The National Legal Eagle

Volume 14
Issue 1 *Autumn 2008*

Article 6

5-1-2008

What's price fixing got to do with it?

Brenda Marshall
Bond University, Brenda_Marshall@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/nle

Recommended Citation
Marshall, Brenda (2008) "What's price fixing got to do with it?," *The National Legal Eagle*: Vol. 14: Iss. 1, Article 6.
Available at: http://epublications.bond.edu.au/nle/vol14/iss1/6

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

What's Price Fixing Got to Do with It?

Associate Professor Brenda Marshall Faculty of Law Bond University

Price fixing, a manifestation of cartel conduct (collusion between competitors), has been condemned by the current Chair of the Australian Competition and Consumer Commission (ACCC), Mr Graeme Samuel, as a 'cancer on the Australian economy'.[1] It is the antithesis of competitive pricing, resulting in higher prices than market forces would permit.

Corporate competitors in Australia are prohibited by ss 45 and 45A of the *Trade Practices Act* 1974 (Cth) (the TPA)[2] from making or giving effect to a contract, arrangement or understanding that has the purpose or effect of fixing the price of any goods or services they supply. The inherently anti-competitive nature of such conduct is reflected in the fact that price fixing is deemed by the TPA to substantially lessen competition in the market in which it occurs, rendering the conduct illegal *per se*.

Establishing a breach of the price fixing provisions of the TPA depends therefore on the apparently simple requirement that a 'contract, arrangement or understanding' to fix prices can be shown to exist between competitor corporations. However, proof of the necessary 'contract, arrangement or understanding' is not always a straightforward matter. In fact, actions brought by the ACCC for alleged price fixing within a range of industries have frequently failed on this point.

Amid widespread public concern about price gouging and cartel activity among Australia's petrol suppliers, recent defeats suffered by the ACCC include the dismissal of its price fixing allegations against various petrol retailers in *Apco Service Stations Pty Ltd v ACCC*[3] (the *Ballarat Petrol* case) and *ACCC v Leahy Petroleum Pty Ltd*[4] (the *Geelong Petrol* case).

The implications of the *Ballarat Petrol* and *Geelong Petrol* decisions for the ACCC's pursuit of unlawful price fixing agreements are considered below.

TPA provisions

Section 45(2)(a)(ii) of the TPA provides that a corporation must not *make* a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, effect or likely effect of substantially lessening competition. Section 45(2)(b)(ii) prohibits *giving effect* to a provision of a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition.

Pursuant to s 45A(1), a provision of a contract, arrangement or understanding that fixes prices is deemed to have the purpose, effect or likely effect of substantially lessening competition, and hence to infringe ss 45(2)(a)(ii) or 45(2)(b)(ii).

The TPA currently applies civil sanctions to parties in breach of s 45(2).[5] Corporations are principally liable and face pecuniary penalties capped at $10 million, or three times their gain from the illegal conduct, or, where the gain cannot be readily ascertained, ten percent of their annual turnover during the preceding twelve month period – whichever is greatest.[6] Individuals may be accessorily liable as persons 'involved in' a contravention of the TPA,[7] incurring pecuniary penalties of up to $500,000.[8]

Contract, arrangement or understanding

The threshold element of s 45(2) is a 'contract, arrangement or understanding' between the parties. As explained by the Federal Court in the *Geelong Petrol* case, these three concepts represent 'a spectrum of consensual dealings'.[9] While the term 'contract' is apt to describe a more formal agreement, consistent with its general law meaning, 'arrangement' suggests something looser than 'contract', and 'understanding' suggests something even looser than 'arrangement'.[10] However, the case law to date reveals no material distinction between the two latter terms.[11]

In fact, the balance of authority is that both 'arrangement' and 'understanding' involve a 'meeting of minds'.[12] According to the Full Federal Court's judgment in the *Ballarat Petrol* case, this requires communication between the parties and *commitment* to a course of action, rather than a mere hope or even an expectation that a course of action will be followed.[13]

