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Commentary on paper by Brent Fisse: "The Proposed Australian Cartel Offence"

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1.1 Introduction

The press release of the Treasurer[1] announces the government's intention to create new parallel prohibitions on cartel behaviour. These new prohibitions will take two forms: one civil and one criminal. The distinction between the two is that there will be not requirement for dishonesty in order to breach the civil provision. The rationale for the distinction must be the assumption that dishonesty is an appropriate way to distinguish cartel behaviour that should be subject to the civil regime from cartel behaviour that should be subject to the criminal regime.

As Brent Fisse explains in his paper, the requirement for dishonesty incorporates into a key proscription in the *Trade Practices Act* language of moral reprehensibility. I share his concerns with this.

The reason for my concern can be explained in terms of the objects of antitrust legislation. The primary object of antitrust legislation is the promotion of workable or effective competition – not the elimination of immoral conduct.[2] The issue came to the fore famously in the decision of the High Court in *Queensland Wire Industries Pty. Ltd v. The Broken Hill Proprietary Company Limited & Anor* (1989) ATPR 40-925. The decision by Mason CJ and Wilson J in that case pointed out that much competitive conduct is designed to injure others in a deliberate and ruthless manner:

> But the object of sec. 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort … and these injuries are the inevitable consequence of the competition sec.46 is designed to foster. In fact, the purpose provisions in sec. 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition – for example, sec 46(1)(c) prohibits a firm with a substantial degree of market power from using that power to deter or prevent a rival from competing in a market. The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.[3]

The decision of the High Court in *Queensland Wire Industries* is famous for its acknowledgment that the provisions of Part IV reflect economic law. The provisions are designed to promote effective competition – not to weed out immoral conduct. The promotion of effective competition may well involve the use of the criminal law. But in

[1] "Criminal Penalties for Serious Cartel Behaviour", 2 February 2005.
[2] See Maureen Brunt, "Legislation in search of an objective", *Economic Record*, Vol 41, September 1965, 357-386. See particularly section 3, "Ends and Means".
[3] At 50,010.

framing any prohibitions, legislators should keep their eye on the ultimate goal of competition policy.

1.2 The full phrase

Brent Fisse is right to concentrate on the word 'dishonestly' – it is the means by which the government proposes to distinguish between the civil and the criminal prohibitions. Nevertheless, the government's proposal involves embedding the word in a phrase. I want to direct my remarks to the phrase in which the word is embedded – because I think that the phrase, with the excision of the word 'dishonestly', has some merit compared with the language of our current s45A. The press release provides two, slightly different, versions of the phrase.

The first is this:

> The cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the **intention of** dishonestly **obtaining a gain from the customers who fall victim to the cartel.**[4]

If this were the only version of the phrase, it might appear that selling cartels would be caught – but not buying cartels. This is clarified in the fuller statement further down the same page of the press release:

> The cartel offence will require proof that a contract, arrangement or understanding between competitors to fix prices, restrict output, divide markets or rig bids was made or given effect to with an **intention to** dishonestly **obtain a pecuniary or non-pecuniary gain, either for the defendant or for another person**. It must be intended to obtain the gain **from a person or class of persons likely to acquire or supply the goods or services to which the cartel relates**.[5]

The words 'to which the cartel relates' are rather vague. I hope that the bill will use more precise language. In particular, 'to which the cartel relates' may catch the indirect price-affecting conduct of the credit card interchange referred to by Brent in footnote 100. A possible meaning of the phrase is that it refers to gains by a selling cartel at the expense of those to whom they sell or gains by a buying cartel at the expense of those from whom they buy. In the second part of this note, I shall assume that this is the meaning that will be given to this phrase.

Providing the phrase 'to which the cartel relates' is given this meaning, it would seem that the proposed cartel offence requires proof of intention that the competitors who entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal.

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[4] P 3, my emphasis.
[5] P 3-4, my emphasis.

