International developments

Letter from Canada

Mr William Miller of the Canadian Bureau of Competition Policy, currently on secondment to the ACCC, will from time to time provide reports on Canadian competition law developments. His previous contributions appeared in the Trade Practices Commission's Bulletin *nos 82 and 83.*

A senior executive of the ACCC is on exchange with the Bureau in Canada.

The Australian competition regulatory regime has been praised for its synthesis of distinctive elements of both the British and North American competition law schemes. The former is reflected in an explicit administrative framework in the authorisation, declaration and notification schemes of the Trade Practices Act. This affords the specific input of public interest concerns. The latter is found in the Commission's discretion to seek court enforced sanctions through the litigation process, particularly with respect to breaches of the restrictive trade practices provisions.

The enforcement of prohibitions regarding explicit price fixing or market sharing arrangements has always received the highest priority amongst competition regulators. They are often referred to as the core provisions of such legislation. In Australia, these provisions are usually enforced civilly. Criminal sanctions are available under Part V of the Trade Practices Act (deceptive and unfair conduct), and these are prosecuted through the office of the Commonwealth Director of Public Prosecutions. In the United States and Canada such breaches are primarily treated as criminal offences and, subject to particular provisions regarding procedure, statutory defences and evidentiary presumptions, are prosecuted under federal laws of general criminal application.

The spectacular success of the Australian Competition and Consumer Commission in 1995, with record fines following the investigation of the freight, cement, food and building industries, was accomplished through a regime of civilly enforceable offences. The extensive use of discovery, refinement of issues through exchange of pleadings, and a relatively relaxed standard of proof are features of this system. A determination to confine most of these matters to the Federal Court, thereby fostering an interest and expertise at the judicial level, has also benefited the Commission's causes. Other jurisdictions that rely principally upon criminal prosecutions often encounter difficulties in pursuing cases under a criminal standard. Such a standard, in any event, holds out only the theoretical advantage of incarceration. Any proposal to introduce into Australia an enforcement regime with criminal sanctions which would permit the jailing of culpable individuals should therefore be considered carefully, in light of foreign experience.

There have been only three instances of jail sentences in the 107-year history of the Canadian statute, and while the celebrated sentences in the US electrical equipment cases are now over 30 years old, it took over 60 years of enforcement to get there. The intimidating and chilling effects upon the commercial public through media reporting of penal consequences to anti-trust offences, and the adoption of extensive publicity and compliance campaigns such as the famous *Price* video, are probably more effective than all

the sentences passed upon local road paving company owners since.

Criminal proceedings for such offences are increasingly infrequent. Probably no other jurisdiction emphasises the criminal option for such offences as much as the United States, despite the availability of parallel or substitute civil proceedings. Significant 'victories' have been obtained through the pursuit of vigorous enforcement policies. It is a high risk game, and equally damaging losses have been incurred as the result of, in many instances, the substantial procedural hurdles which must be overcome in the prosecution of any crime; in particular, the criminal burden and standard of proof, and the vagaries of investigation through the lack of discovery, notwithstanding the investigative role of the grand jury which is directed by the prosecution. In Canada, even the latter tool is not available, although extensive use of search warrants is made.

A further obstacle is an undercurrent of judicial discomfort toward the criminal enforcement of sanctions against what is often regarded as ambiguous commercial conduct. In the United States many of these concerns are diminished by a substantial body of Supreme Court precedent confirming the applicability of the 'per se' rule of liability over the rule of reason. One of the effects of this rule is to narrow the scope of judicial activism in determining the elements of the principal competition offences. That is not to say that the prosecutor's task in per se offences is simple. Merely getting a sceptical court to adjudicate on a per se basis in a criminal anti-trust prosecution is difficult. In the GE Diamonds prosecution (*US v General Electric Company*), the Court took the matter out of the jury's hands and directed an acquittal. The task of the defendant in such a trial is to characterise its conduct sufficiently close to explicit pricing activity, thereby lessening or removing the role of the per se rule in shaping the burden on the prosecution and reducing most trials to a test of credibility of the State's informants, so as to reach the safe harbour of reasonable doubt.

