OLIGOPOLISTIC CONSCIOUS PARALLELISM UNDER THE COMPETITION LAW OF THE USA

LESLIE ALDOR*

1 INTRODUCTION

One of the most crucial and yet challenging problems which faces Australian competition lawyers is the definition of the scope of the terms "contract", "arrangement" and "understanding" in ss 45 and 45A of the Trade Practices Act 1974.[1] Section 45 proscribes contracts, arrangements or understandings which have the purpose or effect of substantially lessening competition in a market. Section 45A then expands on s 45 by providing that contracts, arrangements and understandings which "fix" prices are deemed, for the purposes of s 45, to have the purpose or effect of substantially lessening competition in a market.

The terms "contract", "arrangement", and "understanding" are not defined in the TPA and thus the legislature has left the matter of interpretation "at large". Determining the boundaries of concepts such as "arrangements" and "understandings" is no easy task, especially when the focus of the enquiry is on the parallel behaviour of participants in concentrated markets.

In concentrated markets, that is markets with few buyers or sellers,[2] each competitor may be able to have a significant effect on the state of the market as a whole. In this case, competitors are not independent but are *inter-dependent*. Each competitor may be able to significantly affect the market conditions which its rivals will face but, conversely, each competitor's rivals may also be able to significantly affect the market conditions which it will face. Competitors in such markets, who recognise this interdependence, may *independently* decide that their best interests lie in setting the prices[3] for their goods in line with the (high) prices which have been set by their rivals. Provided that a suitable method of co-ordination is available, such as following an obvious "market-leader",[4] then parallel pricing may result from

---

* Eco. LLB(Monash); LLM (Mon.)

[1] Henceforth referred to as "the TPA".

[2] The term "oligopoly" will be used here, at times, to refer to markets with few buyers. Strictly speaking, however, "oligopoly" refers to fewness of sellers. A market with few buyers is an oligopsony.

[3] Non-price competition does not affect the analysis here. Non-price competition can be characterised either as product differentiation (*ie* creation of "sub-markets") or as disguised price competition.

[4] This is known as "barometric" price leadership as competitors in a market choose to follow the lead given by a particular firm because they believe that that firm is a good barometer of market conditions. There are other forms of price leadership such as dominant firm price leadership where one firm is much larger than its competitors and low-cost price leadership as in *Trade Practices Commission* v *Email Ltd and Anor* (1980) ATPR 40-172, where one firm can dictate prices in its market by having a lower cost structure than its rivals: see pp 42371-42373.

the parallel but independent decision of the competitors in the market.[5] This form of decision making behaviour, in which oligopolists recognise their interdependence and independently adopt market practices which lead to parallel behaviour, is known as oligopolistic conscious parallelism.

Such oligopolistic conscious parallelism can have deleterious economic consequences and *may* logically be vilified as a form of (illegal) collusion. Whether such behaviour *should* be so characterised is a question of policy.[6]

Australian courts have yet to deal directly (or at least explicitly) with the oligopolistic parallel pricing problem. The approach in the leading cases[7] on ss 45 and 45A of the TPA, rather, has appeared to be that the "interpretation" of the terms "arrangement" and "understanding" in ss 45 and 45A of the TPA should be considered as being primarily a semantic exercise. Epitomising this methodology has been a tendency to rely on authorities dealing with the scope of legislation prohibiting "arrangements" designed to avoid tax. These cases have been cited and relied upon, at times, without any apparent consideration of the desirability of relying on "tax cases" when interpreting words in legislation designed to combat restrictive trade practices.[8]

The Australian authorities on "arrangements" and "understandings", therefore, show a tendency towards a legalistic interpretation of the concept of collusion under the TPA. *Trade Practices Commission* v *Email and Anor*[9] illustrates this approach.

The *Email* case involved an allegation that the only two Australian suppliers of electrical kilowatt hour meters had entered into an anticompetitive arrangement or understanding. Email commanded sixty to seventy percent of the market and was the lower-cost producer. Email and its "rival", Warburton Franki sold undifferentiated products and Warburton Franki had no choice other than to follow the price set by Email.[10] Warburton Franki, at times, could covertly engage in limited price cutting but it was unable to engage in any real and sustained price competition with Email. There was

---

[5] Of course, parallel pricing by oligopolists may be the result of collusion, however defined.