This requirement seems to be similar to some of Brent's proposals towards the end of his paper. My argument in this note is that, although I agree that the requirement of dishonesty is problematical, the phrase in which that word is embedded seems to meet many of the problems that arise in connection with our *per se* prohibition on price fixing.[6]

2.1 The proposed cartel offence is linked to economic efficiency

The requirement of proof of intention of competitors to gain at the expense of those whom they deal is consistent with the dictates of economic efficiency. Commercial arrangements, such as agreements among competitors, are generally undertaken to promote the interests of those who enter into the arrangements. The interests of those who enter into the arrangements can be promoted either by creating value – part of which can be captured by those who enter into the arrangements – or by increasing the bargaining power of those who enter into the arrangements. In homely domestic language, the incentive can be to increase the size of the pie that is to be divided or it can be to increase one's ability to capture a larger proportion of whatever pie is there to be divided.

If the incentive to enter into arrangements is to generate value, economic efficiency is promoted by the arrangements. However, if the incentive to enter into arrangements is simply to increase one's ability to capture a larger proportion of whatever value is there to be divided up in commercial negotiations, economic efficiency may well be harmed by the arrangements – because many ways of increasing one's bargaining power involve the destruction of value.

One nice aspect of the requirement of proof that the agreement among competitors entered into the agreement did so with the intention of increasing their bargaining power at the expense of those with whom they deal is that it would seem to avoid catching agreements that were entered into to create value. It will only catch agreements that were entered into to increase bargaining power at the expense of those with whom the competitors deal.

2.2 The proposed cartel offence does not catch agreements with no sustained effect on price levels

Antitrust jurisprudence contains some famous examples of cases involving price agreements that seem to be inoffensive because they involved no intention to affect price levels. Perhaps the classic United States case in this category is *Chicago Board of Trade v. United States*[7]. The outstanding Australian case in this category is *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd.*[8]

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[6] For an exposition of these problems, see Andrew Harpham, Donald Robertson and Philip L Williams, "The Competition Law Analysis of Collaborative Structures", forthcoming *Australian Business Law Review*.

[7] 246 U.S. 231 (1918).

[8] (1982) 62 FLR 437 (Lockart J); (1983) 68 FLR 70 (Woodward, Northrop and Sheppard JJ).

If the agreement, arrangement or understanding involved no intention to affect the level of prices, then there would have been no intention by the parties to gain at the expense of those whom they dealt. This inoffensive class of agreements would not be caught by the new cartel offence.

2.3 The proposed cartel offence does not seem to catch agreements among members of a network that competes against other networks

Agreements among members of networks may tend to fix, control or maintain prices. Some networks have natural-monopoly characteristics, and these networks are unlikely to be constrained by forces of competition. In *Re Applications by Australasian Performing Right Association* the Tribunal found that APRA was a network of this kind.[9] However, other networks operate in markets in which competition is alive and well. In *News Limited v Australian Rugby Football League Limited,* Burchett J found that rugby league saw itself competing against rugby union, soccer, Australian rules football and basketball and that these sports as a matter of fact constrained the market power of the then premier rugby league network (the ARL).[10] Similarly, networks of credit and debit cards compete against each other.

In cases where networks compete against each other, price-fixing agreements among members of networks are likely to be driven by concerns to prevent free-riding or to redistribute funds among members – so that incentives confronting members of the network are compatible. That is, the pricing agreements are unlikely to be found to be intended to obtain a gain from the persons with whom members of the network deal. Rather, they are intended to enable the network better to compete against rival networks – when such competition is ultimately to the benefit of those with whom the networks deal.

2.4 The proposed cartel offence does not catch agreements with negotiating partners to engage in joint negotiations

There is at least one other case in which the requirement to prove that the agreement was made with the intention to obtain a gain from the persons with whom the parties deal seems to provide a worthwhile change from the proscription in s45A. This is the case in which large numbers of buyers and sellers jointly agree to engage in joint negotiations. This was the case in the negotiations between the Victorian chicken growers and chicken processors whose boycott authorization found its way to the Tribunal.[11] It also seems to be true of many joint negotiations that take place over the prices of licences for intellectual property rights.

[9] [1999] ATPR 41-701 at 42,984.
[10] (1996) ATPR 41-466 at 41,685.
[11] *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2 (21 April 2006).

In these cases, the agreements among competitors would be unlikely to be found to have been intended to obtain a gain at the expense of those with whom the parties deal – because those parties are not opposed to the agreement.