"… Predatory pricing is no more than a price set at a level designed to eliminate a competitor or keep a potential competitor from the market."*[46]

Coupled with the statement in the 1986 Explanatory Memorandum to the Trade Practices Bill[47] that predatory pricing can still exist even though no loss is incurred, the difference between competitive pricing and predatory pricing will, in many circumstances, be unable to be seen with any degree of certainty. Regrettably, predation may well in future be inferred from factors such as:

- expressing a wish to see a competitor leave the market;
- making one's aggressive plans known; and
- being in a strong financial position or being part of an integrated group.

All these factors were clearly relevant in the Full Federal Court's evaluation of what BBM was doing.

At what price is one to sell? Competition, according to the High Court in Queensland Wire[48] is "by its very nature deliberate and ruthless"[49]. Surely this necessarily means, contrary to what Justice Finkelstein asserts in Boral, that a market entity should price pro-competitively. Logically this pricing should be aimed to keep potential competitors out of the market. The alternative to this pricing tactic is to price at a level which welcomes competitors to the market, or at least permits competitors to enter the market. This latter pricing is hardly engaging in that "deliberate and ruthless" competition mandated by the High Court in Queensland Wire.

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predatory because of the intent expressed in the Parliamentary Explanatory Memorandum (Text related to n.39).

45 n.44.

46 n.32 at p.42697.

47 n.39.

48 n.22.

49 n.22 (High Court) at p.50010 per Mason CJ & Wilson J.

In short, Boral leaves Australian business quite perplexed as to how it can compete "deliberately and ruthlessly" as required by Queensland Wire yet price in a manner which permits competitors to enter the market, as mandated by Boral. The problem is that words without any real substantive meaning have been used but the relevant theoretical base as to "what it's all about" has not been laid. One cannot say this about the predatory pricing law of the United States.[50]

Boral and "Recoupment"

As previously discussed, "recoupment" is central to the whole theoretical basis upon which predatory pricing illegality is based.

The trial judge rejected the view in Boral that BBM would recoup any of the losses made and found that the low prices charged by BBM were charged because of the need to be competitive in the market. The trial judge thus found no s.46 breach.

The Full Federal Court did not regard recoupment of losses as having any real part in predatory pricing illegality. Justice Beaumont rejected outright the view that there was a need to consider recoupment as an element of predatory pricing.[51] Justice Merkel also found recoupment was irrelevant[52], as did Justice Finkelstein[53].

The reason for the court's rejection of recoupment of losses as an inherent part of predatory pricing illegality lies in the court's view of the legislative policy behind s.46. In 1986, the threshold of market power to bring an entity within s.46 was reduced from one of substantial market control to one of a substantial degree of market power.

Justice Finkelstein comments that firms, other than monopolists, will rarely, if ever, be able to recoup losses after forcing a competitor from the market. This is because other firms will remain and will force the "predator" to be competitive and thus be unable to raise prices sufficiently to recoup losses. Thus, according to Justice Finkelstein, recoupment as a component part of predation had to be rejected because:

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50 See n.37.

51 n.32 p. 42675.

52 n.32 p.42685. Having rejected the concept, his Honour notes, however, that the likelihood of recoupment is a factor in assessing BBM's expectations as a result of its conduct.

> *"(Section 46) is aimed at regulating a firm with a substantial degree of market power, which would include, but not be limited to, a monopolist. While a monopolist may have the ability to extract a monopoly rent and thus recoup its losses, a firm with only a substantial degree of power may never be in that position. Thus the test proposed by the trial judge will, for all practical purposes, make it impossible to establish a case of a predatory pricing scheme against a firm that is not a monopolist."*[54]

It is surely not logical to hold that conduct is illegal simply because the threshold test to bring entities within s.46 has been lowered. Instances of conduct escaping s.46 because of a higher threshold test, but which the legislature may wish to bring within the section, are not hard to imagine.[55] However, if conduct does not merit condemnation, there is no point in illegalising it simply to fit it within a different threshold test.[56] There is no logic in holding that conduct has to be "caught" by an amended threshold test when the conduct itself is otherwise unobjectionable. It is thus not logical to abandon recoupment because to hold it applicable would "make it impossible to establish a case of a predatory pricing scheme against a firm that is not a monopolist". Without a recoupment test, pricing at whatever level, and by whoever it is carried out, is pro-competitive not predatory.

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53 n.4 and discussion in his Honour's judgment at pp.42696-42698.

54 n.4 p.42696.

55 Of recent times, see ACCC v Universal Music [2001] FCA 1800. A music company with only 16 per cent of the market was held to have a substantial degree of market power for s.46 purposes in light of market characteristics of the industry. All retailers needed access to all record company music if they were to stay in business. There was no alternative supply of various CD's other than from the company producing them. When a record company with only a 16 per cent market share cut off music supply to retailers who imported competing product, a breach of s.46 was established. The record company clearly did not "control" the market, a 50 per cent market share probably being necessary to establish control. This case would seem classically the type of case which the legislature intended to catch by the 1986 amendments reducing the market power threshold.

56 See n.55 for an example of conduct which would probably previously escape s.46 because of a lack of market "control" now being within the section. This example, however, involves no departure from any economic theory. The conduct would previously have been condemned if the market control test were satisfied. It is similarly now condemned. All that has changed is that the entity involved is now within the Act whereas previously it was not. This is a long way from re-defining the logic of the predation as has been done by the Full Federal Court in Boral by disregarding the need for recoupment.

Boral and Company Groups

Boral merits a disaster rating not only for its substantive holdings that one can price at a profit without recoupment intention yet still be in sin under s.46 for predatory pricing. It also merits a disaster rating for its impact on corporate structures.

BBM, the relevant member of the Boral Group involved, was condemned for its activities to a significant degree because these activities were carried out by it as a member of a corporate group with access to resources and finance. Yet the court did not consider the other side of the corporate group structure i.e. how pricing and other conduct should be regarded in the corporate group context.

There was no doubt that the Boral Group as a whole, which was involved in the mining, processing and sale of concrete masonry products, was making a profit on its combined activities.[57] BBM, which was the target of the ACCC's prosecution for predatory pricing, was the selling entity of the group. The Boral Group transferred product inter-company on an arm's length basis – presumably, one assumes, for managerial and taxation reasons.

Notwithstanding this, both the trial judge and the Full Federal Court declined to re-work the relevant cost figures by eliminating inter company transfers.

The problem posted by the court's approach to corporate group structures can be illustrated by some theoretical figures set out in **TABLE I** below illustrating inter company transfers at market value.

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[57] See Merkel J n.32 p.42688: "Boral Ltd, the ultimate holding group (made) a net profit out of concrete masonry products during the relevant period notwithstanding the losses incurred by BBM (which acquired raw materials from the group at arm's length prices) in conducting the war".

See also Beaumont J (p.42656) and Finkelstein J (p.42702) to the same effect.

	TABLE I				
	CORPORATE GROUP OF THREE COMPANIES WITH INTERNAL TRANSFERS AT MARKET PRICES				
	Cost of Transferred Product	**Cost of Production, Manufacture or Sales**	**Total Cost to Company**	**Price at which Transferred or Sold**	**Profit to Company**
COMPANY A (Mining)	-	50	50	200 (transfer price)	150
COMPANY B (Manufacturing)	200	100	300	500 (transfer price)	200
COMPANY C (Selling)	500	100	600	450 (sale price)	(150) (loss)
	TOTAL COST OF PRODUCTION OR SALES	$250		**TOTAL PROFIT**	$200

In **TABLE I** the group, overall, has made a profit of $200 by its ultimate sale at a price of $450. Because, there are three companies, however, the selling company (COMPANY C) has incurred a loss of $150 – largely by virtue of internal transfers and mark ups charged to it on product acquisition. BBM, the target of the ACCC proceedings in the Boral Case, was COMPANY C. Should COMPANY C be seen as involved in predatory pricing if it sold for a considerable period on the above price and cost structure?

One might well believe, as a matter of economic logic, that the corporate group as a whole must be allowed to continue to trade at a product sale price of $450. If COMPANY C is singled out for predatory pricing treatment and cannot sell at this price (a loss to it but not to the group), then the group as a whole loses the opportunity to trade profitably.

In the United States, in relation to s.1 of the Sherman Act, the United States Supreme Court said in Copperweld[58]:

> *"…. a parent and its wholly owned subsidiary must be viewed as that of a single enterprise under s.1 of the Sherman Act. Their objectives are common, not disparate, their general corporate actions are guided or determined not by two corporate consciousnesses but one ….."*.

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58 1984-2 Trade Cases 66,065 (U.S. Supreme Court).

This seems to be a view embraced in the United States in the case of all intercompany transfers.[59] It is a logical approach and one which does not force artificial or unwanted structures on corporations for the sake of technical compliance with a market oriented competition law.

The Boral Case holding imposes an artificiality on the concept of group pricing. It can mean that:

- a profitable group can be in breach of s.46 because one company is making a loss on sales;

- company groups which choose to have independent entities for taxation, cost or efficiency reasons can be penalised. It is difficult to see how one single unit company with the costing figures set out in **TABLE I** above could be involved in selling at anything other than a healthy profit. Only if separate entities are formed can this conclusion follow;

- in future predatory pricing cases may well depend upon the artificiality of what company structure is involved.

It is submitted that, at least in the case of wholly owned companies in a company group, profits on inter-group transfer prices should be disregarded. To hold otherwise simply on the basis that s.46 involves a subjective intent merely creates artificiality. In a realistic competitive market as decided by the High Court in Melway (16 days after the decision in Boral) it is difficult to see BBM acting in any way other than the way in which it did. Its purpose was to make profits for the group of which it was a member and selling in the manner it did effected this purpose.

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59 The Report by the U.S. Attorney-General's National Committee to Study the Antitrust Laws said that "to demand internal competition both within and between members of the same business is to promote chaos without promotion of public welfare". [Report of U.S. Attorney-General's National Committee to Study the Antitrust Laws (1955) (U.S. Govt Printing Office Washington) p.34] It seems that transfers between companies in the same corporate group do not constitute "a purchase" in the U.S. price discrimination law context – at least when such subsidiary is part "of a single integrated enterprise" such that dealings between the parent and the subsidiary are "indistinguishable from dealings within the same corporate entity" [Brown v Hansen Publications Inc. 1977-2 Trade Cases 61553] or where a subsidiary is treated "as a profit centre or division rather than as a separate corporation". [Schaben v Samuel Moore & Co. 1979-2 Trade Cases 62927 (CCA8)].