[6] One solution to the conscious parallelism dilemma is to adopt an economic concept of collusion. This concept of collusion "is one simply of establishing policies that are in the firms' joint interests – a collusive *result*, irrespective of what might be the mechanism by which it is achieved". R Baxt and M Brunt, "The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means" (1974) 2 A Bus L Rev 3, 18. Australian judges have shown little inclination to follow this path. See the discussion of the *Email* case below p 87.

[7] *Top Performance Motors Pty Ltd* v *Ira Berk (Queensland) Pty Limited* (1975) ATPR 40-004; *TPC* v *Nicholas Enterprises Pty Ltd and Ors* (1979) ATPR 40-126; *Morphett Arms Hotel Pty Ltd* v *TPC* (1980) ATPR 40-157; *TPC* v *Email Ltd and Anor* (1980) ATPR 40-172; and *TPC* v *Allied Mills Industries Pty Ltd and Ors* (1980) ATPR 40-178. Succeeding parts of the latter case are reported in (1981) ATPR 40-204; (1981) ATPR 40-237; (1981) ATPR 40-241; (1981) ATPR 40-252.

[8] See *Top Performance Motors Pty Ltd* v *Ira Berk (Queensland) Pty Limited* (1975) ATPR 40-004, where reliance was placed on *Newton* v *FCT* (1958) 98 CLR 1. *Newton's* case turned on the words "contract, agreement or arrangement" in s 260 Income Tax and Social Services Contribution Assessment Act 1936-1950 (Cth). Similarly *TPC* v *Nicholas Enterprises Pty Ltd and Ors* (1979) ATPR 40-126 at 18341-18342 shows heavy reliance on another "taxation" case: *FCT* v *Lutovi Investments Pty Ltd* [1978] ATC 4708.

[9] (1980) ATPR 40-172, hereinafter referred to as "the *Email* case".

[10] Warburton Franki could not charge more than Email because the two companies' products were almost identical. Warburton Franki also could not undercut Email's prices because it could not even make a profit at the price which Email was charging and in any case Warburton Franki thought that it would not survive a price war.

always the possibility that Warburton Franki would accidentally undercut the prices set by Email by failing to react sufficiently promptly to a price increase by Email. This possibility was minimised, however, by the two firms swapping price lists with each other.

The allegation that the respondents had entered into an "arrangement" or "understanding" was dismissed by Lockhart J. The primary reason for this decision was that whilst the respondents' behaviour may have raised a "hope or prediction of future behaviour"[11] it had not raised an "expectation of certain behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt".[12] This decision seems to indicate that members of highly concentrated markets will not need to act with more circumspection than their counterparts in less concentrated markets in order to avoid entering into an arrangement or understanding in breach of the TPA.[13]

In the United States, as in Australia, there has been considerable doubt as to the legality of oligopolistic conscious parallelism. This is not surprising given that ss 45 and 45A of the TPA are based, to a large extent, on a United States provision, namely s 1 of the Sherman Act.[14] Section 1 reads in part that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce ... is declared to be illegal".

The similarity in approach of the Australian and American provisions prohibiting collusive behaviour is immediately apparent. Whether one speaks of a "contract", "arrangement" or "understanding", as in Australia, or of a "contract", "combination" or "conspiracy" as in the United States, seems to make little if any difference *in substance*. The Sherman Act[15] cases, therefore, should be of great assistance to Australian lawyers seeking guidance and instruction on the conscious parallelism connundrum. This paper, therefore, after examining the view of two leading commentators in the conscious parallelism debate,[16] reviews the case law on the legality of conscious parallelism under the Sherman Act.[17] The application of s 5 of the Federal Trade Commission Act[18] to conscious parallelism will also be discussed. This section proscribes, *inter alia*, unfair methods of competition.[19]

The final part of this paper attends to the question of remedies.[20]

---

[11] (1980) ATPR 40-172 at p 42371.

[12] *Ibid* 42377. This finding of fact is confirmed at 42379.

[13] Compare however the obiter dictum of Fisher J in *TPC* v *Nicholas Enterprises Pty Ltd and Ors* (1979) ATPR 40-126 on the significance of evidence of price leadership by price signallers in markets where the competitors are interdependent: p 18339, and on the possibility of an arrangement being formed without an offeror receiving a communication of acceptance where there is price leadership and interdependence amongst the members of the market concerned: 18347.

