

Cartels: Early Court resolution in Australia – the Experience – The Challenge

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Australia is in the midst of enormous changes to its competition law, the *Trade Practices Act 1974* (**TPA**) (soon to be changed to the *Competition & Consumer Act 2010*).

Two changes are of particular relevance to this session are that:

- as of 1 January 2007, the TPA provided for a significant increase in civil pecuniary penalties for corporations;
- as of 1 June 2009, the TPA provided for criminal penalties for corporations and more importantly for individuals, including jail terms.

It will be of great interest to watch in the coming few years whether these legislative changes, and the actions of the ACCC in seeking to give effect to these changes, result in a significant shift in the way in which the majority of cartel court actions commenced by the ACCC get resolved.

While, the TPA has been amended on many occasions since being enacted, there has been, over the last twenty years, a consistent approach to the factors taken into account in assessing penalties and the approach to the conduct of proceedings. Generally, they are not fully contested but are resolved 'early' by way of agreement between the Australian Competition and Consumer Commission (**ACCC**) ACCC and parties to the cartel, such agreements being confirmed by the court.

Penalties for cartel conduct

Since the commencement of the TPA in 1974, the Federal Court of Australia (**Court**) has had the power to impose civil pecuniary penalties in court proceedings commenced by the ACCC or its predecessor the Trade Practices Commission for contraventions of the competition provisions of the TPA², including cartel conduct³.

Over the years, the maximum levels of penalties have steadily increased:

- Until 1993, the maximum level of penalties were:
 - For a corporation: AUD\$250,000
 - For an individual, AUD\$50,000

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² Section 76 of the TPA

³ The term "cartel provision" was only inserted into the TPA in June 2009. Prior to the "cartel amendments" the TPA contained prohibitions against contracts, arrangements or understanding between competitors that had the purpose (or effect or likely effect) of fixing prices or contained "exclusionary provisions".

- Between 1993 and 31 December 2006 the maximum level of penalties were:
 - For a corporation: AUD\$10million
 - For an individual, AUD\$500,000
- Since 1 January 2007:
 - For a corporation: the greatest of:
 - AUD\$10million; or
 - If the Court can determine the benefit that has been obtained, 3 times the value; or
 - If the Court cannot determine the value of those benefits, 10% of the annual turnover (as defined in the TPA) of the 12 months ending at the end of the month in which the act or omission occurred;
 - For an individual, AUD\$500,000.⁴

In addition to the maximum pecuniary penalties available since 1 January 2007, there are criminal penalties that the Court may impose in proceedings commenced by the Commonwealth Director of public Prosecutions as follows:

- For a corporation, the same monetary levels as identified above⁵;
- For an individual:
 - Up to 10 years jail; and/or
 - Up to AUD\$220,000⁶.

Prior to each of the above increases in the size of/severity of the penalties, the ACCC had made submissions to various government committees of the need to increase the level of penalties in an attempt to deter cartel conduct.

The object of penalties and the approach to assessing the size of the penalty

On the whole, there has been a consensus in Australia for a considerable period, between the ACCC, the Court and most commentators, that the primary object of imposing penalties under the TPA is deterrence, both for the parties engaging in the conduct and for the broader business community. Many judgments and articles have quoted statements such as those in the judgment of French J, who said:

“The principal, and I think the only, object of the penalties imposed by s76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act.”⁷

Equally, the factors relevant to the assessment of the size of the penalties have also been settled for a considerable period. Section 76 of the TPA itself identifies a number of factors when it states that

⁴ Section 76 of the TPA

⁵ Section 44ZZRF and Section 44ZZRG of the TPA

⁶ Section 79 of the TPA

⁷ Trade Practices Commission v CSR Limited (1991) ATPR 41-076 at 52,152 – Justice French is now the Chief Justice of the High Court of Australia. The principle was reiterated most recently in Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd [2010] FCA (26 August 2010)

the Court may order such pecuniary penalties as it deems appropriate, having regard to all relevant matters including:

- *“the nature and extent of the act or omissions”;*
- *“any loss or damage suffered as a result of the act or omission”;*
- *“the circumstances in which the act or omission took place”;* and
- *“whether the person has previously been found by the court in proceedings....to have engaged in any similar conduct.”*

In addition to the statements of the legislation, factors variously expressed in a number of judgments were then encapsulated by French J⁸ and then added to by Heerey J⁹, to arrive at the following set of factors relevant to penalty assessment (in addition to those set out above):

- the size of the contravening company;
- the degree of power it has, as evidenced by its market share and ease of entry into the market;
- the deliberateness of the contravention and the period over which it extended;
- whether the contravention arose out of the conduct of senior management or at a lower level;
- whether the company has a corporate culture conducive to compliance with the TPA, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;
- whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the TPA in relation to the contravention;
- financial position; and
- deterrent effect.