One cannot help but think that the Boral Group was in a "no win" situation as regards its activities. The fact that BBM was a member of a corporate group was a factor in finding it was involved in predatory pricing. This was because the group had access to raw materials and had financial strength. Yet the Court would not allow the group to demonstrate group costs as a defence to an allegation of predatory pricing. Consistency would surely demand that, if group membership is a factor in predation, group costs must be taken into account in assessing the extent of such predation or whether, indeed, there has been any predation at all.

Boral – The Legacy

Boral deserves its disaster rating because it fails to recognise the logical basis on which a ban on predatory pricing is based. Australian business now has a real problem in distinguishing between keen pricing and predatory pricing. No clear overall principles are established. Australian marketers are perhaps now more in the trade practices fog than previously when many thought that the U.S. recoupment theory distinguished legal from illegal pricing policies.

It is submitted that predatory pricing requires both under cost selling (though there may be grounds for arguing what is the appropriate basis for calculating "cost") and recoupment. If courts cannot reach this conclusion the legislature should do so for them. Further, company groups should legislatively be treated as one entity. Again, if the courts cannot reach this conclusion, the legislature should enact this result.

I also have some concern in Boral at the naivety of the courts in accepting "sales hype smoking gun" memoranda as evidence of evil intent. Perhaps one cannot legislate to overcome this but one can certainly hope that the courts will in future see such memos as also having a pro-competitive purpose. Obviously the Boral Case increases the scope for corporate employment of creative memo writers who can express messages in terms other than those of "killing" competitors. The ultimate irony of the Boral Case is that, had the memoranda involved been expressed in non-warlike terms, the ACCC would simply have had no case on the issue of "purpose" under s.46.[60] Does this not mean that the whole case was essentially one involving

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[60] See n.41 for examples of the Memoranda involved. From these memoranda the court found the relevant "purpose" to exclude a competitor from the market (see n.41 and court observations there set out). Could the same purpose have been found if the memoranda had been expressed in terms such as the following:

the semantic expression of marketing policy? Less aggressive semantics would have resulted in no case at all.

Injunctive remedy in Boral?

A valuable test of the illegality of a practice, it seems to me, is to define the practice and see if an injunction can be framed to prevent it. As we have seen from Melway (discussed above in relation to Queensland Wire) such an injunction must be able to be phrased with precision. It is submitted that no injunction in Boral could be so phrased for the same reason as it could not in Queensland Wire i.e. the courts would have to lay down precise terms of dealing. Further, even if an injunction were issued, could not BBM be wound up and the selling business be conducted by other companies in the group? In **TABLE I** this would mean that COMPANY C would be wound up and profitable business conducted by COMPANIES A and B, one of which would also have a selling function. All of this leads me to believe that the lengthy judgments of the Full Federal Court are, on detailed analysis, devoid of real substance in their finding of a breach of s.46.

IV. THIRD LINE FORCING: SECTIONS 47(6) AND 47(7)

Disaster Number Five: Decisions made in relation to Third Line Forcing

Third line forcing as initially enacted

In the mid 1970's when Senator Lionel Murphy (as he then was) was Ministerially responsible for the enactment of the Trade Practices Act, a particular consumer problem made known to him was that of financiers requiring borrowers to insure with insurance companies nominated by the financier involved. The problem was that directed insurance premiums were non-competitive. Disadvantaged insurance companies also complained of their inability to access a considerable part of the insurance market.

> *"There clearly is excess capacity in this industry at the moment. We will have a tough battle remaining competitive with other producers. We must, however, try to do our best in this competitive environment. Someone may fail. We must try to ensure that it is not us."*

It was not immediately clear what to do with the problems raised so the practice of "third line forcing" was simply illegalised. Thus Australia, uniquely in the world from what I can ascertain, banned the provision of goods or services on the condition that the provided party take other goods and services from a third party nominated by the supplier of the original goods and services. The practice was illegal regardless of its effect on competition and regardless of market power issues. A "force" in favour of a related company was, however, permitted.

The removal of the right to force in favour of a related company

The first disaster in relation to third line forcing was the 1978 decision which removed the ability to third line force in favour of a related company.

Thus, from 1978, one company which could itself provide two items could insist that both be taken from it. If, however, the company structure was such that two companies were involved, one related to the other, then one company in the group could not insist that the second product or service be taken from its related company.

Problems caused by the ban on third line forcing

Should there be a *per se* ban on third line forcing? There is not much doubt that this ban can cause problems. Some of these problems are:

- *Competitive distortion*. Telstra, for example, is one company. Optus is not. Telstra can bundle a variety of services and products together. Optus has to be more circumspect. This can be seen as a distortion of the competitive process.

- *Repairs cannot be required to be performed by trustworthy repairers*. Should not suppliers of goods be able to mandate service of these goods from dealers or repairers they trust? The point is of particular relevance in the case of goods under warranty.

- *Genuine cost savings are thwarted*. Third line forcing can lead to genuine cost savings. It will often be more efficient to supply two products rather than one, even in the case of separate suppliers.

If (as the writer thinks to be the case) this memo, or something like it, expresses no exclusionary purpose, does this reduce the Boral Case simply to a matter of semantics? The writer believes this to be so.

- *Quality concerns*. Sometimes objective quality conditions can be prescribed. But what if they cannot? Why should an ice cream manufacturer not be entitled to prescribe the supplier of the topping to be put on its ice cream? The ice cream supplier has views as to the best topping but the qualities of topping cannot be reduced to objective written standards.

- *Title security concerns*. In some areas, it seems as if title cannot be secured unless a mortgagor is required to effect arrangements with a nominated third party. This argument is strongly put as a necessary consequence of the Australian Stock Exchange CHESS system of trading.

Critics of the absolute ban of third line forcing thus argue that such conduct should be subject to a competition test and certainly there should be no prohibition on a "force" in favour of a related company.

The "Notification" Scheme

The second disastrous decision in relation to third line forcing was taken in 1995. This was a decision not to consider the issue on its merits but to introduce a system of Notification in relation to it. Thus Notification of third line forcing conduct could be given to the ACCC and if the ACCC did not object, then legality resulted.

The ACCC has interpreted the legislation in a manner which *de facto* involves a competition evaluation.[61]

The result: third line forcing is both prohibited and blessed

The result of the 1995 decision is that a *per se* offence is given a competition evaluation in the case of those who are smart enough to lodge a Notification with the ACCC. Those less learned in the law face a *per se* ban. The Notification changes the whole thrust of the legislation. Yet nowhere is there any clearly articulated policy or direction to the ACCC that the ACCC should interpret the law in the way it does. No policy should vary so dramatically depending upon whether or not a form is filed

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[61] See W.J. Pengilley: "Third Line Forcing – What is the Policy?" Australian Company Secretary Nov 1999 pp. 458-461 and ACCC Guideline on Third Line Forcing Conduct there summarised. There had been 174 Notifications filed up to 1997 and only one (in relation to Toyota warranty of new vehicles) had been denied statutory protection.

with the competition regulator. The present policy on third line forcing is neither fish nor fowl.

The disaster of third line forcing is that government has simply not been able to make up its mind on the issue. It is likely that the Government's mind may eventually be made up in the near future and the practice will be subject to a competition test. If this is so, then ss.47(6) and 47(7) should be repealed and third line forcing regarded as a misuse of market power issue. In my view, a competition test will effectively legalise the practice unless the entity engaging in it comes within s.46. Probably, however, the government is unlikely to move any more boldly in the future than in the past. Therefore, some remnants of the practice will, in all likelihood, remain on the statute books.

In short, ss.47(6) and 47(7) have not been the subject of principled thinking and principled problem resolution. The jumbled and woolly thought which has characterised treatment of the practice has been to the benefit of no-one. A positive decision is required.

Treasury and The Law Council of Australia favour a competition test being added to the section and this will probably be adopted. For myself, I favour a more conservative retention of the section in an amended form as I believe those who do not heed the lessons of history are bound to re-live them.[62] But, above all, a definitive policy approach to third line forcing must be determined.

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62 The writer supports the view that third line forcing in favour of related companies should be permitted. However, he does not believe that a competition test for the practice is appropriate. A competition test would effectively destroy the section in all areas in which it was designed to impact. The writer believes that the section needs fine tuning. Thus the present prohibition could remain subject to a defence that a party is not in breach if it can establish that there is no less anticompetitive method of achieving product quality or security than implementing a third line force.

Treasury may argue that the financial market is now more sophisticated than it was in the mid 1970s. The writer believes, however, that those who do not learn the lessons of history are bound to re-live them. In its Permanent Building Societies Decision of 30 June 1976 [1976 ATPR (Com) ¶ 35-220] the Trade Practices Commission found, for example, that the directed house insurer of Perth Building Society, the leading home financier in Western Australia, was able to charge insurance premiums 20-30 per cent above competitive insurers. This is the complaint of consumers in relation to directed insurance. The writer believes that legalisation of the practice or making it subject to a competition test (which would de facto be the same thing) could well see the re-emergence of this consumer problem.

V. COMPANY MERGERS: SECTION 50

Disaster Number Six: The 1991 Cooney Committee Deliberations in relation to Merger Law

The Cooney Committee recommended in 1991 that the merger threshold test should be reduced from that of market dominance to one of substantially lessening competition. This recommendation is not, of itself, necessarily disastrous. What is disastrous is the completely unconvincing way in which the Cooney Committee reached its conclusions, the complete lack of evidence upon which its conclusions were based and the role of the ACCC (then the Trade Practices Commission) in obtaining its way.

Ever since the Cooney Committee paved the way for lowering the merger threshold, merger law has become a slanging competition. The ACCC has championed the lower threshold test as essential to effective competition enforcement. At the same time, perhaps inconsistently to the minds of some, the ACCC has stressed that it prevents very few mergers.

Bodies such as the Business Council of Australia (BCA) ridicule the ACCC view. The BCA asserts that the ACCC is "atomising" Australian industry, that the lower threshold test does not permit Australian industry to attain the size it needs to "punch above its weight" in world markets and that necessarily Australian entities are forced overseas in order to obtain that size needed to compete in the globalised world economy. The ACCC stresses its own reasonableness and the self interest of the BCA in making the assertions it does. The BCA submits that the ACCC is myopic. The whole debate is characterised by much heat and very little light.

All of the above have been significantly the result of the way in which the Cooney Committee reached its decision in 1991 and the role the Trade Practices Commission played in this.

The ACCC now significantly relies on the 1991 deliberations of the Cooney Committee as giving forth the true light. So it is important to re-visit these deliberations and the role which the Trade Practices Commission, the predecessor of the ACCC, played in those deliberations.

