TRADE PRACTICES AND CONSUMERS: THE PLEA NON VULT CONTENDERE CUM DOMINA REGINA ET POSUIT SE IN GRATIAM CURIAE[1]

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When a defendant is asked to plead to a criminal charge, he is not restricted to the pleas of guilty and not guilty. Other pleas well known to lawyers include *autrefois acquit* and the plea to the jurisdiction.[2] Some older pleas such as benefit of clergy have been abolished.

The plea of *non vult contendere cum domina Regina et posuit se in gratiam curiae* is unfamiliar to Australian lawyers. The last reported use of the plea in England[3] was in 1702 in *The Queen* v. *Templeman.*[4] The report of this case is unfortunately brief:

> After pleading *guilty* to an indictment, the defendant may give evidence that *justifies the fact in mitigation of punishment*—S.C. 3 Danv. 253. S.C. 1 Salk. 55.
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> After pleading *guilty* to an indictment, you may give anything in evidence that justifies the fact, or proves him not *guilty* of the fact; for the entry is *non vult contendere cum dominâ Reginâ, sed ponit se in gratiam Curiae.* And it is not like the case where one is found guilty by verdict.

The plea, also known as the pea of *nolo contendere,* appears to have arisen from a colloquy between court and counsel recorded in the year book of 1430.

> Weston. If one be indicted for Trespass and he surrenders and pays a fine, will he be permitted afterwards to plead Not Guilty? Paston (J.) Yes; certainly.
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> Which was agreed by all the court.
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> Weston. It is of record that he admitted it.

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[1] Literally: "I do not wish to contend with the Crown, but place myself on the mercy of the court."

[2] 10 Halsb. (3rd ed.) 404.

[3] The history of the plea is traced in L. B. Orfield, *Criminal Procedure from Arrest to Appeal* (1947) 292-293; N. B. Lenvin and E. S. Meyers, "Nolo Contendere; Its Nature and Implications" (1942) 51 Yale L.J. 1255; case note, (1934) 48 Harv. L. Rev. 128. Some early references are collected in *Hudson* v. *U.S.* (1926) 272 U.S. 451; 71 L. ed. 347; 47 S. Ct 127. [Research in this matter has been limited to University and Supreme Court libraries in South and Western Australia; a better equipped practitioner may have information on a more recent use of the plea before an English court.]

[4] (1702) 7 Mod. 40, 87 E.R. 1081; (1702) 1 Salk. 55, 91 E.R. 54.

> Babbington. If the entry be so, he will be estopped; but the entry is not so, but is thus, that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (petit se admitti per finem). Therefore if one be indicted for felony and has a charter of pardon, and pleads it, and prays that it be allowed, this does not prove that he is guilty; but the King has excluded himself (from claiming guilty) by his charter. And I and all the court are against you on this point.[5]

By 1702 the plea appears to have been also used for pleading in the voluntary absence of the defendant. In the first edition of Hawkins, *Pleas of the Crown* published in 1721 the use of the plea is summarized as follows:

> An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy and desiring to submit to a small fine: in which case, if the court thinks fit to accept of such submission and make an entry that the defendant posuit se in gratiam regis, without putting him to a direct confession, or plea (which in such cases appears to be left to the discretion), the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where the entry is quod cognovit indictamentum.[6]

The limits of the plea are not clearly defined in the meagre historical material available, but attempts have been made to suggest that the use of the plea is limited to cases of trespass (as in the original colloquy) or in cases where a sentence of imprisonment could not be imposed. Similarly, the incidents of the plea are not clearly defined. But some points may be made with reasonable certainty:[7]

(1) The acceptance of the plea is discretionary and the court may require a more conventional plea of the defendant or ask him to show why the plea should be allowed.[8]

(2) The plea will be equivalent to a plea of guilty for many purposes, for example in determining whether the offence is a second offence.[9]

(3) Because the defendant does not directly admit guilt, but tacitly admits it, he is partly protected from the application

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[5] Y.B. Hil. 9 Hen. VI, 60. This translation is taken from *Hudson* v. *U.S.* (1926) 272 U.S. 451, at n. 3.

