SECOND SUPPLEMENTARY SUBMISSION TO THE TRADE PRACTICES ACT REVIEW COMMITTEE

by

Warren Pengilley

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ATTACHMENT "A"

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THE ACCC'S SUBMISSION TO THE DAWSON INQUIRY: THE ACCC URGES THAT WE SHOULD BRING OUR LAW INTO LINE WITH THAT OF OTHER COUNTRIES BUT, IN DOING SO, IT TELLS ONLY HALF THE STORY

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The ACCC has lodged its submission to the Dawson Inquiry. It is an impressive 322 page document.

The ACCC wants criminal sanctions; "cease and desist" powers; a new notification process for small business; collective bargaining arrangements; for the merger test to stay "as is"; for the Commission's role to stay basically "as is"; and for an "effects test to be introduced into s.46.

This commentary does not address the merits of the ACCC's "wish list". What it does is to comment upon where the ACCC's submission that we should bring our law into line with that of other nations misstates the law of the "other nation" involved. Because this commentary cannot comment on the law of all the other nations, it is confined to comparisons with the law of the United States. It is fair to say that the ACCC relies heavily upon United States comparisons. This is appropriate, of course, because the US antitrust law is probably the most enforced in the world and United States court evaluations cover a wide variety of situations experienced only in part in most other world jurisdictions.

SECTION 4D: THE ACCC CONTINUES TO GET IT WRONG

Section 4D covers collective boycotts (referred to in the Trade Practices Act as "exclusionary provisions"). Competitors cannot collectively agree to restrict or limit dealings with another person or another class of persons.

It is important to note that the "target" of the boycott does not have to be a competitor of the parties engaging in the boycott. This was clearly demonstrated in the Kim Hughes Case[i] in which Western Australian Cricket Clubs boycotted Kim Hughes because he led a "rebel" Australian team to South Africa contrary to the then Australian sporting policy in relation to that country. The boycott was held to breach the per se prohibition in s.4D. This conclusion was reached by the court as a matter of statutory interpretation of s.4D even though:

- Kim Hughes was not a competitor of the WACA or any of its clubs; and
- the court expressly held that the arrangement did not have the purpose, effect or likely effect of substantially lessening competition.

The policy rationale of the per se ban on collective boycotts in the United States, whose law we purport to have adopted, is that they necessarily substantially lessen competition. But the

US law is different. An essential ingredient of the US law is that the boycotted target must be a competitor, actual or potential, of those engaging in the boycott.[ii] This test was that recommended by the Swanson Committee in 1976.[iii] But our Parliamentary draftsperson got it wrong and drafted the section so that boycotting is per se banned regardless of who the target is.

The difference is highly important but the examples given by the ACCC in its Dawson Committee submission show that it continues not to appreciate the point. The ACCC instances bid rigging, output restrictions and market sharing arrangements as instances of exclusionary provisions banned per se and practices which should be criminalised[iv]. No doubt these practices are reprehensible. The question, however, is whether or not there are other non-objectionable practices which are also swept up in the s.4D per se ban. Unfortunately, the ACCC misstates the position in that it also says that limitations on output in connection with joint ventures such as restrictions on the number of teams in a sporting competition or the number of games that are televised are not illegal under s.4D because they "would not substantially lessen competition".[v] The Kim Hughes Case[vi] clearly shows us that anticompetitive effect has nothing to do with the statutory interpretation of s.4D. The South Sydney Case[vii] (currently on appeal to the High Court) clearly shows that s.4D may be infringed even though, as in the case of Kim Hughes, the "target" of the boycott was not a competitor of the boycotting parties. And if a group of competitive sporting clubs get together to "black out" the home televising of home games in order to encourage home crowd attendance, this may well not be anticompetitive either. But it still infringes s.4D.

The ACCC has consistently misstated the effect of s.4D. This cannot be out of ignorance. One can only believe that it is to alleviate concern as regards what is, of course, a matter of very great concern.[viii]

There is simply no case for condemning all arrangements between competitors restricting dealings with any persons or any classes of persons. We mistranslated the US Sherman Act downunder. We also mistranslated the 1976 Swanson Committee recommendations which our law is said to have implemented. New Zealand, having initially followed our law, recognised this mistranslation and amended its Commerce Act in 1990 to provide that the target person or class of persons must be in competition with one or more of the parties to the boycott.[ix] Our own law is simply indefensible. There are many desirable social and competition benefits in some activities involving collective limitations on dealings with non-competitors.