An examination of the Cooney Committee's deliberations

The Cooney Committee's deliberations must be placed in context. The two Trade Practices Commission Chairmen immediately preceding Professor Fels (Professor Bob Baxt and Mr Bob McComas), endorsed the merger dominance test (which effectively permitted mergers up to a 50 per cent market share) as appropriate, workable and reasonable. The immediately preceding Griffiths Committee of Inquiry in 1989 had endorsed the dominance test. The dominance test was effectively bi-partisan policy in 1991. The ink on Professor Fels' appointment that year as Trade Practices Chairman was hardly dry when the Cooney Committee convened. Professor Fels mounted a staunch campaign, notwithstanding the odds against him, to have the dominance test changed. In this he was successful though the tactics employed by the Trade Practices Commission to achieve its policy ends can be questioned.[63]

The Trade Practices Commission convinced the Cooney Committee of its views by the techniques of argument which included the following:[64]

- The Trade Practices Commission engaged in a re-writing of the history of the treatment of prior mergers – in particular the three "worst case" mergers at the time (Coles-Myer; News Ltd – Herald & Weekly Times and Ansett – East-West Airlines Limited). In each of these mergers in fact, the merger was regarded as actually or potentially coming within the dominance test and dealt with administratively by the pre-Fels Trade Practices Commission on this basis. The post-Fels Trade Practices Commission asserted to the Cooney Committee that these mergers fell outside the dominance test and that a lowering of the threshold test was necessary to cover mergers of this kind.

- The Trade Practices Commission resolutely refused before the Committee to indicate what it meant by a "substantial lessening of competition". Many submissions had put to the Committee that a drop in the threshold test would create uncertainty. The Commission replied to these by saying that it could

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63 The writer has written elsewhere on this subject in detail – see W.J. Pengilley: "Merger Policy: Why did the Cooney Committee Answer the Trade Practices Commission's Prayers?" 22 University of Western Australia Law Review pp.300-321 (Dec 1992).

64 For discussion in greater detail see n.63.

create certainty by issuing a Guideline on the subject. The Commission's tactics in this regard were, however, somewhat dubious. The Commission's offer to write a Guideline was made in a written submission *after* the Cooney Committee's hearings had closed. Debate on the merits of a Guideline thus never occurred. Even worse perhaps was the fact that the Cooney Committee was not at any stage informed in substance as to what the Trade Practices Commission envisaged by the words "substantially lessening competition". The Commission's tactic was to keep the term undefined whilst mouthing the reasonableness of the test.

- The Commission argued that there would be no impact on its resources by a changed test. Once the Cooney Committee had accepted the lowered threshold, the Trade Practices Commission noted, however, that its recommendations and those of other Committees would have a *major impact* on the Commission's work.

- The Trade Practices Commission argued that, for the sake of uniformity, a competition test should apply throughout the Act. Of course, all sections of the Trade Practices Act other than s.50 deal with conduct. Only s.50 relating to mergers deals with structure. There is no reason at all why different tests should not apply to conduct from those applying to structure.

- Notwithstanding its consistency arguments as set out immediately above, the Commission also managed to argue for a different treatment of "sensitive industries" such as media, banking, insurance, aviation and other industries that it should recommend from time to time. Further, the Commission submitted to the Lee Committee on Print Media that it should have a specific, and different role in relation to mergers of newspapers. Consistency of treatment, though put to the Cooney Committee as a virtue, was hardly a theme consistently followed by the Trade Practices Commission itself.

Unfortunately, Parliamentary Committees do not carry their own "devil's advocates" who can call upon bodies such as the then Trade Practices Commission to substantiate what they submit. Those with differing views cannot be expected to match the resources of the Trade Practices Commission which lodged seven lengthy written submissions to the Cooney Committee and, from the writer's observations, had five or six senior representatives at each of the Committee's hearings. Indeed, on some occasions, there was simply no possibility of any response being made to the Commission's views. No-one could contest the Commission's view as to what

was meant by a substantial lessening of competition, for example, as the Guideline fleshing out the relevant principles had not been written and, indeed, the offer by the Trade Practices Commission to write such a Guideline was made only after the Committee's hearings closed.

Despite the views urged upon it by the Trade Practices Commission's use of the above debating stratagems, the Cooney Committee was far from convinced that a changed merger test was necessary. Though it did recommend a lowering of the merger threshold, it did so with some reluctance and issued the following caveats in relation to its conclusions:

> *"The Committee finds that the empirical evidence on the effect of mergers is conflicting and not conclusive."*[65]
>
> *"There is a poor bank of available studies based on empirical research into the Australian economy. There is no work of which the Committee is aware which would compel it to come to a particular conclusion."*[66]

Given this, the prior Griffiths Committee findings and the views of the two preceding Chairmen of the Trade Practices Commission, one might have thought that no change of merger policy was called for. The tragedy is that the Cooney Committee, notwithstanding the lack of any empirical evidence for change, recommended that the Trade Practices Commission's views be accepted because the Commission had argued that it lacked the necessary authority to carry out its function in a way "most beneficial to the community"[67] and should be given that authority.

The consequences of Cooney

The disaster caused by the Cooney Committee deliberations is not necessarily that it found that merger policy should be changed. One could not object to this if any such recommendation for change were based on sound evidence and conclusions from this. The impression created (and now capitalised upon by the ACCC in resisting any revisitation to the pre-Cooney Committee merger threshold test) is that the dominance threshold test was rejected by Cooney for good reason and should not

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65 Report on Monopolies and Acquisitions – Adequacy of Existing Controls (August 1991: Senator Barney Cooney, Chairman) Pars 3.25 and 3.112.

66 n.65. Par 3.124.

67 n.65. Par 3.124.

again be reconsidered. The dominance test was, however, not rejected for any good reason. Indeed, as previously noted, the Cooney Committee had no idea what the Trade Practices Commission had in mind by the term "substantially lessening competition". Another disaster in the Cooney Committee's deliberations is the virtual endorsement of the view that what the ACCC submits is best for the nation. Independent committees are meant to evaluate conflicting views. A simple recognition that the ACCC argues from a self interested position would not seem unreasonable. Sadly, the Cooney Committee gives the ACCC a status above all others as guardian of the nation's best interests which the ACCC does not deserve. Like all other arguments before independent inquiries, the ACCC's views should be assessed on their factual premises and their logic and accepted only if persuasive on this basis.

The Cooney Committee deliberations thus merit disaster status in this article because of the method by which its inquiry was conducted, the lack of testing of Trade Practices Commission assertions and the lack of solid logic or empirical experience upon which its conclusions were reached.

Sadly, the Cooney Committee's conclusions permit the Business Council of Australia, as a critic of the merger threshold test, to be characterised by the ACCC Chairman, Professor Allan Fels, in highly emotional terms such as the following:

> *"The BCA has at all times opposed any strengthening of merger law. They opposed merger law in the first part. Their agenda is to emasculate merger law, even though that would be highly damaging to the Australian economy, because it would make it into a group of monopolies, which are highly inefficient and anti-competitive and would harm the capacity of our exporters and importers internationally."*[68]

BCA would deny the detrimental effects suggested. So far as I am aware, no study has been done which would support either view. It is appropriate, however, that bodies such as BCA be permitted to revisit previous thresholds when the case for their change has simply not been proven. It is also appropriate that this re-visitation be able to be carried out without ACCC overtones that it is virtually an un-Australian activity to want to do this.

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[68] Evidence of Professor Fels, ACCC Chairman, to Standing Committee on Economics, Finance & Public Administration 30 March 2001 – Transcript p.12.

The Cooney Committee has much to answer for in relation to the manner in which it reached its conclusions. It is hoped that any further inquiries, such as that to be commissioned by the Government in 2002, will assess the issues on their merits – something the Cooney Committee failed to do.

There is other opinion which argues for a higher merger threshold: Comments on the opinion of the Industry Commission

In passing, it should be noted that there is opinion apart from the BCA which argues the case for a higher merger threshold than that adopted by the ACCC in its Guidelines. This opinion hardly aims at the detrimental economic consequences which Professor Fels seems to see as following from the BCA views. The Industry Commission, for example, argues that the ACCC's merger threshold Guidelines should be further relaxed. It argues that the ACCC should look at the possibility of increasing the threshold market share of an individual company to 50 per cent before merger investigation is merited. Although the Industry Commission does not go as far as the BCA probably would like it to go, its views indicate that asking for a re-examination of the threshold merger test is not as un-Australian an activity as perhaps the ACCC would like to have us believe. The Industry Commission also notes that there is very little data published about mergers and that the ACCC could considerably assist by publishing such data. Undoubtedly this would be a useful contribution to the debate but the ACCC has not yet seen fit to engage in this activity.[69]

My guess is that an analysis of company mergers since the introduction of the "substantial lessening of competition" test would show that most of those disallowed would also come within the previous dominance test and have been disallowed under it. If I am right in this, the greater certainty of the dominance test merits its re-introduction. The non-prohibition of those few mergers which might not be caught by a "dominance" test but would be caught by the lower "substantial lessening of competition test" can be justified by the greater certainty of, and smoother overall operation of, s.50 which a dominance test would bring. I may be wrong in my pragmatic view (which is based on no research) but some objective study on the

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[69] See Industry Commission: Information Paper – Merger Regulation: A Review of the draft merger guidelines administered by the Australian Competition and Consumer Commission (June 1996) at pp.28-39. The Industry Commission also questions other points in the ACCC's

issue, as distinct from a BCA-ACCC slanging match, would be a step in the right direction.

VI. THE DAMAGES REMEDY: SECTION 82

1. Disaster Number Seven: The Gates Decision[70]

Facts of the Gates Case

Mr Gates purchased an insurance policy which was represented to him as entitling him to full entitlement if he was rendered unfit to carry on his usual occupation. In fact, the full entitlement was payable only if Mr Gates was unable to be gainfully employed. Mr Gates was injured and unable to do his usual job. The insurance company, City Mutual Life Assurance Society ("CML") refused to pay. Justice Ellicott of the Federal Court held[71] that CML's agent had engaged in misleading or deceptive conduct contrary to s.52 and s.53(g) of the Trade Practices Act.

Eventually the case wound its way to the High Court of Australia on the question of quantum of damages. Mr Gates claimed that he was entitled to damages and that such damages were the amount of the benefits payable under the policy. He said that CML's agent induced him to enter into the contract and had it not been for this assurance he would either not have entered into the contract at all or would have entered into a contract with another company which provided the represented benefits.

