TRADE PRACTICES ACT REVIEW

SUBMISSION BY A I TONKING

I wish to make the following submission in relation to selected topics in the Committee's Terms of Reference. I have no objection to the submission being treated as a public document.

1. <u>Objectives</u>

   A sound competition law must endeavour to meet two principal objectives;

   - to protect the competitive process, by preventing conduct which interferes with that process,

   - to provide as much certainty as possible as to its operation, consistent with the first objective.

   The second objective is referred to in the opening statement to the Committee's Terms of Reference, and repeated in paragraph 1(e).

2. <u>Paragraph 1(a)</u>

   2.1 My comment here relates to the procedure for authorisation for acquisitions which might contravene section 50 of the *Trades Practices Act* ("Act"). I believe the authorisation procedure for mergers is under used. The public benefit test in section 90 (9A) the Act requires the Australian Competition and Consumer Commission ("ACCC") to take into account "all other relevant matters that relate to the international competitiveness of any Australian industry". This adequately deals with the matter raised in paragraph 1(a), but only if authorisation is sought.

   2.2 The reason few authorisations are sought may be that a grant of authorisation may be set at nought by a person who has a "sufficient interest" and who is dissatisfied with the ACCC's determination: section 101(1) and (1AA). Professor Baxt, among others, has long advocated that an applicant for authorisation of an acquisition should have the option for applying to the Australian Competition Tribunal ("Tribunal") in the first instance. The Tribunal is required to deal with a review of a merger authorisation determination by the ACCC within sixty days (which may be extended): section 102(1A) and (1B). A similar period should be allowed for a determination where a person applies to the Tribunal in the first instance. This would provide the applicant with finality, since there is no provision for appeal on the merits, and review of a decision of the Tribunal is a rare occurrence.

3. Paragraph 1(b)

3.1 Consideration of section 46 of the Act takes place against the background of the recent High Court decision in *Melway Publishing Pty Limited v Robert Hicks Pty Limited* [2001] HCA 13 ("Melway") and the appeal in *ACCC v. Boral Limited* (2001) FCA 30. There has been public discussion about an "effects test" which does not make clear whether the proponents of such a change would preserve the remaining elements of section 46 or envisage a wider change.

3.2 The High Court in *Melway* made it clear that section 46 is concerned with harm to the competitive process, not harm to individual competitors: *Melway* at 17[1]. Moreover the respondent's conduct was to be assessed by reference to what it would be likely to do in a workably competitive market, not in a situation of perfect competition[2]. These observations, taken with the approach in *Queensland Wire,* appear to add a judicial gloss to the statutory language, which is concerned with particular competitors or new entrants. The latter (literal) reading would produce a result at odds with the first objective propounded above and should not be accepted.

3.3 The same public discussion refers to the supposed difficulties in establishing a contravention of section 46 because of the need to prove purpose. Sub-section 46(7) permits the existence of the requisite purpose to be inferred from other relevant

1 At paras 37 and 38 the Court refers to the "anti-competitive purpose" proscribed by section 46.

2 At para 52.

circumstances. Having said that, it is not entirely clear why, speaking generally about competition laws, the existence of a purpose to harm a competitor should be subject to sanction if the purpose is not achieved. If the purpose has been achieved, an effects test would suffice, and indeed sometimes the existence of the purpose will be inferred from the effect. These comments probably apply with even greater force to sections 45 and 47 which include purpose as well as effect. Having regard to the perceived difficulty of establishing one of the purposes proscribed by section 46, it is unlikely that a case for contravention would be instituted unless the evidence established at least some use of market power and probably some actual anti-competitive harm. In this sense the requirement of "purpose" in section 46 may be seen as a filter rather than a condemnation of the mere existence of a predatory purpose without more. This seems to be what the Blunt Committee had in mind in its 1979 Report [3] when it said:

> "*It is only purposive misuse of market power and not inadvertent conduct or efficiency inspired conduct that should be at risk . Accordingly we recommend that the purposive element should remain because we consider it is fundamental to a provision dealing with misuse of market power.*"

The need for such a filter is increased as a result of the High Court ruling in *Queensland Wire* that the words "take advantage of" do not require conduct which is predatory or morally blameworthy.

On the other hand the US Seventh Circuit Court of Appeals has observed:

> *"Almost all evidence bearing on 'intent' tends to show both greed-driven desire to succeed and glee at rival's predicament…[but] firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition…Intent does not help to separate competition from attempted monopolisation and invites juries to penalise hard competition."*
> *AA Poultry Farms v. Rose Acre Farms* 881 F 2d 1396 at 1401-1402 (1989).

3.4 Section 76(1)(b) opens the way for the imposition of a penalty where a corporation has attempted to contravene section 46. Perhaps both aspects of the law (the tendency

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[3] Trade Practices Consultative Committee, *Small Business and The Trade Practices Act*, 1979, para 9.22.

to penalise purpose or attempt) may be explained on the basis that, while the anti-competitive purpose may not have been achieved, its pursuit or the attempt, while not achieving its objective, may have caused others in the market to be put to unnecessary cost or inconvenience which should be discouraged by an effective competition law.

3.5 Accepting that there may be some policy served by proscribing mere purpose, the first objective referred to above is principally concerned with preventing conduct which interferes with the competitive process. This suggests we should favour an "effects test" in relation to unilateral conduct which takes advantage of substantial market power. However, merely substituting "with the effect of" for the words "for the purpose of" in section 46(1) would not achieve this objective for the reason already advanced, namely that it is universally accepted that protecting a single competitor is not to be equated, automatically, with (and may be antithetical too) protecting the competitive process. If section 46 is to be amended to incorporate an "effects test", that test should be the same as that which applies in sections 45 and 47, namely the effect, or the likely effect, of substantially lessening competition in a market. Such a change on its own may be seen as reducing the reach of section 46 since, despite the High Court's comments referred to above, it is probably easier to establish harm to one player in a market or one would-be entrant than to the competitive process .

3.6 Such an amendment would then highlight the fact that the existence of a purpose to bring about one of the consequences in section 46(1)(a), (b) or (c) is merely an evidentiary factor, the existence of which may give rise to an inference that the conduct has, or is likely to have, an anti-competitive effect. If section 46 were to be amended by replacing sub-section (1) with a provision proscribing the taking advantage of market power with the effect of substantially lessening competition, the purpose component could be preserved in a separate sub-section having force only as an evidentiary provision, to the effect that proof of one of the presently proscribed purposes would give rise to a rebuttable presumption of anti-competitive effect. This would have the consequence of casting the onus on the respondent in such a case to show that its conduct was not likely to lessen competition substantially[4].

[4] Cf section 51A.

