Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 44 ALR 557

Katrina Gillies*

This case involved price fixing. Price fixing falls under Section 45A of the Trade Practices Act 1974 ("**TPA**")[1] and is a *per se*[2] offence.[3] As price fixing is deemed to automatically substantially lessen competition (regardless of its negative, neutral or positive impact) it is prohibited by section 45(2)(a)(ii) TPA.[4] Section 45(2)(a)(ii) of the *TPA* prohibits any contract, arrangement or understanding that has the purpose, effect or is likely to substantially lessen the competition in a market.[5] Under section 45A a contract, arrangement or understanding that has the purpose, effect or is likely to have the effect of fixing, controlling or maintaining the price (price fixing) is deemed to have had the required anti-competitive effect.[6]

Facts of the Case

In 1982 two competing Sydney FM radio stations, 2MMM and 2DAY, worked together to create a combined advertising rate card; which allowed advertisers to purchase time on both stations with one call.[7] This was in order to attract advertisers to FM radio, and away from the AM frequency (in part as a retaliatory gesture).[8] The AM station networks, of which 2UE belongs, had a similar advertising system.[9] An important feature of the system was that although 2MMM and 2DAY had consulted each other and marketed their rates together, both had established independent advertising rates were free to change their prices at any time.[10]

---

* Barrister-at-Law, Victoria.

1 Bruce, A Webb, E, *'Butterworths Tutorial Series: Trade Practices Law'*, Butterworths, Sydney, 1999 pp71-4

2 Prohibited outright, if proved, regardless of its impact on competition., Op Cit.

3 Op Cit.

4 Op Cit.

5 Trade Practices Act 1974 (Cth) Section 45(2)(a)(ii)

6 Op Cit, Section 45A

7 above n1.

8 Op Cit.

9 Round, D, Hanna, L, 'Curbing Corporate Collusion in Australia: The Role of Section 45A of the Trade Practices Act,' [2005] Melbourne University Law Review 7, <http://www.austlii.edu.au/au/journals/MULR/2005/7.html>, 8 August 2007

10 Op Cit.

2UE sought an injunction on the following two grounds:[11]

a) that this was a breach of s.45(2)(a)(ii) as it substantially lessened competition;[12] and

b) s.45A that it was price fixing.[13]

Judgment

Substantial lessening of competition – section 45(2)(a)(ii) TPA

His Honour Lockhart J found that the conduct of 2MMM and 2DAY in setting up a combined rate card did not "lessen competition at all, let alone substantially. Nor would it be likely to do so."[14] Lockhart J based his judgement on the fact that he believed that the rate card operates was conducive to improving competition between the FM stations and against the AM radio stations.[15]

Price Fixing – section 45A

His Honour Lockhart J also found that the conduct of 2MMM and 2DAY in setting up the combined advertising rate card did not amount to price fixing stating "there was no evidence of any arrangement to fix prices."[16] Lockhart J based his judgement on the following reasoning.[17] Although there was an agreement, each party established their own prices independently.[18] Both respondent's were free to change their prices at any time, which 2MMM did.[19] As stated above, Lockhart J believed that the rate card and the conduct of 2MMM and 2DAY was likely to have a positive impact on competition.[20] Without those two essential elements being proved, "nothing in the agreement between the respondents has anything to do with price fixing."[21]

---

11 above n1.

12 Op Cit.

13 Op Cit.

14 Op Cit.

15 Op Cit.

16 Op Cit.

17 Op Cit.

18 Op Cit.

19 Op Cit.

20 Op Cit.

21 Op Cit.

Lockhart J ordered that:

1. 2UE's application for an injunction be dismissed. [22]

2. 2UE pay the respondents costs. [23]

Principles Established by Judgment

Lockhart J's judgement is very well known. Although he formulated some principles of price fixing, this judgement seems best known for its statutory interpretation.[24] This is a great pity, as it has so many principles which are so vital but which seem to have been almost missed in general application.

The principles elucidated by Lockhart J are as follows:

1) arrangements that were pro-competitive (or had a positive impact on competition) were not in breach section 45A.[25] Not every arrangement "between competitors which has some possible impact on price is per se unlawful under that section...if competitors make an arrangement... [making] prices more competitive, I do not see how such an arrangement is, per se, prohibited."[26]

2) The parties must intend to affect the price competition in order for price fixing to be established. [27]

3) "It is important to distinguish between arrangements ... which restrain price competition and arrangements which merely incidentally affect it or have some connection with it. Not every arrangement between competitors which has some possible impact on price is *per se* unlawful under the section."[28]

4) The Court needs to take great care when characterising the conduct of the parties established by the evidence. [29]

---

22 Op Cit.

23 Op Cit.

24 I state this because when searching for this case 95% of results were quoting substantial or likely.

25 Above n1.

26 <http://www.comcom.govt.nz/BusinessCompetition/AnticompetitivePractices/Applications/ContentFiles/Documents/EGBL%20applicant.pdf>, Accessed 8 August 2007.