High Court Decision in the Gates Case

Mr Gates' claim was rejected by the High Court. Mr Gates' damages, said the High Court, had to be calculated as damages in tort. Tort damages are calculated on the basis of the difference between the value of what Mr Gates paid and the value of the disability payment he received, or would have received, by virtue of such payment. The issue was how much worse off he would have been had he not entered into the

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Guidelines such the concentration ratios selected by the ACCC and the ACCC's treatment of imports.

70 Gates v City Mutual Life Assurance Society Ltd (1986) ATPR ¶ 40-666 (High Court).

71 (1982) ATPR ¶ 40-311.

transaction at all. There was no evidence that the insured cover of $20,000 was worth less than the $2 per month premium paid. Thus no damages were recoverable.

Had Mr Gates been able to establish that he would have entered into a different contract and that this would have yielded the benefit claimed, then damages could be claimed by Mr Gates. This was because lost benefit is referable to opportunities forgone because of the misrepresentation. But, found the Court, there was nothing to suggest that, had Mr Gates known that CML did not offer the insurance represented by its agent, he would have sought out the opportunity to take out insurance elsewhere. Further, there was no evidence to suggest that any other company offered insurance cover of the type represented. The Court believed that its conclusion:

> *"… involves no element of injustice to a plaintiff who is entitled to damages reflecting the loss of benefits he would have obtained under a contract which he could and would have entered into but for his reliance on the contravening conduct of the defendant. Of course, he must prove such loss but there is nothing unfair in requiring him to do so."*[72]

Criticism of the Gates Decision

This judgment can be criticised – and for good reason. The major criticisms which can be levelled at it are:

- The somewhat strange conclusion is that, in order to establish damages, it has to be established that if the true position were known, Mr Gates would have gone elsewhere. The problem is that the true position was not known. This being so, the question of going elsewhere simply did not arise. The requirements of the court thus involved the establishment of a non-considered hypothetical.

- Looking at the policy of the Act, one has considerable sympathy with the views of Professor Bruce Kercher when making a submission to the Australian Law Reform Commission in relation to its compliance with the Trade Practices Act reference. Kercher says:

> *"[I]t is very widely felt that the decision was unjust … [T]his is for two reasons: (a) the court completely failed to see that the overall purpose of the Act is to protect consumers and that their decision had precisely the opposite effect, in*

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[72] n.71 p.47368-p.47369.

that it does nothing to discourage such blatant breaches of the Act; (b) Gates, it is widely felt, DID suffer a 'loss' as a result of [the insurance agent's] actions, and it is only the astonishing narrowness of a then hostile High Court which failed to see that …. I strongly believe that the Act should be amended to make clear that plaintiffs in Gates' position should recover."[73]

- The decision has since been judicially criticised in the Federal Court. However, the judge making such criticism was forced to conclude in the case before him:

  "That (i.e. loss of a remedy) is the consequence … of the Gates Case and it is not for a judge at first instance to question the correctness of that decision. Any remedial action must be a matter for the High Court.'[74]

- The High Court itself had the opportunity to award damages to Mr Gates but did not take it. The Court noted that in the United States, Mr Gates would have recovered damages. The US law is that damages following from misleading or fraudulent conduct should be determined on the basis most favourable to the plaintiff. However, said the High Court, this view has not been adopted in Australia[75] and it thus declined to follow a different path to that adopted in Australian precedent.

Law Reform Commission Reaction to Gates

The Law Reform Commission considers that the Trade Practices Act should be amended to remove any restraints as to the manner in which damages might be awarded. Damages should be able to be awarded in such manner as is reasonable and appropriate and the court should not be constrained by principles of common law, tort or contract in awarding damages. Thus courts could freely exercise their discretion in cases such as Gates.[76] This suggested amendment has not occurred though a number of cases have held that Trade Practices Act damages are not now necessarily to be constrained by the principles of the common law.[77] Further, the

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73 See B. Kercher: Submission to Australian Law Reform Commission in relation to its Report on Compliance with the Trade Practices Act. Cited from Report of the Commission (Report 68 – 1994) p.67.

74 Zoneff v Elcom Credit Union Ltd (1990) 94 ALR 441, 461 (Hill J).

75 n.70 p.47367.

76 Law Reform Commission: Report on Compliance with the Trade Practices Act 1974 (ALRC 68 – May 1994) Par 7.21.

77 e.g. Warnock v Australia and New Zealand Banking Group Limited (1989) ATPR ¶ 40-928; Holt v Biroka Pty Ltd (1988) 13 NSWLR 629; Holloway v Witham (1990) 21 NSWLR 70;

Insurance Contracts Act s.13 (introduced after Gates) implies a duty of good faith by insurers. It is possible that this provision may give a remedy to parties to whom insurance contracts have been misrepresented. Damages in contract put parties in the position they would be in if the arrangement were performed. If Mr Gates could have established a contract, it seems as if he would have received his damages. The Insurance Contracts Act may provide the mechanism to do this.

The Gates Disaster: Denial of a remedy to a deserving applicant and overall reduction in effectiveness of the Act's consumer protection remedies

From what has been said, it is clear enough that the High Court could have devised a remedy for Mr Gates and that all but the lawyer would regard him as a deserving claimant. The disaster is that this obviously deserving complainant was denied a remedy pursuant to what the non-lawyer could regard only as a judicially devised stratagem. The disaster is not only that Mr Gates was denied remedy. It is also that the whole damages regime of the Trade Practices Act has had its effectiveness reduced.

2. Disaster Number Eight: The Henville v Walker Decision[78]

In contrast to the decision in Gates, in 2001 the High Court damages pendulum swung dramatically in favour of plaintiffs in Henville v Walker.[79] So much is this so that the decision in Henville v Walker merits its own disaster rating.

The facts

The facts in Henville v Walker are very simple. Mr Henville, the appellant to the High Court, was an architect. He purchased land with the intent of constructing home units on it. In assessing whether to buy the land in question, Mr Henville entered into a feasibility study which involved assessing the cost of construction of units and the selling price of units. He relied on his own estimate of construction costs. He relied

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Sellars v Adelaide Petroleum NL & Ors; Poseidon Ltd v Adelaide Petroleum NL & Ors (1994) ATPR ¶ 41-301; SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission (1990) ATPR ¶ 41-045. See also Henville v Walker (2001) ATPR ¶ 41-841 following.

78 Henville v Walker (2001) ATPR ¶ 41-841.

79 n.78.

upon the advice of a real estate agent in relation to the selling price of the units and their marketability.

Two things went wrong:

- The agent substantially overestimated the selling price of the units and their marketability. The agent's estimate of selling price was $750,000. The actual realised selling price was $545,000.

- Mr Henville substantially underestimated the cost of the project. His estimate of construction costs was $551,000. Actual construction costs were $864,000.

As a result of the above, the following combinations of profit or loss of the venture and other calculations in relation to it are set out in **TABLE II** and **TABLE III** below.

TABLE II
COMBINATIONS OF PROFIT AND LOSS
OF THE VENTURE

1. Agent's estimated proceeds of sale	$750,000	$750,000		
2. Actual proceeds of sale			$545,000	$545,000
3. Architect's estimated costs	$551,000		$551,000	
4. Architect's actual costs		$864,000		$864,000
PROFIT/LOSS	**$199,000 PROFIT**	**$114,000 LOSS**	**$6,000 LOSS**	**$319,000 LOSS**

TABLE III
DIFFERENCE BETWEEN
ESTIMATES AND ACTUALITY

Agent's estimated proceeds of sale	$750,000
Actual proceeds of sale	$545,000
Estimated proceeds of sale exceeded actuality by	**$205,000**

Architect's estimated costs	$551,000
Actual architect's costs	$864,000
Architect under-estimated actual costs by	**$313,000**

Mr Henville stated in evidence that, if he thought the project would provide a profit of less than $100,000 (or at a minimum $80,000), he would not have gone ahead with it.

The agent admitted that his actions breached s.52 of the Trade Practices Act and that he had engaged in misleading or deceptive conduct causing damage to Mr Henville. The question before the court was the quantum of damages recoverable. At trial, an award of $205,000 ($705,000 less $545,000) was made in favour of Mr Henville. The Full Court of the Supreme Court of Western Australia overruled the trial judge's award. According to the Full Court, even if the units had been sold at the agent's estimated price of $750,000, the venture would still have returned a loss ($114,000) in light of actual expenses incurred by the architect. Thus, said the Full Court, the project would not have been undertaken at all if proper costing had been undertaken by the architect. According to the Full Court, the agent's misrepresentation, therefore, was not the cause of the architect's loss, there was no causal connection between the agent's misrepresentation and the architect's loss and Mr Henville was not entitled to recover any damages.

Mr Henville, on appeal to the High Court, argued that he was entitled to recover at least the $205,000 damages awarded by the trial judge.

All judges of the High Court agreed that Mr Henville was entitled to damages. However, there was a marked difference of opinion between the majority and minority in the court as to the basis upon which these damages should be calculated.

The High Court Majority Judgment

The High Court leading majority judgment was delivered by Justice McHugh. Justices Gummow and Hayne agreed with his judgment.

Justice McHugh stated that Trade Practices Act damages involved common law concepts of causation[80]. But, said his Honour, this does not mean that common law concepts of causation should be rigidly applied without regard to the objects of the Trade Practices Act. The Act states that it should be interpreted in a way which promotes competition and fair trading and protects consumers. No doubt, said his Honour, common law concepts of causation will be adequate to apply in most

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80 Citing Wardley v Western Australia (1992) 175 CLR 514.

circumstances. But care must be taken to avoid a mechanical application of those principles.

His Honour cited prior authority [Gates v City Mutual[81]; Wardley v Western Australia[82]; Kizbeau Pty Ltd v WG & BR Pty Ltd[83] and Marks v GIO[84]] for the following principles of damages assessments under s.82 of the Trade Practices Act:

(i) In most cases, the measure of assessment of damages in tort is the appropriate guide to damages assessments.

(ii) In assessing damages, the courts are not bound to choose between the measure of damages in deceit or other torts and contract.

(iii) The central issue is to establish a causal connection between the loss claimed and the contravening conduct. Once such a connection is found to exist, nothing in s.82 suggests that the recoverable amount should be limited by drawing an analogy with contract, tort or equitable remedies although they will usually be of great assistance.

The question in the present case was, therefore, the extent to which Mr Henville had suffered prejudice or disadvantage as a consequence of adhering to a position created by the agent's breach of the Act.

To date no objection can reasonably be taken to his Honour's views. Where the disaster rating of this case is merited is in the application of the principles stated.