On the question of proving such a 'meeting of minds', the ACCC Chair, Mr Graeme Samuel, has commented as follows:

> 'Cartel cases come in a variety of shapes and sizes. Some, a very few, have written agreements. These are the easiest to prove. More commonly, there is no express agreement and the ACCC must rely on a mixture of direct and circumstantial or inferential evidence to prove a contravention.'[14]

'Direct' evidence refers to documentary evidence or the oral testimony of witnesses. 'Circumstantial or inferential' evidence, in a price fixing context, encompasses factors such as:

- motive, incentive and opportunity of the parties to reach an arrangement or understanding;
- parallel behaviour engaged in by the parties, as well as meetings or exchanges of correspondence or other information;
- the parties' inability or unwillingness to explain the concurrence of their conduct;
- an unusual pattern of parallel behaviour that cannot be explained except by the existence of an arrangement or understanding; and
- the parties acting apparently against their own economic interests (that is, each firm would not benefit from the conduct unless its competitors behaved in the same way).[15]

Respondents' explanations can be critical to rebutting an allegation of price fixing, by showing that independent action was taken, or that there was no communication with other parties, or that no 'commitment' to other parties was incurred.[16]

Ballarat Petrol case

The *Ballarat Petrol* case commenced when the ACCC

instituted proceedings against sixteen respondents (eight corporations and eight individuals) for price fixing conduct in the Ballarat retail petrol market over the eighteen month period from June 1999 to December 2000.

A number of the respondents (four corporations and five individuals) either admitted or did not contest the ACCC's claims and proceeded to penalty hearings before Goldberg J in the Federal Court.[17] The remaining respondents (four corporations and three individuals) proceeded to trial before Merkel J.

The ACCC's case against the contesting respondents relied heavily on circumstantial evidence involving records of telephone conversations between the parties, and correlations between these calls and the timing of petrol price rises. In finding that this evidence established a price fixing understanding (which had been put into effect on sixty-nine occasions), Merkel J accepted that there was a 'meeting of minds' between the respondents, giving rise to the expectation in each of them that the others would engage in price fixing behaviour.[18]

In the result, all sixteen respondents in this case were initially found to have breached the TPA and were ordered to pay pecuniary penalties totalling $23.3 million.[19]

Subsequently, two of the sixteen parties found to have breached the TPA, Apco Service Stations Pty Ltd and its managing director, Mr Peter Anderson, appealed to the Full Federal Court.[20]

Apco and Anderson contended that they were not a party to any price fixing understanding because there had been no *commitment* on their part to increase prices following discussions about prospective price rises. On the contrary, the appellants claimed that Anderson made independent decisions about whether or not Apco should increase its petrol prices based on his own assessment of the Ballarat petrol market, pointing out that Apco only increased its prices on twenty-nine of the sixty-nine occasions under consideration and not on the other forty.[21]

The Full Federal Court (Heerey, Hely and Gyles JJ) accepted this contention.[22] Their Honours held that a mere hope or expectation that a party will act in a certain way is insufficient to constitute an 'arrangement or understanding'.[23] Instead, one party must assume an obligation, or give an assurance or undertaking that it will act in a certain way.[24] In other words, *commitment* to a course of action is necessary to establish a contravention of s 45(2) of the TPA.[25]

The ACCC sought special leave to appeal to the High Court. However, in June 2006, the High Court rejected the ACCC's leave to appeal application, on the basis that the Full Federal Court's decision did not raise any serious issues of interpretation of the TPA.[26]

The Full Federal Court's judgment in the *Ballarat Petrol* case sets a high evidentiary standard in price fixing cases. In particular, it must be shown that the parties to an alleged price fixing arrangement or understanding are committed or morally bound to the agreement.

