EXCLUSIONARY PROVISIONS: THE PAST AND THE FUTURE

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When competitors 'gang up' and agree not to supply goods or services to others,[1] they may engage in what is colloquially known as a collective boycott (and what is more formally described in s 4D of the *Trade Practices Act 1974* (Cth) ('*TPA*') as an 'exclusionary provision'). One instinctively feels that there is something wrong in the competition game if these arrangements are tolerated. More than this, one instinctively believes that they should be banned.

According to economic logic, such arrangements have highly undesirable criteria in that:

- the decision to deny supply is one made jointly by competitors. It thus negates individual decision-making and the promotion of competition that such individual decision-making provides;
- the joint decision-making process involves an aggregation of power. The relevant economic power is not possessed by individuals acting unilaterally;
- the decision is necessarily made by entities which collectively have, or think they have, sufficient economic muscle with which to 'heavy' weaker entities. Collective boycotting is not engaged in by weak market entities. Undue economic power is the antithesis of competition;[2] and
- collective boycotting is frequently engaged in to prevent innovative market entry. The prevention of entry, or the credible threat of such prevention is, in the long term, the greatest inhibition to competition.[3]

Instinctively, therefore, economic logic leads us to believe that a per se ban on such collective decisions is warranted. But it is more than this. This conduct, societally, can be seen as a form of economic bullying and should, in the view of many, be banned for this reason as much as for any other. We may also look at the United States law, from which we have inherited much of our competition

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1 The same comments apply to joint decisions as to the acquisition of goods or services. For simplicity of expression, however, all such arrangements are here referred to as decisions relating to 'supply'.

2 See *Re Queensland Co-Operative Milling Association, Re Defiance Holdings Ltd* (1976) 8 ALR 481 (Trade Practices Tribunal).

3 Ibid.

jurisprudence, and see that collective boycotts are banned there per se. Why should we not do the same?

I THE 1977 ENACTMENT OF THE AUSTRALIAN PER SE BAN ON COLLECTIVE BOYCOTTS.

Effective 1 July 1977, Australia banned collective boycotts.[4] Australia defined a 'collective boycott' as involving

- a provision of a 'contract, arrangement or understanding' between parties any two of whom are competitive with each other
- which has the substantial purpose of preventing, restricting or limiting the supply of goods to particular persons or particular classes of persons
- by the parties to the contract, arrangement or understanding.[5]

It is notable that the Australian ban on collective boycotts:

- does not have a competition test. The parties to the arrangement must be competitors. However, the arrangements are illegal if they have the purpose of preventing, restricting or limiting supply. The test is not whether the arrangement has the purpose of substantially lessening competition.
- does not specify any limitation as to the nature of the 'particular persons' or 'particular classes of persons' who may be the 'target' of the boycott. These persons may well be competitors, actual or potential, of the boycotting parties. They may, however, be any class of persons. The class may, therefore, be a section of the public at large totally unrelated to the boycotting entities. It is obvious enough that problems may well arise as to definition of a relevant class of persons and as to the specificity with which such a class is described.

II DID AUSTRALIA MISTRANSLATE THE *SHERMAN ACT*?

The 1977 Australian statutory provisions purported to follow the United States judicial precedent as to what was an illegal collective boycott and thus banned per se. However, there was a significant mistranslation of the United States *Sherman Antitrust Act*[6] ('*Sherman Act*') in at least the following respects.

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4 *Trade Practices Act 1974* (Cth) ss 45(1)(a), (2)(a)(i) and (2)(b)(i).

5 *Trade Practices Act 1974* (Cth) s 4D. The above is a truncated version of the section aimed to simplify expression. It does not include joint decisions as to the acquisition of goods or services (see above n 1). The section also applies to supply of goods or services 'in particular circumstances or on particular conditions'. Section 4D(2) (omitted from the above text) provides that the subject matter of the supply restriction must relate to goods or services in relation to which the parties to the agreement are competitive. In the *TPA*, collective boycotts are referred to as 'exclusionary provisions'. In this article, the more colloquial expression ('collective boycotts') is used. Section 4F of the *TPA* provides that the 'purpose' of an arrangement has only to be a 'substantial' purpose.

