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Uncle Sam comes knocking: extradition for cartel conduct

Andrew Floro and Howard Shih

MALLESONS STEPHEN JAQUES

On 1 June 2005, UK District Court Judge Nicholas Evans ruled in favour of the US Government's request to extradite Mr Ian Norris, the former CEO of the Morgan Crucible Co plc on criminal charges of price fixing and obstruction of justice. Judge Evans referred the matter to the UK Secretary of State for his decision on whether to grant the US Government's extradition request.

Following two extensions of the period for making the extradition decision, on 29 September 2005, the UK Secretary of State ordered the extradition of Mr Norris. In his public statement announcing the order for extradition, the UK Home Secretary noted:

The extradition of individuals for white collar crime is not a new phenomenon ... for many years individuals have been surrendered to the US for these sorts of crimes. Indeed, the extradition of individuals for alleged white collar crimes pursuant to valid extradition requests is an important part of upholding the rule of law in the international economy.

The Home Secretary's statement obscures an important issue and highlights another. First, it obscures the fact that Mr Norris may be the first person extradited from the UK to the US for a cartel offence. Second, it calls attention to the fact that extraditions for white collar offences from the UK (and Australia for that matter) have occurred on a number of occasions in the past. The ramifications of these two factors for jurisdictions (like Australia) which have close trading ties with the US is significant, particularly in view of the mutual legal assistance arrangements between the countries with respect to antitrust enforcement¹ and the US Department of Justice's implementation of new methods for tracking down 'international fugitives' who they believe have engaged in cartel

conduct.²

Mr Norris appealed the decision of the District Court to send his case to the Secretary of State and the decision of the Secretary of State to extradite him. On 25 January 2007, the Queens Bench Division of the High Court dismissed Norris' appeal. On 13 March 2007, Mr Norris was permitted to make an application to appeal to the UK's highest court, the House of Lords.³

Until such time as it has been overturned, the High Court's decision has significance for jurisdictions like Australia.

This article examines the decision of the High Court⁴ and its implications, including its possible impact on the extradition of persons from Australia to the US and other countries that have criminal sanctions for cartel conduct.

Norris v USA

Facts and arguments

Mr Norris was employed by Morgan Crucible for almost 30 years and was CEO from 1998 to 2002, with responsibility for 180 companies operating in many countries. He was charged in the US with obstruction of justice and price fixing on 24 September 2003 and 14 October 2003. The second superseding indictment, filed on 28 September 2004, describes the offences.

By the first offence, the US alleges that Mr Norris engaged in a combination and conspiracy to eliminate competition by fixing the prices for various carbon products including carbon current collectors, carbon brushes and mechanical carbon products (the carbon products) for a period commencing in late 1989 and ending in May 2000. The conduct is said to constitute an unreasonable restraint of interstate and foreign trade



and commerce in violation of § 1 of the *Sherman Act* 15 USC 1. Significantly, the US alleges that the price fixing and bid rigging occurred in meetings and conversations held in Europe, Mexico and Canada, and related to the sale of the carbon products in the US and elsewhere. The effect of the cartel is claimed to be to defraud customers who were required to pay prices that were elevated above the competitive level for carbon products.

By the second, third and fourth offences, the US Government alleges that Mr Norris:

- corruptly persuaded, or attempted to corruptly persuade, other persons known to the grand jury with intent to influence their testimony in an official proceedings; and
- corruptly persuaded and attempted to corruptly persuade other persons known to the grand jury with intent to cause or induce those other persons to alter, destroy, mutilate or conceal records and documents with the intent to impair their availability for use in an official proceeding.

These allegations arise out of a subpoena which was served on Morganite Industries Inc. It is contended that Mr Norris instructed employees to destroy documents evidencing the cartel. It is also alleged that Mr Norris and his co-conspirators met to formulate a script which could be used by the conspirators in the US Department of Justice's investigations of the alleged cartels or for the purposes of responding to questions by the grand jury. The script was intended to provide legitimate explanations for the meetings between Morganite and its competitors.

In December 2004, the US Government sought extradition of Mr Norris to face trial in respect of these charges. On 1 June 2005, Judge Nicholas Evans of the UK District Court found in favour of the US Government's request to extradite Ian Norris to the US by reason that:

- the extradition request involved extradition offences within the

meaning of the UK *Extradition Act 2003* (the UK Act); and

- the extradition was not otherwise barred by the passage of time or the operation of human rights considerations including the operation of European Convention of Human Rights (ECHR).

Following the decision of the UK Secretary of State on 29 September 2005 to extradite Mr Norris, Mr Norris appealed to the Queen's Bench Division of the High Court raising a number of issues, including whether:

- the cartel offences specified in the extradition offences were properly characterised as extradition offences by reason that the price-fixing conspiracy alleged against Mr Norris

UK extradition principles

The first issue which is to be assessed in determining whether a person should be extradited under the UK Act (and under many extradition regimes throughout the world) is whether engaging in the conduct, which is the subject of the request for extradition, constitutes an offence in both jurisdictions. This principle is known as the 'double criminality' principle. The second issue to be addressed is whether the offence is of sufficient seriousness to justify extradition. The seriousness of the offence is usually measured by the nature of the penalty which may be imposed.

Under the UK Act, if these two

The first issue which is to be assessed in determining whether a person should be extradited under the UK Act ... is whether engaging in the conduct, which is the subject of the request for extradition, constitutes an offence in both jurisdictions. This principle is known as the 'double criminality' principle.

did not constitute a criminal offence in the UK at the time, and by reason that the US offence did not require proof of dishonesty;

- the obstruction of justice offences constituted extradition offences by reason that the obstruction of a US investigation did not constitute an offence in the UK;
- delay in prosecution would mean that Norris' extradition would be unjust or oppressive; and
- his extradition would be compatible with his rights under the ECHR.

As this article is concerned with the application of the principles in *Norris* to the Australian context, it will focus on the first and second of these issues.

principles are made out in respect of the relevant conduct then that conduct is capable of constituting an extradition offence and can form the basis of a successful extradition application. The Act provides that conduct constitutes an extradition offence if:⁵

- the conduct occurs in a specific territory covered by the Act;
- the conduct would constitute an offence under the law of the relevant part of the UK punishable by imprisonment or other form of detention of 12 months or more had it occurred in the UK; and
- the conduct is so punishable under the law of the first-mentioned territory.



There was no question in *Norris* that the offence met the seriousness criterion. The key question was whether the double criminality principle was addressed, by reason that, unlike in the US at the time the conduct occurred, there was no legislative criminal offence for cartel conduct in operation in the UK. A statutory offence has been introduced in the UK and came into effect on 20 June 2003, after the relevant conduct occurred which was alleged by the US Government.⁶ As discussed further below, the Australian Commonwealth Government has also announced the imposition of a statutory offence based on the UK model which is expected to be presented to the Commonwealth Parliament this year.

Double criminality

Cartel offence

As the US Government was not able to rely on the statutory offence to establish double criminality, it sought to rely on the common law offence of conspiracy to defraud.

To assess whether the double criminality criterion was made out, the High Court first determined whether price fixing was capable at the material time of amounting to the common law offence of conspiracy to defraud. *Norris* sought to mount a number of arguments to counteract the application of the common law principle including that common law conspiracy to defraud required an additional element of dishonesty not required under the *Sherman Act*. The court found that discerning a distinction between deceiving potential customers by secrecy or by some other form of dishonesty is difficult. The court agreed with the proposition that third parties dealing with persons that are participants in a cartel will proceed on the assumption that they are dealing with persons that are lawfully engaged in competition with each other. The very fact that the existence of the cartel is kept secret will amount to dishonesty by reason that the participants know that the customer is acting under the incorrect assumption.

Norris also argued that the introduction of civil law, and now criminal law, regulation of price fixing

excluded the application of the common law offence to cartel conduct. The court held that the relevant legislation did not restrict or limit the common law offence as there has been no express extinguishment of the common law offence.