It is not just in the "classic" collective boycott area that s.4D impacts (and those examples cited by the ACCC basically are those without any redeeming social benefit). The misdrafting of s.4D is a significant problem in the area of joint ventures. These arrangements should be evaluated under a competition test. But limitations as to whom competitive joint venture parties will sell can well come within the per se ban of s.4D. Instead of attempting to draft complex but inadequate joint venture exemptions to the per se ban provisions of the Act, much would be achieved by recognising the errors of policy incorporated in the basic drafting of s.4D itself.

The ACCC recommends no change in the drafting of s.4D itself. Instead it suggests the creation of a new criminal offence illegalising arrangements between competitors which would, directly or indirectly:

> *"restrict the ability of the parties to the agreement to freely supply specified goods or services or to freely supply goods or services to specified customers."*[x]

This is said to be one of "the worst antitrust offences" and to constitute "hard core cartel conduct".[xi] Undoubtedly, in certain cases, it can be. But it can also be neutral or even desirable conduct as we have seen. The ACCC has simply got it wrong if it believes that this

will bring our law into line with that of the United States (the example take for purposes of this commentary).

If, notwithstanding my protestations, such a law is enacted, it is my hope that at least the ghastly two split infinitives in it might be eliminated.

AN "EFFECTS TEST" IN S.46, SAYS THE ACCC, WOULD BRING OUR LAW INTO LINE WITH THAT OVERSEAS

As is well known, the ACCC wishes to insert an "effects test" into s.46. One justification for this is that "Amending s.46 to include an effects test would bring Australian law into line with European and US law and acknowledge the importance to the Australian economy of … underlying economic principles".[xii] This is very much a "half truth" – something which the ACCC condemns so fervidly in the case of misleading or deceptive conduct. To illustrate the point, the law of the United States is again taken.

The words "intent", "effect" or "purpose" are not contained in the text of the United States Sherman Act. The ACCC in Appendix 3 to its submission glosses over the US law by saying that, even though an element of deliberation is required "in practice effect is more important and the intention is inferred from it". The ACCC states in relation to US law that "intent is linked to effect for a firm can be presumed to have intended the consequences of its actions".

Although the ACCC in its submission asserts that our Act must be amended to bring it into line with the United States law, Australian law is not as weak on the question of "purpose" as may be thought by many. As was said by the Full Court majority (Davis & Einfeld JJ) in General Newspapers Pty Ltd v Telstra Corporation[xiii]:

> *"If, having regard to the nature and substance of a transaction and to what it was designed to achieve, it could be said that a substantial purpose of a transaction was one of the purposes proscribed by s.46(1) than that would be sufficient and it would not be necessary to make any further examination of the subjective reasons of the persons in control of the transaction. Nor, if such a purpose was to be inferred from the conduct of the corporation or other relevant circumstance, as s.46(7) permits, would it be a defence to say that the predominant factor actuating the persons in control was the achievement of another end. As s.4F provides, a substantial purpose is sufficient."*[xiv]

The above said, it must be stressed that the United States law does not rest on issues of "purpose" and "effect" alone. It is substantively different. Justice Pincus analysed the United States law at trial in the Queensland Wire Case[xv] concluding that the American cases required that some reprehensible behaviour directed against a competitor was necessary as a pre-requisite to infringement and there was no violation of the law if "valid business reasons" existed for conduct involved.[xvi]

To bring our law into line with US law, we would have to re-draft s.46 to provide that it applied only in relation to a "misuse" of market power – rather than a mere "use" of market power, as held by the High Court in Queensland Wire[xvii]. If the ACCC was genuine in wanting to align the Australian and United States systems of law it would recommend this change. However, this would make the reach of s.46 both more restricted and more certain and there is no evidence that the ACCC's agenda includes either of these goals. Further, the United States law has a threshold of dominance (normally interpreted as a 50 per cent market share) before it impacts[xviii].