4. Paragraph 1(c)

4.1 Increasing concentration in markets, driven by a number of factors, has taken many forms, including mergers and new types of collaborative arrangements between firms. There have been suggestions that the Act needs to make special provision for these new arrangements, including strategic alliances. Where there is no acquisition of shares or assets section 45 is likely to be the section which applies to these new forms of cooperation.

4.2 In this context I do not propose to comment on section 4D, which is the subject of a pending appeal to the High Court[5], and whose application to vertical arrangements may be affected by the decision of that Court in another matter[6], save to say that the definition of exclusionary provision continues to display ambiguity which causes difficulty in practice.

4.3 Section 45(A) contains an exception for joint ventures (the only express form of recognition of this form of cooperation in the Act). The concept of joint venture is defined in section 4J and, as deployed in section 45A(2), may not be apt to encompass the new types of collaboration. However until and unless the latter develop a clearly defined format, each needs to be analysed under section 45 on its own terms. It is incumbent on those who contend there should be a series of new exceptions to demonstrate why, and to define the features of the collaboration which warrant special treatment. Failing this there may be opened up an avenue for collusive conduct which could bring significant harm to the competitive process.

4.4 Even where there is no intention to hinder competition, such arrangements can have that effect collaterally, as discussed below. Such arrangements should therefore continue to be subject to scrutiny under section 45, with the authorisation process continuing to be available to those which are productive of benefits but which might otherwise fall foul of the Act. This is the approach taken in the United States where the Collaboration Guidelines of the Department of Justice and Federal Trade

5 *South Sydney District Rugby League Football Club Ltd v. News Ltd* (2001) FCA 862.
6 *ACCC v. Visy Paper Pty Limited* (2001) FCA 1075.

Commission[7] provide that efficiency-enhancing agreements which are reasonably related to the collaborative arrangement and reasonably necessary to achieve its pro-competitive benefits will generally be allowed.

4.5 There appear to be two broad types of collaboration which may be undertaken and which may fall outside the scope of the traditional joint venture as defined in section 4J. The first is where collaboration is engaged in with a view to producing a single output from the parties' contributions, and the second where inputs are shared but outputs continue to be sold separately. Of their nature they are likely to have few if any competitors, and indeed may be natural monopolies. Alternatively they may involve all the significant players in an industry, leaving consumers no real choice.

4.6 As I see it, there are a number of risks for competition, and therefore for consumer welfare, in the proliferation of alliances and other forms of collaboration, including collaborative networks. These risks need to be weighed in the balance when any gains in terms of efficiency or otherwise are being evaluated.

4.7 In relation to the first type identified above, which I shall call the integrated collaboration, there is the risk that potential competition is removed: if not its actuality, then the spur that it provides; and that entry barriers are raised, all of which will inevitably lead to higher prices. This may be an inevitable price of having what the collaboration can offer by way of locally produced products.

4.8 In relation to the second type, where the parties continue to produce their own end product, there is the risk firstly of overt or covert parallel pricing in relation to the outputs. There may also be a quantitative restriction on outputs because each party knows important details about the demand being met and expected by the other. There is a further risk which seems to have attracted little attention in the literature: where costs of some common inputs are agreed, there will be scope for the common input to be charged out at the profit maximising price. This is the case whether the input is provided by the parties themselves, at an identical price, or is outsourced, because in both instances, by definition, the input is not provided in a competitive market as it would be absent the collaboration. The input cost will be a hidden cost and the tendency will be for that cost component to be passed on indiscriminately as part of

[7] *Antitrust Guidelines for Collaboration among Competitors,* April 2000.

the price of the final product, even though the latter product is supplied in a nominally competitive environment.

4.9 Whether section 45A applies to this situation depends on whether the parties can be viewed as acquiring the inputs in competition with each other or whether the agreed input has the effect of controlling the price of the downstream product[8].

4.10 These comments are not intended to ignore the fact that such arrangements may, in many cases, have very positive, even pro-competitive features, but if they are not tested by the authorisation process, or some other standard, such as an appropriate exception from sections 4D and 45A which would permit incidental and necessary restrictions (assuming such an exception could be drafted adequately), we may find that we are harbouring a large number of lazy, quasi-monopolists.

4.11 It has become routine to suggest that such an outcome can be obviated by some sort of access regime, to allow others to share in those aspects of the process which arguably amount to a natural monopoly. But that is very much a second best option and one which involves significant delays to allow for due process, as the experience with Part XIC of the Act has shown.

4.12 As I have attempted to illustrate, the feature which is greatest concern from a competition prospective with new forms of collaboration between competitors or potential competitors is that there tends to be a lack of transparency in relation to costs at various stages of the production process. This comes about because the new operation, being the only significant purchaser of the input, can afford to pass on the price of the input in the downstream market where the only competition faced is between the collaborators. In that environment neither the price of the input nor the price of the downstream product can be tested by exposure to market forces and there is little or no scope for competition to drive down costs or prices.

4.13 In my view the case has not been made out for any amendment to section 45A to provide any further exceptions. There is a minor wording change which could be made, which would not alter the operation of the section but would make it easier to interpret, and that is the insertion of the words "*two or more*" in the phrase "*by any of*

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8 *ACCC v. CC(NSW)Ltd* (1999) 92 FCR 375.

them" in sub-section 45A(1). The reasons for suggesting this change, as well as a more detailed discussion of the subject dealt with in this section of my submission (including the joint venture exception), are covered in a paper which I recently presented at a conference. I have taken the liberty of attaching a copy of the paper, should the Committee wish to have further background on the discussion. I apologise for the fact that I have not had time to extract the relevant portions and include them here.

5. Paragraph 1(e)

5.1 I have already referred to the procedure for seeking authorisation of mergers.

5.2 Sections 47(6) and (7) have been the subject of criticism in successive reviews of the Act's operation. The Hilmer Committee recommended they should be subject to the same test as other types of exclusive dealing[9]. This recommendation was not adopted; instead the notification procedure was amended. This is cumbersome and costly. The section is constantly honoured in the breach, usually by traders who have no idea that they are in breach of the law, and who are providing goods or services in ways which consumers value. There seems to be a strong consumer lobby in favour of the retention of the present law, comprised of people who continue to support the *per se* operation of these provisions because of tied insurance in house lending in the 1970s. They appear not to understand that the provisions operate randomly in other areas so as to distort and even prevent arrangements which are quite unexceptional, including arrangements between companies in the same group. The arguments are well known and I do not repeat them here.

[9] *National Competition Policy, Report by the Independent Committee of Inquiry,* August 1993, recommendation 3.3.

Thank you for the opportunity to make a submission and for agreeing to an extension of time to do so.

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ANALYSING THE RISKS OF BUSINESS COOPERATION

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> *"In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers*."