[6] Hawkins, *Pleas of the Crown* Vol. II, 333. The plea is also mentioned as being available in J. Chitty, *A Practical Treatise on the Criminal Law* (1816) 431.

[7] American usage has developed the incidents of the plea at the same time as it has clarified them. It is difficult to distinguish the one process from the other.

[8] Chitty, *loc. cit.; Twin Ports Oil Co.* v. *Pure Oil Co.* (1939) 26 F. Supp. 366; *City of Burbank* v. *General Electric Co.* (1964) 329 F. 2d 825; *U.S.* v. *Jones* (1954) 119 F. Supp. 288; *U.S.* v. *Wolfson* (1971) 52 F.R.D. 170; *Piassick* v. *U.S.* (1958) 253 F. 2d 658.

[9] *People* v. *Daiboch* (1934) 265 N.Y. 125; 191 N.E. 859; *U.S. ex rel Clark* v. *Skeen* (1954) 126 F. Supp. 24.

> of estoppel. Accordingly, he is not estopped from denying his guilt in subsequent civil proceedings in the same cause.[10]

This last incident is the principal advantage to be derived from the use of the plea. In most civil proceedings, an admission of guilt in prior criminal proceedings will not substantially hinder a defendant. For example, civil courts sitting in collision cases now accept that a defendant may have entered a plea of guilty for a number of reasons, not least among which is the cost of defending a prosecution. Yet some weight might be placed on a plea of guilty to a specific offence. More importantly, for present purposes, a statute may specifically allow findings made in a prosecution to be used in a subsequent civil action.[11]

Use of the Plea in the United States of America

The plea has been revived in the United States of America, initially in the area of anti-trust legislation. In their attempts to characterize the plea, the courts have used labels including confession; implied confession; quasi-confession of guilt; substantially, though not technically, a plea of guilty; conditional plea of guilty; substitute for a plea of guilty; and mild form of pleading guilty to an indictment.[12]

The incidents of the plea which I have mentioned have been canvassed in the American cases and I propose to consider these in more detail.

(1) *Discretionary acceptance*

It is open to a trial court to accept the plea.[13] Neither the prosecution nor the defendants can, by consent alone, bind the court to accept any chosen plea. However, the court need not formally accept the plea any more than it formally accepts any other plea.[14] The prosecution is entitled to oppose the use of the plea, and may in fact vigorously do so. Similarly the defendant may have to show cause why the plea should be accepted. However, like any discretion of court, it cannot be exercised arbitrarily.

Some of the criteria for the exercise of the discretion were established in the anti-trust case of *U.S.* v. *Standard Ultramarine and Color Co.*[15] where the defendants wished to plead *nolo contendere*, but the prosecution sought the entry of a plea of guilty. When considering these criteria it should be borne in mind that in the United States,

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[10] *Hudson* v. *U.S.* (*supra*); *U.S. ex rel Clark* v. *Skeen* (*supra*); *Twin Ports Oil Co.* v. *Pure Oil Co.* (*supra*); and see also the authorities collected in K. A. Drechsler's annotation on the plea of *nolo contendere* in (1944) 152 *American Law Reports, Annotated* 253-296.

[11] See *e.g.*, Restrictive Trade Practices Act 1971 (Cth) ss 101, 137.

[12] See Drechsler, *op. cit.* 256-257; *U.S.* v. *American Bakeries Co.* (1968) 284 F. Supp. 864.

[13] *U.S.* v. *Standard Ultramarine and Color Co.* (1955) 137 F. Supp. 167.

[14] *City of Burbank* v. *General Electric Co.* (*supra*); Drechsler, *op. cit.* 267.

[15] (1955) 137 F. Supp. 167.

anti-trust legislation provides that the evidence used in government proceedings other than consent proceedings is *prima facie* evidence in a subsequent civil action[16] and, in effect, that a conviction (including a conviction on a plea of guilty) is *prima facie* evidence that the defendant committed the offence of which he has been convicted.[17] Since triple damages may be awarded in any civil action, counsel for corporations have sought to avoid convictions by the use of the plea of *nolo contendere*.[18]

The defendants in the *Standard Ultramarine* case submitted to the trial judge, Weinfeld J., that:

(a) the public interest would still be protected even if the plea was accepted, since it was equivalent to a plea of guilty;

(b) but that, if the right to plead *nolo contendere* was denied, a plea of not guilty would naturally be entered, thus necessitating a trial, adding to the congestion of the trial list; and

(c) the use of the plea conforms to congressional policy.