Norris also sought to argue that the absence of a requirement that the perpetrator be acting dishonestly from the US offence where dishonesty was a requirement of the UK offence meant that the 'double criminality' criterion was not met. The court rejected this argument. It noted that double criminality requirement under the UK Act would be satisfied if the *conduct* constituting the offence in the foreign jurisdiction (not the offence) constituted an offence in the UK.

Obstruction of justice

The High Court was also required to consider whether the conduct alleged to constitute the obstruction of justice offences in the US also satisfied the double criminality principle. It was submitted by Mr *Norris* that the relevant test should be whether there is a UK offence of obstructing the federal grand jury. In other words, *Norris* argued that to establish double criminality the prosecuting authorities would need to point to a UK offence of obstructing the US grand jury. The court also rejected this argument, reasoning that s 137(3)(c) of the UK Act, by its use of the terms 'equivalent conduct ... in corresponding circumstances' that would 'constitute an extra-territorial offence under the law of the relevant part of the United Kingdom', indicates a 'broad conduct-based approach, shorn of the national and institutional setting in which it occurred'.⁷ The High Court therefore agreed with the District Judge's assessment that the double criminality principle could be satisfied if Mr *Norris*' conduct would constitute a criminal offence punishable by imprisonment of 12 months or more if it had occurred in the UK and had it been aimed at interfering or obstructing a criminal investigation within the UK.

Other grounds for challenge

Mr *Norris* submitted that his extradition should be barred by reason



of the passage of time.⁸ Section 82 of the UK Act provides:

A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be).

Mr Norris also sought to invoke Arts 8 (right to privacy) and 14 (right to be free from unjustified discrimination) of the ECHR claiming that his extradition would be incompatible with those articles. Each of Norris' arguments were rejected by the court and, as a consequence, his appeal was dismissed.

Implications for Australia

This decision has significant implications for a country like Australia, which has strong trading ties with the US, and which has a similar extradition regime and common law offence of conspiracy to defraud as that of the UK.

Cartel conduct is regulated in Australia pursuant to Pt IV of the *Trade Practices Act 1974* (Cth) (TPA), which deals with restrictive trade practices. Under s 78 of the TPA, criminal proceedings cannot be imposed upon corporations (or individuals involved) for a contravention of Pt IV. Accordingly, enforcement of the Part is only available by way of civil proceedings. The question arises as to whether the TPA extinguishes conspiracy to defraud in respect of cartel conduct as was argued in respect of the relevant UK legislation in *Norris*.

Part IV of the TPA does not appear to exclude the common law or state legislation. Section 51AAA of the TPA specifies that 'a law of a State or Territory should be able to operate concurrently' with Pt IV 'unless the law is directly inconsistent' with it. The Explanatory Memorandum to the Competition Policy Reform Bill 1995 (Cth) provides that despite the difference in wording, s 51AAA is intended to have the same operation as s 75(1) of the TPA.⁹ Section 75(1) of the TPA has been held to indicate:¹⁰

... a very clear expression of intention that the [TPA] is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics.

Therefore, it is likely that an argument similar to the one made in *Norris* would fail.¹¹

As mentioned above, the Australian Government has been contemplating criminal sanctions for serious cartel conduct in Australia for some time and the Treasurer announced on 2 February 2005 that it intends to introduce criminal sanctions.¹²

The decision in *Norris* raises the possibility that persons located in Australia who are involved in cartel conduct overseas may be extradited even in the absence of these proposed amendments, as the common law offence of conspiracy to defraud could potentially be used in Australia to satisfy the double criminality requirement for extradition. In order to properly assess the extent to which *Norris* may be applied in Australia, it is necessary to first consider the extradition requirements in Australia and how Australian courts have approached the common law offence of conspiracy to defraud.

Extradition requirements in Australia

All incoming and outgoing extradition requests in Australia are processed pursuant to the *Extradition Act 1988* (Cth) (the Australian Act).¹³ In respect of outgoing extraditions, Australia can only accept requests from countries declared as 'extradition countries' in the regulations. These extradition countries are usually a party to a bilateral or multilateral treaty with Australia with respect to extradition, but there are also some extradition countries that do not have a treaty relationship with Australia. On the other hand, Australia can make extradition requests to any country, but in the absence of a treaty, the acceptance of the request will depend on the domestic laws of the particular country.

The process for extradition under the Australian Act is largely the same as the UK Act — that is, the conduct

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subject to the extradition request must satisfy the 'double criminality' principle and be sufficiently serious in order to be characterised as an extraditable offence. Pursuant to the Australian Act, conduct constitutes an 'extraditable offence' if it is:¹⁴

- in relation to Australia or part thereof, an offence against a law of Australia or a law in force in a part of Australia for which the penalty is at least 12 months imprisonment or other deprivation of liberty; and
- in relation to the country seeking extradition, an offence against a law of that country for which:
 - the penalty is at least 12 months imprisonment or other deprivation of liberty; or
 - if the offence does not carry a penalty in that country, the conduct is required to be treated as an offence for which the surrender of persons is permitted under the extradition treaty between Australia and that country.

In particular, the US, which has been the main instigator in prosecuting foreign persons for breaches of US antitrust laws, is a declared extradition country under the *Extradition (United States of America) Regulations 1988* (Cth). The Australian Act therefore applies to the extradition of persons in Australia to the US, subject to the bilateral treaty on extradition between the countries.¹⁵ Importantly, cartel conduct is punishable in the US by more than 12 months imprisonment under the *Sherman Act*.

However, the US is not the only country that may request an extradition from Australia for cartel conduct as the criminalisation of cartel conduct has been a growing trend. A number of nations on at least five continents, including Canada, Japan, the UK, France and Korea, already have laws providing for criminal sanctions for cartel conduct.¹⁶ Each of these countries has an extradition relationship with Australia and, accordingly, could seek to extradite persons in Australia for cartel conduct committed in their respective countries provided that cartel conduct constitutes an extraditable offence.

Application of conspiracy to defraud in Australia

Conspiracy to defraud is one of the last remaining common law conspiracy offences in Australia. All jurisdictions in Australia recognise the offence of conspiracy to defraud at either common law or in statute. In particular, in the Commonwealth, ACT and the coded jurisdictions,¹⁷ the elements of conspiracy to defraud are determined by the statutory definition.¹⁸ The common law still applies in NSW, SA and Victoria.¹⁹

In *Peters v R* (1988) 192 CLR 493, Toohey and Gaudron JJ set out the requisite elements of common law conspiracy to defraud as follows (at 509–10):

- an agreement to use dishonest means;²⁰ and
- an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others (that is, dishonesty by ordinary standards).

Knowledge is usually inferred if the above elements are satisfied.

In order to prove dishonest means, the prosecution would be required to establish that the defendant intended to prejudice another's right or interest by;²¹

- making or taking advantage of representations or promises which they knew were false or could not be carried out;
- concealing facts which they had a duty to disclose; or
- engaging in conduct which they had no right to engage in.

We are not aware of any Australian cases that have considered whether cartel conduct could constitute common law conspiracy to defraud. However, Australian courts have generally tended to follow English authority in deciding conspiracy to defraud cases.²² By its nature, cartel conduct involves dishonest means. For example, it is likely that a court could find that a cartel would involve the taking advantage of false representations. This is consistent with the approach of the UK High Court in *Norris* where it acknowledged that a cartel might involve false representations. Further, it is likely that a court could determine that cartel



conduct would involve the prejudicing of rights or interests of others.

In any event, the UK High Court's analysis of conspiracy to defraud in *Norris* is consistent with the construction given by Australian courts. Accordingly, the decision in *Norris* suggests that, based on the current state of the law in Australia, conspiracy to defraud could readily attach itself to cartel conduct. While Australian courts are not bound to follow the decisions of English courts, the case may hold persuasive value and arm foreign governments with the increased confidence to request extradition of persons in Australia for cartel conduct committed in their country even before the introduction of specific criminalised sanctions in Australia.