6 15 USC §§ 1–7.

1. The United States law bans per se only those arrangements which necessarily have 'a pernicious effect on competition and lack any redeeming virtue'.[7] The Court first looks at the practice 'facially' and condemns it only if, on a facial examination, it would 'always or nearly always tend to restrict competition and decrease output'.[8] Recently the United States Supreme Court has said that condemnation per se was applicable only if, after a 'quick look':

> an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets.[9]

Clearly enough, competition is an important factor in evaluating boycotts in the United States. Despite the generally expressed view that collective boycotts are per se banned in the United States, this result follows only in the case of clearly anti-competitive arrangements. Thus in *Northwest Wholesale Stationers v Pacific Stationery*,[10] the United States Supreme Court concluded that its decisions had banned boycotts per se only when there had been:

- a denial of necessary access to stock exchange facilities;[11]
- a denial of trade association certification quality of product;[12] and
- denial of important sources of news.[13]

The Court noted that, in the above cases, the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete. Frequently, the boycotting firms possessed a dominant position in the relevant market.

2. As a test of whether a collective boycott must be condemned, the United States courts require that the 'target' of the boycott be a competitor, actual or potential, of those engaging in the boycott. The effect of the action must be pernicious, as characterised by the concerted attempt by a group of competitors at one level to protect themselves from non-group members who also seek to compete at that level.[14] According to the competition test, an arrangement is not illegalised per se if the target is not a competitor of the boycotting parties.[15]

In 1977, Australia mistranslated the United States law in its enactment of s 4D.[16] Clearly there is no room for a competition evaluation in s 4D. Equally

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7 *Northern Pacific Railway Co v United States*, 356 US 1, 5 (1958). See also the extensive citation of authority in nn 18–25 in *James McCoy (Yazoo) v Pro Football*, 1978-2 Trade Cases ¶62,338 (DC Cir) ('*James McCoy*').

8 *Broadcast Music Inc v Columbia Broadcasting System* 441 US 1, 19–20 (1979).

9 *California Dental Association v Federal Trade Commission*, Trade Cases ¶72,529, 84,790 (1999) (US Supreme Court).

10 472 US 284 (1985).

11 *Silver v New York Stock* Exchange, 373 US 341 (1963).

12 *Radiant Burners Inc v Peoples Gas Light & Coke Co*, 364 US 656 (1961).

13 *Associated Press v United States*, 326 US 1 (1945).

14 *James McCoy*, 1978-2 Trade Cases ¶62,338 (DC Cir).

15 Ibid.

16 See above n 5 and related and subsequent text for the relevant provisions of s 4D. The writer regards the drafting of s 4D as one of the five most disastrous political/administrative decisions made under the *TPA*. See Warren Pengilley, 'The Ten Worst Decisions Made under the Trade Practices Act' (2002) 30 *Australian Business Law Review* 331. Five of the 'disastrous' decisions referred to in the article are judicial.

clearly, the 'target' of the boycott may be any person or class of persons. It is irrelevant whether the 'target' person or persons is a competitor, actual or potential, of the parties to the arrangement.[17]

III DOES IT MATTER THAT AUSTRALIA HAS NOT FOLLOWED THE UNITED STATES LAW?

It is not suggested that there is inherent virtue in slavishly following the United States law, though it may well have been wise to have taken the experience of that country into account in drafting the Australian legislation.[18] However, the over-zealous ban imposed by s 4D has given rise to significant difficulties.

Prime amongst these difficulties are the problems caused by s 4D in relation to most cooperative arrangements. If parties undertake a joint venture, the joint venture may itself not be anti-competitive as it may bring new competition where none previously existed. But the parties to the venture may well be 'in competition' simply because they are in the same industry or make the same product. If the venture imposes restrictions as to whom it will sell its product, then, there being no limitation in s 4D as to the 'target' involved for illegality to follow, all the requirements for s 4D illegality are satisfied. Further, as competition is not a relevant factor in legality evaluations under this section, the venture's restrictive supply provisions may be illegal even though the joint venture may itself qualify as competitive.