Since these judgments, the Court has, in considering the appropriate level of penalty, always taken account of the above factors. Accordingly, in hearings before the Court to assess the level of a penalty, submissions are made/evidence is adduced in respect of these factors – generally as part of joint submissions by the ACCC and the contravener in support of a proposed penalty.

While it is not the focus of today’s session, it is also interesting to note that the Australian approach to calculating pecuniary penalties is not as precisely defined as some other jurisdiction, particularly the United States and the European Commission whose guidelines are more formulaic and precise.¹⁰ Australia has no definitive statement about the process of calculation of penalties either by the Court or by the ACCC in any guideline.

⁸ In *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 at 52,152 – the factors since have been known as the “French factors”

⁹ In *North West Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) ATPR 41-515 at 42,444-5

¹⁰ See United States Sentencing Commission, *Federal Sentencing Guidelines Manual* Chapter 2 Part R Antitrust Offenses 2009 and European Commission, *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) (a) of Regulation No1/2003* [2006]

In Australia, it is also not clear, when seeking to analyse judgments by the Court, the factors are taken into account to identify a base fine or, with any clarity, the actual impact of any individual factor that has aggravated or mitigated particular penalties.

It is accepted that:

- where there are multiple contraventions, regard has to be given to the totality principle – in essence so that the total penalty for related contraventions did not exceed what was proper for the entire contravening conduct;¹¹
- an assessment of penalty needs, in addition to being based on all the relevant factors, to give *“careful attention...to maximum penalties.... which invite comparisons between the worst possible case and the case before the Court at the time. They provide the yardstick, which is to be taken and balanced with all of the other factors.”*¹²

However, having said that, the approach to the actual calculation of penalties in judgments varies considerably, with some assigning a penalty figure for each contravention and then summing those figures, and others providing no breakdown but instead arriving at an amount the Court considers as the appropriate total penalty in the circumstances. Most recently Mansfield J (the Judgment was not in a cartel case) made the following statements: *“I do not think it is necessary to analyse in detail the individual conduct in relation to each of the sets of contraventions.....The detail of that conduct does not, in my view, enlighten in any relevant way the assessment of the nature and extent of the contravening conduct or the circumstances in which it occurred”,* going on to state that *“There is no particular mathematical formula which I have applied in reaching those conclusions [about the quantum of penalty].”*¹³

Penalty decisions in practice

While there have been significant numbers of cases that have been fully contested before the Court, what has now become relatively the standard approach to concluding proceedings commenced by the ACCC alleging cartel conduct is for early resolution of the proceeding.

The practice generally involves:

- the ACCC, pursuant to its Cooperation Policy for Enforcement Matters¹⁴ arriving at an agreement with a party, by way of a Statement of Agreed Facts, on the facts and circumstances relevant to the proceeding (although the parties need not have arrived at the Statement of Agreed Facts as part of ongoing cooperation with the ACCC under the Cooperation Policy);
- the parties agreeing on an appropriate level of civil pecuniary penalties (and other orders/remedies), for both the corporation and the relevant individuals; and
- the parties then making joint submissions to the Court seeking the Court’s endorsement by way of an Order of their agreed position.

On the whole, there has been acceptance by the Court of joint submissions as to penalty, the principle generally considered to be best encapsulated by the Full Court in *NW Frozen Foods Pty Ltd*

¹¹ Adopted in many judgments over the last 15 or so years: see *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41-375 at 40,169, *Australian Competition and Consumer Commission v Visy industries Holdings Pty Ltd* [No3] 2007 244 ALR 673 at 707 and most recently reiterated in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2010] FCA (26 August 2010) at 8

¹² This principle is derived from *Makarian v The Queen* 2005 215 ALR 213 at paragraphs 27 and 31 – referred to by way of example in *Australian Competition and Consumer Commission v Gullyside Pty Ltd* (2006) ATPR 42-097 at 44,756

¹³ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2010] FCA (26 August 2010) at 10 and 14

¹⁴ The ACCC has had a “Cooperation Policy” in place since 1998, the most recent policy was published on 31 July 2002

v Australian Competition and Consumer Commission¹⁵ (**NW Frozen Foods**), affirmed some years later, again by the Full Federal Court, in Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd¹⁶ (**Mobil**).

