

GREAT(ER) EXPECTATIONS

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‘I want something to write about that’s not other writers writing about other writers writing ...’

Julia, *Great Expectations*, Charles Dickens

I BACKGROUND

Like Julia, the Dawson Committee (‘the Committee’) was required to write about something about which many had previously written. Despite this, there were great expectations upon the Committee. The Dawson Review¹ was hailed as the most significant review of the *Trade Practices Act* 1974 (Cth) (‘Act’) since Hilmer.² The Committee had a broad brief: it was asked to consider all aspects of the restrictive trade practices provisions of the Act (Part IV) and their administration. The Review attracted a large amount of public attention; and many submissions were made. Several factors combined to heighten public interest in the Review, including:

- the high public profile of the Australian Competition and Consumer Commission (‘ACCC’) Chairman, Professor Allan Fels. At the time of the Review, controversy existed over the appointment of Professor Fels’ successor and there were complaints about a lack of consultation between the Commonwealth Treasurer and his State counterparts over that appointment. Further public interest in the appointment of the new Chairman was stimulated by Professor Fels’ appearance on the ABC programme

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1 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) (the ‘Dawson Review’).

2 The Commonwealth Treasurer, Peter Costello, referred to the Dawson Committee Review as ‘the first substantial review of Australia’s competition laws since the Hilmer process.’ See Peter Costello, Press Conference (23 April 2003) <<http://www.treasurer.gov.au/tsr/content/transcripts/2003/024.asp>> at 14 July 2003.

Australian Story in 2002,³ in which the then Chairman announced his forthcoming retirement in 2003;

- some controversial uses of the media by the ACCC. Perhaps the most controversial of these was the ACCC's investigation into alleged price-fixing arrangements by oil companies (investigators – supposedly ACCC staff – were photographed carrying boxes of exhibits in Martin Place that were later found to be empty). The allegations, which were never substantiated by the ACCC, were later dropped; and
- significant recent or pending decisions by the High Court of Australia in relation to the interpretation of s 46 of the Act, and the scope of the ACCC's search powers under s 155 of the Act.

Small business and big business alike were interested in the Committee's findings. Small business was concerned about their own capacity, and that of the ACCC, to constrain anti-competitive conduct by large organisations. They saw the Review as an opportunity to redress that regulatory imbalance. In contrast, big business was concerned that the ACCC lacked substantial accountability in relation to the administration of its powers and believed there should be greater checks and balances on the ACCC's use of its powers. Finally, the ACCC itself had a keen interest, made all the more acute by the ambitious changes (including the inclusion of an effects test into s 46 and the introduction of criminal penalties for 'hard-core' offences) the ACCC proposed the Committee adopt. Indeed, the ACCC mounted a very public campaign in support of many of the reforms it was urging the Committee to recommend.

Telstra, like many companies, was concerned that the ACCC lacked sufficient accountability. It argued that the ACCC could – and sometimes did – use the media in a way that improperly caused brand damage to firms under ACCC scrutiny. Telstra contended that the introduction of an effects test under s 46 and the related ACCC proposal to introduce cease and desist powers, would expand the ACCC's discretion, with no offsetting accountability and no countervailing consumer gain. In addition, Telstra recommended alignment of the so-called *per se* prohibited forms of conduct (eg, exclusionary provisions and third line forcing arrangements), with the rule of reason provisions in the Act.

II THE COMMITTEE'S FINDINGS

Entitled *The Review of the Competition Provisions of the Trade Practices Act*, the Committee's report was published in January 2003 and publicly released three months later. When released, the Review was accompanied by the Commonwealth Government's supportive response, endorsing the bulk of the Review's proposals. Several of the Committee's recommendations were consistent with Telstra's submissions. From Telstra's perspective, perhaps the most significant findings were the:

3 ABC, 'Being Allan Fels' *Australian Story*, 2 September 2002.

- rejection of an effects test in s 46;
- rejection of ACCC cease and desist powers. Apart from conferring unnecessarily broad discretion on the ACCC, Telstra believed that such powers were problematic for two reasons. First, they were unnecessary. For example, the Commission could approach the Federal Court for an urgent interim injunction. And, second, they were likely to be unconstitutional for breach of the separation of powers doctrine;
- recommendation to establish a Joint Parliamentary Committee to oversee the ACCC's administration of the Act and the establishment of a code to govern the ACCC's use of the media including a requirement that the ACCC decline to comment on investigations. Telstra, which had been the subject of many ACCC media reports (including in relation to ongoing investigations) also supported accountability measures for the ACCC;
- recommendation to amend the per se prohibitions on third line forcing, exclusionary provisions and joint ventures to make these prohibitions subject to a substantial lessening of competition test. Telstra argued for the relaxation of these provisions to bring them into line with international practice and broadly accepted competition policy principles;
- suggestion to introduce criminal penalties for hard-core or serious cartel behaviour. Telstra generally supported such measures on the condition that certain definitional issues (eg, what is meant by 'hard-core'?) be clarified and that there be further clarification of the roles of prosecutorial authorities; and
- encouragement for the ACCC to provide more detailed reasoning in relation to informal authorisation determinations. Telstra supported such measures; it was concerned that the ACCC was not sufficiently accountable, detailed or transparent in relation to its informal authorisation decisions. It therefore argued that the Commission should make publicly available more detailed reasoning concerning those decisions.

The Review is to be considered for a period of at least three months by the States and Territories before the Committee's recommendations are put to Parliament.

III UNANSWERED QUESTIONS

While the Dawson Review will usher in important changes to the Act, it will also affirm the importance of retaining several provisions, including s 46, in unamended form. By any measure, the Review is a significant piece of work. Yet, some aspects of the Review lack the analytical depth that might be expected from such a significant Review and may fail to meet the expectations of those interested in competition policy issues. Two such issues are considered below.

A Dual Listed Companies

The Committee's reasoning and recommendations concerning dual listed companies ('DLCs') are not entirely satisfying. As the Review observes, a DLC typically involves two corporations, one listed domestically and the other listed on a foreign exchange, agreeing to share their businesses as a unified enterprise and sharing the associated risks and rewards.⁴ The Review notes that 'A DLC may operate in a similar fashion to that of a body produced through a merger or a highly integrated joint venture'.⁵

While the Review observes that a DLC may have the characteristics of a merger, it also notes that a DLC may be formed without any acquisition of shares or assets taking place. As a result, the formation of a DLC may be placed beyond the merger provisions in s 50. Notwithstanding, the Dawson Review notes that contractual arrangements between companies forming and running a DLC may be in breach of s 45 of the Act and are hence regulated under that provision.

In this light, the Committee contends that intra-firm DLC transactions should not be subject to regulation under s 45. At the same time, the Committee appears to consider that the formation of DLCs should be regulated under s 50. The reasoning in this regard is perhaps less impressive than one might expect from such an eminent Committee. After surveying international approaches to DLCs, the Review recommends that intra-party transactions in a DLC should be treated as the equivalent of related party transactions within a group of companies and exempted from the operation of ss 45 and 47 of the Act.

It offers no guidance, however, in relation to how to regulate the *formation* of DLCs – a critical issue for two reasons. First, the Committee acknowledged that DLCs may 'operate in a similar fashion to that of a body produced through a merger'.⁶ And, second, because it was admitted that s 50 is likely to be impotent in relation to the formation of DLCs. Further, the Review's reasoning could result in anomalous regulatory arrangements. That is, the formation of a DLC would potentially escape scrutiny under *both* ss 50 and 45, even though the arrangement had the effect of substantially lessening competition. Such regulatory treatment could provide an incentive for parties to enter into arrangements that would otherwise breach s 45, simply by structuring their arrangements as a DLC.⁷

B Section 46 – The Effects Test

The Committee's rationale for rejecting an effects test under s 46 is less convincing than it might have been. It rejected such an amendment to s 46, on five grounds:

- difficulties of proving purpose under s 46 are not as great as what is claimed;

4 Dawson Review, above n 1, 135.

5 Ibid.

6 Ibid.

7 See Henry Ergas, 'Doubts about Dawson' (Paper presented at the Trade Practices Workshop, Sydney, 17 May 2003).

- arguments that s 46 should be aligned with other effects-based provisions in Part IV of the Act ignore the fact that s 46, unlike those other provisions, is concerned with unilateral anti-competitive behaviour;
- introduction of an effects test would render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive behaviour;
- experience with Part XIB of the Act tended to suggest that such an amendment was not necessary; and
- other inquiries had recommended against such an amendment.

Two observations may be made about the Committee's findings in relation to an effects test under s 46.