There are other cases which would seem innocuous to many but which may find themselves condemned per se under s 4D. On the law at the time of writing, a sporting competition organiser cannot limit the number of teams in a sporting competition even by objective selection criteria impartially administered. An excluded team may successfully claim to have been illegally excluded pursuant to s 4D.[19] Likewise, a home town 'black out' of televised sporting fixtures seems

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17 See especially *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10. Kim Hughes was boycotted by the Western Australian Cricket Association ('WACA') and its constituent cricket clubs for captaining an Australian 'rebel' cricket tour to South Africa, defying Australia's then sporting ban on that country. Kim Hughes (a cricketer) was not a competitor of the WACA or any of its constituent clubs (the parties to the boycott). It was held that, nonetheless, there was a collective boycott breaching s 4D. It was also expressly found that the arrangement did not substantially lessen competition. For reasons canvassed in the text, this decision could not have been reached in the United States.

18 See *Trade Practices Act* Review Committee, Parliament of Australia, *Report to the Minister for Business and Consumer Affairs* (1976) (the 'Swanson Committee'). The Swanson Committee recommended a prohibition on boycotts in line with the United States law. When legislation was enacted, however, the Parliamentary draftsperson did not faithfully incorporate the Swanson Committee recommendations into law. The reason for this is not known. It may have been an attempt to make sure 'nothing escaped'. It may, however, have simply been a conceptual drafting error.

19 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 (argued on appeal to the High Court on 6 August 2002 with judgment reserved). The writer has opined that the Full Federal Court decision in this is case is one of the five worst judicial decisions under the *Trade Practices Act* (see Pengilley, above n 16). Only five of the decisions referred to in the article were judicial decisions, the other five being political or administrative.

to infringe s 4D as it is clearly a group of competitors (sporting teams) jointly denying services (television broadcast rights) to a television station (the 'target' of the arrangement). The television station does not have to be a competitor, actual or potential, of the sporting teams. The purpose of home town television broadcast 'black outs' is, of course, to ensure crowd attendance at home town games – essential both to the success of home town games themselves and also to their television broadcasts. While this practice appears to be banned in Australia under s 4D, the United States considers television 'black outs' of home town games to promote competition rather than restrain it.[20]

Even medical rosters, not likely to be anti-competitive, are at risk under s 4D because a substantial purpose of the roster agreement is for some medical practitioners to limit their services when 'rostered off' just as much as it is to ensure that others make their services available at these times.[21]

The Australian Competition and Consumer Commission ('ACCC'), seeing no need to 'weaken' s 4D, alleges that the sporting restrictions outlined above as well as medical rosters do not infringe s 4D because they do not substantially lessen competition.[22] The major problem with this assertion is simply that a lessening of competition test has no relevance to the legality of actions under s 4D. Another problem is the pragmatic one that, at the time of writing, the National Rugby League has in fact been found by the Full Federal Court to be in breach of s 4D with respect to the very conduct which the ACCC alleges not to be an infringement.[23]

The examples given are illustrative of the problems caused by the present wording of s 4D though they are far from an exhaustive study of all such problems. What these instances show is that s 4D is banning per se a number of arrangements with no competitive or societal detriment many of which should not only not be banned but should be encouraged under competition law.

If practices are banned over-zealously, parties, in order to avoid litigation, will be excessively cautious about innovating. Others will also be deterred from engaging in potentially efficient practices of the kind wrongly condemned. If the legislature or the courts err by condemning a beneficial practice, the benefits of

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20 See *United States v National Football League*, Trade Cases ¶67614 (1953). The judgment in this case was construed in *United States v National Football League*, Trade Cases ¶70082 (1961) and in *WTWV Inc v National Football League*, Trade Cases ¶64784 (1982). Questions of whether one League can tie all three television networks were considered in *US Football League v National Football League* Trade Cases ¶67074 (1986).