His Honour concluded that Mr Henville had lost $319,000. If the agent had not made the false representation, Mr Henville would have lost nothing. The loss of $319,000 was, therefore, directly attributable to the agent's contravention of s.52. His Honour also saw this conclusion as serving the purposes of the Trade Practices Act by permitting recovery of the actual losses incurred by embarking upon a course of conduct. In his Honour's view:

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81 n.70.

82 n.80.

83 (1995) 184 CLR 281.

84 (1998) 196 CLR 494.

- the measure of damages was not determined by reference to what Mr Henville would have received had the agent's representation been true;

- nothing in the Trade Practices Act supports the conclusion that damages under s.82 should be reduced because the loss could have been avoided by the exercise of reasonable care;

- there is no ground for reading doctrines of contributory negligence or apportionment of damages into s.82 damages assessments;

- questions of reasonableness may be relevant in assessing how much of a loss is occasioned by a contravention of the Act. But there was no unreasonable conduct engaged in by Mr Henville in incurring the costs which he did;

- a damages verdict of $319,000 served the purposes of the Trade Practices Act by permitting recovery of actual losses incurred by embarking on a course of conduct;

- losses to a consumer will ordinarily be greater than an amount recoverable by treating a misrepresentation as a warranty. An award of damages will, therefore, ordinarily be inadequate if made on the basis of a breach of warranty. The main purpose of the Act is to compensate a claimant for what he or she has suffered as a consequence of altering his or her position pursuant to the inducement of the false representation.[85]

Having said that Mr Henville was entitled to $319,000, his Honour awarded only $205,000. This was because Mr Henville had requested in his High Court appeal that the damages award of the trial judge ($205,000) be reinstated. He had not, in his High Court appeal, sought damages in excess of this sum.

The High Court Minority View

Chief Justice Gleeson and Justice Gaudron were of the view that only $205,000 damages could be awarded.

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[85] His Honour cited Toteff v Antonas (1952) 87 CLR 647, 650 as authority for this observation.

The view of the minority was that the agent was not required to underwrite all the losses of the project, regardless of how they were incurred. The agent's representations related to revenue, not profit. The costs were estimated by the architect. They were completely beyond the control of the agent. It was the conduct of the architect which resulted in those costs exceeding the original estimates. Chief Justice Gleeson said that Anderson J at trial was correct because:

> *"What he was seeking to do was to measure the causative effect of the misleading representation made by the respondents; and the method he employed, in practical effect, bound the respondents to make good those representations by awarding the appellants the difference between what the units would have sold for if the representations were true and the amounts for which the units were actually sold …"*

The disaster in the judgment

The disaster of the decision lies in the impact it must have. The case holds parties responsible for damages caused by matters they did not warrant and over which they have no control. The case also encourages non-responsibility for decisions taken. Parties in the position of Mr Henville can act irresponsibly in what they do in the knowledge that any losses caused by their actions can be recovered from another party.

The illogicality of the majority opinion can, in my view, be illustrated by a simple, and quite plausible scenario.

Assume an auction sale. The sale realises (on the figures of the case) $545,000. The agent immediately says:

> *"Sorry, Mr Henville. I said you would get $750,000. You only got $545,000. Here is my cheque for the balance of $205,000 ($750,000 - $545,000) to make my promise good and to ensure that you are not disadvantaged by what I said."*

Is Mr Henville then entitled to reply:

"I do not want $205,000. I want $319,000 because I underestimated the costs of development."?

Commonsense, which is stressed as a criterion of judgment by the majority, must dictate that the agent should be able to pay $205,000 and be fully relieved of further responsibility. Further, to this writer, there is absolutely nothing in the policy of the Trade Practices Act which would lead to a contrary conclusion.

Has the High Court accurately read community expectations under the Trade Practices Act?

In Astley v Austrust Ltd[86], the High Court was of the view that business and the community generally would prefer a contractual position where contributory negligence could not be pleaded and thus plaintiff parties could contractually recover all damages notwithstanding the fact that they were themselves responsible for aspects of these damages. That the High Court was wrong in this assessment of commercial and community mores is shown by the fact that all States and Territories speedily enacted legislation to reverse the High Court's decision in this regard. It will be interesting to see if the present case brings about a similar legislative reaction and s.82 of the Trade Practices Act, and akin State and Territory provisions, are amended to overcome the decision and to provide a statutory basis for the calculation of damages.

3. What should the damages position be?

The damages position would, in both Gates and Henville v Walker[87], have been appropriate if damages had been calculated on the basis that the representation made was true and compensation was awarded to reflect this position. This would effectuate the purposes of the Trade Practices Act. A warranty as to result is, in fact, all that a representor can, in all reasonableness, be asked to deliver. A calculation of damages on this basis would have given a remedy to Mr Gates and also have sensibly limited the quantum of damages in Henville v Walker.

There may be a case for an assessment of damages according to United States principles that the quantum of damages for misleading or deceptive conduct should be determined on the basis most favourable to the plaintiff. Should this view be taken, it seems, in light of Henville v Walker, that a qualification should be added to the effect that a defendant is not to be liable for those damages caused by the act of the plaintiff[88]. Such a situation would seem to comply with any relevant policy objectives which may be found to be within the purposes of the Trade Practices Act.

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86 (1999) 197 CLR 1.

87 See Gates n.70 and Henville v Walker n.78.

88 For United States principles of damages assessment see discussion in **PART III.1** under heading *Criticism of the Gates Decision*. In putting the proposition in the text, the writer does not purport to engage in a drafting exercise. The proposition put is in broad terms only and,

VII. PRICE EXPLOITATION[89]

Disaster Number Nine: The Enactment of the Prohibition against Price Exploitation

PART VB of the Trade Practices Act was introduced to counter so called "price exploitation" as a result of the introduction of the Goods and Services ("GST") Tax effective 1 July 1999.

The provisions are due to expire on 30 June 2002. They will thus not have any long term effect on the future of the Trade Practices Act. However, the legislation deserves its disaster rating simply because the price exploitation legislation was both disastrously conceived and disastrously implemented. The legislation has, however, one significant benefit. It should serve to warn off any future legislature which has ambitions of enacting legislation which enables the ACCC to poke and probe the basis on which every pricing decision by every business in the nation is made.

Initial general observations on PART VB

Some initial general observations must be made in relation to the price exploitation provisions of PART VB of the Act:

- If one wishes to counter inflation, there are, broadly speaking, two ways to do this. The first is to trust competition theory and actually believe that competition is an efficient regulator of prices. The second is to have bureaucratic regulations which impose various forms of price control or seek to implement price control formulae.

  Both the market and price control solutions to the problem of inflation are, no doubt, deficient in various ways. But relying upon competition theory does at least have one great advantage. It is $56 million cheaper![90]

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no doubt, needs fine tuning after detailed evaluation of the case law on the subject of damages.

89 Much of this material is commentary which the writer has previously made in "Competition regulation in Australia: a discussion of a spider web and its weaving" (2001) CCLJ 255 at pp.290-292.

90 $56 million represents the cost of implementation of the programme over three years – see D. Cousins, ACCC Commissioner: The Role of the ACCC in implementing the New Tax System Changes. A paper given to the 30th Annual Conference of Economists 23-26 September 2001. Published in ACCC Journal No. 36 (Sept-Oct 2001) pp.40-57.

Even if the competitive system has deficiencies, one might expect that any pricing control mechanism would be limited to entities having a substantial degree of market power, or that there would be some similar appropriate threshold test. There is no such test in the price exploitation legislation. Every sandwich shop in the nation is thus open to challenge on the basis that it has not complied with the ACCC Price Exploitation Guidelines.

- What was the overseas experience? Much of the "selling" of the price exploitation legislation was based on its importance in controlling inflation and claims that this was backed by overseas experience. At the time of the height of the ACCC's price exploitation activity, we have Professor Fels, ACCC Chairman, for example, asserting that:

> *"Evidence from other economies that experienced similar changes in taxation laws suggests that the price oversight regimes, such as the one being administered by the Commission, not only help a smoother transition, but lower inflationary impact."*[91]

Professor Fels' assertion as to the overseas benefits of price exploitation legislation is backed by no reference to legislation in any country. It is simply baldly asserted. Nonetheless, Professor Fels lectured to business which was critical of the legislation in the following terms:

> *"Quite a lot of business criticism (of price exploitation law and its enforcement) has been very short sighted. They are unable to see that the tax reform legislation couldn't be achieved without the public seeing a credible watchdog."*[92]

As the legislation wound down a year and a half later, the ACCC's Chief Price Exploitation Enforcer, Dr David Cousins was to state that:

> *"Overseas experience does not cast much light on the desirability or otherwise of prices oversight in response to major tax laws."*[93]

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91 A Fels "The Trade Practices Act – The past, the present and the future": A Paper given to the Trade Practices and Consumer Law Conference 27 May 2000.

92 Business Review Weekly 13 October 2000.

93 D Cousins n.90 above at p.43.

A definitive statement of the position in relation to overseas price exploitation legislation seems in fact to be that revealed by a study made by three trade practices practitioners who asserted that:

> *"in other jurisdictions, including New Zealand, where GST or similar indirect taxes have been introduced and where suppliers have been in a position to retain new tax savings, it has not been thought necessary to introduce special legislative provisions against price gouging."*[94]

Can one believe the assertions of the ACCC Chairman upon which the benefits of price exploitation have been sold politically and to the public? Where is the overseas substantiation of the need for the legislation?

A reliable source in the bureaucracy has told me that the whole price exploitation policy was conceived on Talk Back Radio when a Minister was asked what the Government was going to do about those businesses which exploited the new tax. Instinctively, the Minister threw the solution to the only place he could, on the spur of the moment, summon to mind – the ACCC – and said "We have the ACCC to ensure that does not happen". Of course, the ACCC, possibly contrary to the Minister's understanding of the situation, had no price exploitation control powers at the time. So PART VB of the Trade Practices Act was born. Given Australian politics, this seems to me a highly credible explanation of how it was all conceived.

- Law, in order to be effective, has to be certain. Only if this is the case can citizens comply with it and the ACCC secure convictions for breach with certainty. PART VB of the Trade Practices Act is far from certain. Section 75AU(2) of the Trade Practices Act declares that price exploitation occurs if a price is unreasonably high having regard alone to the New Tax System changes after taking into account costs, "supply and demand conditions" and any other relevant matters. The immediate conflict of principle, of course, is that a business which sells goods even at a highly inflated price is surely complying with "supply and demand" conditions although it may also be selling at what the ACCC might regard as "unreasonably high" prices. The whole interpretation of PART VB thus floats

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94 B Fisse, G Cass-Gottlieb and M Wijewardena: "The New Bitter? Price Exploitation under PART VB of the Trade Practices Act" (2000) 8 TPLJ 95, 96.

upon a sea of doubt. Because of this the ACCC was loathe to test the Act in court and used extra curial methods of enforcement – as is noted later.