[14] 15 USC s 1.

[15] Cases which turn on s 2 of the Sherman Act can also be of assistance in this area. Section 2 of the Sherman Act deals with "monopolization" and refers, *inter alia*, to persons who "combine or conspire" to monopolise.

[16] See pp 77-80.

[17] See below pp 80-90.

[18] 15 USC s 45.

[19] See below pp 90-93.

[20] See below pp 93-98.

2 TWO LEADING VIEWS ON CONSCIOUS PARALLELISM

Before examining the American case law on conscious parallelism, it may be useful to extract some of the policy issues which underlie the conscious parallelism debate. The comparison of the opposing views of Turner and Posner on conscious parallelism may help to highlight some of these policy issues.

A *Turner's Views*

In formulating his view on oligopolistic conscious parallelism, Turner[21] recognised that

> since each seller is fully aware of the interdependence and the consequences of his taking advantage of it, it is not at all preposterous, to say the least, to classify what transpires as a "tacit agreement", and to conclude, since "price fixing" is involved, that the agreement is unlawful.[22]

Turner rejected the view that "mere" conscious parallelism is unlawful partly because it could be said that oligopolistic conscious parallelism was not an "agreement in the traditional sense"[23] and could even be "described as individual behaviour".[24]

In the main however, Turner thought it repellent[25] to consider conscious parallelism as an illegal "conspiracy"[26] because in a significant sense, the behaviour of the rational oligopolist in setting his price is precisely the same as that of the rational seller in an industry consisting of a very large number of competitors. Both are pricing their product and determining their output so as to make the highest profit, or suffer the least loss, that can be obtained in the market conditions facing them. The rational oligopolist simply takes one more factor into account – the reactions of his competitors to any price change that he makes. He must take them into account because his competitors will inevitably react.[27]

Furthermore, in Turner's view because oligopolists cannot avoid acting

---

[21] D F Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) 75 *Harv L Rev* 655.

[22] *Ibid* 663.

[23] *Ibid.*

[24] *Ibid.* 666. Turner *did not* say that conscious parallelism could not be considered as a form of agreement. Turner simply argued that such behaviour should not be considered unlawful. In Turner's view there was not much point in labelling conscious parallelism as a form of agreement because "[o]nce one goes beyond the boundaries of explicit, verbally communicated assent to a common course of action . . . it is extraordinarily difficult if not impossible to define clearly a plausible limit short of interdependence". *Ibid* 683. In Turner's view if a line could be drawn "it would seemingly be too thin to be a workable principle of law, and [would] be only productive of confusion". *Ibid* 683.

[25] *Ibid* 663.

[26] Turner made it clear that he was only "exonerating" oligopolistic pricing breaching the "conspiracy" provisions of the Sherman Act: *ibid* 671. See above p 76 for the relevant provisions of the Sherman Act.

[27] *Ibid* 665.

interdependently, to prohibit such behaviour would be to "demand such irrational behaviour that full compliance would be virtually impossible".[28]

B *Posner's Views*

Posner[29] trenchantly rejected Turner's views and the theory of oligopolistic interdependence on which they were based. Posner stated:

> in some circumstances competing sellers might be able to coordinate their pricing without conspiring in the usual sense of the term – that is, without any overt or detectable acts of communication. This is the phenomenon that lawyers call "conscious parallelism" and some economists term "oligopolistic interdependence", but which I prefer to call "tacit collusion" in contrast to the explicit collusion of the formal cartel or its underground counterpart.[30]

In Posner's opinion, "Turner's analysis is a logical application of the interdependence theory ... but the theory is inadequate".[31] Posner gives a number of reasons for rejecting the interdependence theory as inadequate[32] and states that he finds an acceptable, alternative approach, in work done by Stigler.

> George Stigler has developed an alternative approach that is at once subtle and simple: to treat oligopoly pricing as a special case in the general economic theory of collusive pricing.[33] In this analysis, ... cartels (here broadly defined to include any method of collusive pricing) are assumed to vary in formality from the full-blown cartel that the Sherman Act has substantially eliminated in the industries subject to it to the "cartel" that requires no detectable machinery of collusion – the "cartel" in which collusion is effectuated by a purely tacit meeting of the minds, a mutual forbearance to carry production to the point where price equals marginal cost.[34] This approach opens up the possibility that the same basic legal doctrines and remedies might be employed effectively across the entire range of cartel formality.[35]

Two elements of this analysis require particular attention. These elements, which are inter-related, are Posner's attitude to the likelihood of collusion among oligopolists which engage in parallel pricing and Posner's definition of collusion.