1. Introduction

The now classic words of the Trade Practices Tribunal in QCMA[11] encapsulate the policy espoused by the more prosaic words of section 2 of the *Trade Practices Act* (TPA): "*To enhance the welfare of Australians through the promotion of competition*

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10 Barrister, Sydney

11 *Re QCMA and Defiance Holdings* (1976) ATPR 40-012, at 17,246.

and fair trading and provision for consumer protection." They also serve to remind us that, while flexibility with respect to price is the essence of competition, the notion of competition (an expression not defined in the TPA) extends to other dimensions of what is offered to buyers, and that, in the words of the US Supreme Court in *US v Socony-Vacuum Oil Co*[12], anything that "*tampers with the price structure*" is to be proscribed. In that case an agreement between competitors to limit supply was seen as apt for the application of a per se standard of illegality, even though the agreement did not set the exact price for petrol.

Price is the barometer of competition. It is the clearest signal as to whether a market is operating effectively. There may be an abundance of choice and a great many additional features or services offered, but these may not indicate competition in the true sense. US antitrust law, from 1940, prohibited price fixing without the need to show market power, as is the case under the TPA. As the Supreme Court expounded in 1958, certain agreements or practices were without redeeming virtue and conclusively presumed to be unreasonable.

> "*This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved …*"[13]

The main reasons for per se illegality (our sections 45A and 4D) are a desire for relative certainty and the overwhelming evidence that price fixing, collective refusals to supply, and other forms of limitation on production are antithetical to competition and consumer welfare[14]. It is the trade-off between a clearer law and a law that recognises scope for exceptions: the difference between a saw and a scalpel. Australian law however recognises the need for a more discerning instrument and provides the avenue of authorisation, to be discussed later.

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12 310 US 150 (1940)

13 *Northern Pacific Railway v US* 356 US 1, 5 (1958)

14 In *News Limited v Australian Rugby Football League Limited & Ors* (hereafter *News v ARL*) (1996) 64 FCR 410 at 558 the Full Federal Court observed in relation to the latter provision: *"It is plain that the Parliament regarded horizontal arrangements of an exclusionary character as having a necessary tendency to inhibit competition and that this was regarded as sufficient to proscribe the making of such arrangements."*

From a consumer welfare point of view, coordinated conduct without actual collusion may be just as harmful as outright price fixing or other collusive behaviour. It is not prohibited, mainly because it is very difficult to identify and to distinguish from pricing which may occur in competitive markets, especially markets for undifferentiated products. It features as a concern mainly in relation to merger policy[15]. The elements of price fixing commonly proscribed by competition laws include some sort of meeting of minds[16], between businesses which are not in common ownership or otherwise related, which has the effect or the objective of "fixing, controlling or maintaining" prices by any or all of those firms. The collective boycott provisions, to the extent they proscribe market sharing and are therefore actuated by the same concerns, are in similar but not identical terms. This paper concentrates first on the elements of the prohibition on price fixing as broadly described before examining the statutory language of the TPA to see how it operates in two particular situations, joint ventures and agreements affecting prices indirectly.

2. Price-fixing Characteristics

The parties to a price fixing are *ex hypothesi* competitors, or at least potential competitors. If they are in common ownership they are not regarded as competitors[17]. If the agreement or arrangement results in their ceasing to be competitors by a change of ownership that is a matter for the merger laws[18]. Some forms of ongoing collaboration, short of merger, are regarded as having justification either because one participant lacks resources (financial or otherwise) another has, or because of the scale of operations required, or because alone they lack any market power to face a counter-party with substantial market power[19]. Without the first two types of cooperation the players concerned might not participate in the market at all; without the latter an abuse of market power may go undetected. Unlike US antitrust law, our more prescriptive legislation carves out safe havens for these cases in at least two ways. It allows authorisation of collective arrangements generally, including terms as

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15 ACCC Merger Guidelines, 1999 para. 5.167-5.170

16 *News v ARL* at 571-573.

17 The TPA makes exceptions for related bodies corporate: section 45(8).

18 Which the TPA makes paramount: section 45(7).

19 See section 5 below; and compare Antitrust Guidelines for Collaboration among Competitors, Federal Trade Commission and Department of Justice (US), April 2000, page 8. E.U law treats such arrangements under Article 82 (formerly 85) of the Treaty of Rome.

to price[20], but it also establishes ad hoc exceptions within section 45A. Until the *Competition Policy Reform* Act 1995 was enacted, certain areas of the economy were not covered by the TPA. Consistent with the approach of the US Courts, as mentioned earlier,[21] the TPA does not afford parties to a price fixing arrangement any defence, ex post facto, in recognition of arguments that there may be countervailing benefits flowing from their cooperation. A party must either obtain authorisation or bring itself within the scope of the statutory exception, or its cooperation is illegal. There is nothing revolutionary about this: it is an approach which, in various forms, has existed since at least 1977[22].

While there may be scope for argument that the law with respect to efficiency enhancing cartel arrangements should be harmonised with that in relation to mergers[23] by applying a substantial lessening of competition test, that is not what the law does. Certainty was considered more valuable, particularly given the existence of the authorisation process and other statutory exceptions. It is surprising then that some large enterprises continue to adopt the risky approach of seeking to raise *ex post facto* defences of improved efficiency, necessity, joint venture or other such matters when charged with price fixing. It is surprising also that State and Territory Governments, seven years after the Hilmer reforms were enacted, continue to persist with statutory exemptions which they agreed at that time to dismantle and which stifle competitive conduct[24].

For the purposes of the ensuing discussion the statutory language assumes importance and the more important sub-sections are set out below. They follow, and qualify, section 45(2), which prohibits a corporation from making or giving effect to a contract, arrangement or understanding which contains an exclusionary provision or has the purpose, or would have or be likely to have the effect, of substantially lessening competition.

> *"**45(3)** For the purposes of this section and section 45A, "competition", in relation to a provision of a contract, arrangement or understanding or of a*

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20 Section 88(1) and 45(6).

21 Page 2 above.

22 *Trade Practices Amendment Act* 1977

23 See R.H. Bork "*The Antitrust Paradox*", Revised Edition 1993, 264

24 e.g. in NSW the Director-General of Transport still fixes the price for hiring a taxi pursuant to sec 60A of the *Passenger Transport Act* 1990. Nor do taxi cooperatives, or individual taxis, compete on service; e.g. in Sydney all still change shifts at the same times twice a day.

proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services."

*"**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)** Subsection (1) does not apply to a provision of a contract or arrangement made or of an understanding arrived at, or of a proposed contract or arrangement to be made or of a proposed understanding to be arrived at, for the purposes of a joint venture to the extent that the provision relates or would relate to:*

(a) the joint supply by 2 or more of the parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;

(b) the joint supply by 2 or more of the parties to the joint venture of services in pursuance of the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture of services in pursuance of, and made available as a result of, the joint venture; or

(c) in the case of a joint venture carried on by a body corporate as mentioned in sub-paragraph 4J(a)(ii):

- *(i) the supply by that body corporate of goods produced by it in pursuance of the joint venture; or*

- *(ii) the supply by that body corporate of goods produced by it in pursuance of the joint venture, not being services supplied on behalf of the body corporate by:*

  - *(A) a person who is the owner of shares in the capital of the body corporate; or*

(B) a body corporate that is related to such a person."