- Because of the inability of the legislation to specify with precision what did or did not comply with it, the legislature resorted to two major draconian measures:

  - The ACCC was permitted to issue Guidelines. The ACCC was also permitted to issue notices which deemed a party prima facie in breach of PART VB. This provision meant, of course, that the ACCC was not required to prove that an entity came within the quagmire of s.75AU(2). The recipient of the ACCC's notice had to argue its way out of the quagmire; and

  - s.75AYA of the Trade Practices Act was enacted. This section imposed penalties of $10 million on a corporation and $500,000 on an individual who, in connection with the supply of goods or services made a misleading or deceptive statement about the effect or likely effect of the New Tax System changes. This provision contrasted somewhat dramatically with the penalty in other parts of the Act for making misleading or deceptive statements. Misleading or deceptive statements unconnected with the New Tax System carry no pecuniary penalty at all and give rise to a civil sanction only. Even those provisions of the Act relating to false representations carried, at the time, penalties of only $200,000 (for a corporation in breach) and $40,000 (for an individual in breach). In other words, if a corporation, in connection with the supply of goods or services, misleadingly stated the likely effects of the New Tax System, the penalty for transgression was 50 times higher than any other transgression of the consumer protection provisions of the Act. This inexcusable penalty provision had nothing to do with protecting consumers. It simply provided ammunition to the ACCC which enabled that body to arm twist compliance with Guidelines it was permitted to issue by threatening to take misleading or deceptive conduct proceedings, with accompanying highly disproportionate penalties, in the event that a business entity did not concur with its view.

The whole scenario was extremely heavy handed, to say the least. It is not known whether the Courts would have imposed the huge penalties provided in the Act. There is no doubt, however, that the ACCC used the quantum of these penalties *in terrorem* to achieve its goals.

What followed?

Predictably, what followed were ACCC Guidelines which went into minute detail in relation to those prices which could and could not be charged. It is not here intended to discuss these Guidelines apart from noting that they had two aspects:

- a "dollar margin" rule which said that business should not increase net dollar product margins on account of the New Tax System changes alone. The rule permitted firms only to increase prices by the net increase in taxes and costs from the New Tax System; and

- a "price rule" which said that no price should rise by more than 10 per cent on account of the New Tax System changes alone.

Without going into detail, it is immediately obvious from but a cursory study of the ACCC's guidelines that they are both complex and "cost oriented", not market oriented.

Those businesses, particularly small businesses, which did not calculate costs with precision but made market oriented pricing decisions ("What can I get for it?") were immediately in trouble. It cannot be overlooked either that, on occasions, even the ACCC had problems in understanding its own Guidelines.[95]

The ACCC points with some pride to the number of queries, complaints and investigations it conducted. To take some random examples, the ACCC points with pride to the fact that between 1 July 1999 and 30 June 2001, it answered 177,000 calls on its GST Priceline and Infocentre and investigated 6,200 GST related matters. It also obtained various orders and undertakings. Refunds of $10 million were paid to nearly 1 million consumers.[96] One has to ask if it was all worth it at an average refund of $10 per head. Generally speaking, the infractions were, it appears, not matters of any evil intent by business but simply cases where the complexity of the ACCC's Guidelines threw business into confusion. Thus, for example, Wholesale Sales Tax

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95 See, for example, "Gaffe fuels attack on ACCC": The Australian Financial Review 28 July 2000. The Review gives details of the ACCC being "red faced last night after a call centre staff member issued incorrect advice to a person enquiring about the tax treatment of new cars".

96 Cousins n.90 at p.51.

Reductions were not passed on "correctly" and GST was charged "incorrectly" in some cases. And, of course, some entities increased their prices more than 10 per cent in breach of the ACCC's Guidelines.[97] A lot of these infractions may well not have been offences at law. But they infringed the ACCC's Guidelines.

The manner in which the ACCC enforced the price exploitation provisions of the Trade Practices Act gave rise to considerable criticism. A Parliamentary Committee reviewing the ACCC's record in this regard[98] reported that:

- The Australian Retailers' Association was of the view that the ACCC had "overreacted to inadvertent errors by retailers" and that retailers had been singled out and victimised;

- The Australian Chamber of Commerce and Industry accused the ACCC of "prosecution by press release";

- Australian Business Limited said that there was a reasonable amount of fear about the ACCC's price exploitation powers;

- retailer Gerry Harvey accused the ACCC of acting in "a totally un-Australian way";

- former Trade Practices Commission Chairman, Bob Baxt, described the ACCC as a "bully" for its advocacy of the view that any price rise in excess of ten per cent was unlawful; and

- in June 2000, The Australian editorialised that the ACCC was "bullying business proposing price rises".

All of these claims were, predictably, rejected by the ACCC. Specifically, the ACCC denied that it "bullied" small business. However, the ACCC was on pretty shaky ground here because, as the Parliamentary Committee found:

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97 Cousins n.90 at p.51.

98 House of Representatives Standing Committee on Economics, Finance and Public Administration (D. Hawker: Chairman): Review of the Australian Competition and Consumer Commission 2001 p.45. The writer's views were also noted. These were recorded in the following terms:

"Professor Pengilley said that the ACCC's powers were 'heavy handed' and that in most sectors of the economy, the Government could rely upon competition to keep prices down."

"Organisations that are generally supportive of the ACCC are increasingly prepared to publicly point to a specific problem area. For example, the Council of Small Business Organisations of Australia is generally supportive of the ACCC but critical of its approach to the treatment of small business under the New Tax System arrangements." [99]

The ACCC misstatement of the law and its powers under it in order to assist it in its enforcement of price exploitation legislation.

Whatever the ACCC may say about its non-bullying, there is no doubt, on any objective evaluation, that it misstated the legal position in relation to price exploitation and then attempted a most unconvincing and unprofessional cover up of this point. All of this was aimed at the ACCC attempting to convince Australian business that it had powers which it simply did not possess. One could reasonably believe that the ACCC's actions constituted "bullying" but whatever word is used, they were quite improper.

I refer in the following comments to the ACCC's activities in relation to the second leg of its price exploitation Guideline i.e. to the ACCC's Guideline statement that no prices could increase more than 10 per cent as a result of the introduction of the New Tax System. The ACCC's so-called "price rule" states in unequivocal terms that:

"No price may rise by more than 10 per cent because of the New Tax System Rules."

The Goods and Services Tax is 10 per cent. The Treasurer promised that no prices would rise above 10 per cent as a result of the imposition of GST.[100] In January 2000, the Minister for Financial Services, the Hon Joe Hockey, said the 10 per cent limit was "our policy and that is the law". The statement, of course, could not cover all circumstances as the compliance costs of some entities (in some cases on a continuing basis by virtue of legal changes forcing managerial changes) plus the imposition of GST meant an increase of more than 10 per cent in prices if costs were to be recovered. There is nothing in the price exploitation provisions which prevents such costs being passed on. Nothing in the law specifically caps any price increase to 10 per cent.

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99 n.98 p.4.

100 Sydney Morning Herald, 2 May 2000. See also Senate Debates, Hansard, 11 May 2000, speech by Senator Sherry.

On 1 May 2000, Professor Fels conceded that the 10 per cent GST price cap had no legislative backing.[101]

One would have thought in light of the above that the ACCC would concede that prices may, in certain circumstances, rise, as a result of GST, more than 10 per cent. Clearly there would be cases when an increase of more than 10 per cent would not constitute price exploitation despite the statement in the ACCC Guideline that no increase in price could be more than 10 per cent.

This concession, however, was not to be. On 2 May 2000, the ACCC issued a media release under the heading "PRICING GUIDELINES ENFORCEABLE: ACCC". This media release stated:

> *"Claims that the Australian Competition and Consumer Commission pricing Guidelines are unenforceable are without foundation, ACCC Chairman, Professor Allan Fels said today."*

At least as far as the absolute 10 per cent limit on price rises is concerned, the ACCC's Guidelines are not the law and Professor Fels had conceded as much before the Senate Economics Legislation Committee the previous evening. This did not prevent the ACCC media release saying that:

> *"The ACCC is … firmly of the view that the 10 per cent limit on any one price rise protects consumers, is fair, enjoys public support and is valid. It will be enforced.*"

The ACCC's press statement of 2 May 2000 continued with the statement that:

> *"The Trade Practices Act 1974 requires the ACCC to issue pricing guidelines. The Guidelines thus derive their authority from the Act and are fully enforceable in the Federal Court."*

Just to make sure that we are in no doubt about it, the ACCC media release adds that "there is no question about their enforceability". This statement is wrong. The Act requires the ACCC to issue Guidelines. The Guidelines thus derive their authority from the Act. But they derive their authority in terms of the Act. The Federal Court

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101 For details of the appearance of Professor Fels before the Senate, see Senate Debates, Hansard, 11 May 2000, speech by Senator Sherry.

has to interpret the legislation. In doing so, it may "*consider*" the ACCC Guidelines.[102] The Guidelines are, however, far from "fully enforceable in the Federal Court".

If anyone was in doubt about the ACCC's views, the 2 May 2000 media release added ominously:

> *"The law and the Guidelines are backed up by penalties of up to $10 million per offence and the ACCC will have no hesitation in enforcing them."*

While the law is backed up by the stated penalties, the Guidelines certainly are not.

The ACCC media release then speaks of other issues, to some extent confusing these issues with the above statements as to the enforceability of the ACCC Guidelines.[103]

The disinformation publicity of the ACCC makes even bolder claims for the ACCC in relation to its GST powers. In subsequent publicity, the ACCC asserts:

> *"The ACCC can impose severe penalties for businesses that fail to pass on tax savings for lower prices – up to $10 million per offence for corporations, and up to $500,000 per offence for individuals."*[104]

We are now getting to the stage where the ACCC is quite blatantly and wrongly claiming powers which it does not have. The ACCC "can impose severe penalties" on no-one. It is the Federal Court of Australia which imposes any such penalties and the ACCC has to mount a case in that court to obtain a penalty. In fact, the ACCC kept clear of the Courts. To have the legislation subject to judicial interpretation may well have meant the collapse of the whole noble edifice, given the vague terms in which the Act was drafted. While bringing legal cases necessarily involves resource commitment and will be a selective process, imposing a penalty by administrative fiat has no such restraints. The impression given is that the ACCC will be able to deal

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102 Trade Practices Act s.75AV(4).