Obstruction of justice

Norris also raises the possibility that extradition could occur on the basis of the offence of obstruction of justice. In this regard, there are several offences in Australia which could be used to satisfy the double criminality and seriousness requirements for extradition. For example, in all Australian jurisdictions, it is a serious offence to attempt to pervert the course of justice, and is punishable in each jurisdiction by imprisonment of more than 12 months.²³ Further, s 155(5) of the TPA prohibits a person from failing to comply with a notice for information, documents and evidence issued under that section by the Australian Competition and Consumer Commission or knowingly furnish information or given evidence which is false or misleading, and s 155(6) makes such conduct an offence punishable by imprisonment of up to 12 months. Therefore, there may also be scope for using obstruction of justice offences rather than conspiracy to defraud offences to establish double criminality for the purposes of extraditing someone from Australia.

Conclusion

Even though cartel conduct had never been criminally prosecuted in England prior to the introduction of

the statutory offence, *Norris* suggests that the requisite mechanisms have long been in place to ground a criminal prosecution. Given the similarities between the extradition regimes in Australia and the UK, and the fact that Australia has broadly adopted the English authorities in relation to common law conspiracy to defraud, this begs the question of whether Australian courts would also be willing to apply the offence to cartel conduct for the purposes of extraditing a person located in Australia to a foreign country.

The decision in *Norris* also raises the possibility that, outside the context of extradition, a person in Australia could be criminally prosecuted for cartel conduct under the various statutory offences or under the common law offence of conspiracy to defraud even before the

conduct took place before the introduction of the statutory offence or in circumstances where the conduct does not fall within its terms. ●

Andrew Floro, Senior Associate, and Howard Shib, Solicitor, Mallesons Stephen Jaques.

The views expressed in this article are those of the authors alone and should not be attributed to Mallesons Stephen Jaques. The authors would like to acknowledge and thank the comments and suggestions provided on an earlier draft of this article by Roger Featherston, Partner, Mallesons Stephen Jaques.

Endnotes

1. See the Agreement between the Government of the United States of America and the Government of

Even though cartel conduct had never been criminally prosecuted in England prior to the introduction of the statutory offence, *Norris* suggests that the requisite mechanisms have long been in place to ground a criminal prosecution.

introduction of the new proposed amendments to the TPA. However, in our view this is unlikely given the previous approach of Australian regulators to cartel conduct. Further, the government's interest in the introduction of criminal sanctions may lessen a regulator's interest in testing the boundaries of the common law for the purposes of setting a precedent.

In any event, if and when Australia legislates for the criminalisation of cartel conduct, it is likely that a foreign government would only seek to rely on conspiracy to defraud to establish double criminality in circumstances where the alleged

Australia on Mutual Antitrust Enforcement Assistance, dated 27 April 1999, available at <<http://justice.gov/atr/public/international/docs/usaus4.htm>>.

2. This includes placing them on Interpol's Red Notice Watch — Masoudi G (Antitrust Division of the US Department of Justice) 'Cartel enforcement in the United States (and beyond)', paper presented at the Cartel Conference, Budapest, Hungary (16 February 2007).

3. Herman M 'Norris cleared to take extradition fight to Lords' *Times Online* 13 March 2007. The House of Lords is entitled to refuse to hear an appeal as it has done in the past. For



instance, the House of Lords previously refused to hear an appeal for the extradition of three NatWest bankers to the US on fraud charges in relation to the collapse of Enron. All three have since been extradited.

4. *Norris v Government of the United States of America* [2007] EWHC 71 (Admin).

5. See ss 64, 65, 137 and 138 of the UK Act.

6. *Enterprise Act 2002* (UK), s 188.

7. [2007] EWHC 71 at [138]–[139].

8. See s 79 of the UK *Extradition Act*.

9. At paras 357–60.

10. *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 (Mason J).

11. Note also s 4M of the TPA, which preserves the operation of the law relating to restraint of trade and breach of confidence. In *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 141, Gleeson CJ, Gummow, Kirby and Hayne JJ held that s 4M had a number of impacts including that the common law restraint of trade may develop independently of the TPA and that the common law may strike down a restraint which falls outside the operation of the TPA.

Notwithstanding this, the High Court also recognised that the common law may develop with regard to the statute, being what Parliament had determined to be the appropriate balance between competing claims and interests.

12. Federal Treasurer the Hon Peter Costello ‘Criminal penalties for serious cartel behaviour’ media release (2 February 2005). Proposed changes to the TPA would render individuals involved in serious cartels criminally liable and punishable by five years imprisonment and a fine of \$220,000. A draft Bill has not been released at the time of writing.

13. While extradition is the responsibility of the Attorney-General under the Australian Act, in practice decisions are made by the Minister for Justice and Customs.

14. See s 5. Note that the regulations may impose additional requirements (pursuant to the relevant treaty between the countries). For example, the *Extradition (Republic of France)*

Regulations 1989 (Cth) require two years rather than one as the minimum period of imprisonment to constitute an extraditable offence.

15. The Treaty on Extradition between Australia and the United States of America that came into force on 8 May 1976, as amended by the Seoul Protocol on 4 September 1990.

16. Pate R H (US Department of Justice) ‘International anti-cartel enforcement’, paper presented to the 2004 ICN Cartels Workshop, Sydney, Australia (21 November 2004).

17. The code jurisdictions are Queensland, WA, Tasmania and the NT.

18. It is worth noting that under the legislative provisions of the NT (*Criminal Code* (NT), s 284) and Queensland (*Criminal Code* (Qld), s 430), the definition of conspiracy to defraud appears to be closely related to cartel conduct as it is defined to involve: conspiring by deception or any fraudulent conduct to affect the market price of anything publicly sold, or to defraud the public or any person, or to extort any property from any person.

19. Although common law conspiracy has been abolished in Victoria, the common law offences of conspiracy to defraud and conspiracy to cheat and defraud have been retained: compare with the *Crimes Act 1958* (Vic), s 321F.

20. The means will usually be deemed to be dishonest if a person asserts something as true that is false and which is known to be false or not believed to be true or if the person knows they have no right to use the means in question.

21. *Peters v R* at 529 (McHugh J).

22. *Vereker v Rodda* (1987) 79 ALR 49; *R v Horsington* [1983] 2 NSWLR 72; *R v Eade* (1984) 14 Crim R 186; *R v Karounas* (1995) 63 SASR 451.

23. See, for example: *Crimes Act 1914* (Cth), s 43; *Crimes Act 1900* (NSW), s 319; *Criminal Code* (NT), s 109; *Criminal Code* (Qld), s 140; *Criminal Law Consolidation Act 1935* (SA), s 256; *Criminal Code* (Tas), s 105; *Criminal Code* (WA), s 143. In the ACT and Victoria, the common law offence of attempting to pervert the course of justice applies.



Sons of Gwalia paves road for trade practices issues for shareholder investments

Lynden Griggs

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In a decision which, depending on one's perspective, either delivered 'unprecedented rights to shareholders'¹ or established a principle which should be 'changed urgently',² the High Court's deliberations in *Sons of Gwalia (subject to deed of company arrangement) v Margaretic*³ certainly attracted considerable media attention. There is no doubt that this awareness will follow through to the practitioner and academic community with the likelihood that pressure will be brought to bear on the Commonwealth Parliament with legislative reform a distinct possibility.