---

[28] *Ibid* 669. Turner noted that an injunction which did not bar interdependent behaviour but simply barred the subject "from further conspiring to fix prices" would be "hopelessly vague": 669. The problem of injunctions of vague import was discussed by Murphy J in a dissenting judgment in *Thomson Australian Holdings Pty Ltd* v *TPC and Ors* (1981) ATPR 40-234, at p 43132. The amendment of s 80(1) of the TPA by Act No 39 of 1983 to allow a court to grant an injunction in such terms as it "determines to be appropriate" has alleviated the problem by removing the pressure for courts to word injunctions in terms closely similar to the legislation in question.

[29] R A Posner, *Antitrust Law: An Economic Perspective* (1976) (cited hereinafter as "Posner, *Antitrust Law*"); R A Posner, "Oligopoly and the Antitrust Laws: A Suggested Approach" (1969) 21. *Stanford L Rev* 1562.

[30] Posner, *Antitrust Law* 40.

[31] *Ibid* 44.

[32] *Ibid* 44-47.

[33] G J Stigler, "A Theory of Oligopoly" in his book *The Organization of Industry* (1968), 39.

[34] This is the "perfect" competition level of production.

[35] Posner, *Antitrust Law* 47.

Although Posner does not say so directly, there is a strong implication, in the passage just quoted, that oligopolists which act in parallel can be assumed to be colluding.

Strictly speaking, Posner suggests that a two stage approach to oligopolistic pricing be adopted. The first stage is to use economic analysis to discover markets in which conditions are favourable for collusion. The second stage is to use economic analysis to see whether collusion actually exists in those markets.[36]

In practice, however, Posner's approach verges on a "constructive collusion" approach in which collusion will be assumed in cases in which economic analysis indicates that collusion is likely. Posner makes this clear, whilst commenting on the relevance of economic evidence as proof of price-fixing. Posner notes that economic evidence is widely used in price-fixing cases, but adds:

> it is widely assumed that the only use of such evidence is to help the trier of fact infer the existence of a price-fixing conspiracy – i.e., an overt agreement – and that such an inference is indispensable to finding that the Sherman Act has been violated. This is where I part company with many other students of antitrust policy. If the economic evidence introduced in a case warrants an inference of collusive pricing, there is neither legal nor practical justification for requiring evidence that will support the further evidence that the collusion was explicit rather than tacit. Certainly from an economic standpoint it is a detail whether the collusive pricing scheme was organized and implemented in such a way as to generate evidence of actual communications.[37]

Posner's readiness to infer collusion among oligopolists leads to the second major feature of his analysis of conscious parallelism, his wide-ranging definition of collusion. Posner believes that the reference in s 1 of the Sherman Act to a "contract, combination ... or conspiracy" is sufficiently wide to support his suggested approach to oligopolistic collusion. Posner supported this contention and explained his conception of collusion in the following passage:

> There is no distortion of accepted meanings in viewing tacit collusion as a form of concerted rather than unilateral activity. If seller A restricts his output in the expectation that B will do likewise, and B restricts his output in a like expectation, there is a literal meeting of the minds, a mutual understanding, even if there is no overt communication. In forbearing to seek short-term gains at each other's expense in order to reap monopoly benefits that only such mutual forbearance

---

[36] *Ibid* 55. At 55-62 Posner suggests that following factors can be used to identify markets in which collusion is likely: (1) Market concentrated on the selling side (2) No fringe of small sellers (3) Inelastic demand at competitive price (4) Entry takes a long time (5) Many customers (6) Standard product (7) The principal firms sell at the same level in the chain of distribution (8) Price competition more important than other forms of competition (9) High ratio of fixed to variable costs (10) Demand static or declining over time (11) Sealed bidding (12) The industry's antitrust "record". Posner suggests at 62-71 the following criteria for inferring actual collusion: (1) Fixed relative market shares (2) Price discrimination (3) Exchange of price information (4) Regional price variations (5) Identical bids (6) Price, output and capacity changes at the formation of the cartel (7) Industry-wide resale price maintenance (8) Declining market shares of leaders (9) Amplitude and fluctuation of market prices (10) Demand elasticity at market price (11) Level and pattern of profits (12) Basing-point pricing.