In NW Frozen Foods, the ACCC accepted, and it remains the ACCC's stated position that:

- there is significant expense that is saved by the cooperation of the contraveners, including potentially both the expense of the investigation and the court process;
- the cooperation and agreement also often results in broader efficiencies and savings for the ACCC in that it leads to in evidence about the conduct of other contraveners, or assistance in a chain of enquiry in relation to other contraveners that were part of the same cartel (and sometimes other cartels);
- the time savings as well as the cost savings frees the ACCC officers to investigate other matters (and the Courts to resolve other proceedings); and
- the negotiated resolutions often include measures that assist in promoting compliance and vigorous competition in the relevant market.

In addition, while many judges reiterate that the level of penalties in each particular case depends of the facts and circumstances of the particular case, the time savings, as against protracted court hearings have also led to a greater number of judgments being made sooner than would have otherwise have been the case, thus providing some level of precedent value. Judgments on penalties have on occasion been referred to, in ACCC submissions, as being the relevant 'yardstick' for the later decisions.

The greater number of judgments that have resulted 'sooner' due to the early court resolution process have also assisted the ACCC to maintain ongoing set of publicity about the consequences of cartel conduct, reinforcing the rhetoric of the ACCC about the 'evils' of cartel conduct - assisting with deterrence message.

The combination of NW Frozen Foods and Mobil encapsulate the following principles:

- (i) *"It is the responsibility of the Court to determine the appropriate penalty to be imposed under s 76 of the TP Act in respect of a contravention of the TP Act ["The Act places on the shoulders of the court the responsibility to determine 'appropriate penalty in each particular case having regard to 'all relevant matters' including the matters specified in the section"¹⁷].*
- (ii) *Determining the quantum of a penalty is not an exact science. Within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another ["the court is likely to be assisted greatly by the views put forward by the Australian Competition and Consumer Commission, or by economists called on behalf of the parties."¹⁸].*

¹⁵ 1996 141 ALR 640

¹⁶ [2004] FCAFC 72

¹⁷ NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission 1996 141 ALR 640 at 644

¹⁸ NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission 1996 141 ALR 640 at 644

- (iii) *There is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy. Accordingly, when the regulator and contravener have reached agreement, they may present to the Court a statement of facts and opinions as to the effect of those facts, together with joint submissions as to the appropriate penalty to be imposed.*
- (iv) *The view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty. In particular, the views of the regulator on matters within its expertise (such as the ACCC's views as to the deterrent effect of a proposed penalty in a given market) will usually be given greater weight than its views on more 'subjective' matters.*
- (v) *In determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case. Where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so.*
- (vi) *Where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure is, in the Court's view, appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if within the permissible range.”¹⁹*

Mobil did however make the point that it remains the responsibility of the ACCC to “explain to the Court the process of reasoning that justifies a discounted penalty.”²⁰

More explicitly, the Full Court in NW Frozen Foods stated that “The court will not depart from an agreed figure merely because it might otherwise have been disposed to select some other figure, or except in a clear case.”²¹

There was some criticism by a number of judges following NW Frozen Foods about the practice of the Courts accepting joint submissions about agreed pecuniary penalties such as that there are “very real problems....[with the] settlement of quasi-criminal proceedings”²², that it is a “somewhat undesirable practice”²³ and that such judgments “are not a good yardstick against which to measure whether what is agreed in later cases is within the range of appropriate penalties.”²⁴

However, since Mobil confirmed the Court’s position, the principle has been settled, with even one of the critics, Finkelstein J acknowledging that the import of the earlier cases is that “a court should not depart lightly from the settle decision.

¹⁹ Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72 at para 51

²⁰ Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72 at para 56

²¹ NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission 1996 141 ALR 640 at 644

²² Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at 42,936

²³ Australian Competition and Consumer Commission v Colgate Palmolive Pty Ltd [2002] ATPR 41-880 at 45,064

²⁴ Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at 42,936

Since NW Frozen Foods, the majority of cases have been resolved early by way of agreed submissions on facts and penalties - in approximately 67% or about 40 out of 60 judgments. And the position has been more marked since the Mobil decision with approximately 75% of judgments being the subject of early Court resolution.