While the decision was based on an interpretation of ss 553 and 563A of the *Corporations Act 2001* (Cth), and its impact on the substantive principles of trade practices law is negligible, its practical import may well be immense. Should the ruling go unchanged, actions for deceptive and misleading conduct contrary to s 52 of the *Trade Practices Act 1974* (Cth) (TPA), or s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) by shareholders aggrieved by the collapse of listed public companies may well rise exponentially. If this does occur, trade practices lawyers will need to focus on establishing how the misleading conduct by the company led to the purchase of the shares and the appropriate measure of damages. As was shown by the dissent of Callinan J in *Sons of Gwalia*, these are not matters to which an answer is readily apparent.

Facts

Margaretic purchased 20,000 shares in Sons of Gwalia on 18 August 2004. His name was entered on the shareholder of members some five days

later. On 29 August, Sons of Gwalia went into external administration. By this time, the value of Margaretic's shares was worthless. Margaretic claimed⁴ that the company had failed to comply with the continuous disclosure obligations required by s 674⁵ of the *Corporations Act* and Rule 3.1 of the ASX Listing Rules. Specifically, the allegation was that Sons of Gwalia had not told the market that their gold reserves were inadequate to meet their contractual obligations. Margaretic suggested that if this information was known, he would not have purchased the shares. Therefore, by failing to make these disclosures, Sons of Gwalia had engaged in misleading and deceptive conduct in breach of:

- s 52 of the *Trade Practices Act*;
- s 1041H of the *Corporations Act*; or
- s 12DA of the ASIC Act.

This failure resulted in a loss of \$26,288.59, which comprised the cost of shares, brokerage and GST. In effect, Margaretic was claiming that he was no longer a shareholder of the company, but a creditor, and therefore entitled to participate on an equal footing with other unsecured creditors. This foundation stone was challenged by the administrator and a major unsecured creditor, ING Investment Management LLC (with this entity described in the Full Court of the Federal Court as the 'true contradictor of the arguments put by the shareholder').⁶

The legal issue

The legal question to be resolved was whether the (assumed) liability of Sons of Gwalia to Margaretic was a liability due in his capacity as member or creditor.

If that liability was as a member, Margaretic's claim would be, due to

the operation of the deed of company arrangement and s 563A⁷ of the *Corporations Act*, postponed until the claims of all creditors were met. In effect, Margaretic as a shareholder would rank behind the creditors in a winding up.

However, if the hat that Margaretic was wearing was as a creditor, he would, pursuant to s 553⁸ of that same legislation, rank equally with other unsecured creditors. At both the trial level,⁹ and in the Full Court, the decision was in favour of Margaretic. The decision of the Full Court was appealed to the High Court.

Resolution by the High Court

By a 6:1 majority, the High Court found in favour of Margaretic. Reaching a different conclusion to, or at least distinguishing earlier authority, the majority was clear — there was no common law principle that a shareholder could not claim against a company which had gone into external administration. This conclusion was mandated by the legislative provisions within the *Corporations Act* and the respondent's claim squarely came within the operation of s 553 of that Act. Significantly for present purposes, the claim for misleading and deceptive conduct arose out of a statutory basis, and found its underpinning in something other than Margaretic's capacity as a member. It stood apart from any obligation owed by the company to shareholders.

Reasoning

In coming to this conclusion, the High Court rejected all submissions made by the appellants.

First, the statute was the critical focus on the enquiry, and as far as



winding up is concerned (and this was the key corporate law component), there are no 'general principles of company law' that would decree that a shareholder, simply by possession of that status, be ranked last.¹⁰ Second, once the spotlight is drawn to the Act, the operation of the legislative scheme can be placed in its appropriate context, and differences between the Australian regime and others can be noted.¹¹ The claim of *Margaretic* was not a debt owed to him in his capacity as a member. Similarly, the reliance by the appellants on the English authority of *Houldsworth v City of Glasgow Bank*¹² or the relatively recent Australian High Court authority of *Webb Distributors (Aust) Pty Ltd v Victoria*¹³ was misguided. *Houldsworth*, in purportedly establishing that a shareholder cannot claim against a company in external administration, was decided in the context of the law of deceit, and not on the basis of the equivalent statutory provisions under consideration in the instant matter. It was also decided prior to the seminal authority of *Salomon v Salomon & Co Ltd*,¹⁴ in a time when the 'separateness of a corporation from its members had not been fully recognised'.¹⁵ This, as Kirby J reflected, demonstrates the danger of 'attributing undue weight to what was

said in England in the 19th century when attempting to construe contemporary Australian legislation' (at [104]).¹⁶

In addition, the High Court's own authority of *Webb Distributors* provided no support for the appellant. In this case, the liquidator of three societies sought directions from the court as to how people who had subscribed for shares in those societies should be treated. These shareholders alleged that they had been induced to join the societies on the basis of deceptive conduct by the companies in question. The High Court held that the shareholders could not prove in the winding up. In so doing, the court relied heavily for support upon the principle of maintenance of capital — that is, that the creditors can look to the paid-up capital of the company as the fund by which their debts will be repaid (with shareholders not enjoying the same level of access).¹⁷ Hayne J considered that this decision had no application where the shareholders do not subscribe capital (as occurred with *Margaretic*, who purchased from a third party), and in any event, any so called common law principle could not deny *Margaretic* the 'operation of the relevant consumer protection and investor protection provisions' (at [190]).¹⁸ Gummow J was prepared to

contributions

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go further and suggested that ‘it must be doubted whether the result reached by the majority in *Webb* was correct’ (at [97]). Gleeson CJ also considered that within *Webb Distributors* there was a ‘chronological curiosity’ (in that the statutory language could not be said to reflect the applied decision of *Houldsworth*, despite this assertion by the court in *Webb*) and that the principle within *Houldsworth* is ‘famously elusive’ (at [14]).

By contrast to the majority, Callinan J (in dissent) considered that the matter could only be looked at in light of the consumer and investor protection provided throughout the *Corporations Act*. With sections such as s 140 (the statutory contract), s 232 (the oppression section), s 236 (the statutory derivative action), s 246D (class rights) and ss 180–183 (directors’ duties) all operating to provide remedial options to investors, his Honour concluded (at [242]):

It does appear to me then that the contextual indications are more than mere straws in a breeze sighing in [Sons of Gwalia’s] direction. Shareholders’ ample and superior statutory rights, their voluntary abdication of control over their investment in favour of their appointees, the directors, who have large statutory and constitutional discretions and obligations in the application of it, their rights of intervention, their rights to proceed against the directors personally as well as the company in some circumstances, their statutorily mandated limited liability, especially that, and their rights to participate in the bounty of any successes, sit uncomfortably with the notion that s 563A gives them equal billing, in the failure of the company, with ordinary creditors.

The trade practices perspective

The decision, as repeatedly emphasised by the majority, was one based on an interpretation of specific sections of the *Corporations Act*. However, its effect on large scale insolvencies may well be prodigious. The many thousands of aggrieved investors in large-scale collapses such as HIH, One-Tel and Sons of Gwalia (and as noted, the action in this case

was supported by a litigation funder on behalf of 800 shareholders) may well be seeking advice on their chances of success in pursuing a deceptive and misleading conduct claim against the company. As noted by Callinan J (at [256]):

It is not difficult to imagine a situation in which claims of a large body of shareholders, perhaps most of them, would dilute the creditors’ rights to less than a trickle.

However, the availability of bringing such an action may well belie the possibility of success. As trade practices practitioners would well know, s 52 of itself creates ‘no justiciable liability’,¹⁹ with the well-known authority of *Marks v GIO Holdings Pty Ltd*²⁰ an example of where breach was located, but with remedy absent. What are the potential problems?