Weinfeld J. pointed out that other advantages would accrue to the defence, including:

(d) the defendants would avoid a trial with its attendant expense and adverse publicity; and

(e) most importantly, the risk of treble damage suits would be reduced.

The prosecution submitted that the public interest would best be protected by allowing treble damage suits and accordingly, prospective parties should be allowed the benefits of a *prima facie* case.

Weinfeld J. held that Congress had shown that anti-trust offences were not just "white collar" offences or "technical" infractions, by legislating against them since 1890. Congress had called in aid the private interest to join with government agencies in securing compliance with the legislation.[19] The judge then went on to outline some factors to be considered: the nature of the claimed violations; how long they were persisted in; the size and power of the defendants in the particular industry; the impact of the condemned conduct on the economy; and whether a greater deterrent effect would result with a successful prosecution. Also, he said, some weight was to be given to the opinion of the Attorney-General.[20]

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[16] Clayton Act, s. 5 (15 U.S.C.A. § 16); *c.f.*, Restrictive Trade Practices Act 1971 (Cth) ss 101, 137.

[17] *City of Burbank* v. *General Electric Co.* (*supra*).

[18] See case note in (1952) 65 Harv. L. Rev. 1400; and N. B. Lenvin and E. S. Meyers, "Nolo Contendere; Its Nature and Implications" (1942) 51 Yale L.J. 1255.

[19] (1955) 137 F. Supp. 167, 171.

[20] See also *U.S.* v. *Socony-Vacuum Oil Co.* (1938) 23 F. Supp. 531.

In this case the offence was the serious one of price fixing and had been persisted in for nine years. In 1954, the various defendants controlled sales of thirty million dollars in the total national market of eighty million dollars. Bearing all these factors in mind, the right to enter the plea was denied. Particular mention was made of the greater deterrent effect attached to a finding of guilt and the aid which the denial would give to prospective litigants in the same cause.[21]

It has been reiterated that the court must consider, in deciding whether or not to accept the plea, whether the acceptance would be in the public interest.[22] All the factors mentioned by Weinfeld J. are only amplifications in the particular case of this general rule.

(2) *Protection from estoppel*

As mentioned, the principal advantage of the plea is that it will protect the defendant from the application of estoppel in a subsequent civil action. Drechsler admits that the rule that a plea of *nolo contendere* will not constitute an admission in subsequent civil proceedings has been vigorously adhered to, but he is generally unsympathetic to this concept.[23] Weinfeld J. held that the public interest would best be protected in the *Standard Ultramarine* case by allowing civil litigants the advantages of the evidentiary provisions of the anti-trust statutes. He pointed out that

> the years that followed the enactment of the treble damages provision revealed that few private litigants had the resources or staying power to conduct a protracted and difficult anti-trust case. And those who were able and willing to assume the staggering cost of litigation were frequently worn out by their opponents by sheer attrition.[24]

The contrary view has been taken in *U.S.* v. *Jones*[25] where the Court held that in the absence of some reason why a defendant should not have the benefit of the plea, the court will normally allow it to be entered. Courts should avoid permitting criminal prosecutions to be used as a means of redressing civil wrongs and by means of a criminal judgment, procuring either directly or indirectly some advantage in a civil case. Similarly, in *U.S.* v. *Safeway Stores Inc.*[26] the Court held that Congress did not intend that pleas of *nolo contendere* should be refused in anti-trust cases in order that private litigants in subsequent civil proceedings could rely on the evidentiary provisions of the Clayton Act.

It may be impossible to resolve these conflicting views in the near future, and decisions may oscillate between the extremes.

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[21] *C.f., U.S.* v. *Safeway Stores Inc.*, text to n. 26 *infra*.

[22] See *e.g., U.S.* v. *Chin Doong Art* (1961) 193 F. Supp. 820; *U.S.* v. *Faucette* (1963) 223 F. Supp. 199.

[23] Drechsler, *op cit.* 282.

[24] (1955) 137 F. Supp. 167, 171.