In Canada three significant matters were recently prosecuted under the Competition Act. The outcomes in each of these cases confirmed the continuing difficulty faced by a regulator in enforcing a criminal-based competition law statute. Two of these proceedings were dismissed without any defence being brought forward and the other salvaged only one conviction out of nine charges. Indeed, all of these cases were significant in displaying the inflexible view that the Courts took of pricing agreements and the stringent degree of evidence required to demonstrate illegal anti-competitive behaviour. They also reflected the Courts' benign view of commercial communications amongst competitors that would suggest that if the principle of 'facilitating practices' as an illegal arrangement under the Competition Act ever had any life in Canada it was in theory and not practice.

Of the three cases, the prosecution in *R. v Clarke et al* is probably the most significant in terms of the economic stakes of the case. The Crown, upon the referral of the Director of Investigation and Research, charged that the corporate participants and several executives in the freight forwarding industry had fixed prices and exclusively shared the market amongst the parties to the agreement from 1976 to 1987. This had resulted in a substantial lessening of competition in the freight forwarding industry; this industry being the shipment of general merchandise by the consolidation of less than truckload shipments into rail car loads for delivery to distant points, in this case from central to western Canada. In the language of the statute, they 'combined, conspired, agreed, arranged, etc. to lessen competition unduly'. It was estimated that the amount of commerce affected by this conspiracy was more than $1 billion.

The Court dismissed the proceedings after the Crown's case which took over two months to present. The Court found that the Crown had failed to demonstrate a discrete anti-trust market or, in the alternative, the presence of sufficient market power amongst the conspirators in a larger transportation market to establish an undue lessening of competition. The Court rejected the expert evidence about the ambit of the market, making adverse findings regarding suggested bias of the Crown's expert. Other anecdotal evidence was similarly regarded as not probative of a market. The Court seemed to have accepted that since other modes of transportation could 'carry' the

freight in question, the choices available to a shipper extended to a greater competitive array than that offered by the accused. It is not clear how the significant cost advantage of the accused, partly passed on to the public to maintain price superiority over other modes, figured into the Court's view of the competitive process.

The freight forwarders' case was the first case to have gone to a contested conclusion after the Supreme Court of Canada's decision in the Nova Scotia pharmacies case. As feared, the seemingly useful language in that judgment regarding the relaxation of the legal test for a lessening of competition was not taken up by the trial judge as he preferred to insist upon the Crown acquitting itself of the traditional criminal law evidentiary burden.

In *R. v Dr. Hook Towing et al* the Crown brought proceedings against a number of Winnipeg auto towing companies which, it was alleged, agreed upon the bid price submitted for exclusive performance of Winnipeg city vehicle towing contracts to a value of over $3 million. Bid rigging, otherwise defined under the Act, is a strict liability offence. The case was dismissed without the defence being put to its evidence, based upon asserted doubt as to the credibility of the Crown's witnesses, principally other industry attendees at the crucial meetings. At one stage of the proceedings, the Court even invited submissions as to why discussions between competitors regarding industry pricing in the context of the subject bid were objectionable.

In *R. v Mr. Gas*, the Crown brought a number of charges under s. 62(1)(a) of the Competition Act. The prohibition of price maintenance, which is set out in s. 62 of the Competition Act, is not limited to 'resale' restrictions, but also applies to horizontal restrictive pricing arrangements between suppliers of a product or service which may be consensual, as the result of a threat, or through 'other like means'. The accused, a small retail petrol chain operating in Eastern Canada, had adopted two schemes of price support. Firstly, the accused had engaged in extensive unilateral, later reciprocal, exchanges of current and proposed pricing information with competitors, which resulted in documented price changes by the whole local industry. Secondly, and somewhat coordinated with the pricing exchange, the accused had raised prices in areas where it had some concentration of business and undercut prevailing prices in other areas, restoring prices when rivals reacted favourably to Mr. Gas' pricing overtures in its 'home' market.

The Court dismissed all of the charges, except one based upon explicit provocative discussion between principals of Mr. Gas and a rival on specific future prices. The Court took a restrictive view of the phrase 'like means' which, it held, was coloured by the other nominate terms of described interaction between competitors found in the section. The Crown had pressed that like means should be viewed as meaning 'less than full conduct'. The Court saw exchanges of pricing information between competitors and aggressive price cutting as non-collusive activities, the former seen as being available from commercial monitoring services, and the latter seen as being indistinguishable from ordinary competitive activity.