The ACCC's view of "bringing Australian law into line with … US law" is not expressed in terms of changing the Australian substantive test of infringement to that of the US ("use" to "misuse"). Neither is it suggested that there be a change in the threshold test ("substantial

degree of power in a market" to "dominance"). It is expressed solely in terms of introducing an "effects test". Clearly, however, the introduction of such a test, of itself, does nothing to bring our law into line with that of the United States.

The most obvious impact of adding an "effects test" to s.46, as suggested by the ACCC, will be to make justification of genuine business purpose for conduct irrelevant or at least less able to be argued. Genuine business purpose justification for conduct is a fundamental monopolisation defence in the United States.

It is quite clear that the ACCC will seek to apply an "effects" test in a way which is not only not aligned with United States law but quite at odds with it and, it is submitted, at odds with fundamental competition principles, as is elaborated in the commentary following.

WHERE THE ACCC SEES THE PRESENT LAW AS INADEQUATE AND HOW IT WOULD SEEK TO APPLY AN "EFFECTS" TEST

The ACCC in its submission gives us some idea of how it sees a s.46 "effects" test working. It argues that parties can under the present "purpose" test argue self interest as a defence to certain conduct. Thus the ACCC regards it as wrong that, in response to an allegation of predatory pricing, an incumbent firm might say:

> *"My purpose was only to retain my market share. Why should I be forced to relinquish my market share to a new entrant?"*[xix]

Likewise the ACCC suggests that it is wrong for a party to refuse to deal by asserting:

> *"My purpose is to dedicate my resources to my related company or division. I have no care for my competitors and why should I be forced to look after a competitor?"*[xx]

Further, the ACCC suggests that it is wrong for a firm to insist on better terms than its rival. It is wrong, says the ACCC for a firm to be able to plead:

> *"My sole focus is on my own costs of supply. If I am able to lower my costs relative to my rivals, I will be a more effective competitor. I have no thought to damaging my competitor or deterring entry. Everyone must simply look after themselves."*[xxi]

Other not dissimilar examples[xxii] are given but the above will be adequate to illustrate the ACCC's line of thinking.

In each case the ACCC believes that the conduct should be evaluated by a competitive "effects" test.

The US law, with which the ACCC suggests we should align our own, establishes some basic principles which the ACCC's above concepts infringe. Two fundamental principles of US law are that:

- competition law is about protecting "competition" not "competitors"[xxiii]; and
- monopolists, like everyone else, must be entitled to compete. To hold otherwise is to hold an umbrella over inefficient competitors[xxiv].

Further, as the Privy Council said in Telecom NZ v Clear Communications[xxv]:

> *"(Misuse of market power legislation) 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."*

Given these factors, it would seem reasonable for parties to be able to act in their own self interest unless there are clearly articulated rules which provide to the contrary. This is the US evaluative starting point. It is the opposite starting point to that adopted by the ACCC whose premise seems to be that consideration of the position of a competitor is the first principle by which conduct is to be evaluated. Because, generally speaking, clearly articulated rules as to circumstances in which one should or should not deal with another have proven impossible to prescribe in practice, the United States has said, with but very limited exceptions, that such decisions are the province of those in the marketplace and they should not be second guessed by the judiciary or by regulators. In the United States, certainty of conduct is achieved by even those having a substantial degree of market power being able to deal as they wish[xxvi]. Such parties can thus deny supply for such reason as is, in their view, in their own best interests. A refusal to deal in the US does not infringe the law as it is not "commercially reprehensible conduct". Further, low pricing is permitted so long as it does not infringe the US interpretation of predatory pricing, one aspect of which is pricing below cost with intent to drive a party from the market[xxvii]. There is, in the US, a clearly articulated line which does not exist in Australia between keen competitive pricing and predatory pricing.

In the United States, therefore, a party is, generally speaking, quite entitled to defend conduct as justifiable because its purpose is to retain market share, to dedicate resources to my own company or division or to lower costs relative to its rivals. Only in quite limited circumstances prescribed by articulated principles is there any obligation to consider the position of a competitor. This, many would believe, is of the essence of what competition is all about.