[25] (1954) 119 F. Supp. 288.

[26] (1957) 20 F.R.D. 451.

The plea has been allowed in diverse areas of the law besides anti-trust law. Examples of cases where it has been allowed include:[27] accepting wagers without paying a special occupational tax;[28] infringement of the Emergency Price Control Act 1942;[29] infringement of the Second War Powers Act 1942 in securing rationed goods;[30] failure by a wholesale liquor dealer to pay internal revenue tax;[31] income tax evasions;[32] violating a war order, allocating fats and oils made under the War Mobilisation and Reconversion Act 1944;[33] importation of an alien prostitute;[34] indictment for mail fraud;[35] and espionage.[36]

One problem which has arisen in America is whether a sentence of imprisonment may be imposed after a plea of *nolo contendere* has been accepted. Initially, the cases had been divided. The leading authority *Tucker* v. *U.S.*[37] had favoured the contention that a prison sentence could not be imposed. The problem came on for hearing in *Hudson* v. *U.S.*[38] and, after a scholarly inquiry, Stone J. held that a prison sentence could be imposed.

Various justifications have been advanced to support the use of the plea. Among them, the avoidance of the stigma attached to a plea of guilty, the expectation of a lesser penalty, and the creation of a semblance of equality with the prosecution, at least in anti-trust cases. Drechsler is not persuaded by these justifications and expresses the view that:

> So far as logic and clearness is concerned, the complete abolition of the plea could not be considered as a great loss to our legal system.[39]

His conclusion is that the only *arguable* justification for the retention of the plea exists in cases where the alleged wrong is not *malum in se* but is an economic wrong. In the latter type of case, the use of the plea may justifiably avoid a protracted and costly trial, and in anti-trust cases of this latter type, its use can often lead to discussion between the prosecution and the defence with a view to attaining

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[27] Many cases have been collected in the *Modern Federal Practice Digest* (1966) Vol. 16 and 1971 supplement. West Key Number system, title: Criminal Law 275.

[28] *U.S.* v. *Rodgers* (1968) 288 F. Supp. 57.

[29] *Kramer* v. *U.S.* (1948) 166 F. 2d 515.

[30] *U.S.* v. *Bradford* (1947) 160 F. 2d 729.

[31] *Harris* v. *U.S.* (1951) 190 F. 2d 503.

[32] *Klingstein* v. *U.S.* (1954) 217 F. 2d 711.

[33] *U.S.* v. *Western Chemical and Mftg Co.* (1948) 78 F. Supp. 983.

[34] *U.S.* v. *Lair* (1912) 195 F. 47.

[35] *Dillon* v. *U.S.* (1940) 113 F. 2d 334.

[36] *Farnsworth* v. *Sanford* (1940) 33 F. Supp. 400. For other examples, see Drechsler, 152 A.L.R. 253, 265-266.

[37] (1912) 196 F. 260; 116 C.C.A. 62; 41 L.R.A. (N.S.) 70.

[38] (1926) 272 U.S. 451; 71 L. ed. 347; 47 S. Ct 127.

proper understanding and a settling of, or elimination of possible future occurrences of, the particular grievance.

To these points must be added another argument,[40] that the appropriate tribunal for the satisfaction of civil wrongs is a civil court and that a judge should avoid directly influencing litigation (which may well be unformulated) where no evidence has been presented and where the parties are not before him. Whatever one's personal view may be, these arguments appear to have been acceptable to American courts and may be acceptable to Australian courts.

There is no doubt that the plea evokes a lesser stigma than the plea of guilty and this was pointed out by Weinfeld J. in the *Standard Ultramarine* case.[41] Whether this is due to the technical nature of the plea or its ancient name is difficult to say, but in any event it has acquired the tag of being "the gentleman's plea of guilty".[42] The case of *U.S.* v. *Chin Doong Art*[43] provides an interesting example of this: the defendant sought to persuade the Court that his was an appropriate case for admitting the plea, by pointing out that he was a prominent man in the Chinese community and that he would lose face if he were convicted. The Court accepted that this point was required to be considered, but held that it could not override more important issues of the public interest.