27 Above n1.

28 Op Cit.

29 Op Cit.

1) Section 45(2)(a)(ii)[30]

a) Likely effect: his Honour found that it was unnecessary to determine its definitive meaning except to say that it did not mean "... a mere possibility whether real or not..."[31]

b) Substantial: Lockhart J's definition of substantial is possibly the most significant and well known component of his judgement. [32] In the legislative context it is ambiguous and must be taken from its surrounding context.[33] This definition below, as elucidated by Lockhart J in Radio 2UE, is arguably the authority for defining what substantial means in Australian competition law. [34]

> The word "substantial" is imprecise and ambiguous. Its meaning must be taken from its context. It can mean considerable or Big... It can also mean not merely nominal, ephemeral or minimal. Sometimes it is used in a relative sense, and at other times to indicate an absolute size or quantity. In the context of sec. 45, the word "substantial" is used in a relative sense. The very notion of competition imports relativity. One needs to know something of the businesses carried on in the relevant market and the nature and extent of the market before one can say that any particular lessening of competition is substantial." [35]

Simply put, Lockhart J's test of what is substantial is a relative one. There is no objective standard, but individual circumstances from individual cases must be taken into account. This definition of substantial is not limited only to Trade Practices Law, but finds itself being applied in Veteran Affairs Tribunal Appeals[36] and even judicial review cases.[37] However, not all agree that this definition

---

30 Could apply to sec 45(1)(b), (2)(a)(ii), (2)(b)(ii) and 45B(1) TPA 1974, but as Lockhart J was discussing it specifically in relation to s.45(2)(a)(ii) it will only have a narrow reading in this case note. 'CCH Trade Practices Commentary,' CCH, Sydney, section 3-400.

31 Op Cit 3-430.

32 Op Cit 3-450.

33 Australian Competition and Consumer Commission v Worldplay Services Pty [2004] FCA 1138 summarising Lockhart J.

34 CCH3-450.

35 Above n1.

36 Re Smith and Repatriation Commission - (1996) 42 ALD 186.

37 Murphy v Director Of Public Prosecutions and Another - (1985) 60 ALR 299.

of substantial adds "very much to the statutory language."[38] However, this definition has been affirmed in so many cases, and by so many judges it would be hard to find another case seen by so many as the definitive interpretation of substantial.

2) Section 45A

   a) Lockhart J referred fixing as something that was not instantaneous and that had been set previously. A fixed price did not need to be permanent but needed to be for some period of time, even though it may be varied in the future.

   b) Lockhart J defined maintain, when used in section 45A, as going for a length of time "not merely being momentary or transitory."

Impact of the Judgment

Although Radio 2UE may be an authority for interpretations, it is arguable whether it has had much impact on the actual law of price fixing. A reason for this may be that Lockhart J attempted to change the spirit of the legislation.

To Breach or Not to Breach

Lockhart J believed that this case was the first time section 45A was to be applied since its introduction in 1977. For authority, his Honour looked towards the United States of America for guidance on issues such as distinguishing between restraining or incidentally affecting prices[39] and Australia for discussions on the meaning on arrangement.[40] It is with this guidance that Lockhart J distinguished between price arrangements which restrained competition and those which had a connection.[41]

As previously discussed Lockhart J found that this was the type of arrangement which was not related to price fixing or lessening competition. This is consistent with the current approach in the United States as seen in Texaco Inc v Dagher (547 US (2006)) a company "...must have the discretion to determine the prices of the products it sells, including the discretion to sell

---

38 Seven Network Limited v News Limited [2007] FCA 1062 at 2234.

39 Above, n1 discussing Board of Trade of the City of Chicago v. United States 246 U.S. 231 (1918)) and United States v. Socony-Vacuum Oil Co. Inc. 310 U.S. 150 (1940))

40 OP Cit, discussing Trade Practices Commission v. Nicholas Enterprises Pty. Limited (1978) ATPR ¶40-097; (1978) 40 F.L.R. 74 per Fisher J. (at ATPR p. 17,959; F.L.R. p. 79) and Trade Practices Commission v. Email Limited & Anor. (1980) ATPR ¶40-172; (1980) 43 F.L.R. 383

41 Above n1.

a product under two different brands at a single, unified price".[42] Using the Texaco case as guidance, clearly neither 2DAY or 2MMM had the control of the other's brand to enter into price fixing.