Early Court Resolution – A success?/the criticisms

For the above reasons, the ACCC considers that early court resolution in Australia has been a success. There have however been criticisms about the Australian approach. In particular, some commentators consider that the corporate fines in Australia may be considered as too low to achieve the deterrence that is the aim of imposing pecuniary penalties – and that starkly, Australia lags behind international trends relating to quantum of penalties and method of penalty setting.²⁵

Round undertook an analysis of penalties in Australia for the period 1974-2000. He expressed the view that penalties in Australia were lagging behind international trends, and arguably not achieving the deterrence that is the aim of penalties, due to the apparent reluctance of judges in Australia to set penalties commensurate with the maximum penalties available under the legislation. Round cited that on average corporate penalties between 1974 and 2000 underwent a fivefold increase – well below the 40-fold increase in the legislated maximum penalty.

Interestingly, a more recent study published in 2008 stated that of 31 recent penalty judgments, 15 made no reference at all to the maximum penalty, while of the remaining 16, only 6 considered the penalty by reference to the maximum, the remainder just recited the maximum.²⁶

The trend for penalties for individuals in Australia appears to be even more stark with the median penalty actually declining between 1999-2008.²⁷

In all likelihood, the significant reasons for the lower level of penalties have been the approaches taken to date by the ACCC in implementing its *Cooperation Policy for Enforcement Matters* or otherwise arriving with contraveners at an agreed position of facts and penalties, and the Court's general position of not departing from the position jointly reached by the parties.

The approach of seeking an early court resolution necessarily requires some level of compromise that may highlight mitigating factors on the part of the contraveners. Finkelstein J highlighted this issue in the recent marine hose judgment in Australia when he stated that:

“...Penalties in Australia are still something of a light touch notwithstanding the new penalty regime that was introduced in 2006. If they are to be reviewed, perhaps the place to begin is not to lose sight of the maximum aggregate penalty that can be imposed in a particular case. Although only to be applied in the worst possible case, there must still be some relationship between the maximum penalty and the penalty that is imposed.” However, he went on to state that *“All in all, the penalties suggested by the parties were reasonable, having regard to the constraints imposed upon a judge in going beyond what the parties have suggested.”*²⁸, thus placing the onus back on the ACCC's approach to arriving at an agreed penalty position with the contraveners.

²⁵ D Round, J Siegfried and A Baillie, 'Collusive Markets in Australia: An Assessment of their Economics, Characteristics and Judicial Penalties', Australian Business Law Review, vol 24 1996, and the soon to be published book, Caron Beaton-Wells and Brent Fisse *Australian Cartel Regulation : Law Policy and Practice in an International Context*.

²⁶ P Stevenson, D Stewart and A Floro, 'A Dollar in the Hand: Assessing Penalties for Contraventions of Part IV of the *Trade Practices Act*, *Trade Practices Law Journal* vol 16 2008, page 203

²⁷ Referred to in the upcoming book by Caron Beaton-Wells and Brent Fisse *Australian Cartel Regulation : Law Policy and Practice in an International Context* (para 11.3.6) cross referring to M Welsh 'Civil Penalty Orders: Assessing the Appropriate Length and Quantum of Disqualification and Pecuniary Penalty Orders', *Australian Bar Review*, vol 31, 2008, 96, at 119.

²⁸ Australian Competition and Consumer Commission v Bridgestone Corporation [2010] FCA 584 at para 49-50

However, just as making an assessment about all of the factors relevant to a pecuniary penalty is an inexact science, equally, seeking to assess the point at which penalties should be struck to be 'successful' at deterring wrongdoing is inexact. There are, as is pointed out by other authors such as Wouter P J Wils²⁹ additional considerations when analysing the factors that may deter contraveners other than (just) the quantum of the pecuniary penalty.