Geelong Petrol case

In the *Geelong Petrol* case, the ACCC accused eighteen respondents (eight corporations and ten individuals) of fixing prices in the Geelong retail petrol market during the two year period from the beginning of 1999 to the end of 2000. The Federal Court (Gray J) dismissed the case against all respondents despite several of them having admitted to the ACCC's allegations.

It was not disputed by the respondents that they regularly telephoned each other to discuss the price of petrol, and the amount and timing of petrol price rises. What was at issue was whether these communications constituted an 'arrangement or understanding' about how the parties would price their petrol.

The ACCC submitted that the telephone conversations gave rise to eight separate, but interlocking, arrangements. The arrangements were said to have operated serially, with price information and commitments flowing from one set of petrol retailers to the next.[27] The retailers were alleged to have given effect to the arrangements on multiple occasions during 1999-2000.

Unlike the *Ballarat Petrol* case, these proceedings did not involve an allegation of a single, multi-party price fixing arrangement.[28] Rather, this was a case in which a multi-transaction, multi-party arrangement was alleged to exist.

In his judgment in this matter, Gray J accepted that 'a good deal of information about price increases was passed between competitors in the Geelong petrol market, most of it by means of telephone conversations.'[29] Yet this conduct alone was considered insufficient to indicate the existence of an arrangement or understanding to fix prices in contravention of the TPA.[30]

A factor in Gray J's reasoning was the use by most of the respondents of roadside boards to display petrol prices – a practice which, in and of itself, would be expected to ensure a high degree of price uniformity.[31] His Honour took the view that the only difference between being informed of prospective petrol price changes by telephone and viewing the prices on the display boards was that the telephone notification method gave competitors a slight time advantage when deciding how they would respond, if at all.[32]

Furthermore, Gray J emphasised that for an arrangement or understanding to exist, there must be an 'element of commitment, or moral obligation, or obligation binding in honour only'[33] to observe and adhere to the arrangement or understanding. His Honour's finding that there was *no* commitment or obligation by the parties to any course of action was therefore 'fatal to the ACCC's case',[34] since 'an arrangement or understanding in which each party is free to do as it wishes is a creature unknown to s 45(2)'[35] of the TPA. Consequently, Gray J concluded that 'in this case ... it is more probable than not that none of the arrangements ... alleged by the ACCC in fact existed.'[36]

A controversial aspect of Gray J's decision in the *Geelong Petrol* case was the dismissal of the ACCC's allegations against those respondents who had admitted entering into and giving effect to price fixing arrangements in breach of the TPA.[37]

The ACCC had argued that, before departing from an admission, a court would need to be satisfied that it was 'plainly incorrect'.[38] However, Gray J held that he had discretion to decline to act on admissions where there was 'reason to doubt their correctness' or 'reason to question the correctness of the facts admitted or agreed'.[39]

Despite its obvious disappointment at the outcome,[40] the ACCC decided not to appeal against Gray J's decision in the *Geelong Petrol* case. The ACCC reasoned that the Full Federal Court would be unlikely to reverse the findings of fact made by the trial judge, given the general reluctance of appeal courts to overturn factual findings made by the judge

at first instance.[41]

Thus, the question not tested on appeal is why the respondent petrol retailers in this case would continue to advantage their competitors by providing them with prospective pricing information. It might be suggested, for instance, that the sharing of this information reassures competitors that they will not be on their own if they raise their prices, and/or that such behaviour over a lengthy period amounts to a course of conduct indicative of an 'arrangement or understanding'.

Implications

The decisions of the Full Federal Court in the *Ballarat Petrol* case and the Federal Court in the *Geelong Petrol* case demonstrate the difficulties associated with proving price fixing under the TPA. The carriage of such cases – which often involve a series of events over a lengthy period and a large number of parties – can be complicated, even when the parties are willing to cooperate with the ACCC in its investigations, make admissions, and provide direct written and oral evidence.