21 See Warren Pengilley, 'Medical Rosters and the Trade Practices Act' (2003) 178 *Medical Journal of Australia* 337.

22 In relation to sporting restrictions and their legality, see Australian Competition and Consumer Commission, *Submission to the Dawson Committee* (June 2002) 38. In relation to medical rosters, see Australian Competition and Consumer Commission, *Submission to Inquiry into the Impact of Part IV of the Trade Practices Act on the Retention and Recruitment of Medical Practitioners in Rural and Regional Australia* (29 November 2001) 22.

23 See above n 19. The conduct involved was the limitation of the number of teams in the National Rugby League competition. The rules of eligibility were specified in laid down criteria which were impartially administered. South Sydney, excluded on application of the criteria, was successful in the Full Federal Court in alleging illegality of its exclusion pursuant to s 4D.

that practice may be lost for good. As Judge Easterbrook, a learned United States antitrust academic, commentator and judge has commented:

other things being equal, we should prefer the error of tolerating questionable conduct which imposes losses over a part of the range of output, to the error of condemning beneficial conduct which imposes losses over the whole range of output.[24]

IV IS AUTHORISATION A SUBSTITUTE FOR A CHANGE IN THE LAW?

Unlike its United States counterpart, the Australian competition regulator (the ACCC) can authorise anti-competitive practices if they deliver public benefit.

Is authorisation a suitable substitute for an amendment to the law if that law is condemning over-zealously?

It is not.

A major problem in the authorisation procedure in the case of conduct banned per se is that even if such conduct is not anti-competitive, it is unable to be authorised (and thus remains illegal) unless public benefit can be demonstrated. In all likelihood, many arrangements falling within s 4D will have no public benefit. Thus authorisation will not save them. They will remain illegal even though they are not anti-competitive.

In principle, it is difficult to understand why conduct that is not anti-competitive should have to apply for regulatory blessing, let alone why it should have to jump the high public benefit hurdle that is a pre-requisite to such blessing. There are also practical objections to the authorisation process. Amongst other things, it involves costs and delays which should not have to be borne by parties not engaging in anti-competitive conduct.

What have they done in New Zealand?

New Zealand initially copied the principles of s 4D in whole into its *Commerce Act 1986* (NZ) ('*Commerce Act*'). However, New Zealand has recognised the over-zealous restrictions imposed by s 4D. In 1990, New Zealand added a proviso[25] to its collective boycott ban (*Commerce Act* s 29) which provided that the 'target' of the boycott had to be a competitor, actual or potential, of the parties to the boycott. The New Zealand *Commerce Act* was further amended with effect from May 2001[26] to provide that parties to a collective boycott are not in breach if they can demonstrate that the arrangement is not anti-competitive. In other words, a collective boycott can be justified on competition grounds on a reverse onus of proof basis.

For all practical purposes, the New Zealand law and the law of the United States relating to collective boycotts are identical.

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24 Frank Easterbrook, 'The Limits of Antitrust' (1984) 63 *Texas Law Review* 1, 10 cited in Beau Buffier 'Shoot First, Ask Questions Later: The Rapid Response Powers of the ACCC to Regulate Anticompetitive Conduct in Telecommunications Markets' (2002) 10(1) *Trade Practices Law Journal* 5.

25 *Commerce Act 1986* (NZ) s 29(1)(c).

26 *Commerce Act 1986* (NZ) s 29(1A).

V WHAT HAS THE DAWSON COMMITTEE DONE AND HOW WILL IT WORK OUT?

The Dawson Committee[27] ('the Committee') believed that because of the cumbersome nature of the authorisation process, s 4D should be reduced in scope so that it does not extend to conduct that is not anti-competitive. Having reached this conclusion, the Committee had two available choices:

- to abolish the section altogether. If this were done, collective boycotts would be adjudicated, like the vast majority of other arrangements, on whether or not they substantially lessened competition; or
- to retain special treatment for collective boycotts, making them presumptively illegal but providing a lesser coverage of the section and/or providing some basis on which they could be justified.