If we are going to align ourselves with US law, as the ACCC suggests, we should align ourselves with all of it – including the concept that parties in a competitive process are basically allowed to look after their own interests first. The process of competition inherently involves inflicting harm on competitors. Contrary to what the ACCC appears to assert, competition, at least in the United States, does not incorporate any concept of "noblesse oblige". The ACCC argues that "Competition can be damaged irrespective of the purpose motivating … conduct".[xxviii] But surely the competitive process must enable a party to give its reasons for engaging in conduct – something which the ACCC seems to want to negate but which, in the United States, is fundamental to a defence of "business justification". Some pro-competitive conduct may give rise to what might be regarded on first sight as an anti-competitive effect – for example the elimination of a competitor. Yet this is of the essence of competition itself.

The business purpose or reason for which conduct is engaged in must be regarded as of crucial importance in the interpretation of s.46. At some points in the judgments of the Justices of the Full Federal Court in Boral[xxix], it was said that an evaluation of the business purpose of conduct was introducing the concept of reprehensibility, contrary to Queensland Wire,[xxx] by the back door. Surely, however, the business reason for which one engages in conduct must be crucial to the legality or otherwise of s.46 conduct whether or not moral reprehensibility is involved in the interpretation of the section. 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 if there are detrimental effects on others, surely a rational business purpose can at least show, on balance, that it was not a substantial purpose to produce those detrimental effects. A fundamental principle is that conduct undertaken with the purpose of advancement of one's own position in the competitive race is not something which is detrimental to the competitive process. This principle should be circumscribed only by very clear and limited rules which address the competitive process as a whole and not the position of individual competitors in it.

The difficulty with the ACCC's view is that, if an effects test is to be implemented as it suggests, it reconceptualises what competition is all about. Instead of competition being about obtaining and retaining market share, it is reconceptualised as involving a duty of care to forsake market share, if necessary, to preserve and perhaps even nurture other competitors. In making assessments as to when this should be done, there cannot possibly be any rules of general application. Thus much is left to the subjective opinion of the ACCC as competition regulator. The ACCC as regulator can determine what prices should be charged and when one should deal in order that a competitor is protected. The difficulty is, of course, this certainty of decision making suffers because executives cannot determine the legality of conduct at the time they have to decide upon a course of action. There is simply no way of knowing in advance what the ACCC will consider to be "fair".

There seems to be no doubt from the ACCC's submission to the Dawson Committee that it will regard its role as "pro-active" in second guessing business decisions made as to pricing and dealing terms. This added involvement of the ACCC in injecting into business decisions its own concept of the "fairness" of pricing and dealing conduct cannot be of benefit to the competitive process as a whole. It substitutes the decisions of a non-market player for those of market entities and considerably obfuscates the market rules of conduct.

When giving evidence to a Parliamentary Committee in 1999 on the "pros" and "contras" of introducing an "effects" test into s.46, ACCC Chairman, Professor Allan Fels, noted the following problems which the introduction of an effects test might cause[xxxi]:

- 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.

I suggest that the ACCC's submission to the Dawson Committee clearly bears out all these points. The absence of any criteria for the evaluation of conduct (other than the ACCC's idea of what is "fair", taking into account the interests of competitors) cannot do other than create uncertainty. Necessarily this will cause unintended breaches of the Act. Also it will cause considerable doubts. Competitors must be able primarily to look after their own interest. If this is not a fundamental concept, then competition, and the competition process as a whole, cannot be other than less robust.

I have no objection to Australia aligning itself with the more robust United States law. If the ACCC suggests this, it should, however, tell the whole story and not only those parts of it which suit its cause. Clearly, changing the "effects" test is not an alignment of s.46 with the United States law of monopolisation.

PROBLEMS OF PROOF OF "PURPOSE"

The ACCC in its submission to the Dawson Committee states that it has received many complaints of anticompetitive conduct by companies possessing market power.[xxxii] It states that these complaints have often not been pursued because of an inability to obtain evidence of purpose. It instances some gross examples where this has occurred – in some cases relating to the destruction of records. But one would think that adverse inferences in relation to purpose could be drawn from this conduct and one wonders, in any event, why companies determined to evade the law would not destroy documents whatever test of infringement there may be. Further, as anyone in commerce well knows, complaints against a competitive party do not equate to transgressions of the law. A party's "purpose" in furthering its own self interest may well be beneficial to the competitive process even if inimical to the interests of particular competitors within that process. Those disadvantaged will complain even though there is no illegality involved.