There is a fine line between what does and does not constitute a price fixing contract, arrangement or understanding. Nevertheless, corporate competitors would do well to remember that the ACCC has vowed to remain 'extremely vigilant' in dealing with collusion and potential price fixing cartels,[42] and that the sharing of price information and the explicit signalling of pricing intensions to competitors will always carry a high risk of contravening the TPA.

References

1 'ACCC chiefs past and present in stand against price fixing', *CCH News Headlines* (25 June 2007).
2 All section references in this article are to the TPA.
3 [2005] FCAFC 161.
4 [2007] FCA 794.
5 However, the Federal Government plans to amend the TPA to introduce criminal penalties for 'serious cartel conduct', thereby allowing jail sentences (of up to five years) to be imposed on company personnel responsible for price fixing.
6 Section 76(1A).
7 Section 75B(1).
8 Section 76(1B).
9 [2007] FCA 794, [24] (Gray J).
10 Ibid [25]-[27], reflecting established precedent.
11 See, eg, *Re British Basic Slag's Agreements* [1963] 2 All ER 807; *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) ATPR 40-004.
12 A point recently confirmed by the Full Federal Court in the *Ballarat Petrol* case: [2005] FCAFC 161, [47] (joint judgment of Heerey, Hely and Gyles JJ).
13 Ibid [45].
14 Graeme Samuel, 'The Enforcement Priorities of the ACCC' (2006) 14 *Trade Practices Law Journal* 71, 84.
15 See Warren Pengilley, 'What is required to prove a "contract, arrangement or understanding"?' (2006) 13 *Competition & Consumer Law Journal* 241, 244.
16 Ibid 263.
17 *ACCC v Leahy Petroleum Pty Ltd* (No 3) [2005] FCA 265.
18 *ACCC v Leahy Petroleum Pty Ltd* [2004] FCA 1678, [330].
19 *ACCC v Leahy Petroleum Pty Ltd* (No 2) [2005] FCA 254; *ACCC v Leahy Petroleum Pty Ltd* (No 3) [2005] FCA 265.
20 Apco had been fined $3 million and Anderson $200,000.
21 [2005] FCAFC 161, [3]
22 Ibid [53].
23 Ibid [47].
24 Ibid [45].
25 Ibid.
26 *ACCC v Apco Service Stations Pty Ltd* [2006] HCA Trans 272.
27 [2007] FCA 794, [121]-[126].
28 Ibid [119].
29 Ibid [960].
30 Ibid.
31 Ibid [923].
32 Ibid [925].
33 Ibid [940].
34 Ibid [949].
35 Ibid [948].
36 Ibid [960].
37 Ibid [130].
38 Ibid [48].
39 Ibid [49], relying on the judgment of Heydon JA in *Damberg v Damberg* (2001) 52 NSWLR 492.
40 See David Uren, 'ACCC pans judge's "textbook for price-fixers"', *The Australian* (31 May 2007).
41 ACCC Media Release (MR 148/07, 19 June 2007).
42 'ACCC loss in petrol price-fixing case', *CCH News Headlines* (29 May 2007), quoting Graeme Samuel.

Research task:

ACCC v Gullyside Pty Ltd [2005] FCA 1727 is a Federal Court case on petrol price fixing. Find this case (on AustLII, for example) and refer to para [18] of the judgment for factors relevant to assessing the appropriate penalty for anti-competitive conduct in breach of the TPA.

The contents of this publication are intended as general legal information only and should not form the basis for legal advice of any kind. © The Law Society of New South Wales1998.
Published by The Law Society of New South Wales, 170 Phillip St. Sydney NSW 2000. Telephone: 9926 0333. Co-Editor Robyn Cross, Email: rnc@lawsocnsw.asn.au Written by Bond University. May 2008.
National Legal Eagle is produced by Insight Print Services Suite 1104, Level 11, 109 Pitt Street Sydney NSW 2000 Phone 9221 7411 Fax 9221 4242