The Committee opted for the second alternative.

The Committee was of the view that collective boycotts should be recognised as being generally anti-competitive. However, there should be a reverse onus of proof enabling parties to justify a collective boycott on competition grounds. This, thought the Committee, would enable parties to engage in appropriate activity while still facilitating the prosecution of collective boycotts, given that they are generally undesirable.

The Committee also noted the problem of defining the 'class of persons' in s 4D at whom the boycott must be aimed. It thought that the generality of the provision gave too wide an interpretation to s 4D. The Committee thought that a provision akin to s 29(1)(c) of the New Zealand *Commerce Act*, limiting the 'target' of the boycott to competitors, actual or potential, of the boycotting parties, would solve this definitional problem as well as maintain a focus on competition.

The Committee thus adopted what might be called 'a New Zealand solution'. It thought this to be justified in terms of logic and because it gave recognition to Australia's obligations under the Australia New Zealand Closer Economic Relations Trade Agreement,[28] in which Australia and New Zealand agreed to seek to 'harmonise' their laws on restrictive trade practices. The Government has accepted the Dawson Committee recommendations. Assuming that these recommendations are enacted, Australian law in future will be identical to that of New Zealand and de facto the same as that of the United States.

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27 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the* Trade Practices Act (2003) ch 8.

28 Australia New Zealand Closer Economic Relations Trade Agreement, art 12.1 (entered into force 1 January 1983).

In the writer's view, this move is long overdue. The amendment of s 4D along the lines recommended by the Dawson Committee has been the writer's 'hobby horse' for about 15 years.[29]

The ACCC, however, is not so sure about the benefits of the amendments. It believes, in relation to the 'reverse onus' competition defence, that 'there may or may not be some merit in the recommendation'.[30] It has strong reservations, however, about the wisdom of s 4D being limited to 'targets' who are competitors, actual or potential, of the boycotting parties. The ACCC says:

> This will have a serious impact on the ACCC's ability to combat agreements between competitors to rig bids, collude in tendering or share markets, all of which are directed at the buyer rather than competing supplier.[31]

The writer does not understand why the arrangements with which the ACCC is so concerned do not constitute price-fixing (which remains a per se breach of the TPA) or why, in appropriate cases, the ACCC should be unable to demonstrate a substantial lessening of competition. However, these issues are beyond the scope of this article. Suffice it to say that the ACCC will be in no worse position than that of its United States and New Zealand brethren agencies and, therefore, it has little about which to complain. This is particularly so when, in many areas, the ACCC submitted to the Dawson Committee that the Australian law should be brought into line with that of overseas jurisdictions. The s 4D amendments do just that in relation to collective boycotts.

In the ultimate, the writer believes that, other things being equal, we should not condemn beneficial conduct as to do so makes parties excessively cautious about innovation and deters them from engaging in potentially efficient practices. This is particularly so, at the present time, in relation to s 4D and cooperative arrangements. The realistic readjustment of s 4D so that it condemns per se only practices that necessarily have a pernicious effect on competition and lack redeeming virtue must be considered to be a sound step and one totally consistent with sound competition law philosophy.

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29 See Warren Pengilley, 'The Exclusionary Provisions of the New Zealand Commerce Act in Light of United States Decisions and Australian Experience' (1988) 3 *Canterbury Law Review* 357. The Law Council of Australia, *Submission to the Dawson Committee* (24 July 2002) at 43 noted that s 29 of the *Commerce Act* had been amended after the issue of a Department of Trade and Industry Paper drawing heavily on the above. The writer made a submission to the Dawson Committee urging amendment of s 4D along the lines of the New Zealand legislation. The Law Council of Australia, in its submission to the Dawson Committee urged amendment of s 4D to similar effect.

30 Australian Consumer and Consumer Commission 'Media Release on Dawson Report' (Media Release, 16 April 2003).

31 Ibid.