In particular, Wils when considering the 'offender's' subjective estimate of the gain, possibility of detection and punishment, he refers turns to cognitive psychology to assert that people tend to rely disproportionately on those incidents which can be easily brought to mind because they are recent, happened close to them, or were well publicised. He then asserts that because it is impossible to achieve complete deterrence, it is important for regulators to have a constant stream of decisions so that those decisions stay in the mind of potential contraveners, and to give such decisions maximum publicity – in essence to keep the deterrence message 'front of mind' (otherwise the decisions fade in the minds of potential contraveners).³⁰

Wils also points to the 'moral effects' of ongoing imposition of, and publicity about, pecuniary penalties – it sends a message to the spontaneously law-abiding, reinforcing their moral commitments to the rules.³¹

The approach by the ACCC to seek to detect cartels by way of policies such as the Immunity Policy for Cartel Conduct³² and then utilise, either formally under the Cooperation Policy, or more informally, early court resolution, together with constant reinforcement through publicity/speeches by the ACCC about the 'evils' of cartels and the successes in detection and penalty, arguably assist in achieving the ends referred to by Wils. Arguably it also confirms for the ACCC that it is on the 'right path' with its approach of early court resolution of cartel matters.

The future

While on the one hand, the ACCC has aggressively promoted the above approach to early court resolution which appear to have achieved penalties that are significantly lower than the available maximum, the ACCC has on the other hand been a strident advocate that the penalty regime that it seeks to administer is not high enough to have a significant deterrent effect – such submissions being key in the legislature's decisions to increase civil pecuniary penalties for business in 2007 and for the introduction of criminal penalties in 2009.

The legislature now having enacted these changes, the challenge for the ACCC and the Court (and business) is how to give effect to these changes in the paradigm of the Australian experience of early court resolution.

It is only now that conduct that occurred following the 2007 amendments, resulting the higher maximum corporate penalties, is finding its way to the Court – and no doubt still some time before criminal proceedings are commenced.

It is clear both the ACCC and the Court³³ have in their minds the 'will' of the legislature in enacting the more severe penalties. The ACCC has been highlighting to business the existence of the new

²⁹ See Wouter P J Wils, "Optimal Antitrust Fines: Theory and Practice" *World Competition Law and Economics Review* vol 29 No2 2006

³⁰ See Wouter P J Wils, "Optimal Antitrust Fines: Theory and Practice" *World Competition Law and Economics Review* vol 29 No2 2006 at 194

³¹ See Wouter P J Wils, "Optimal Antitrust Fines: Theory and Practice" *World Competition Law and Economics Review* vol 29 No2 2006 at 193

³² Most recently republished in July 2009

³³ See Finkelstein J in *Australian Competition and Consumer Commission v Bridgestone Corporation* [2010] FCA 584 at para 49-50

penalty regime and criminality in its press releases and speeches, such as in its press release earlier this year when it made statements as follows:

"Make no mistake, the ACCC will be seeking higher penalties. The courts will be asked to apply penalties in the new legislative context and the ACCC will be advocating for the penalty regime to be used to its maximum effect.

"Hypothetically, this means that where a cartel might have faced penalties in the tens of millions of dollars – in a case which affected a large number of consumers – it would now be facing penalties totalling hundreds of millions of dollars.

"In cases where we are satisfied that there is serious cartel conduct, we will be recommending criminal prosecution to the Commonwealth Director of Public Prosecutions, with the intent of putting high ranking executives behind bars."³⁴

The ACCC has confirmed its resolve in a number of speeches to business where the Chairman made statements such as: *"...The ACCC will be pressing for any penalty to be calibrated against whatever might be the maximum...."*³⁵

It will be interesting to observe (and participate in) the manner in which the ACCC gives effect to the more severe sanctions enacted by the Parliament in the context of the Australian tradition of early resolution of cases. While the Court has stated on a number of occasions that previous penalty decisions are of little precedent value, business is well aware of the quantum of previous penalties. In the short term, the cost/benefit of an agreement with the ACCC on penalties, as against proceeding to a hearing may shift in the face of the ACCC seeking hundreds of millions of dollars rather than tens of millions – particularly where to date judges have not ordered penalties anywhere near the maximum specified in the legislation. The cost/benefit equation may also be reconsidered in circumstances where the action being taken is criminal.

Clearly, in other jurisdictions there have continued to be early court resolutions in the face of severe penalties and criminal sanctions. It may however require a period of contested hearings in Australia before a recalibration of the expectations of business, the ACCC and the Courts to the new penalty and new criminal regimes.

³⁴ ACCC press release "ACCC: Breaching the Trade Practices Act has never been more costly", 26 February 2010

³⁵ Speech by ACCC Chair Graeme Samuel "Current Issues on the ACCC's radar" 29 May 2010