*"**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(8)** The reference in subsection (1) to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services."*

3. The Special Treatment of Joint Ventures

Section 4J provides that:

"A reference to a joint venture is a reference to an activity in trade or commerce:

(i) carried on jointly by two or more persons, whether or not in partnership; or;

(ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate".

It will be seen that section 45A(1) deems price fixing arrangements to have the proscribed purpose or effect of substantially lessening competition where they relate to the supply or acquisition of goods or services by the parties to the contract, or by any of them or their related bodies corporate, "in competition with each other". This requirement that the parties be in competition is expanded by section 45(3) to any market in which any of the parties supplies or acquires goods or services (not just the goods or services the subject of the arrangement), and to any market in which the party is likely to supply or acquire goods or services or would do so but for the provision which constitutes the price fixing arrangement[25]. This requirement has given rise to some confusion and disagreement, particularly in the context of vertically integrated companies, a subject which will be dealt with below in section 8.

First, however, I wish to deal with the so-called joint venture exception contained in section 45A(2). I have set out section 4J which contains a very broad description of a joint venture, which may either be incorporated or unincorporated. For present purposes incorporated joint ventures, which do not appear to have given rise to any difficulty in this context, can be ignored Although the description in section 4J is in the most general of terms, it does impose some further limitation on the scope of the exception in section 45A(2) beyond the requirements in paragraphs (a), (b) and (c), namely there must be "an activity in trade or commerce" which is carried on "jointly", whether or not in partnership. I suggest that the exception is to be construed as containing certain limitations by virtue of the combined effect of the words in section 4J and the requirement in section 45A(2) that the arrangement which is protected be an arrangement made "for the purposes of a joint venture". Further, the exception extends only to the provision "to the extent that it relates" to a form of joint supply (or the supply by an incorporated joint venture). Finally, leaving aside the case of the incorporated joint venture, the provision must relate, and be limited to, the joint supply of goods jointly produced or services produced "in pursuance of the joint venture", and the supply must be made "in proportion to [the parties'] respective interests in the joint venture".

In proceedings commenced in 2000 by the Australian Competition and Consumer Commission (ACCC) against National Australia Bank Limited (NAB) in relation to its participation in the credit card schemes operated under the brand names Visa, MasterCard and Bankcard, it was alleged that NAB had entered into and given effect to price fixing arrangements with other banks with respect to the interchange fees payable to issuing banks in respect of transactions using credit cards. NAB in its defence relied on the joint venture exception. Proceedings were settled before any

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[25] See *ACCC v.J.McPhee & Son (Aust) Pty Ltd & Ors* (1997) ATPR 41-570 at 43,920.

determination of the question whether the arrangements between the banks constituted a joint venture for the purposes of section 45A.[26]

The difficulty likely to have been faced by NAB in relying on the exception was to show that there was a joint supply of the relevant services to which the price fixing provision related, and that such supply was "in proportion to" the respective interests of the banks in the joint venture activity. The provision alleged to contravene section 45 involved the fixing of the interchange fee which was payable on every credit card transaction by one bank to another at a common rate[27]. It was then alleged that, as a consequence of the fixing of the interchange fee, the merchant service fees charged by banks to merchant customers were "controlled or maintained". There was no joint supply of merchant services, in respect of which the banks compete for customers.

It appears that NAB intended to propound a much broader concept of joint venture and joint supply than that suggested above. NAB saw the joint venture as encompassing the entirety of the arrangements between the members of each of the credit card schemes, pursuant to which they provided to their credit card holder and merchant customers the services of accepting and honouring credit cards and making the necessary transfers of funds to give effect to the arrangements in place between the issuing and accepting banks. There remained the difficulty of expressing in any meaningful way the proportions in which those services were said to be supplied and relating that to their (unexpressed) proportionate interests in the joint venture. Presumably the banks' respective interests in the broad "joint venture" just described varied from instant to instant in accordance with the level of transactions in which each participated. It is difficult, in the absence of documentation establishing the "joint venture" in traditional terms, to see any other basis for those interests being ascertained.

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[26] It has been reported that a representative of another bank, when apprised of this defence, remarked that this was the first he had heard of such a joint venture.

[27] There appears to be little dispute that interchange fees were fixed by agreement between representatives of the member banks. What is interesting is that they have remained unchanged for so long, despite technological change, and are at the same level for the three card schemes (save for Bankcard which still charges 1.2% for electronic transactions): see Reserve Bank of Australia and ACCC Report, *Debit and Credit Card Schemes in Australia; a study in interchange fees and access,* October 2000, p.43. Yet Visa has argued that the setting of interchange fees is a complex matter that requires commercial judgment: Reserve Bank *Reform of Credit Card Schemes in Australia,* August 2001, Vol II page 30.

A further difficulty was the fact that the NAB would be likely to have contended that it competed with the other banks with respect to acquiring merchants and card holders. The scope of the joint venture contended for therefore appeared to include both the cooperative elements and the competitive elements of the network of relationships between the banks.

It is important to examine the arguments which might have been available to the NAB and the other banks because, if the banks contentions were correct, it would seem that many clearing houses, networks and other self-regulated markets would be able to take advantage of the exception to fix prices for *inter se* transactions with impunity. Such arrangements would tend to "control" or "maintain" the prices each then charged outsiders for goods or services provided to them.

4. What is a Joint Venture?

It is useful to commence with a brief survey of what has been said about joint ventures in other contexts. Thus, it has been said:

> *"The description joint venture or joint adventure is not new. It was applied to arrangements between English traders for the exportation and sale or the purchase and importation of goods in the Eighteenth and Nineteenth Centuries in which the distinguishing features were that separate stocks were contributed or separate funds subscribed for acquiring stocks that were later to be divided and that the parties were associated only for a particular transaction. The description has been applied in this century in the United States to many business relationships of limited duration and purpose. It is used in Scottish law to denote a species of partnership which, like a partnership in English law but unlike a general partnership or firm under Scottish law, is not a legal person distinct from its members."*[28]

The issue which has most frequently come before the Courts in relation to joint ventures is whether the arrangement constitutes a partnership and, if it does not, whether the relationship nonetheless gives rise to fiduciary obligations among the venturers.[29] The question whether a particular joint venture is a partnership and, if not, nonetheless gives rise to fiduciary obligations, depends on an examination of the

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[28] J.D. Merralls QC, *Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts* (1981) 3 Australian Mining and Petroleum Law Journal 1. (Citations omitted)