First, shareholders will have many and varied reasons for deciding to invest. Assuming that there has been a breach of the disclosure obligations of the company, the shareholder will be required to establish that had the information been in the marketplace they would not have invested. For some, this will be relatively easy; for others, it may be problematic. For example, investors may well invest on the basis of detailed market analysis and research, the application of statistical charts, the professional advice of a financial adviser, a recommendation from a friend or a hunch based on something read. There may also be a number of causes relevant to the decision to invest. With causation informed by policy,²¹ contributory negligence now relevant to s 82 matters²² and *Henville v Walker*²³ illustrating how the same set of facts can lead highly skilled legal professionals to come to diametrically opposed conclusions, the answer as to whether an individual’s loss was caused by the failure of a company to be transparent with the market will not necessarily be easy to answer. The mere possibility that the conduct in breach was the causative factor is insufficient to attach liability.²⁴ In the context of Margaretic’s claim, the failure to meet the continuous disclosure requirements will not, of

itself, be enough. Arguably, a person will need to be able to show that they would not have invested if the complete picture was available to the market at large.²⁵

A second area where trade practices litigation will be particularly pertinent is the quantum of loss. Hayne J considered (at [175]) that the measure of Margaretic’s loss was the difference between the amount he paid for the shares and the value on a properly informed market.²⁶ Callinan J questioned the coherency and fairness of this. His Honour considered (at [256]) that it would give recent shareholders a significant advantage over longer standing shareholders, and although s 87 of the *Trade Practices Act* might provide some remedial flexibility so as to allow long-term shareholders to recover, that result would only lead to a reduction in the funds available for creditors.²⁷ A further point relating to quantum is whether damages for loss of opportunity would be available — for example, where an investor in a failed company has not only lost the value of the investment, but the opportunity to invest in an alternative profit making opportunity. With lost chance damages clearly recoverable under ss 82 and 87 of the *Trade Practices Act*,²⁸ litigants will need to consider how this head will be proven.²⁹

Conclusion

There is no doubt that in a corporate context, this decision is probably the most significant in the last decade. However, its operation extends beyond the corporate sphere. For practitioners in the trade practices area, on both the plaintiff and defendant sides, an understanding of its practical import is vital. It will only be by subsequent litigation and the exploration of how an investor can be misled and deceived by corporate action, and the quantum of any loss, that the full ramifications of *Sons of Gwalia* will be understood. Arguably, it is the trade practices, rather than the corporate law area, where the future progeny lies. ●

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Endnotes

1. Keenan R 'High Court hands big victory to Sons of Gwalia Investors' *The West Australian* 1 February 2007.
2. Stumbles J 'Creditors have new reason to worry' *Australian Financial Review* 1 February 2007.
3. [2007] HCA 1; BC200700205.
4. Margaretic's claim was being pursued on his behalf by a litigation funder which was representing about 800 shareholders of the company. A short summary of Margaretic's claim can be found in the judgment of Callinan J at [212].
5. Section 674(2) of the *Corporations Act* states:
 - If,
 - (a) this subsection applied to a listed disclosing entity; and
 - (b) the entity has information that those provisions require the entity to notify to the market operator; and
 - (c) that information:
 - (i) is not generally available; and
 - (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price of value of ED securities of the entity
 - (d) the entity must notify the market operator of that information in accordance with those provisions.
6. *Sons of Gwalia Ltd (subject to DOCA) v Margaretic* [2006] FCAFC 17 (27 February 2006); BC200600748.
7. Section 563A of the *Corporations Act*: 'Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, person otherwise than as members of the company have been satisfied.'
8. Section 553 of the *Corporations Act*: 'Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.'
9. *Sons of Gwalia Ltd (admin apptd) v Margaretic* [2005] FCA 1305; BC200506887 (Emmett J).
10. See the comments by Gummow J at [35]–[36].
11. The judgments of the High Court noted that the US *Bankruptcy Code* explicitly subordinates claims made by shareholders. No such provision exists in Australia (at [39]).
12. (1880) 5 App Cas 317.
13. (1999) 179 CLR 15.
14. [1897] AC 22.
15. [2007] HCA 1 at [3] (Gleeson CJ).
16. Gummow J also comments that 'Excessive significance should not be attributed to statements in nineteenth century British cases, decided at a time of endeavours to "flesh out" the developing body of statute law ...' (at [37]).
17. *Trevor v Whitworth* (1887) 12 App Cas 409 at 414.
18. Heydon J agreed with Hayne J at [263].
19. *Western Australia v Wardley Australia Ltd* (1991) 30 FCR 245 at 257.
20. (1998) 196 CLR 494.
21. *March v E & M H Stranmare Pty Ltd* (1991) 171 CLR 506.
22. Section 82(1B), TPA.
23. *Henville v Walker* (2001) 206 CLR 459.
24. *Ricochet Pty Ltd v Equity Trustees Executor & Agency Co Ltd* (1993) 41 FCR 229.
25. Though it's not always necessary to prove that a claimant personally relied upon the conduct, only that there is a link between the conduct and some of the loss. This is particularly pertinent in passing off actions: *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.
26. [2007] HCA 1, [175].
27. [2007] HCA 1, [256].
28. *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.
29. For example, in *Kenny & Good Pty Ltd v MGICA* (1999) CLR 413 the measure of damages was the full loss suffered by the mortgage insurer (relying on an incorrect valuation), rather than the difference between the true value and the incorrect valuation of the property.



CASENOTE

Prestige goods and resale price maintenance: ACCC v Jurlique

Anne Rees

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A recent case involving resale price maintenance (RPM) was notable for two factors:

- record penalties; and
- the comments by the judge hearing the case in the Federal Court highlighting arguments against RPM being a *per se* contravention of the *Trade Practices Act 1974* (Cth) (TPA).

The case, *Australian Competition and Consumer Commission v Jurlique International Pty Ltd* [2007] FCA 79; BC200700396, was non-contentious in that the respondents filed a defence admitting the relevant conduct and the parties filed a joint submission as to the form of orders and penalties, leaving only the quantum of penalties to be determined by the court. Those penalties totaled \$3.4 million against four companies in the Jurlique group and \$200,000 against its former manager-director, Dr Jurgen Klein. These were record penalties for RPM.

Background

Jurlique is a manufacturer and supplier of premium skin care products within Australia and internationally. One of the respondent companies, J & J Franchising, operated company outlets, day spas, offering Jurlique products and treatments and it was also a franchisor of outlets retailing only Jurlique products and treatments.

Contraventions

The Australian Competition and Consumer Commission (ACCC) alleged contraventions of the TPA dating as far back as 1991, although only those contraventions from 2000 onwards were within the limitation period for the imposition of a penalty. The contraventions alleged were of s 45 price fixing and s 48 RPM. The

contraventions involved conditions in agreements between the Jurlique companies and franchisees and Australian/international retailers which provided that the franchisee/retailer would not sell Jurlique products below a specified price or would not engage in practices that would damage the prestige image of Jurlique. In addition, price lists were distributed that did not indicate that the prices were recommended only. Dr Klein was found liable as an accessory to the breaches.

aura of exclusivity about them' (at [60]). In particular, Spender J noted arguments that RPM can assist new products and can prevent free riding by discount retailers who take advantage of a manufacturer's investment 'in creating an image based on quality and prestige to increase demand for its product' (at [68]).

Having pointed to the arguments in favour of RPM for prestige goods, or at least arguments in favour of the application of a rule of reason

Those penalties totaled \$3.4 million against four companies in the Jurlique group and \$200,000 against its former manager-director, Dr Jurgen Klein. These were record penalties for RPM.

RPM and prestige goods

The joint submission from the parties noted that the Jurlique Companies' brand value had been enhanced by no discounting and that 'at the time of the conduct considered the maintenance of resale prices contributed to the growth in the Jurlique brand' (at [58]). For Spender J, this raised the issue of RPM in the case of prestige goods. His Honour (at [61]–[64]) cited Chicago School and other academic arguments that vertical price restraints are not anticompetitive, stating '[t]he fact of the matter is that the attraction of many products to consumers lies in the fact that they are expensive, and have an

approach,¹ Spender J described his comments as 'somewhat of an indulgence' noting that 'notwithstanding the views outlined above, I am bound by the law' (at [75]).