103 The media release speaks of the fact that the Guidelines did not depend for their status on any ministerial direction. (A political factor in the 10 per cent rule was that Minister Hockey had stated by a Media Release FSR/003 on 15 January 2000 that he had directed the ACCC to impose a 10% price cap. This direction had never, in fact, been issued). The media release also says that the most important element of the Guidelines relates to prices which are not in excess of 10% and that legal questions as to the validity of the 10% limit of any price rises "should not be confused with wider questions". Notwithstanding this, the media release states that the 10% rule is fair and valid and will be enforced.

104 ACCC Update "Special GST Issue" June 2000.

administratively with many cases and of its own motion impose penalties. This is certainly not the case.

A Parliamentary Committee of Inquiry noted that when criticism was made of the ACCC in claiming penalty powers which it did not have:

> *"… the reaction of the Chairman suggest(ed) an intolerance of criticism, even where it is well founded."*[105]

The Committee was concerned that other justified questions about the ACCC's performance were being similarly dismissed.[106]

Price Exploitation and Arm Twisting

> *"Arm twisting is a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a regulated entity."* [107]

Arm twisting or, as many regard it, regulatory bullying, can manifest itself in a variety of ways. The greater the regulatory power, the more credible an arm twisting threat is and the more likely it is that regulators will engage in the practice. No-one can bully from a state of perceived weakness. Arm twisting is particularly apparent in situations where:

(1) The regulator threatens widespread legal action against a particular section of the community whereas the facts are that it is never likely to take such action, or at least not take action to the extent threatened. The threat aims to make a particular person believe that enforcement is widespread when it is not and thus to coerce compliance with the regulator's wishes.

(2) The regulator consistently "talks up" penalty provisions in legislation with the effect that the community believes that even the most minor transgression of the law is likely to involve the maximum of penalties.

(3) The regulator may point *in terrorem* to powers which it has to serve notices which give prima facie validity to certain determinations it makes. These

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105 n.98 p.47.

106 n.105.

107 L. Noah, "Administrative Arm Twisting in the Shadow of Congressional Delegations of Authority" (1977) Wisconsin L Rev 73.

determinations may ultimately be court reviewable but the cards are stacked in favour of the regulator because of presumptions running in its favour.

(4) The regulator may state a legal position in its "Guidelines" which accords with its policy but is not the legal position at all. The regulator, by its position, convinces the party involved that the law is as it states and that it will enforce the law according to its view.

(5) The regulator actually issues court processes but, because of doubts in the regulator's own case, then "settles" the matter after lengthy pre-trial proceedings. The party proceeded against has little option but to settle. However, it will have incurred significant costs, legal and otherwise, which will not generally be recoverable. The threat of this action, and the knowledge that the regulator has engaged in such tactics in previous cases, may itself be enough for the regulator to win the day. Further, the fact that legal proceedings are pending has a deterrent effect on others who may believe that they can act lawfully but are concerned at the regulator's pending action. In this way, the regulator can often achieve its objective but the legal correctness of its views is never tested.[108]

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[108] The writer believes that the Video Ezy Case illustrates this point in the price exploitation area – see W.J. Pengilley – "The Video Ezy Case settled: ACCC price exploitation contrasted with the realities of settlement", 17 Australian & New Zealand Trade Practices Law Bulletin pp. 9 – 11. This article sets out the ACCC's "allegations" which were, to say the least, extensive compared with the reality of settlement which involved a possible error in one store. In its Press Release of 26 May 2000, announcing the institution of proceedings, the ACCC announced that it was alleging price exploitation in 21 of the 33 Video Ezy corporately owned stores; that it was also investigating Video Ezy franchisees; that proceedings also joined the Video Ezy general manager, a director and a senior manager and that the price exploitation involved was not the result of junior staff errors but reflected the policy of Video Ezy management. The announcement said that the ACCC was seeking pecuniary penalties and that these could be up to $10 million for a corporation and $500,000 for an individual. The case was settled and the terms of settlement were that the ACCC discontinued its price exploitation claims; that there were no further enquiries in relation to Video Ezy franchisees; and that Video Ezy conceded that its staff may have made some misrepresentations in its Townsville store. No penalty was sought. Video Ezy gave certain discounted TV rental to any customers who could substantiate that they had been misled. Even though the ACCC had issued a price exploitation notice (deeming Video Ezy prices prima facie unreasonably high) this notice was not proceeded with, and hence not legally tested. Commissioner Cousins outlined what was probably the true function of this notice, when he said that "it greatly heightened business awareness of the price exploitation laws", i.e. its chief function was publicity. (See Cousins n.90 p.51). The writer expressed the view in October 2000 (i.e. after the institution of the Video Ezy Case but before its settlement) that the ACCC issue of price exploitation notices was primarily an in terrorem weapon and that cases the subject of such notices would be settled as the ACCC did not want the price exploitation law legally tested.

(6) The regulator uses publicity which can often imply, if not specifically state, that a party has breached the law without this fact ever being finally demonstrated, or required to be demonstrated. Any threat of adverse publicity can be a formidable regulatory weapon. The credible threat of such publicity can often coerce acquiescence to the regulator's view.[109]

Enforcement of regulatory authority by arm twisting is, by definition, bad regulatory enforcement. On any objective valuation, all of the above factors occurred in the ACCC's regulation of price exploitation.

Did the Price Exploitation Legislation do any good?

Perhaps the price exploitation legislation was politically useful. However, in my view, it brought the ACCC into considerable disrepute. The lesson to learn is that if a regulator is given the power to issue notices with reverse onuses of proof and is generally given power to "arm twist", then the regulator will assuredly do just this, whatever claims to benevolence it may publicly make.

The need for price exploitation legislation was never established from overseas experience though it was sought to be sold politically and publicly on this basis.[110]

Neither small business nor big business endorsed the price exploitation legislation or the ACCC's enforcement of it.

Did the price exploitation legislation achieve anything in budgetary or economic terms? It is possible that it did but it is certainly not an achievement that is measurable or has been measured. ACCC Commissioner, David Cousins, seems to believe that the ACCC's enforcement of price exploitation legislation may have contributed to keeping down inflation but he also cites economic conditions as being an important factor in this. He noted that, in any event, any effect of price exploitation legislation was exhausted in about 15 months.[111] The 2001 House of Representatives Committee Review of the ACCC noted that inflation after the

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[See W. Pengilley (2001) 8 CCLJ 225,292.] Deacons, to which firm the writer is Special Counsel, acted for Video Ezy in this case.

109 These comments also apply to the Video Ezy Case – see details n.108.

110 See n.91.

111 n.90 pp.66-67.

introduction of the New Tax System was 2.5 per cent compared with budget estimates of 2.75 per cent. However, the Committee was unable to draw a conclusion as to whether this was the result of economic conditions or the ACCC's enforcement of price exploitation law. In any event, it is, of course, by no means unusual for budget estimates to be out by 0.25 percent.

Price exploitation: conclusions

To treat perceived pricing and misallocation of resources problems by imposing price control formulae is like treating jaundice by painting the patient pink. The price exploitation legislation was wrongly conceived as a solution to such problems. In fact, it led only to the creation of a new set of problems involving questions of enforcement credibility and due process. It cannot be asserted dogmatically, as Professor Fels has done, that a watchdog was needed and that overseas experience supported this view.[112] Both legislators and the public should regard unsubstantiated assertions of this nature as somewhat suspect.

Never again should we enact laws which permit regulators to second guess every pricing decision of every business in the nation. The legislation did not work. It will cease to have effect on 30 June 2002. Nonetheless, it deserves a Top Ten disaster rating in this article in order that its lessons are not forgotten and lest there be a temptation to repeat that which proved both impractical and ineffective and was delivered only at considerable social and commercial cost.

VIII. THE SWANSON COMMITTEE'S DECISION NOT TO ANSWER REFERENCE 2

Disaster Number Ten: The Swanson Committee fails to comment on the drafting of the Act

The Swanson Committee was constituted on April Fool's Day 1976[113] by the then Minister for Business and Consumer Affairs, the Honourable John Howard. Its prime reference was to report on whether the Trade Practices Act was achieving its purpose and/or whether it was causing unintended difficulties or unnecessary costs to the Australian public and Australian business. The Committee was also to enquire

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112 n. 91 and 92.

113 This is no disparagement of the Minister or of the Swanson Committee. However, one cannot let such coincidences go unnoticed.

whether the Act inhibited, or was likely to inhibit, economic recovery contrary to the economic objectives of the Government.

The Swanson Committee's Second Term of Reference reads as follows:

> *"2. The Committee should pay **particular attention** to the need to ensure that the Trade Practices Act is sufficiently certain in its language to enable persons affected by it to understand its operation and effect so as to be reasonably able to comply with its obligations in the ordinary course of business."*
> *[Present writer's emphasis.]*

The Swanson Committee reported in August 1976[114]. Far from paying ***"particular attention"*** to Reference 2 as directed by Minister Howard, the Swanson Committee made no specific recommendations at all as to what might be done in relation to the problem set out in such reference.

I would have interpreted Reference 2 as an invitation to the Committee to re-write the Act, or suggest that it be rewritten, in what is now termed "Plain English" style. To be fair to the Swanson Committee, however, this form of drafting was not generally either known or embraced in Australia in the mid 1970's. Indeed, the first Law Reform Commission Report on the subject was that of the Victorian Law Reform Commission and this was in 1987, some 11 years after the Swanson Committee Report.[115]

The result of all this is that Reference 2 of the Swanson Committee's 1976 terms of reference is still unanswered.

I believe that the drafting of the Trade Practices Act is a matter which merits disaster status. The Act is certainly incomprehensible to those who have to comply with it in the ordinary course of business. Whatever may be the detailed problems of competition policy, there is no excuse for further confusing these by creating problems of grammar and construction. Plain drafting may also assist in clarifying policy problems themselves because a policy well defined (as would be required by Plain English drafting) is a policy problem half solved.

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114 Trade Practices Review Committee (T.B. Swanson: Chairman): Report to the Minister for Business and Consumer Affairs, August 1976.

115 Law Reform Commission of Victoria: Plain English Drafting and the Law (30 June 1987).

It is not difficult to highlight the drafting problems of the Trade Practices Act. Perhaps the most central restrictive trade practices prohibition is that of price fixing. This practice is prohibited by s.45 and s.45A, the latter being the most relevant section. Section 45A has 6 subsections. In order to illustrate the obfuscatory nature of the drafting of this section, the four most fundamental of these subsections are set out as a footnote to this article.[116]

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116 **45A(1)** Without limiting the generality of section 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

45A(2) …

45A(3) (repealed 17 August 1995)

45A(4) …

45A(5) For the purposes of this Act, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only of:

(a) the form of, or of that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding; or

(b) any description given to, or to that provision of, the contract, arrangement or understanding or the proposed contract, arrangement or understanding by the parties or proposed parties.