[37] Posner, *Antitrust Law* 71.

> will allow, A and B are like the parties to a "unilateral contract" which is treated by the law as concerted rather than individual behaviour. If someone advertises in a newspaper that he will pay $10 to the person who finds and returns his dog, anyone who meets the conditions has an enforceable claim against him to the promised reward. The finder's action in complying with the specified condition is all the indication of assent that the law requires for a binding contract. Tacit collusion is similar: one seller communicates his "offer" by restricting output and the offer is "accepted" by the actions of his rivals in restricting their outputs as well. I am arguing simply that it may be appropriate in some cases to instruct a jury to find an agreement to fix prices if it is satisfied that there was a tacit meeting of the minds of the defendants on maintaining a noncompetitive pricing policy.[38]

Given the broad approach to tacit collusion indicated in the passage above, it is not surprising that Posner thought it unnecessary to prove actual collusion. Tacit collusion, as defined by Posner could safely be assumed, except in cases where economic analysis indicated that oligopolistic interdependent behaviour was unlikely.

In Posner's view, the approach which he suggests is justifiable both because purely tacit collusion is unlikely (even tacit collusion as he defines it) and because in his opinion "tacit collusion is not an unconscious state".[39]

3 CONSCIOUS PARALLELISM AND OLIGOPOLY: US LAW AND EXPERIENCE

A *Conscious Parallelism and the Sherman Act*

In *Interstate Circuit Inc et al* v *United States*,[40] the Supreme Court of the United States gave the words "combination" and "conspiracy" in s 1 of the Sherman Act an extremely wide and comprehensive scope.

Interstate, a major "first-run" movie theatre chain had forwarded letters to eight movie distributors demanding that they require operators of "subsequent run" films to charge an admission price of at least 25 cents. Interstate also demanded that "first-run" films not be shown in conjunction with other feature films under the so-called policy of "double features".[41] Each of the letters to the movie distributors named all of the movie distributors as addresses. Interstate as a major movie exhibitor,[42] had considerable market power. All eight of the movie distributors agreed to most of the demands which Interstate had made.[43]

---

[38] *Ibid* 71-72. The last sentence of this passage appears to considerably tone down Posner's "tacit collusion" argument. In the succeeding paragraph Posner allowed that the approach which he had suggested could be taken too far. Posner conceded that oligopolists who in reacting to an external, market shock took account of the probable reactions of competitors could be said to have acted with elements of tacit collusion. Posner would not hold such conduct illegal, however, as he is only concerned with tacit collusion to limit output and to increase prices.

[39] Posner, *Antitrust Law* 74.

[40] (1938) 306 US 208. *Interstate* was not the first US case on "conscious parallelism". This "honour" seems to be held by *Eastern States Retail Lumber Dealers' Association* v *US* (1913) 234 US 600.

[41] *Ibid* 217.

[42] *Ibid* 215 Interstate had a monopoly in a number of cities.

[43] *Ibid* 218.

The defendants appealed against a finding that the movie distributors had entered into an agreement with one another and into an agreement with Interstate to impose restrictions upon the availability of films to "subsequent-run" exhibitors.[44]

Stone J, who delivered the opinion of the Supreme Court, had little difficulty in finding a "combination" or "conspiracy". His Honour said:

> It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.[45]

Furthermore, His Honour indicated that, in his opinion, the concept of a "conspiracy" under the Sherman Act was very wide indeed. Stone J declared:

> While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce ... and knowing it, all participated in the plan.[46]

Given this approach to conspiracy, it is no wonder that the defendant's appeal was dismissed.

If Fisher J in *Trade Practices Commission* v *Nicholas Enterprises Pty Ltd and Ors*[47] had adopted an *Interstate Circuit* type of approach to "arrangements" or "understandings", then all of the respondents would have been "convicted". All of the respondents knew of the plan to "fix" beer prices and all of them acted in a manner that was consistent with the plan. Fisher J could have taken this approach. Accordingly, His Honour's decision to interpret "arrangements" and "understandings" restrictively may be considered an exercise of judicial "discretion".