His Honour also pointed to the difficulties of quantifying the loss or damage in such a case. He noted that if RPM had caused prices to be, say, 10 per cent higher than might otherwise have been the case, this was not an indication that a price fall would have increased sales, and indeed on the arguments about price and prestige goods, might have caused a fall in sales (at [76]–[77]). Indeed, Spender J suggested that given Jurlique did not



have significant market power in relation to premium skin care products, 'it is impossible to conclude that the maintenance of retail prices by the Jurlique Companies caused loss and damage to consumers' (at [78]).

His Honour cited (at [79]), with emphasis, the joint submission by the parties that:

The Jurlique Companies were spending significant advertising funding differentiating its product from its competitors *and it gained what it considered to be an advantage in the promotion of its image and stocking of its product by maintaining undiscounted prices for its products. These two issues meant that through its contravening conduct, Jurlique Companies obtained advantages over competitors who complied with the law.* [Emphasis added.]

His Honour suggested (at [80]) that:

... perhaps unconsciously ... the maintenance of an expensive retail price is part of the allure of prestige products, and confers a competitive advantage to those products over those which are variously seen as discounted.

Determining the penalties

In determining the penalties, Spender J emphasised the principles of deterrence, especially general deterrence, particularly in the context of price fixing and *per se* contraventions. Other relevant factors were capacity pay, the length of time over which the contraventions occurred, Jurlique's market power in relation to its franchise stores (including that any threat to remove stock from these stores would have destroyed franchisees' investment, and the deliberateness of the conduct).

However, his Honour also noted that Dr Klein had since left the company and Jurlique had subsequently instituted compliance training.

The parties' joint submission indicated consensus on the quantum of penalties. Having noted the public policy to avoid complex litigation,² and that the agreed penalties were within the permissible range, Spender J confirmed the penalties including orders restraining the Jurlique companies and Dr Klein from engaging

in similar conduct for a period of five years.

Lessons from the case

The size of the penalties, both corporate and individual, are salutary lessons for companies and managers about the dangers of specifying minimum prices. Although Spender J highlighted the arguments as to why a company dealing in prestige goods might wish to ensure the maintenance of brand image by preventing discounting, that RPM is a *per se* contravention of the TPA means that retailers must be free to set their own prices. Further, threats to discontinue supply as a means of controlling prices is sufficient to invoke the TPA. In this case, some of the retailers threatened were franchisees of the respondents. Section 96 of the TPA provides that RPM occurs where a corporation engages in certain conduct in relation 'to a second person'. A franchisee, having separate legal personality, is clearly a second person in this context even if it trades under the company's brand name. The most that franchisors can do in relation to the prices of goods that they supply is, as with other suppliers, specify a recommended retail price. Further, there can be no attempt to enforce that price whether pursuant to agreements or by recourse to threats.

Interestingly, despite what appeared to be Spender J's approach in favour of an anticompetitive test in regard to RPM, the issue is not one that has been on the agenda for reform for some time. The Hilmer Report in 1993 found no reason to recommend relaxing the *per se* aspect of the prohibition and the issue was not considered in the Dawson Report. ●

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Endnotes

1. A rule of reason approach allows a court to consider the reasons for the conduct. This is opposed to a *per se* banned approach such as that adopted in s 48 of the TPA in relation to RPM.

2. His Honour cited (at [110]) the Full Court of the Federal Court in *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 291.



What settlement undertakings is the court unable to accept?

Dr Warren Pengilley
 DEACONS

Settlement undertakings are akin in effect to court injunctions. A breach of an undertaking, as a breach of an injunction, is enforceable by contempt proceedings. For this reason, it is important that undertakings, as injunctions, be drafted with precision. In the words of the learned text of Meagher, Gummow and Lehane, ‘the recipient of [an injunction] must be placed in a position where he knows exactly what he is obliged to do’.¹

In a trade practices context, settlement undertakings, their obligations and their drafting have been previously subject to court determinations — notably, in *Thomson Holdings*,² *WA Real Estate*,³ *Z-Tek Computer*,⁴ *Foster*,⁵ *NW Frozen Foods*⁶ and *Virgin Mobile*.⁷

The relevant principles in the above cases in relation to the court’s acceptance of settlement undertakings plus some additional points were recently considered by Besanko J in *ACCC v Auspine Ltd*.⁸ Because of their importance at a practical level, it is appropriate to review these principles using *Auspine* as the vehicle of analysis.

Principles in relation to settlement undertakings

The principles in relation to the acceptance of settlement undertakings by the court, in point form, are as follows.

- An undertaking cannot exceed the injunctive power of the court. In other words, an undertaking in terms wider than the court’s injunction power, even if by consent, is unacceptable.
- An undertaking is given in place of an injunction. The remedies for breach of an undertaking are the same as those for breach of an injunction.

- In a case where contravening conduct is neither proven nor admitted (as was the case in *Auspine*), the court’s power to accept an undertaking is governed by the injunctive power provided in s 80(1AA) of the *Trade Practices Act 1974* (Cth) (TPA). This power permits injunctions to be issued ‘in such terms as the court determines to be appropriate’ to prevent contraventions of (among other provisions of the TPA) Pts IV (restrictive trade practices) and V (consumer protection), as well as

unambiguous language. Thus an undertaking should not be accepted if it is vague or uncertain, or if enforcement is likely to prove impossible.¹⁰

- There must be a relevant nexus between the injunction or undertaking and the alleged or proven contravening conduct.
- An injunction does not have to be framed only in terms of restraining a repetition of conduct. An injunction or undertaking as to future conduct may be in wider terms.

An undertaking cannot exceed the injunctive power of the court. In other words, an undertaking in terms wider than the court’s injunction power, even if by consent, is unacceptable.

permitting injunctions to be issued to prevent attempts, inducements and the aiding or abetting of any breach. An injunction may be issued whether or not it appears to the court that a person intends to engage again in the conduct and may be issued by consent of all parties whether or not the court is satisfied that a person has engaged, or intends to engage, in prohibited conduct.

- The court’s power to grant an injunction is contained exclusively in s 80 of the TPA and reliance cannot be placed on s 23 of the *Federal Court of Australia Act 1976* (Cth).⁹
- An undertaking, as an injunction, must be couched in clear and

- In the case of undertakings requiring parties to engage in compliance programs, it is neither practicable nor useful to prescribe with minute particularity the content of such programs. An order which contains objectives to be fulfilled or aims to be achieved might be too uncertain to be enforceable, although the problem might be overcome by making the obligation a ‘best endeavours’ obligation.¹¹
- In relation to general educational or compliance program, there is no doubt as to their desirability. However, this is a different issue from that of the court’s power to order such a program or to accept



an undertaking to implement such a program. The obligations ordered in respect of any such programs must be 'appropriate'. Thus a program covering Pts IV and V of the TPA will not be 'appropriate' when a breach of only one such Part is alleged or proven. In the case of a breach of Pt V, it may not be 'appropriate' to order a compliance program in respect of the whole of Pt V when the conduct alleged or proven involves a contravention of a provision of Pt V far-removed from the conduct alleged or proven. However, in a case of the competition provisions of a contravention or alleged contravention of Pt IV, it may be appropriate to order a compliance program in respect of the whole of Pt IV. This is because the whole of Pt IV may be seen as interconnected and related. In each case, questions of the relevant nexus will be a question of judgment and will vary with the facts of the case before the court.¹²

- Questions have arisen, and arose in *Auspine*, as to the court's power to make an order or accept an undertaking requiring an external audit of a compliance program or, alternatively, the appropriateness of so doing. In the opinion of Besanko J in *Auspine*,¹³ it was important to have a clear understanding of what was meant by an external audit of a compliance program. His Honour was of the view that an order or undertaking leaving the definition of the major obligations to be undertaken to a third party, or leaving the question of whether the conduct was in breach to a third party, was beyond power or at the very least inappropriate. Such a delegation would not be in clear terms and would involve an impermissible delegation of the court's power to determine breach. However, an order might include a provision for external audit provided the major obligations were defined and it were clear that the question of breach was for the court to determine having regard to the facts and the terms of the order or undertaking.¹⁴

Undertakings in *Auspine* and the court's evaluation of them

Auspine concerned alleged price fixing in relation to quotations for various services in connection with the supply of timber.