[29] See, for example, *Canny Gabriel Castle Jackson Advertising Pty Limited v Volume Sales (Finance) Pty Limited* (1974) 131 CLR 321; *United Dominions Corporation Limited v Brian Pty Limited & Ors* (1985) 157 CLR 1; *Noranda Australia Limited v Lachlin Resources NL & Ors* (1988) 14 NSWLR 1.

documents and the relationship between the parties. It is suggested that the reference in section 4J to an activity carried on jointly "whether or not in partnership" is intended to limit the notion of a joint venture for the purposes of the Act to joint ventures as commonly understood in commercial usage in Australia. However it has been said by one commentator that the term "joint venture":

> *"Has acquired a very wide meaning in political and commercial usage, but has not been rigorously defined in Australian law."*[30]

After a reference to section 4J that commentator refers to various commonly utilised forms of business cooperation which have come to be referred to under the description "joint venture". Probably the most commonly encountered in the Australian commercial context is that used in natural resources exploration and production. Numerous such arrangements have been the subject of authorisation determinations by the ACCC[31].

The Swanson Committee provided little detail in relation to what it regarded as a joint venture but referred to:

> *"An association between two or more enterprises to carry on together a joint activity, but specifically excluding joint selling which does not involve further substantive processing of products acquired from the joint venturers. The joint activity need not require the creation of a separate corporation or partnership; there may merely be physical pooling of assets but retention of individual ownership. Alternatively, a separate joint organisation may be formed and it may, or may not, have a separate legal existence (e.g. company or partnership)."*

The Committee's discussion of joint ventures appears to be primarily concerned with resources joint ventures and includes a discussion of non-compete provisions among venturers. The Committee recommended that pricing restrictions among joint venturers should be prohibited:

> *"except where they can reasonably be regarded as necessary if the parties are to agree that the joint production facilities are to be established and carried on by them or, in the case of existing joint production facilities, to continue to be carried on by them. Where the restrictions are reasonably necessary in the*

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30 Malcolm Smith "Joint Ventures" in K.W. Ryan (Ed) "*Law and Business in Australia*", Australia Japan Trade Law Foundation, Sydney 1979 p.182.

31 See, for example, *Delhi Petroleum Pty Limited and Santos Limited* (1988) ATPR (Com) 50-076; *Dupont (Australia) Limited & Ors* (1996) ATPR (Com) 50-231; *M.I.M Holdings Limited* (1996) ATPR (Com) 50-233 .

manner just described, the parties should be able to seek and be granted authorisation of the restriction when the agreement is in the public interest."[32]

In other words, goods or services jointly produced (that is produced by use of a "joint production facility") should be able to be sold at an agreed price (or prices) if authorised on the basis that the arrangement was necessary and in the public interest. In the event what was enacted was more liberal in so far as section 45A(2) provided an intermediate position between prohibition and authorisation. The authorisation provisions for section 45 conduct as amended in 1997 made special mention of joint ventures but otherwise did not permit authorisation of price fixing with respect to goods[33]. When the Act was amended in 1995, following the report of the Hilmer Committee, authorisation of price fixing for goods was allowed generally[34], and the specific authorisation provision for joint ventures was removed.

5. When does the joint venture exception apply?

The question remains, to what situations do the words of section 45A(2)(a) and (b) apply. The following observations may be made:

(1) The exception applies to a price-fixing provision only "to the extent that the provision relates or would relate" to one of the types of supply described in paragraphs (a) and (b). Thus, the existence of a joint venture under which it may be said that goods or services of a particular description are jointly supplied will not be enough if the price fixing provision relates to a narrower class of goods or services, albeit those goods or services are supplied in the course of the joint venture's activities. In the credit card example the price-fixing provision related most closely to the interchange fee and the merchant service fee, whereas the services said to be provided jointly were all of the benefits of being a cardholder. However the latter services were provided to cardholders, not to merchants or participating banks.

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32 Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs, August 1976, paras. 4.71 to 4.81. The position in the United States is that joint venture restrictions are considered under the rule of reason, commencing with *US v Chicago Board of Trade* 246 US 231 (1918).

33 Section 88(2), (3), repealed in 1995.

34 Section 88(1) remained.

(2) Paragraph (a) applies only where the price-fixing provision relates to the supply of goods jointly produced. In the typical resources joint venture coal or minerals are recovered (produced) by the combined efforts of the joint venturers. The joint venture agreement will invariably then provide that, at a particular point in the production process, each party will acquire title to its share of production (in the proportion in which it shares in ownership of the assets of the venture) and will be free to dispose of it as it wishes. This is to avoid the venturers being treated as a partnership for income tax purposes. The venturers may then enter into parallel sales contracts for their share of production with a single purchaser, but they do so as independent vendors and not as parties to the joint venture[35]. Paragraph (a) is clearly designed to accommodate such a situation. There may be a supply by all the venturers, in which case it is likely to be of product owned individually in the proportions in which the vendors participate in the joint venture. Alternatively, some venturers may have participated in an arrangement where only they have borne the cost of producing material from a portion of the ore body and only those venturers are entitled to the product. In this case there may be a joint supply by two or more parties of goods jointly produced.

(3) Paragraph (b) reflects similar concepts in relation to a joint venture for the provision of services. The wording differs because the concept of services being jointly produced is not apt. Instead the paragraph adopts the concept of services being supplied "in pursuance of" the joint venture. In the case of a supply by all of the parties there is an additional requirement that the services were "made available as a result of" the joint venture. While these notions may be somewhat wider than that of jointly produced goods, the requirement that the price-fixing provision relate either to joint supply of the relevant services or their supply by all participants in proportion to their respective interests again limits the exception to the subject matter of the joint venture.

Thus the statutory language seems apt for, and based on, concepts found in the traditional resources joint venture, but its application to looser collaborative arrangements, which do not have the features of joint production and constancy of

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[35] P.W. Knox "Mining Joint Ventures" in *Taxation in Australia*, April 1982, p.802.

participating interests, becomes quite strained. Strategic alliances and other forms of collaboration do not have any of the recognisable features of the traditional joint venture and, if they involve agreements as to pricing, may well need to be authorised.[36] Finally, it needs to be borne in mind that, absent an authorisation, the exception in section 45A(2) (sometimes mistakenly called a "defence") is an exception only to the deeming provision in section 45A(1), and the price-fixing may still fall foul of section 45 if it has the proscribed purpose or effect of substantially lessening competition.