In *United States* v *Masonite Corporation et al*,[48] Douglas J who delivered the opinion of the Supreme Court, followed the decision of that court in *Interstate Circuit*. Douglas J, however, seemed to extend the principles of the *Interstate Circuit* case. In *Interstate Circuit* Stone J had stated that a conspiracy can arise when parties know of the existence of a plan and decide to follow it. Douglas J however, extended this principle to apply also to cases in which parties unwittingly act in accordance with a plan, find out about the plan and then decide to continue in accordance with it.[49]

---

[44] *Ibid* 220 For the case in the Court below, see 20 F Supp 868 (1937).
[45] *Ibid* 223.
[46] *Ibid* 226-227.
[47] (1979) ATPR 40-126.
[48] (1942) 316 US 265.
[49] *Ibid* 275.

In *American Tobacco Co et al* v *United States*[50] the Supreme Court took the *Interstate Circuit* conscious parallelism doctrine even further.

The petitioners in this case were the American, Ligget and Myers and R J Reynolds Tobacco companies, a subsidiary of American, and certain officials of the tobacco companies. The petitioners had been convicted in a District Court of violating s 1 and 2 of the Sherman Act.[51]

Each petitioner had been convicted on four counts: (1) Conspiracy in restraint of trade, (2) monopolisation, (3) attempt to monopolise and (4) conspiracy to monopolise.[52]

The petitioners had appealed unsuccessfully[53] from the decision at first instance and when the case reached the Supreme Court, the only issue which that court chose to consider was the monopolisation[54] issue.

The petitioner tobacco companies controlled "over two-thirds of the entire domestic field of cigarettes and ... over 80%"[55] of the field of burley blend cigarettes, the type of cigarette in which they specialized. The tobacco companies shared, in roughly equal proportions, a dominance that was so marked that the smallest of them at all times produced over twice as much as the largest "outsider".[56]

The petitioner tobacco companies controlled the tobacco leaf and chewing tobacco markets. These companies did not compete with one another in the prices which they were willing to pay for tobacco. The companies also did not compete in cigarette prices. The list prices charged and the discounts which the petitioners had allowed had been practically identical since 1923 and absolutely identical since 1928. From that date until 1948 the companies had only changed their prices on seven occasions. On each of these occasions, Reynolds had been the first to announce the increases.[57]

In 1931, the petitioners increased their cigarette prices, even though America was in the depths of the Depression and tobacco prices were extremely low. This move by the petitioners opened up the cigarette market to the cheaper brands of their competitors. The petitioners' competitors, then, for the first time, seized a significant share of the market. The petitioners reacted by bidding up the prices of low quality grades of tobacco which they did not use but which were used by their competitors. The petitioners also cut their prices and pressured their retailers to minimise the price differential between the petitioners' and their competitors' cigarettes. By 1934 the petitioners had beaten back the threat from the competitors' cheap cigarettes and had again raised their prices.

The main issue which the court had to consider was whether the practice

---

[50] (1946) 328 US 781.

[51] See above p 76.

[52] Conviction at first instance in USDC (E D Ky), unreported but "noted" by the Supreme Court (1946) at 328 US 781, 783. Note that no penalty was imposed under the third count as the Court held that the third count merged into the second count.

[53] (1944) 147 F 2d 93. (Circuit Court of Appeals 6th Circuit.)

[54] Cert granted (1945) 324 US 836. The "monopolisation" issue, of course, depended upon the respondents having combined or conspired, *supra* n 15.

[55] (1946) 328 US 781, 797: statistics at 796.

[56] *Ibid* 796.

[57] *Ibid* 804.

of monopolisation required an actual exclusion of a competitor.[58] In the course of dealing with this issue however, Burton J, who delivered the opinion of the court, had stated that:

> The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in an exchange of words. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.[59]

In the passage just quoted, Burton J was referring to conspiracies to monopolise. Nonetheless, since *Theatre Enterprises*, courts have taken the logical view that the cases on "combinations" or "conspiracies" under s 1 of the Sherman Act are applicable to cases on combination or conspiracies in s 2 of the Act; and vice versa.[60]

Cases such as *Interstate Circuit*, *Masonite* and *American Tobacco* seemed to assure a bright future for the concepts of combination and conspiracy in s 1 and 2 of the Sherman Act. In *American Tobacco* for example, the passage from the judgment of Burton J which was quoted above[61] seems to be fully consistent with the idea that conscious parallelism is a form of collusion. Oligopolists who, without explicit agreement, acted on a recognition of their interdependence could be said to have had a "unity of purpose" and "a meeting of minds". Given the differing views of Turner and Posner discussed above[62] it is not surprising that Turner criticised the respondents' conviction[63] while Posner endorsed it.[64]

In *Theatre Enterprises, Inc* v *Paramount Film Distributing Corporation et al*[65] the Supreme Court severely dampened the enthusiasm which had been developing for the conscious parallelism doctrine.[66]

---

[58] *Ibid* 784. See above n 54.