Interestingly enough, ACCC opinion varies from time to time on the problems of proof. Thus Professor Fels said but a year ago:

> *"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."* [xxxiii]

There is nothing which has changed in the past year in this regard other than the fact that the ACCC now sees the "proof issue" as another, but an unproven, argument to further its general agenda.

IN CONCLUSION

The case for amendment of s.4D to accord with US and New Zealand law is overwhelming. Our legislation is the product of a drafting error which has to be corrected. If the ACCC wishes to criminalise certain conduct akin to s.4D, it has to define such conduct in terms which do not repeat the drafting error committed in the initial drafting of s.4D itself.

The ACCC's "effects test" case is, in my view, unproven. It shows an intention to interpret such a test in a way which would be inimical to the competitive process as a whole. The ACCC attempts to justify its advocacy of an "effects test" by saying we should align our law with that of the United States. But the ACCC tells only half the story. What the ACCC proposes would bring about great divergency from US law than that which currently exists.

ENDNOTES

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

[ii] See Smith v Pro Football Inc 1978-2 Trade Cases ¶62,338; E A McQuade Tours v Consolidated Air Tour Comm. 1972 Trade Cases ¶74,125.

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

[iv] Australian Competition and Consumer Commission: Submission to the Trade Practices Act Review (June 2000) Par 2.1.

[v] n.iv Par 2.4.4.4.

[vi] n.i.

[vii] South Sydney Rugby League Football Club v News Ltd (2001) ATPR ¶41-825. (Full Federal Court)

[viii] See, for example, 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 said that medical practitioners entering into rostering arrangements with a local hospital did not infringe s.4D. Legal advice from Blake Dawson Waldron to the Australian Medical Association to the opposite effect which, in this writer's view, is clearly correct, was rejected by the ACCC. The fact that medical practice roster systems may be a per se breach of Trade Practices Act has been a matter of considerable concern to medical practitioners. The ACCC plays down their fears. But it misstates the law in doing so.

[ix] Commerce Act (New Zealand) s.29(1)(c).

[x] n.iv Par 3.3.5.

[xi] n.iv Par 2.4.2.

[xii] n.iv Par 3.3.5.

[xiii] General Newspapers Pty Ltd v Telstra Corporation(1993) ATPR ¶41-274.

[xiv] n.xi p.41,697-p.41,698.

[xv] Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited (1987) ATPR ¶40-810 (Pincus J at trial).

[xvi] n.xiii at p.48,819.

[xvii] Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited (1989) ATPR ¶40-925 (High Court).

[xviii] US v Aluminium Co. of America (148 F. 2d 416; Mowery v Standard Oil of Ohio 463 F. Supp 762; 590 F. 2d (6 Cir. 1978); Cliff Food Stores v Kronger 1969 Trade Cases ¶72,923 (6 Cir. 1969); 30 per cent market share held inadequate in Richter Concrete v Hill Top Concrete 1982 – 3 Trade Cases ¶65,503 (6 Cir. 1982).

[xix] n.iv p.87.

[xx] n.iv p.88.

[xxi] n.iv p.89.

[xxii] The other examples are a party choosing a discount scheme which best maximises its supplier returns and imposing safety standards (n.iv p.90). In both cases, the ACCC sees an obligation on parties to take into account the effect of the arrangements on other firms.

[xxiii] Brunswick Corp v Pueblo Bowl-O-Mat 429 US 477 (1977). This principle adopted by the High Court in Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) ATPR ¶41-833.

[xxiv] Olympic Equipment Leasing v Western Union Telegraph 797 F. 2d. 370 adopted by the High Court in Queensland Wire Industries v BHP (n.xv).

[xxv] [1995] 1 NZLR 385 at 403.

[xxvi] Burdell Sound v Altec Corporation 515 F. 2d 1249 (1975). Approved by the High Court in Melway v Hicks (2001) ATPR ¶41-805.

[xxvii] Brooke Group Ltd v Brown & Williamson Tobacco 509 US 209; (1993) 1 Trade Cases ¶70-277.

[xxviii] n.iv Par 3.3.1.

[xxix] ACCC v Boral Limited (2001) ATPR ¶41-803.

[xxx] n.xv.

[xxxi] See Evidence: Official Committee Hansard – Joint Committee on the Retailing Sector: 13 July 1999 pp.1161-1162.

[xxxii] n.iv Par 3.3.3.

[xxxiii] 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.50.