6. Section 45A(2) contrasted with an exclusionary provision

The existence or otherwise of fiduciary duties between parties to what was described as a joint venture has arisen in the trade practices context, but only in relation to the application of section 4D, in *News Limited v ARL*.[37] The trial judge had decided that fiduciary obligations were owed by the clubs which made up the League. The facts were examined in considerable detail by the Full Court which referred to the leading authorities on the subject and overruled the decision of the trial judge.[38] The Court was referred to a number of United States authorities but concluded that they were not helpful in determining whether the arrangements involving the League, the ARL and the clubs created fiduciary duties. The cases referred to all arose under the *Sherman Act* and the Court observed:

> *"For example, in NCAA v Board of Regents, the question was whether the NCA's television plan, which fixed prices for particular telecasts of college football games and limited the production of televised college football, contravened section 1 of the Sherman Act. The Supreme Court referred to a 'certain degree of cooperation' being necessary, if the college football competition were to be preserved. The Court also referred to a sporting venture of this kind constituting a 'joint enterprise'. However, these references were made in the context of a decision that it would be inappropriate to apply a 'per se rule of illegality', where some horizontal*

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36 One of the earliest "strategic alliances" was that of 1991 between Westpac Bank and the AMP Society. In its 1991-92 Annual Report the Trade Practices Commission commented that the alliance "…which had the effect of concentrating their businesses and stopping the companies competing in each other's core markets revealed the inadequacy of s. 50 to catch certain anti-competitive behaviour." (Annual Report p.37). The alliance involved non-compete covenants and a 10% shareholding by AMP in Westpac. The alliance did not survive the decade.

37 *News Limited v Australian Rugby Football League Limited* (1996) 64 FCR 410.

38 At 538-551..

> *restraints on competition were essential if the product was to be available at all…"*[39]

The Full Court went on to consider whether the clubs were in competition with each other for the purposes of section 4D(2) of the TPA and stated that:

> *"In many respects the clubs were in vigorous competition, notably for spectators, sponsors and television viewers."*[40]

It concluded that the arrangements between the clubs, the League and the ARL (which might be described as "strategic alliances") were capable of and did in fact contain exclusionary provisions as defined in section 4D, notwithstanding the existence of the joint interests which those entities had in pursuing certain objectives. For the purposes of section 4D, the parties to the exclusionary provision are treated as being in competition only if they, or their related bodies corporate, are in competition, or may in future be in competition,[41] for the supply of the very goods or services to which the exclusionary provision relates: section 4D(2). This is to be contrasted with section 45A(1) where it is sufficient that two or more of the parties compete in relation to the supply of goods or services, provided the price-fixing provision has the effect of fixing, controlling or maintaining the price for that supply, even though its terms may be confined to some anterior supply of other goods or services between the same parties.[42] This is the effect of the decision in *ACCC v CC (NSW) Pty Ltd*[43].

7. The *Concrete Constructions case*

The facts in the *Concrete Constructions* case were that members of the Australian Federation of Construction Contractors (AFCC), including the respondent, had agreed to apply an unsuccessful tenderer's fee (UTF) of $750,000 for a particular building project. It was found that the parties had agreed that the successful tenderer would pay the UTF to each of the three unsuccessful tenderers. It was alleged but not found that the tenderers undertook to take their obligation to pay the UTFs into account in calculating their tender price. However it was found that each tenderer had an

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39 Page 550.
40 Page 565.
41 Pages 566-567; and see *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 656..
42 See also note 16 above. A further contrast is that the provision which prevents the parties being competitive in sec 4D must be the exclusionary provision, whereas in sec 45A(8) it may be a provision of any contract, arrangement or understanding.
43 (1999) 92 FCR 375, (the *Concrete Constructions* case).

independent expectation that as a matter of fact each of the others would, if successful, pay the UTFs out of the proceeds of the job and would take its commitment to do so into account in calculating its tender price. This was because the tenderers knew most of the facts in relation to the likely effect of the arrangement on price.

Lindgren J held that it was not a necessary element of the notion of controlling a price within section 45A that there be some specificity as to price[44]. This would allow for circumvention and cannot have been intended. The question which arose was simply the factual one whether, on the evidence, the limited understanding the parties had was likely to have the effect of controlling the price to be charged to the client. In the course of discussing these matters his Honour quoted from the judgment of Douglas J in *United States v Socony-Vacuum Oil Co Inc* (1940) 310 US 150 at 225-226:

> *"Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an enquiry into their reasonableness. They are all banned because of the actual or potential threat to the central nervous system of the economy."*

His Honour found that the UTF understanding was likely to have the effect of controlling the price to the client if, as a matter of fact, each tenderer was likely, if successful, to pay the UTF out of the proceeds of the job and to take them into account in calculating its price. His Honour considered that they were likely to do so even though the amount of the tender was a relatively small proportion of the price, approximately 5%. Finally his Honour found it unnecessary to determine to what extent the successful tenderer would have taken the total of the UTFs into account in determining its price or profit; however evidence as to that would be relevant to penalty[45].

8. Indirect Effect of Price-fixing Provisions

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[44] At 415. See also *Trade Practices Commission v. Service Stations Association Limited & Ors*

The scope of the operation of section 45A opened up by the decision in *Concrete Constructions* has been aroused some controversy. Alarms have been raised that it has a wider operation than in fact the words of the section permit.

As noted earlier, sec 45A was introduced in 1977 to implement one of the recommendations of the Swanson Committee which had reported in August 1976[46]. The original section 45 prohibited price agreements unless the effect on competition between the parties or any of them and other persons was insignificant[47]. In paragraph 4.59 of its report the Committee recommended that, subject to joint venture and joint acquisition exceptions, there should be an absolute prohibition of agreements between competitors having the purpose or effect, or likely effect, of fixing or controlling prices of goods or services supplied by the parties, or any of them, in competition with each other to other persons. They should be incapable of authorisation. The Committee commented:

> "It is our firm belief that such agreements will so rarely be in the public interest that the costs in time and money, both for industry and Government, involved in allowing attempts to justify such agreements far outweigh the social benefits which might flow from the possibility of an occasional successful justification in terms of the de minimis exceptions stated in the present section 45(3). [4.60] The abovementioned prohibition should in our view be directed to substance, not form, and accordingly should apply to all agreements having the proscribed purpose or effect, regardless of what the parties themselves have called the agreement."

The Committee went on to consider "true" recommended price agreements and laid the groundwork for the present section 45A(7).

The Explanatory Memorandum to the Bill introducing section 45A adopted the reasoning of the Swanson Committee. It said :

> "*Contracts, arrangements or understandings between competitors having the purpose or effect of fixing, maintaining or controlling the price of goods or services are deemed to have the purpose or effect of substantially lessening competition in a market (new section 45A).*"[48]

(1993) 44 FCR 206, 228.