Lockhart J then went on to discuss a much contentious point, which has been the source of much discussion and judicial comment, whether pro-competitive price-fixing is prohibited.[43]

> "[I]f competition is improved by an arrangement I cannot perceive how it could be characterized as a price fixing arrangement within the ambit of those sections...Nor, in my view was s 45A introduced by Parliament to make arrangements unlawful which affect price by improving competition."[44]

In other words, Lockhart J was attempting to make price fixing a relative offence.[45] Before deciding whether a contract or agreement is in breach one must look at the effect it has had (or is likely to have) on the competitiveness of the market.[46] However, without stating whether or not they agreed with Lockhart J's reasoning the Court of Appeal affirmed the TPA legislation that any price fixing (including a pro-competitive arrangement) is captured by section 45A and is illegal.[47]

Lockhart J appears to have been a big proponent of the pro-competitive defence[48] to price fixing as seen in the Radio 2UE case and in Media Council No. 2:[49]

> ...the proposed conduct would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition. [50]

---

42 'Competition Law and Intellectual Property 2007, Topic 12, Collective Action: Relevant Legislative Provisions, Joint Marketing and Copyright Collecting Societies,' <http://graduate.law.unimelb.edu.au/files/subjectmaterials/get-file.cfm/4288824283.ppt?ContentID=18529>, accessed 12 August 2007.

43 Above, n13.

44 Op Cit.

45 Op Cit.

46 Op Cit.

47 Radio 2UE Sydney Pty. Ltd. v. Stereo F.M. Pty. Ltd. (1983) 48 ALR 361

48 For the sake of this case note I will call it the pro-competitive defence. Whether or not Lockhart J intended it to be used as a defence in the future I am not discussing, it is for simplicities sake.

49 (1987) ATPR 40-774

50 Bhojani, S, 'Exemptions, Notifications and Authorisations,' < http://www.accc.gov.au/content/item.phtml?itemId= 95761&nodeId=55f0c9995346b7cfecd7143a609cd6c6&fn=Exemptions.doc>, Accessed 8 August 2007.

In Radio 2UE Lockhart J was breaking out and reinventing section 45A of the TPA. However, this is not in the spirit of the legislation. As a *per se* offence the result does not matter. That is not to say that having exclusions to section 45A would not have some benefits. For example, the two largest independent petrol companies A and B agree to sell their petrol at 20 cents less than all of the major retailers. Price fixing – yes, anti competitive – yes, benefit to the public outweighs the loss of competition – arguable but probably.

Even the regulatory bodies of Australia[51] and New Zealand[52] accept the pro-competitive defence, as put forward by Lockhart J, by allowing price fixing behaviour to be excused or authorised if the defendant meets certain criteria.

In New Zealand a breach of section 30 can be authorised if the defendant can show that their conduct enhanced competition.[53] In Australia, the it is by virtue of s88(1) TPA, with the tests for authorisation set out under s90(6), (7) and (8). The criteria being that the contract, arrangement or understanding would result in a benefit to the public that outweighs the detriment caused by lessening the competition.[54]

Intention

Intention is "the formation of a purpose or design in mind; the mental act of determining to take some certain action or pursue some certain result."[55] In the order for price fixing to be proved, Lockhart J stated that the parties to the contract or arrangement must have intended for their conduct to affect the price competition.[56]

This was affirmed in the decision of the Full Court which stated that:

> "[t]here must, we believe, be an element of intention or likelihood to affect price competition before price "fixing" can be established, but that this may often be a matter of inference.[57]

Although this has been affirmed in many decisions since, where in the legislation is intention required?[58] When dealing with an offence that does

---

51 Op Cit.

52 Above, n31.

53 Op cit.

54 Above n52.

55 'Butterworths Concise Australian Legal Dictionary Second Edition,' Butterworths, Sydney, 1998. p 234

56 Above, n1.

57 Above, n13.

58 Op Cit.

not require damage (there does not need to be any lessening of competition) why does their need to be intent? [59] It almost seems backwards. Should we not be looking for an effect on competitiveness and then proving it was intended to be caused. Or even having a blanket rule that any price fixing, intentional or not, is in breach. When evidence is so hard to find, intent is very hard to prove.

Evidence of Conduct

> "The court's task is to characterize the conduct before it in a given case. Care must be taken in performing that task because, by its very nature, the violation of s 45A is deemed, for the purposes of s 45, to substantially lessen competition per se. Such a finding may have far reaching consequences to the competitors concerned."[60]

As O'Loughlin J stated in ACCC v Pauls, Radio 2UE is an important judicial decision and a major turning point because it helps to "clarify the difficult area of Judicial discretion." [61]

Radio 2UE is an important, if not undervalued case. Although often used only for statutory interpretation, Lockhart J's judgment is full of valuable principles and legal policy relating to price fixing which are still of great value and use today.

---

[59] Op Cit.

[60] Radio 2UE quoted in Australian Competition and Consumer Commission v Pauls Ltd [2002] FCA 1586

[61] Op Cit.