Since price maintenance is an offence with strict criminal liability and the Crown is under no obligation to demonstrate anti-competitive intent or result, the prohibition against it is a valuable sanction against direct anti-competitive pricing activity. Nevertheless the Court's rigid approach has failed to breathe life into the statute. This case has been described as a further diminishment of the Director's use of this provision as a tool to 'attack horizontal conduct'.

The Director's recent experience in the criminal enforcement of the Competition Act may be passed off as an aberration, not indicative of any supervening difficulty in the structure of such proceedings but perhaps more reflective of the individual frailties of each prosecution. This is difficult to accept. Indeed it is difficult to recall any case since Albany Felt (1979) that has proceeded to a concluded trial in which the Crown has succeeded under the Act's restrictive trade practices provisions. While significant fines have been obtained through numerous guilty pleas during this period, the continued lack of development of the law, through reasoned judgments after measured, purposeful

argument, tends to undermine the advancement of the purposes of the Act.

Indeed each of the judgments discussed clearly reflects a lack of comprehension of an overall principle of public policy motivating the enforcement approach of the Act. Each of these cases prioritise the criminal law aspects of the cases and confuse that procedural vehicle with the unique aims of the law. In other regulatory enforcement regimes which invoke the criminal or quasi-criminal law, such as environmental regulation, securities and other such schemes, the congruence of policy and the role of courts appears to be more clearly recognised. As one Canadian commentator noted, the courts in Canada continue to mouth the appropriate catenation of words regarding the protection of free competition but appear to have lost sight of their meaning as a guiding principle. Older judgments appear to be more sensitive to the public's interest in curbing restraints of trade.

From New Zealand

These items were extracted from the December 1995 – January 1996 issue of the New Zealand Commerce Commission's newsletter Fair's Fair.

The Commerce Commission enforces both the Commerce Act 1986, which contains restrictive trade practices provisions, and the Fair Trading Act 1986, which deals with consumer protection matters.

Commission investigates food content claims

The Commerce Commission has been looking at nutrition claims about food products, focusing on key issues rather than the entire market. So far, it has looked at claims about fat, orange juice and salt. The Commission is using a mix of education of the industry and enforcement action to further its aim of increasing the degree to which nutritional claims comply with the Fair Trading Act.

Two products have been selected as making claims that are typical of claims about fat content. Pacific Brands is being prosecuted in respect of Plumrose canned ham, and another company will be prosecuted in respect of a snack food it produces. Both prosecutions are test cases dealing with claims made on labels and consumers' perceptions of the overall impression created by promotions.

The Commission has developed guidelines for orange juice labelling after considerable work with the industry and consumers. O and K juices was prosecuted and convicted, and court action will be taken against another company in relation to claims about freshness and country of origin. The results of these court actions will provide important precedents for the industry.

After investigation, the Commission decided that claims about salt content and sodium levels are best dealt with through the Food Regulations administered by the Ministry of Health.

The Commission has run a series of seminars for the food industry, is in frequent contact with industry organisations and has publicised its activity.

In 1996 it will focus on claims about cholesterol, sugar and fibre.

Draft Business Acquisitions Guidelines

The Commission has recently released an exposure draft of its Business Acquisitions Guidelines. Part III of the Commerce Act prohibits business acquisitions which lead to the acquisition or strengthening of a dominant position in a market. The guidelines set out the Commission's approach to assessing whether a business acquisition is likely to breach that provision, and cover issues such as:

- whether a particular transaction is a business acquisition as defined under the Act;

- definition of a relevant market for competition analysis;
- identification of market participants, including importers; and
- assessment of barriers to entry and assessment of dominance in the market.

Comments on the guidelines were sought from interested persons by the end of February 1996.

Air New Zealand/Ansett authorisation timetable

Air New Zealand has applied for authorisation to buy 25 per cent of Ansett Australia, with an option to buy a further 25 per cent. Ansett Australia owns Ansett New Zealand.

The Commission's timetable for considering the authorisation provides for a final decision by 20 March 1996.