45 At 415.

46 Trade Practices Act Review Committee, Report to the Minister of Business and Consumer Affairs, August 1976.

47 Trade Practices Act 1974, section 45(3).

48 Trade Practices Amendment Bill 1977, Explanatory Memorandum, paragraph 6.

The Committee was no doubt influenced by the approach that has generally prevailed in the United States. The approach adopted by Judge Taft in the *Addyston Pipe* case[49] (1898) was modified in the *Appalachian Coal* case[50] (1933) where the Supreme Court recognised that an agreement between a small number of competitors might not affect competition. In *Trenton Potteries*[51] (1927) the Court had grappled with, but not resolved, the question whether other social benefits should weigh in the balance when considering a price-fixing arrangement. Heydon[52] at paragraph 4.700 comments as follows in relation to *Appalachian Coal*:

> "The fact that competition among the parties (12% of the east coast coal) was prohibited would not be a ground for illegality because sufficient other non-member local producers were able to preserve effective local competition. (This point should be noted when considering the correct construction of section 45A as to the meaning of 'fixing or controlling or maintaining' prices of goods sold in competition with each other [4.750]. If there is local competition can parties through an agreement ever achieve this?) Section 45A would, of course, be infringed if the requisite purpose was present even though the effect was not."

At paragraph 4.860 Heydon comments that the words "by any of them" in section 45A(1) probably means so long as two are in competition, and at 4.980 concludes that "in competition" probably requires the parties to be in competition for the supply of the goods or services the subject of the price agreement.

It has been suggested in a paper by Brewster[53] that the application of the reasoning in the *Concrete Constructions* case may mean that many standard agreements are struck down. Brewster argues that the reasoning in that case should be confined to the facts, where the UTF was an artificial and illegitimate charge not reflecting any true services provided. Brewster refers to the example of the supposed supply of Y-bar by BHP to Queensland Wire, suggesting the resulting agreement as to price would have been caught by section 45A(1) because BHP (or more correctly, its subsidiary) and Queensland Wire were competitors in the market for star pickets.[54]

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49 *US v. Addyston Pipe & Steel Co* 85 Fed. 271 (6th Cir. 1898).

50 *Appalachian Coal Inc. v. United States* 288 US 344 (1933).

51 *US v. Trenton Potteries Co* 273 US 392.

52 Heydon, *Trade Practices Law*.

53 D.Brewster, "Recent Developments in price-fixing law: when will an agreement on the price of an input control or maintain the price of an end product?", unpub., 2001.

54 See also the insightful discussion by A.Nicotra and J.O'Regan, "Dare to Deem – Does Section 45A of the Trade Practices Act prohibit 'pro-competitive' pricing?", unpub., 2001.

The argument proceeds on an understandable misreading of the language of section 45A (1). This is apparent because the author highlights the words "*or by any of them*" in the final part of the sub-section. It is clear from the succeeding words "*in competition with each other*" that the earlier words should be read as if they said "*or by any two or more of them*", since there must be at least two for there to be competition.[55] An agreement for the supply of goods or services by A to B, which necessarily fixes the price, cannot be said to control the price at which A (or its subsidiary) supplies those, or derivative goods or services, in a downstream market. It can only be said (assuming certain facts about the relativity of those prices) to control the price at which B sells in that market. Hence the requirements of section 45A (1) are not satisfied by the example. They are satisfied only if the agreement involves more than one supplier in the first market.

Apart from the paper just dealt with, no one has suggested any significant flaw in the reasoning in *Concrete Constructions.* The case stands for the proposition that, provided the price that is controlled or fixed is the price at which *two or more* parties supply in competition with each other, any agreement between A and B for A to supply goods or services to B enabling B to supply those goods or services in the same or, more usually, altered form in competition with A, or a related body corporate, at the next functional level of the market, would be liable to be at risk by reason of section 45A. A necessary precondition is that the price of the original goods or services is such that it can be said to have the effect of controlling the price of the downstream product, as supplied by B. This will be so irrespective of the market shares of A and B in either market.

The situation does not appear to have arisen in the United States where there is no equivalent statutory provision. The closest the textbooks get to it is in the discussion of price information agreements, such as the *Maple Flooring*[56] case. It is said, for example, that such price information arrangements "are likely to be effective when the parties control close to 100% of the market and entry barriers are high"[57]. The same author says that a price control mechanism is more effective the less difference there is between the parties' marginal costs. Where they are the same or can be

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55 As Heydon suggests, see note 43 above.

56 *Maple Flooring Manufacturers' Association v. US* 268 US 563 (1925).

57 H.Hovenkamp, *Federal Antitrust Policy*, 2nd ed., 1999, 145.

maintained at the same level, the price fix downstream will be more stable and effective. Input pricing arrangements are an effective proxy for outright price fixing at the next level. They eliminate cheating as a risk. They also remove the likelihood of too many other surprises. Supra-competitive pricing at the next level is the likely outcome. It is the obverse of base point pricing.[58] However such arrangements generally arise in the absence of a supply relationship between the parties.

When the BHP/QWI example is analysed it will be seen that it differs in two further significant respects from the situation in *Concrete Constructions.* First there are only two parties, and secondly it results in B (QWI) being able to supply a product in the downstream market which it could not supply but for the agreement with A (BHP). In other words, the distinguishing features which seem to emerge are:

(a) the agreement for supply cannot be said to control the price at which A supplies the ultimate product, only B's price; thus the statutory requirement is not satisfied;

(b) there is no agreement purely between competitors at the supply level in the case of A and B. They are the only parties, and they are both necessary parties for the supply to take place. The only agreement as to price is in the context of a supply transaction between them. In contrast in *Concrete Constructions* there was an agreement between suppliers as to the prices at which they would supply in competition with each other, as well as the downstream effect;

(c) there would, as a result of the necessary pricing agreement to facilitate supply, be an additional competitor in the downstream market compared with the position without that agreement. By contrast, the number of competitors in the building business was not increased by the agreement to charge an unsuccessful tender fee in the *Concrete Constructions* case.

While the points of distinction recorded in (b) and (c) do not affect the application of statutory test, they provide an economic justification for treating cases where there are two or more suppliers as a *per se* breach. There can be no justification for the price

58 Ibid. pp. 146 and 180.

agreement between the suppliers, unless they are truly in joint venture, in which case section 45A(2) will take them out of the deeming provision. Moreover, the distinctions suggested above are preferable to that suggested by Brewster, as they are dependent on a readily applied competition analysis, rather than one based on whether the arrangement is, or appears, artificial. The distinctions in (b) and (c) above do not rest on any point of factual difference that can be drawn from the statutory language. But, unlike the distinction suggested by Brewster, they do not depend on the sort of reasoning which prevailed in the *Radio 2UE* case[59]:

> "*Nor in my view was section 45A introduced by Parliament to make arrangements unlawful which affect price by improving competition. It is fundamental to both sec. 45A and 45 that the relevant conduct, in purpose or effect, substantially lessens competition or would be likely to do so. If competition is improved by an arrangement I cannot perceive how it could be characterised as a price fixing arrangement within the ambit of those sections.*"
>
> "*…not every determination of a price, following discussions between competitors, will amount to a price 'fixing'. There must, we believe, be an element of intention or likelihood to affect price competition before price 'fixing' can be established.*"[60]

That line of reasoning may be amenable to more confident application by a court under a judicially enforced rule of reason such as applies in the United States, and as exemplified by the decision of the US Supreme Court in *BMI v Columbia*[61]. Clearly, such an arrangement would not have the purpose of lessening competition, the purpose would be pro-competitive. However if the price of the component comprises a substantial part of the price of the end product, the "effects" language of section 45A(1) would catch the arrangement on its face. The Trade Practices Act lacks the flexibility of (but arguably provides greater certainty than) its US counterpart. After all section 45A is a deeming provision, that is a drafting device, "a statutory fiction"[62]and nothing more. As such it needs to be analysed carefully and applied strictly.