[59] *Ibid* 809-810.

[60] *Delaware Valley Marine Supply Co* v *American Tobacco Co* (1961) 297 F 2d 199, 200; *Independent Iron Works, Inc* v *United States Steel Corp* (1965) 322 F 2d 656, cert denied (1963) 375 US 922; *Cackling Acres Inc et al* v *Olson Farms Inc* (1976) 541 F 2d 242, cert denied (1977) 429 US 1122; *US* v *General Motors Corp and Ford Motor Co* [1974-2] Trade Cases para 75 253 at p 97 669; D A Washburn, "Price Leadership" (1978) 64 Va L R 691, 728-729 and cases at 729, n 197.

[61] See text accompanying n 59 *supra*.

[62] See above pp 77-80.

[63] D F Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) 75 *Harv L Rev* 655, 671.

[64] R A Posner, *Antitrust Law: An Economic Perspective* (1976) 72-73.

[65] (1954) 346 US 537.

[66] The US Government gave a lead even though it asserted conscious parallelism in only two suits; namely, *Triangle Conduit & Cable Co Inc et al* v *FTC* 168 F 2d 175 (7th Cir 1948), affirmed by an equally divided court sub nom *Clayton Mark & Co* v *Federal Trade Commission* (1949) 336 US 902 and *United States* v *Armour and Co* No 48-1351 (ND Ill, filed Sept 15, 1948). In both of these cases, the first count alleged by the US government was based on traditional conspiracy grounds whilst the second count relied on conscious parallelism. In the *Armour* case, the US government ultimately filed a stipulation dismissing the case without prejudice. In *Triangle Conduit* however, the 7th Cir upheld the conscious parallelism count. It must be noted however that in *Triangle Conduit* conscious parallelism was only asserted and sustained under s 5 Federal Trade Commission Act. [s 5 of the Federal Trade Commission Act, 15 USC s 45 does not deal

The petitioner, Theatre Enterprises Inc, was the owner and operator of a movie theatre located some six miles from the "downtown" shopping centre of Baltimore, Maryland. The petitioner wanted to show "first run" movies in its theatre. To this end, the petitioner individually approached each of the respondent movie producers and distributors. Each of the respondents rebuffed the petitioner as each of them had an established policy of only supplying movies to the "downtown" Baltimore movie theatres. The petitioners alleged that the respondents had breached ss 1 and 2 of the Sherman Act by conspiring to restrict "first run" pictures to the downtown Baltimore area.[67] The petitioner admitted that there was no direct evidence of an illegal agreement.[68]

Clark J delivered the opinion of the Supreme Court. His Honour, in the course of dismissing the petitioner's case, observed:

> The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement ... But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.[69]

Although this passage is recognised as a "landmark" in the United States law on conscious parallelism, its exact significance is a matter of controversy. Some authorities such as Turner[70] believe that *Theatre Enterprises* precludes the possibility of finding a "conspiracy" or "combination" solely on the basis of conscious parallelism.[71] Other authorities believe that Clark J simply held that evidence of conscious parallelism does not compel a finding of "conspiracy".[72] Still other authorities, for example Posner,[73] playdown the significance of Clark J's judgment on the basis that the respondents had provided a convincing alternative to "conspiracy" to explain their parallel conduct.

---

directly with conspiracies to restrain trade, however described, but deals *inter alia* with "unfair methods of competition": See below p 90.] A number of civil cases followed this lead: *Milgram et al* v *Leow's Inc et al* (1951) 192 F 2d 579 cert denied, (1952) 343 US 929; *Ball* v *Paramount Pictures Inc* (1945) 169 F 2d 317. See also *Bordonaro Bros Theatres Inc* v *Paramount Pictures, Inc* (1949) 176 F 2d 594 reversed on other grounds (1946) 327 US 251. For this note I am indebted to M D Blechman, "Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws" (1978-9) 24 NYLS Rev 881, 883.