Desist undertakings

The court accepted undertakings that the parties would not make any contracts, arrangements or understandings in relation to various quotation services. These restrained conduct which breached the TPA and it was within the court's power to issue an injunction prohibiting conduct similar to that alleged in the case.

Undertakings by individuals to attend trade practices compliance seminar

The court accepted an undertaking given by three individuals that they would each attend a trade practices compliance seminar in terms specified in detail in the undertaking. The seminar related to price fixing and anticompetitive conduct. In the court's view, a knowledge of provisions of Pt IV of the TPA other than ss 45 and 45A would also assist in an understanding of the operation of ss 45 and 45A covering price fixing and anticompetitive collusive conduct.

Undertaking by a corporation to implement recommendations of a report evaluating its trade practices compliance program

A report had been made by an independent evaluator as to the effectiveness of the trade practices compliance program of one of the corporate respondents. The undertaking offered was that this respondent would implement those recommendations which indicated where the respondent's compliance program could be improved. The conclusions of the independent evaluator, whose competence was not in issue, were generally favourable to the respondent. It is not necessary here to detail the areas in which the evaluator thought the compliance program could be improved.¹⁵ Suffice it to say that these recommendations were in terms (among others) that the respondent:



- 'may wish' to develop certain aspects of the program;
- should review resources necessary to support the program; and
- should 'touch base' with staff in various ways.

The court saw difficulties with this undertaking in the following respects.

- The undertaking was wider than obligations under Pt IV and only Pt IV conduct was in issue in the case. This, suggested the court, could be remedied by linking the recommendations to Pt IV and not to the TPA generally.
- Though the court was prepared, in settlement of commercial litigation by a large organisation having a compliance program, to impose an obligation on a party to 'consider' a course of action, the undertaking offered did not even do this. This problem could be overcome, said the court, by making the obligation to consider mandatory.
- There were difficulties with the specific terms of the trade practices compliance program. The major aspects of the program were not identified. The formulation of the program was left to the respondent and the external consultant to determine. There was also a provision that the program could be changed from time to time. The suggestion in the wording of the undertaking was that it was up to the independent consultant to determine that whatever program was formulated was appropriate. It was also up to the independent consultant to determine whether the program as formulated was appropriate. It was also up to the independent consultant to determine whether the program was implemented from time to time. The program, said the court, had to be defined in all its major aspects and the question of breach could not be made to depend solely upon the consultant's opinion.¹⁶

In conclusion

Auspine is a convenient summary of the relevant aspects of undertakings which will be acceptable to the court and merits consideration as a case which gathers these principles together.

In the case, the court left it open for the parties to make a further application to it, if so advised.

In the heat of combat, peace is a highly desirable prize. Perhaps the court's view as to the boundaries which cannot be transgressed appear at the time of peace negotiations to be technical but significant impediments to the peace negotiation process. However, nothing can be more basic than the fact that contempt proceedings should not lie unless a party is in breach of an order which tells him or her exactly what he or she is obliged to do. Interpretation of the settlement document is just as important as the negotiation of the settlement terms themselves. The court is wise in ensuring that settlement documents are free of imprecision, difficult as it sometimes can be to meet the court's drafting requirements. ●

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Endnotes

1. Meagher R P, Heydon J D and Leeming L J *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (4th edn) LexisNexis, Sydney 2002 at [21-505].
2. *Thomson Australian Holdings Pty Ltd v TPC* (1981) 148 CLR 150.
3. *ACCC v Real Estate Institute of WA* (1999) 161 ALR 79.
4. *ACCC v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197.
5. *Foster v ACCC* (2006) 149 FCR 135.
6. *NW Frozen Foods v ACCC* (1996) 71 FCR 285.
7. *ACCC v Virgin Mobile Australia Pty Ltd (No 2)* [2002] FCA 1548; BC200207781.
8. [2006] FCA 1215 (7 September 2006); BC200607117.
9. Above at [28], citing *Thomson* and *Foster*.
10. Above note 8 at [29].
11. Above at [29] citing *ACCC v Real Estate Institute of WA*.
12. Above note 8 at [30]–[32].
13. Above at [35].
14. Above.
15. See above at [45]–[52] for these details.
16. Above at [52].

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DEVELOPMENTS IN
MERGERS AND ACQUISITIONS

Media mergers – a brave new world?

Jackie Mortenson

MINTER ELLISON LAWYERS

What's all the fuss about?

In 2006, several related pieces of legislation were passed by the federal government to amend the *Broadcasting Services Act 1992* (Cth) (BSA), including the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) (Media Ownership Act) which relaxes media ownership and control laws.

On proclamation, but no later than 1 January 2008, the Media Ownership Act will repeal the foreign media and cross-media ownership and control restrictions currently contained in the BSA. New provisions which restrict the number of media licences a single entity can control in a given area, however, replace the current restrictions.

While the minister is yet to announce the date of proclamation for the repeal of the media ownership and control laws, the 'major media players are reported to be poised in the blocks waiting for the Commonwealth Government to fire the starter's gun on new media laws'.¹ It is commonly thought that an increased number of media mergers will occur once the foreign media and cross-media ownership and control restrictions are repealed.

Who is responsible for assessing media mergers?

Potential media mergers will be assessed by one or all of the Australian Communications and Media Authority (ACMA), the Australian Competition and Consumer Commission (ACCC) and possibly the Foreign Investment Review Board (FIRB).

ACMA is tasked with ensuring compliance with the BSA and, once the BSA is amended, will need to ensure a media merger will not result in a

breach of the required level of, and diversity of ownership in, media platforms.

Under the *Trade Practices Act 1974* (Cth) (TPA), potential acquirers of media assets will be required to show that they are not in breach of s 50; namely, that the acquisition does not have the effect or likely effect of substantially lessening competition. It is the ACCC which carries out this assessment.

In the case of foreign purchasers, the FIRB is required to ensure foreign ownership thresholds under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) are not breached by a merger.

Greater numbers of media mergers?

Even before the repeal of the media ownership and control restrictions in the BSA, increased numbers of media mergers have been under review by the ACCC. Since 4 November 2006, the day on which the Media Ownership Act received Royal Assent, the ACCC has completed the public review of seven media mergers and is currently examining two additional media mergers. Compared to recent years, this is indeed indicative of a 'media merger frenzy'.

The ACCC appears to have prepared itself for the predicted increase in media merger activity. In August 2006, it published guidelines on media mergers with the aim of providing guidance to 'industry and the public as to how future cross-media merger proposals might be assessed and the ACCC's approach to defining media markets'.² These are the first industry-specific merger guidelines that the ACCC has published.

In the guidelines, the ACCC has indicated that it will specifically examine whether a media merger raises competition concerns in relation to:

- the supply of advertising opportunities to advertisers;
- the supply of content to consumers; and
- the acquisition of content from content providers.

Despite the guidelines, and especially the ACCC's analysis of its approach to the media sector and the impacting technological changes, the statutory test against which the ACCC is required to assess a merger is the same as for any other merger. It is also the same test for proposed media mergers under the BSA as currently drafted and once the media ownership and control restrictions are repealed.

ACCC and ACMA information sharing

Given that ACMA is required to examine the level of, and diversity of ownership in, media platforms in a given area, any media merger to be examined by the ACMA is also likely to be subject to ACCC scrutiny under the TPA.