45A(6) For the purposes of this Act but without limiting the generality of subsection (5), a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall not be taken not to have the purpose, or not to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services by reason only that the provision recommends, or provides for the recommending of, such a price, discount, allowance, rebate or credit if in fact the provision has that purpose or has or is likely to have that effect.

45A(7) For the purposes of the preceding provisions of this section but without limiting the generality of those provisions, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed to have the purpose, or to have or to be likely to have the effect, of fixing, controlling or maintaining, or providing **for** the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied as mentioned in subsection (1) if the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, such a price, discount, allowance, rebate or credit

It should be noted that[117]:

- s.45A(1) has one sentence consisting of 152 words and 22 commas;

- s.45A(5) has one sentence (admittedly with two subparagraphs) consisting of 125 words and 20 commas. This subsection also throws in some delightful "double negatives" [a contract, arrangement or understanding shall "not be taken not to have the purpose, or not to have … the effect"] which make it even more incomprehensible;

- s.45A(6) has one sentence containing 119 words and 20 commas. Section 45A(6) also has confusing double negatives incorporated in it; and

- s.45A(7) has one sentence containing 185 words and 27 commas.

No person would write in this style with the intention of conveying a message. The task of the Parliamentary Draftsperson is surely to convey a message. The Parliamentary Draftsperson's failure to do this means that the Act is a drafting disaster.

There are also other areas which stand out as drafting disasters. The section numbering of the Income Tax Act, for example, has now descended into the Trade Practices Act. Section 44ZZQ and its kindredly numbered sections are a numerical abomination. The drafting style is not even consistent throughout the Act. For example, PART X of the Act has but one major section number (s.10) though this sections runs from 10.01 to 10.93.

To redraft the Act does not involve a weakening of it. Likewise, concepts such as "competition" and "markets" are difficult ones employing principles of decided cases and requiring application of these to diverse factual situations. Redrafting of the Act will not make many of the substantive principles of law any easier to interpret. But at least the Act should be able to be read and understood as a piece of soundly

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in relation to a re-supply of the goods or services by persons to whom the goods or services are or would be supplied by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them.

117 The writer has attempted to count words and commas accurately. He begs the indulgence of the reader should he have made minor counting errors.

constructed prose and grammar. Problems of grammar should not be added to what are, undoubtedly, difficult enough concepts in any event.

It is my view that compliance suffers greatly simply because many in business cannot understand the edicts to which they are subject. There is no reason why this should be. It is a disaster that this is the case. Prime Minister Howard should ensure that the Second Reference he gave to the Swanson Committee in 1976 is also given to the Committee of Inquiry he announced in 2001. This time he should ensure that the Inquiry answers the reference given.

IX. WHAT ARE THE LESSONS?

Despite the frivolous introduction to this article,[118] it was written with positive intent. I thought that, if I could identify the ten worst decisions made in relation to the Trade Practices Act, this would show at least some important areas in which the Act could be considered for amendment – an important matter in light of the inquiry to be conducted this year.[119]

The analysis is this article has shown that any rethink of the Trade Practices Act is more than mere massaging of its wording. There is fundamental re-evaluation to be done.

The problems of decision makers must be addressed: What about framing injunctive relief as a pre-requisite to success?

The prime thing that comes out of this article is the apparent incapacity, or unwillingness, of the courts to look at the problems of the decision maker at the time of decision. Conduct which seems to comply with the law and makes perfect sense to the business executive at the time of decision making may, however, be condemned in generalistic and often moralistic terms when it is painstakingly legalistically dissected within the cool cerebral confines of our justice system some years later.

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118 See **PART I**.

119 See announcement by Prime Minister Howard on 15 October 2001 in a Press Release entitled "Securing Australia's Prosperity". The Press Release stated that the Inquiry would be under an independent Chairman and would report by August 2002. This timetabling must be considered highly doubtful in view of the fact that, at the time of writing (15 February 2002), neither the terms of reference for the inquiry nor its Chairman have been announced.

This may be a problem inherent in the delivery of all justice. However, it behoves our legislature to enact laws which are reasonably certain in nature. Only then can decision makers act within the law.[120]

Manifestly the trade practices law is, in many respects, not certain. It is bad law which says, as does Queensland Wire,[121] that you must deal but which is incapable of laying down the terms and conditions which will satisfy this demand. It is bad law which says that BBM must not charge certain prices but is quite incapable of specifying with reasonable certainty what prices may be charged.[122] Given these circumstances, it seems to me to be quite wrong for the law to condemn that which the Courts cannot themselves articulate.

Perhaps a good first step in all trade practices proceedings, whether civil, criminal or seeking pecuniary penalty, would be to require the party initiating proceedings to draft with precision the form of injunctive relief it would require if it were successful – and to do this whether or not it actually seeks injunctive relief in the proceedings. If it is not possible to draft such relief with precision, then the proceedings might well be considered for early dismissal on the basis that no restrainable breach can be articulated. Such a test would have meant, in my view, that proceedings in **Disaster Two** (The South Sydney Case);[123], **Disaster Three** (Queensland Wire);[124] and **Disaster Four** (Boral)[125] would have been unsuccessful. In my view, all of these cases deserved a verdict in favour of the defendant. The suggested pre-requisite of requiring an initiating party in an action (whether the action is for damages, pecuniary

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120 The Courts have stated certainty as being a prime principle of interpretation of the Trade Practices Act. See N.Z. Telecom and Melway: n.35 and related text.

121 See discussion in **PART III.1**.

122 See discussion in **PART III.2** and in particular text in relation to n.42 to n.50.

123 See discussion in **PART II.2**. An injunction was issued in the South Sydney Case (see text relating to n.16). However, the writer believes that this injunction does not comply with the requirements articulated by the High Court in Melway (see n.19 and related text).

124 See discussion in **PART III.1**.

125 The Boral Case was brought by the ACCC seeking an order for pecuniary penalty. Questions of drafting an appropriate injunction were not, therefore, of prime importance in the case. However, requiring the ACCC to engage in the drafting of such an injunction would have been a salutary exercise. It would have required the ACCC to state specifically how the pricing practices of BBM infringed s.46. In the writer's view, they clearly did not so infringe. Had the ACCC been required to state specifically what pricing practices would have complied with s.46, the writer believes that non-infringement of s.46 would readily have become apparent.

penalty or injunctive relief) to draft specific injunctive relief, and be successful in such specific drafting as a pre-condition to a verdict, would, in my view, have readily demonstrated that those cases were unmeritorious.

Specific legislative remedies suggested by this Study

Section 46 cries out for legislative remedy to give to it greater certainty and to clarify issues of "cost", "recoupment" and other specific issues related to predatory pricing. The areas where s.46 should be amended have been discussed in relation to the commentary on Queensland Wire and Boral. The issue of a specific remedy being capable of being articulated (discussed immediately above) may seem extreme, and is certainly novel, but it may have a considerable amount of merit.

Three other specific points in relation to legislative amendments which arise from this study are:

- Section 4D is wrongly drafted in principle. Had the Parliamentary Draftsperson stuck to the U.S. law or what the Swanson Committee recommended instead of engaging in legislative overkill, our law would be wise. Instead it is distinctly otherwise. New Zealand has corrected this drafting problem in its Commerce Act. We should do likewise.[126] The suggested amended drafting would also necessarily have meant that **Disaster Two** (The South Sydney Case) would not have occurred.

- It is time we either condemned or blessed third line forcing. At least a definitive policy should be implemented.[127]

- The question of damages assessment in the High Court has led to two disasters [**Disaster Seven** (The Gates Case)[128] and **Disaster Eight** (The Henville v Walker Decision)[129]]. The Australian Law Reform Commission has recommended a change in the calculation of damages under s.82. This should be done, bearing in

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126 See discussion **PART II.1**.

127 See discussion **PART IV**.

128 See discussion **PART VI.1**.

129 See discussion **PART VI.2**.

mind the need to account for the decision in Henville v Walker in the drafting of any legislative provisions.[130]

Attitudinal matters which will determine the future of a number of trade practices law and policy issues

Three attitudinal matters have been highlighted in this study:

- Homage should not be shown to Reports without reading the whole of the text of such Reports. It is thus simply wrong to accept axiomatically that the Cooney Committee has put to sleep any controversy in relation to the appropriate merger test. The Cooney Committee did not, in fact, make definitive findings. It made a value judgment and itself conceded that there was no real evidence for what it concluded. It is not "raking over old coals", as the ACCC would perhaps have us believe, to revisit the merger threshold test in light of experience since the Cooney Committee Report. The tragedy of Cooney is that it made definitive findings without evidence and the ACCC wants to regard its findings as ending debate on the matter. There is no warrant for this approach.[131]

- The Price Exploitation legislation has delivered very little benefit. But it has come at considerable expense, both governmental and private. Enforcement of the law has been based on the ACCC's elliptical view of the legal position and its public statements in relation to such view. Government should learn from this and never again enact legislation permitting the bureaucracy to set guidelines for, and then /to pry into, the pricing decisions of every business in the nation.[132]

- The Trade Practices Act needs redrafting in Plain English terms. Perhaps such a redraft will suffer the same fate as the redrafting of taxation legislation. There was considerable plain English redrafting of the Income Tax Act but such redrafting has also been accompanied by the enactment of new and amending legislation drafted with great haste to meet parliamentary exigencies. New and amending legislation has been drafted in the traditional convoluted obfuscatory style. Unfortunately, the amount of new legislation far outweighs the rate of re-drafting

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130 See discussion **PART VI.3**.

131 See discussion **PART V**.

132 See discussion **PART VII**.

of the old. Though some may say that this is reason enough not to start re-drafting the Trade Practices Act, my own view is that this is extreme negativity. It is, in any event, possible that the Trade Practices Act will not suffer the same rate of amendment as the Income Tax Act and so a re-draft of the Trade Practices Act may even be able to be completed.

- The drafting style of the Trade Practices Act, and the incomprehensibility of the Act as a result of such drafting style, was recognised by Government as a problem in 1976. The situation has not improved since then. Indeed, the problem has been considerably magnified since then. It is time to make a start in solving this longstanding difficulty in understanding, and thus in complying with, the law.[133]

The 2002 Inquiry has a lot to consider. It is hoped that some of its terms of reference relate to matters raised in this Paper.

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[133] See discussion **PART VIII**.