Use of the Plea in Australia

In Australia, there would appear to be no theoretical inhibition to the use of the plea. The revival of old precedents is not unknown to English law, one of the best known examples being the revival of trial by battle.[44] In ordinary criminal cases the use of the plea may be inhibited by statute.[45] Modern practices have made some of the advantages of the plea redundant in minor criminal matters, examples being summonses with forms of entering a plea of guilty, grants of power to magistrates to proceed *ex parte* in the absence of the defendant, and "on the spot fines".

However, the Restrictive Trade Practices Act 1971 (Cth), like the American anti-trust legislation, makes provision for civil remedies.[46]

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[39] Drechsler, *op. cit.* 295.

[40] *U.S.* v. *Jones* (1954) 119 F. Supp. 288.

[41] (1955) 137 F. Supp. 167, 169.

[42] See the discussion in *U.S.* v. *Jones* (1954) 119 F. Supp. 288, 290.

[43] (1961) 193 F. Supp. 820.

[44] *Ashford* v. *Thornton* (1818) 1 B. & Ald. 405, 106 E.R. 149; see also R. E. Megarry, *Miscellany-at-law* (2nd ed., 1958) 191.

[45] *E.g.*, Criminal Code 1970 (W.A.) s. 616; Criminal Law Consolidation Act 1935-1966 (S.A.) ss 284, 285; see also Crimes Act 1961 (N.Z.) s. 357.

[46] The provisions relating to findings in contempt proceedings are substantially the same as the provisions of the earlier Trade Practices Act 1965-1971 (Cth). The extent of the private right is critically examined in G. Walker, *Australian Monopoly Law* (1967) 303.

A person who has suffered loss and damage may commence an action in the Commonwealth Industrial Court to recover such loss. Findings of fact made by the Court in contempt proceedings in which the civil defendant has been found guilty of a contempt of the Trade Practices Tribunal are available as evidence of those facts.[47] The effect of these sections is to give an evidentiary aid to the plaintiff.[48] The value of this aid is yet to be determined by the Court[49] but it would appear to be the intention of the legislature to ensure at least a *prima facie* case against the defendant, and possibly to ensure that such findings of fact are irrebuttable.

Since a finding of guilt can constitute proof of the offence charged in an indictment[50] it may be desirable to avoid a conviction by use of the plea of *nolo contendere*. Despite differences between the American anti-trust legislation and our restrictive trade practices legislation it is open to the Commonwealth Industrial Court to allow the use of the plea in appropriate contempt cases. Similarly, it is open to other courts in our legal system to allow the use of the plea. This may be appropriate in areas such as consumer affairs and environmental protection[51] where a series of civil actions may be possible, pending the finding in a prosecution. If the courts decide that a criminal prosecution should not be allowed to influence subsequent civil litigation in other jurisdictions and between other parties, they may allow the use of the plea. In addition, just as the use of the plea in the United States attracts a lesser stigma than does a plea of guilty, it is possible that the technical nature of the plea and its ancient name may serve to distinguish it sufficiently in Australia. This may be useful to defendants who anticipate a double punishment—from the courts and from undesirable publicity.

In summary, the plea of *nolo contendere* is theoretically available for use in Australian courts. If it is accepted by our judges, it may provide a useful addition to the armoury of counsel seeking to avoid the evidentiary provisions of Acts such as the Restrictive Trade Practices Act and seeking to avoid the stigma attached to a plea of guilty.

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[47] Ss 101, 137; see also Trade Practices Act 1965-1971 ss 90, 90ZI.

[48] Although the Australian Industries Preservation Act 1906-1950 (Cth) by s. 11 provided for a civil remedy to recover triple damages, no evidentiary aid was given to the plaintiff. See also *Meyer Heine Pty Ltd* v. *China Navigation Co. Ltd* (1966) 39 A.L.J.R. 448.

[49] The evidentiary aid is mentioned in Walker, *loc. cit.*, and in G. G. Masterman and E. Solomon, *Australian Trade Practices Law* (1967) 335; but its value is not discussed in either text.

[50] However, a plea of guilty does not necessarily constitute an admission of the facts in the depositions; see *The Queen* v. *Riley* [1896] 1 Q.B.D. 309, 318.

[51] *E.g.*, s. 6 of the Pollution of Sea by Oil Act 1960-1965 (Cth).