SUPPLEMENTARY SUBMISSION TO THE 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

35 Skelton Street
HAMILTON NSW 2303

PROFESSOR WARREN PENGILLEY
B.A., LL.B., M. Com, J.D., D. Sc.
FCPA, FAICD, AFAIM

Phone : **(02) 4961 1534**
Mobile: **0414 263 229**
Fax: **(02) 4962 3921**
Email: **wpengill@mail.newcastle.edu.au**

26 June 2002

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

SUPPLEMENTARY SUBMISSION TO THE TRADE PRACTICES ACT REVIEW COMMITTEE

1. In my initial submission to the Committee dated 14 June 2002, I highlighted at pp.10-33 the issues relating to the addition of an "effects test" to s.46. In general terms, I believe that the addition of an "effects test" would be counter productive.

2. The "effects" test is fulsomely advocated by the Australian Competition and Consumer Commission. Yet this advocacy has not been consistent and has certainly been less enthusiastic in the past than at present.

3. The ACCC has itself seen detriments in the addition of an effects test. The Committee should be aware of this.

4. I draw the attention of the Committee to evidence given by Professor Fels to The Joint Committee on the Retailing Sector on Tuesday 13 July 1999. Professor Fels' evidence in relation to the addition of an "effects test" is at pages 1161 to 1162 of the Hansard Transcript of hearings on 13 July 1999. This evidence is set out verbatim as an Attachment to this Supplementary Submission. I have not yet seen the submission of the ACCC to the Committee but it may well not refer to this evidence of the Chairman. I think it is important that the Committee take such evidence into account when evaluating submissions made by the ACCC.

5. A summary of the points noted by Professor Fels in relation to an effects test is as follows:

   - There is an effects test in relation to telecommunication but this was because "Telstra had such huge market power". There are a number of factors set out by Professor Fels as to why an "effects test" was thought appropriate in relation to Telstra but may not be appropriate in the case of other entities.

- There is help to the ACCC in relation to proving "purpose" because this can be inferred.

- An effects test might have to be linked with some kind of authorisation procedure.

- Possibly one would have to limit an effects test by saying:

  "This is a new powerful law. Maybe only the ACCC should be allowed to apply it."

- "There are some people who say:

  We are getting into deep water. Let us apply it to specified areas – telcos and maybe one or two other areas.

  It tends then to make who is declared and who is not declared a bit of a political business, and all sorts of factors start creeping into who does or does not get declared."

- Some points against an effects test are:

  – that it is a considerable strengthening of the section and it may be too intrusive and too interventionalist for many tastes. The purpose test, for all its imperfections, is a way of ensuring that s.46 is not carried too far.

  – there are dangers in carrying s.46 too far because one problem is that it can deter genuinely pro-competitive behaviour. An effects test could take the edge off the incentive for firms to compete keenly on price and other dimensions.

  – an "effects test" is also likely to create greater uncertainty for business.

  – a purpose test is far less likely to catch unintended behaviour. In other words, a firm may innocently be competing and unknowingly breach s.46 if an effects test is added to the section.

  – every time s.46 is strengthened there is a double effect because of private actions. If you are a hawk on this matter, the increase in private actions will delight you. But it is possible that s.46 could be used for tactical and anticompetitive reasons to stop competition.

6. From the evidence of Professor Fels, only the following points arise in favour of adding an effects test to s.46:

   - it would be more logical in some respects. There is a presumption of law that if something is anticompetitive, it is undesirable.

   - it would put beyond doubt that s.46 is about protecting <u>competition</u> and not about protecting <u>competitors</u>. But the High Court in <u>Queensland Wire</u> "made it pretty clear that the test is really largely about the effect on competition".

7. The above evidence leads to the conclusion that Professor Fels, as at 13 July 1999, thought that an "effects test" was introduced to telecommunications control only to combat Telstra market power and that there may be a case for it only in specific areas. However, the decision as to which industries would be covered by s.46 would have considerable downsides. Professor Fels thought that an authorisation process could well be necessary if an effects test were introduced and that there were

dangers of carrying the section too far and discouraging competition. He canvasses the position that only the ACCC should be permitted to enforce s.46 with an "effects test". He concedes greater uncertainty as a result of an "effects test" and that such a test could be used in private actions for tactical and anticompetitive reasons.

The above points are reason enough for the non-introduction of an effects test into s.46. They are put by the person who now is the chief advocate of such a test. I believe they were put at a time of more objective evaluation of the position and prior to the time when adding an "effects test" to s.46 became part of the ACCC's "agenda".

8. Professor Fels speaks about evidentiary problems but not at length. In any event, of course, there are considerable statutory provisions existing which assist plaintiffs in this area. Professor Fels acknowledges this. The only point of substance in favour of an effects test raised by Professor Fels in his 1999 evidence is that such a test could ensure that the section applied to protect competition rather than to protect competitors. He, however, concedes that the section has been largely interpreted this way at present. There is merit, in my view, for making the point clear but the way to do this is not to introduce an effects test. It is to introduce a short definitional section which could apply to the Act overall such as:

> "In interpreting any lessening of competition, the court is to evaluate the lessening of competition in the context of the competition process as a whole and not in relation to the position of any particular competitor in such process."

[This is not put forward as a technical drafting provision but merely to indicate the principle involved. Perhaps a simple statement such as "This Act is aimed to protect the competitive process as a whole and is not aimed at protecting the position of any particular competitor" might be more appropriate.]