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59 *Radio 2UE Sydney Pty Limited v. Stereo FM Pty Limited* (1982) 62 FLR 437 per Lockhart J, although there the parties were supplying different products.

60 *Radio 2UE Sydney Pty Limited v. Stereo FM Pty Limited* (1983) 68 FLR 70 (Full Court).

61 *Broadcast Music Inc. v. Columbia Broadcasting System Inc.* 444 US 1 (1979).

62 Per Griffith CJ in *Muller v. Dalgety & Co Limited* (1909) 9 CLR 693 at 696; see also *Macquarie Bank Limited v. Fociri Pty Limited* (1992) 27 NSWLR 203 at 207-8 per Gleeson CJ.

A distinction based on the proportion of the market supplied does not serve to provide a satisfactory basis for an exception, as the BHP/QWI example demonstrates. Indeed it is the very case where a supplier has a large market share that calls out for encouragement to supply a downstream competitor, e.g. the Australian telecommunications market. Such supply arrangements (which necessitate agreement on price[63]) are likely to affect the totality of the market. The saving feature appears to be that they are pro-competitive in terms of both purpose and effect; and the operation of a deeming provision (properly understood) does not interfere with that result.

Where there is an unnecessary or gratuitous agreement between competing suppliers and no net increase in competition it is difficult to see a justification for extending an exception. There may be a basis for authorisation, but it is unlikely to be the case that there will be any increase in competition. One example is where existing competitors reach agreement for one to supply another with an input which it was already obtaining from another source, including from itself. The result will be no increase in competition, and may even see a reduction in the number of competitors in the first market. Thus the interchange fee charged by the banks to each other did not increase the number of suppliers of merchant services, but served rather to eliminate price competition between them in the downstream market[64]. If there was a case for an agreement as to the interchange fee, based on efficiency or otherwise, it was one which could and should have been made out on an application for authorisation.

It is suggested therefore that, in applying section 45A, as a deeming provision, regard should be had to both form and substance. Where a supplier and an acquirer of goods or services will, as a result of a transaction between them, become competitors in a downstream market, their agreement on the price of the good or services, which is a necessary incident of the transaction, promotes competition by adding another competitor. This is the case even though that agreed price is likely to affect, and may "control", the price at which the acquirer re-supplies (in the same or altered form) in the downstream market. However the original goods or services were not "*supplied… by the parties… in competition with each other*", and section 45A(1) has no application. It is only where two (or more) suppliers supply in competition with each other (or where section 45A(8) applies) at an agreed price that section 45A(1) can

[63] See Part XIC of the Trade Practices Act.

apply. Its application may be negatived by the joint venture exception, or its application may be extended (in accordance with the reasoning in *Concrete Constructions*) to the downstream market where the original parties or some of them compete in relation to goods or services in the same or altered form as those supplied upstream.

9 Authorisation

Until 1995 price-fixing in relation to goods could not be authorised; price-fixing in relation to services always could. Generally price-fixing is not authorised unless it is ancillary to and necessary for some other arrangement which is beneficial[65], or it involves parties who alone are price-takers and face a counter-party with substantial market power. Thus recently in the health care area a group of small hospitals was authorised to negotiate collectively with health insurers[66], as were anaesthetists, but major hospitals were refused authorisation[67]. Similarly 580 Queensland dairy farmers were authorised to negotiate collectively with processors[68]. The process of authorisation involves semi-public conferences and public submissions. However it is considerably less painful than litigation and pecuniary penalties.

It is here too that we find a remarkable convergence lately between Australian and United States jurisprudence, despite the radically different statutory provisions, and the differing judicial approaches. The American approach is perhaps best reflected in the Guidelines published jointly in 2000 by the Federal Trade Commission and the Department of Justice[69]. The following extracts from those Guidelines, which refer to key decisions of the Supreme Court (the references are omitted in the extracts) show how consistent the approach is with that which applies in Australia. The United States does not have an equivalent to authorisation, with the certainty and protection it affords, but similar reasoning applies in the enforcement policies of the two agencies,

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64 In line with the reasoning of Hovenkamp, *supra* n.48.

65 e.g. *Clay and Brick Pavers Association of NSW* (1999) ATPR (Com.) 50-274.

66 *Inter-hospital Agreement* (2001) ATPR (Com.) 50-287; *Australian Society of Anaesthetists* (2000) ATPR (Com.) 50-287.

67 *St Vincent's Provate Hospital etc* (2000) ATPR (Com.) 50-285.

68 *Premium Milk Supply Pty Ltd* (2001) ATPR (Com.) 50-288. According to the Australian Financial Review, 5 April 2002, a similar authorisation is to be appealed to the Competition Tribunal by National Foods Ltd, a major processor.

69 See above note 10. The Guidelines may be accessed on the Federal Trade Commission website via www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

and in the reasoning of the courts. Under the heading "Agreements Challenged as Per Se Illegal" the Guidelines state:

> *"Agreements of a type that always or almost always tend to raise price or reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Typically these are agreements not to compete on price or output. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects….*
>
> *If however participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal…. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis set forth…below."*[70]

[70] Ibid, page 8. See also W.F.Atkinson and T.M.Leonard, "*Orbitz: An Antitrust Assessment*" in Antitrust, Spring 2992, Vol. 16, No.2, p. 76.

10. Conclusion

It can be seen from this analysis that section 45A is performing the task for which it was designed 25 years ago, and the criticisms which have been made of its scope and exceptions are generally based either on a misreading of the statutory language or on a view that the parties to any type of business collaboration should be free to fix prices subject only to proof of substantial lessening of competition. The latter approach would, it is suggested, largely neutralise the protection afforded consumers and the competitive process by the deeming provision, indeed by section 45 as a whole. This is because of the uncertainty such a requirement would introduce and the need to establish, at much greater cost, competitive harm in cases of price fixing where, with very few exceptions, such a consequence is almost universally accepted. Those exceptional cases benefit, under the Australian approach, from the authorisation system whereas in the United States the parties to such arrangements must trust the discretion of agencies not to prosecute.

29 May 2002.