First, the Committee's claim that an effects test would blur the distinction between pro-competitive and anti-competitive behaviour appears to be undertaken in abstraction from the 'taking advantage of' element of s 46. The Committee notes that:

Under an effects test the proscribed purposes in section 46 ... would become proscribed effects. Normal competitive behaviour by a firm with substantial market power which injured a competitor would be likely to satisfy an effects test ... *the introduction of an effects test would be likely to extend the application of section 46 to legitimate business conduct and discourage competition.*⁸

It is difficult to see how the Committee could reach such a conclusion without ignoring the 'take advantage of' element of s 46. The Committee's conclusion appears to give no recognition to the role that the 'taking advantage of' element of s 46 may play in *preventing* firms from being convicted for engaging in legitimate business conduct. This analytical gap becomes even more evident in the following passage from the Review, where the Committee observes that

an effects test would not necessarily be confined to large corporations but could extend to small business as well. An effects test could, in the view of the Committee, discourage legitimate competitive practices by small business having the effect of injuring a competitor or discouraging a potential competitor, in the same way as with larger businesses.⁹

Absent a very narrow reading of either the 'substantial power' or 'take advantage of' elements of s 46, it is not clear why, or how, the Committee would reach such a conclusion. Additionally, if the required effect was that of substantially lessening competition, it is difficult to see how conduct by a small company, even if it indeed damaged a competitor, could substantially lessen competition in a market. Then, in its one-paragraph analysis (in a 209-page report) of the 'take advantage of element', the Committee notes that 'take advantage' means little more than 'use', and that the application of such a test 'affords an uncertain safeguard against the capture by an effects test of legitimate business conduct'.¹⁰

Again, the Committee's grounds for reaching such a conclusion are not clear. In view of the recent High Court decisions in *Melway Publishing Pty Ltd v*

8 Dawson Review, above n 1, 81 (emphasis added).

9 Ibid.

10 Ibid.

*Robert Hicks Pty Ltd t/as Auto Fashions Australia*¹¹ and *Boral Besser Masonry (now Boral Masonry Ltd) v Australian Competition and Consumer Commission*¹² (*'Boral'*) in which 'take advantage' was the primary issue in dispute (the release of the Dawson Review was delayed so that the Committee could comprehend *Boral*), just why the Committee attributed such little judicial merit to either of these cases is slightly perplexing. One possible reason for the Committee's blunt appraisal is that the Committee was not convinced that the 'take advantage' test is clearer now than what it was before those decisions. Another possible reason is that the Committee felt that, to draw the necessary principles from all of the decided cases, it would be committed to undertaking a detailed legal discourse on the interpretation of this expression – an analysis that, for reasons of time, space and speed of publication, the Committee was reluctant to undertake. If either reason existed, then the Committee might have said so. As it is, the Committee's rather brusque evaluation of the 'take advantage' expression is not particularly enlightening.

Second, on the effects test, the Committee cites Part XIB of the Act as evidence against moving to an effects test under s 46. While detailed consideration of Part XIB of the Act was beyond the scope of the Review (the Productivity Commission had already considered it), the Committee recognised that Part XIB of the Act could provide useful guidance in relation to replacing the purpose based test under s 46, with an effects based test.¹³ However, the Committee's somewhat truncated findings on the market conduct arrangements for telecommunications are less than edifying. The Committee cited the Productivity Commission's observation that:

Part XIB has the potential negative effect of encouraging regulatory error and overreach and deterring acceptable pro-competitive conduct ... [the recommendation to retain Part XIB] ... was based on the unique circumstances in the telecommunications industry ... [and that] ... Part XIB should be further reviewed in three to five years.¹⁴

The Committee also notes that it was submitted to the Committee that

the effect of Part XIB has been to discourage pro-competitive behaviour, and that an effects test has not generated superior outcomes in terms of ease of proof or greater effectiveness in distinguishing between pro-competitive and anti-competitive behaviour.¹⁵

The above quoted passages constitute the full extent of the Committee's analysis of the operation of Part XIB. There is no further consideration of whether the characteristics of the telecommunications industry – for example the high sunk costs of investment for core services – might be replicated in other industries (one could assume that they would be); and whether, therefore, the policy rationale for singling out the telecommunications industry for either the

11 (2001) 178 CLR 253.

12 (2003) 195 ALR 609.

13 Part XIB comprises an effects-based market conduct test, under which the ACCC is not necessarily required to prove any relevant anti-competitive purpose to substantiate a claim of a misuse of market power.

14 Dawson Review, above n 1, 82.

15 Ibid.

effects test, or other special market conduct laws is warranted. The Committee's failure to consider the lessons from the telecommunications industry in greater detail means that an opportunity was lost to reject either the legitimacy of the effects test under Part XIB, or find a convincing policy rationale for rejecting such a test under s 46. Instead, the Committee did neither. In effect, like Julia, it merely wrote about what others had written about others.