There is also much obviously to be said in this context for the repeal or substantial amendment of the present s.46(1)(a) (illegalising conduct within s.46 if it eliminates or substantially damages a competitor). This test of s.46 illegality is an invitation to the Court to interpret s.46 as a section protecting a competitor rather than as a section protecting the competitive process as a whole.

9. I submit that the Committee should accept the evidence of Professor Fels given on 13 July 1999 and conclude from it that there is no case for introducing an "effects test" into s.46.

(Warren Pengilley)

ATTACHMENT

EVIDENCE OF PROFESSOR FELS TO THE JOINT COMMITTEE ON THE RETAILING SECTOR

Thursday 13 July 1999

Pages 1161-1162

TRANSCRIPT – EVIDENCE – JOINT SELECT COMMITTEE ON THE RETAILING SECTOR

13 July 1999

PAGE 1161
" . . . . . .

CHAIR – Could we move for the moment off the cap and talk about the effects proposal, rather than purpose, under section 46.

Prof. Fels – There is an effect test now in regard to telecommunications in part 11B of the act. That was put in by the parliament because it considered that Telstra had such huge market power – it is an incumbent; it started off with a huge market share; it controls a network facility; it is vertically integrated; it has a big established customer base. We have an effects test there, but not elsewhere. Going to section 46, as you know, we have a purpose test. There is some help in the test, in terms of provisions that the parliament has put in, to infer purpose from effect, but at the end of the day there has to be a purpose; the court has to be satisfied that there is a purpose. Parliament has made it a little easier for it to conclude there is a purpose by putting in the explicit comment about inferring it.

The argument for the effects test is that it would be a more logical test in some respects. Our concern, on the whole, in competition policy is with the effects of actions. If actions are taken which have the effect of substantially lessening competition, then, on the whole, we think that is an undesirable development in our economy. Of course, it is true that we sometimes authorise those things. But, putting that to one side, there is a presumption in the law that if something has an anticompetitive effect, then it is undesirable. So that law would go further than the somewhat constrained section 46 that we had, with the hurdle, as it were, that purpose must be proved. So some people are sufficiently concerned about the problems of market power and of big players in the economy. They are concerned about the increase in concentration in some areas that has grown up over the years and would want to see a stronger effects test.

There is also another advantage: that it would put beyond doubt, once and for all, that section 46 is about protecting competition, not competitors, if it replaced 46 rather than were additional to it, because 46 does not talk about competitors, although it is also true that the High Court in the Queensland Wire Industries case made it pretty clear that the test is really largely about the effect on competition. Another advantage is that it would reduce problems of proof in court. There are problems in finding proof of evidence. One comes across anticompetitive conduct, and that is only part of the story. One has to be able to find evidence. In the BHP case it turned out that there was quite a lot of evidence, after a search of company documentation and so on, about anticompetitive purpose.

An effects test might have to be linked with some kind of authorisation provision, because there are some forms of behaviour that are anticompetitive but which might be authorisable. At the moment there is no authorisation available under the section 46 test. Possibly one would limit it by saying, "This is a new, rather powerful, law. Maybe only the **[PAGE 1162]** ACCC should be allowed to apply it, " and we would see how things would go for a few years. I will come back to the question of private litigation in a moment, in the case against this. There are some people who say, "We are getting into deep water. Let us just apply it to specified areas – telcos and maybe one or two other areas." It tends then to make who is declared and who is not declared a bit of a political business, and all sorts of factors start creeping into who does or who does not get declared.

Some points against an effective tests are that it is a considerable strengthening of section 46 and it would be too intrusive and too interventionist for many tastes. Over the years there

is no doubt that parliament and governments of all persuasions have not wanted to take that step of putting an effects test into the act, because they have just felt it would go too far. The purpose test, with all of its imperfections, is a way of making sure that section 46 is not carried too far. There are dangers in taking section 46 too far, because one always has the problem that it can deter genuinely pro competitive behaviour. Just take the famous price cutting matter. There is always an issue as to whether price cutting is good for consumers. On the face of it, one would think so. But an effects test could take the edge off the incentive for firms to compete keenly on price and other dimensions.

It is also likely to create greater uncertainty for business. That is compounded by the fact that section 46 in its present form, because it has a purpose test, is far less likely to catch unintended behaviour. In other words, a firm may innocently be competing and unknowingly breaching a section 46 effects test. So firms may unintendedly do anticompetitive things – the big fish wags it tail and, without knowing it, wipes a small player and, in doing so, breaches the law. So there is that kind of consideration.

Another matter is that under section 46 there is a right of private action. So, every time section 46 is strengthened you get a double effect. You get more vigorous enforcement action, because if the commission did not act – and there are a number of reasons why we do not act – then you may get more private actions. If you are, so to speak, a hawk on this matter, you will be delighted at the prospect that there would be a lot of private action under section 46. But it is also possible that actions under section 46 can be used for tactical and anticompetitive reasons to stop competition. So there are some concerns about the private uses that can be made of section 46 if taken too far.

There are a few opening points on it. As I said, there are further questions as to whether this is to add on a new provision or to replace a provision – I guess it would be to add on – and also whether it would be limited to public action, whether there would be authorisation and, possibly, no penalties, maybe to see how things go. Because the intent may not be there – it may be the accidental result of behaviour by businesses – the arguments for penalty may not be so great.

. . . . . ”