In recognition of this, on 5 March 2007 the ACCC and ACMA announced that in respect of media mergers that will need to be investigated by both the ACCC and the ACMA they will 'facilitate the flow of information between the two agencies during media merger investigations in a way that protects confidential information while helping to ensure that each agency's investigations are fully effective'.³

It will be of interest to watch how the same information is used by the different regulators in their assessment of the one merger on different bases.



What does it all mean?

The repeal of the media ownership and control restrictions in the BSA is likely to make it easier under the BSA for companies already holding media assets to acquire further media assets. Accordingly, a greater number of potential media acquisitions are likely to require notification to the ACCC. However, given the nature of the ACCC's and ACMA's assessments,

it is not as easily said that a greater number of media mergers, especially those involving the major players, will be allowed to proceed. And this is without even considering the impact of any assessment by FIRB on merger activity by foreign entities. ●

*Jackie Mortensen, Senior Associate,
Minter Ellison.*

Endnotes

1. Samuel G 'Regulating media and broadcasting networks in a changing media environment' speech presented at the Australian Broadcasting Summit 2007, 5 March 2007, p 1.
2. ACCC *Media Mergers* (August 2006).
3. ACCC 'ACCC and ACMA seek to share confidential media merger information' media release MR 054/07 (5 March 2007).

TPnews



Australia

The foundations of good consumer

protection policy: Samuel

15 March 2007. Strong law, vigorous enforcement and the educated consumer are the hallmarks of good consumer protection policy according to Australian Competition and Consumer Commission (ACCC) Chair, Mr Graeme Samuel, in his presentation to the 2007 National Consumer Congress.

In his address, Samuel identified some key issues from the ACCC's perspective in relation to the Productivity Commission's inquiry into the national consumer protection framework.

He noted a number of developments which have significantly changed the consumer's world since 1974 including:

- the boarder range of products and services from a greater variety of sources;
- competition reforms and deregulation which have presented consumers with choices in energy, telecommunications and other areas where previously the only choice was a government-owned monopoly;
- the increasing complexity of products/services and their pricing structures; and
- the development of e-commerce and online trading, and the issues these pose.

'Nevertheless,' said Mr Samuel, 'while there is a tendency to consider these as new issues, in fact, there area some

striking similarities between the issues faced by consumers today and the issues faced in 1974 when the [*Trade Practices Act 1974* (Cth)] was introduced.

'My point is not that we can be complacent about our consumer policy framework because "nothing has changed". While the fundamental issues of concern for consumers in the marketplace may not have changed, what has changed, and will continue to change over time, is the magnitude and intensity of the issues faced by consumers.'

Mr Samuel identified a number of potential areas where improvements could be made.

- *The need for introduction of civil pecuniary penalties into the TPA.* Mr Samuel noted that while the ACCC is committed to taking criminal actions where the conduct warrants such a response, these actions are slow and require significant resources, not to mention the need to meet a very high standard of proof to achieve a result. 'The ability to obtain civil pecuniary penalties, declarations, injunctive relief, and other measures such as corrective advertising within a single action would significantly enhance the ability of the ACCC to obtain effective outcomes and provide a higher degree of deterrence,' said Mr Samuel.
- *The need for ACCC to be able to seek court orders to obtain consumer redress for large numbers of consumers.* Currently, the ACCC can only obtain redress in relation to persons who provide written consent.

- *The need to reduce the level of inconsistency between state, territory and Commonwealth fair trading laws.* He noted that the costs of increasing lack of uniformity are significantL 'For business, there are costs associated with meeting different requirements in different jurisdictions. ... The current system also imposes an increased burden on consumers to be aware of the different standards that may exist between jurisdictions, and can raise false expectations that protections that may exist in their home jurisdiction apply when dealing with traders in other jurisdictions.' *A full copy of the paper is available from the ACCC at <www.accc.gov.au>.*

New national industry standard for telemarketing and research calls

26 March 2007. The Australian Communications and Media Authority (ACMA) has determined a national industry standard for making telemarketing and research calls.

The *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* establishes minimum standards intended to provide greater certainty for consumers on the minimum level of conduct they can expect from those making unsolicited telemarketing and research calls.

- The industry standard applies to:
- all telemarketing calls made to an Australian number to offer, advertise or promote goods, services, interests in land, business opportunities or investments, or to solicit donations;
 - all research calls to conduct opinion polling and to carry out standard questionnaire-based research; and



- calls made for the above purposes by organisations exempt from the general prohibition on calling numbers listed on the Do Not Call Register, such as charities, registered political parties and religious organisations.

A key requirement is to define when calls can and cannot be made.

The industry standard is require to commence at the same time as Pt 2 of the *Do Not Call Register Act 2006* (Cth), expected to commenced on 31 May 2007.

Source: ACMA media release MR 26/2007 (26 March 2007).



New Zealand

Residence overseas no shield from prosecution under the Commerce Act: High Court

21 March 2007. The NZ High Court has ruled that the NZ Commerce Commission (NZCC) can pursue penalty proceedings against three defendants in the wood chemicals cartel case who were living overseas when the cartel was operating.

Elias Akle, Andrew Poynter and Neil Harris had protested the jurisdiction of the court to hear the NZCC's cartel claim against them. They argued that they lived overseas and did not perform any acts in NZ that breached the *Commerce Act 1986* (NZ). The NZCC accepted that most of their alleged actions took place outside NZ, mainly occurring in Australia, but noted that

the cartel affected NZ businesses and consumers.

The High Court set aside the protests of all defendants and held that people who allegedly enter into cartel agreements overseas, which are aimed at a NZ market, can be pursued in the NZ courts.

The decision confirms that the *Commerce Act* applies not just to companies and individuals in NZ, but also to overseas residents who conspire to breach the Act and communicate with people in NZ or have people in NZ acting on the conspiracy.

NZCC Chair Paula Rebstock welcomed the ruling. 'Many NZ businesses are now managed from abroad, or are subsidiaries of overseas companies. This judgment goes a long way towards ensuring that unlawful agreements entered into overseas — but aimed at NZ markets — can be the subject of legal action here,' said Ms Rebstock.

'Residence overseas will not shield people who breach the *Commerce Act*.'

Justice Williams noted that the close economic relationship between NZ and Australia made it particularly important that Australian-based defendants should be subject to the jurisdiction of NZ courts.

A full hearing will need to be held to determine whether any of the individuals has breached the Act. If the defendants do not appear at court, the NZCC can seek judgment in their absence. In the meantime, the two defendants have indicated they will apply to appeal the jurisdiction judgment.

A discussion of the decision and its implications will feature in the next issue

of the *Australian & New Zealand Trade Practices Law Bulletin*.

Source: NZCC media release no 108 (21 March 2007).

Ribena Vitamin C claims false and misleading

27 March 2007. GlaxoSmithKline has pleaded guilty to 15 representative charges of breaching the *Fair Trading Act 1986* (NZ) by making misleading claims about the vitamin C content of Ribena. The NZCC investigated after a complaint from two college students who tested the drink for a science project.

In the Auckland District Court, GlaxoSmithKline was fined \$227,500 and ordered to undertake a nationwide campaign of corrective advertising in newspapers to explain that some forms of Ribena contain no detectable level of vitamin C.

The guilty please relate to two kinds of misleading or false claims about Ribena made between March 2002 and March 2006. Five charges relate to claims that ready-to-drink Ribena contain 7 mg of vitamin C per 100 mL. Testing found no vitamin C in the ready-to-drink product. Ten charges relate to claims in TV advertisements that 'the blackcurrants in Ribena have four times the vitamin C of oranges'. GlaxoSmithKline now accept this statement was liable to mislead consumers.

NZCC Chair Paula Rebstock said that the case should alert other businesses to the importance of ensuring that claims made in advertising and on packaging were accurate.

Source: NZCC media release no 112 (27 March 2007).

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