[67] (1954) 346 US 537, 539-540.

[68] *Ibid.*

[69] *Ibid* 540-541.

[70] Turner, *supra* n 21, 658-659.

[71] D A Washburn, "Price Leadership" (1978) 64 *Va L Rev* 691, 708.

[72] S A Nye, "Can Conduct Oriented Enforcement Inhibit Conscious Parallelism?" (1975) 44 *Antitrust LJ* 206, 207. Note that Nye was speaking as Commissioner of the FTC; D J Simonetti, "Conscious Parallelism and the Sherman Act: An Analysis and a Proposal" (1977) 30 *Vanderbilt L Rev* 1227, 1230.

[73] Posner, *Antitrust Law* 73.

B *Conscious Parallelism "Plus"*

Despite the controversy over the precise significance of the judgment of Clark J,

> most decisions which have come down after *Theatre Enterprises* have applied a rule of "conscious parallelism plus"; that is, they have required some additional circumstantial evidence, besides the fact of the defendants' uniform conduct, to make out a conspiracy.[74]

Circumstantial evidence of this type is referred to as a "plus factor".[75]

The "plus factor" which has been most frequently considered in this connection is whether or not the conduct of each defendant accorded with its individual self interest.[76]

Where the answer is affirmative, that is where there is an independent business justification for the behaviour of each of the defendants, then no inference of conspiracy can be drawn. Where, however, there is no independent business justification for the conduct of the defendant, then the parallel behaviour of the defendants can be regarded as being probative of conspiracy.[77]

Other "plus factors" which have likewise been considered are the presence (or absence) of a motive on the defendants' part for entering into the alleged conspiracy; the artificial standardization of products; the pervasiveness of the claimed parallel conduct; whether the defendants' pricing has been contrary to what economic factors would indicate; whether their profits have been extraordinarily high; whether their output has been restricted; and in some circumstances, whether the defendants have shown a past proclivity for antitrust violations.[78]

At first glance, these "plus factors" appear to reflect a "common sense" approach to "conspiracy". "Plus factors" however should be used with caution. Many "plus factors", for example the "individual self-interest plus factor", rely on the assumption that parties can act independently. In concentrated markets however, parties are not independent but interdependent. "Plus factors" therefore, will often be of little use in distinguishing between "mere" "conscious parallelism" and "conspiracy".

Despite this inherent weakness, the conscious parallelism "plus" approach has been widely accepted by courts in the United States.[79]

---

[74] M D Blechman, "Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Law" (1978-9) NYLS Rev 881, 885.

[75] Blechman, *ibid*, says that the term "plus factor" was first used in *C-O-Two Fire Equipment Co* v *United States* (1952) 197 F 2d 489, 493 cert denied, (1952) 344 US 892. There the court found conspiracy on the basis of parallel conduct and six "plus factors".

[76] Blechman *supra* n 74, 885 and cased cited there. Some of the more recent cases are: *Pan-Islamic Trade Corp* v *Exxon Corp et al* (1980) 632 F 2d 539, 559; *Worldwide Marine Trading Corp et al* v *Marine Transport Services* (1982) 545 F Supp 156, 163; *State of Montana* v *Super-America* (1983) 559 F Supp 298, 302-303; *Proctor* v *State Farm Mutual Automobile Insurance Company et al* (1982) 675 F 2d 308, 327.

[77] Blechman 885-886.

[78] *Ibid* 886-887.

[79] Some of the more recent cases are: *Gainesville Utilities Department* v *Florida Power and Light Co* (1978) 573 F 2d 292; *Richard Schoenkopf d/b/a Vend-Mark* v *Brown & Williamson Tobacco Corp et al* (1980) 483 F Supp 1185 and the cases in n 76 *supra*.

In *Joel Levitch et al* v *Columbia Broadcasting System Inc, et al*[80] for example, it was stated that:

> The vast majority of courts which have considered the question has concluded that in order to support a finding of conspiracy as a result of consciously parallel conduct, a plaintiff must present additional facts or circumstances tending to show that the actions of the alleged co-conspirators were interdependent or somehow concerted. And while there has been some disagreement as to what "plus factors" are sufficient to sustain a charge of interdependent conscious parallelism, the requirement of these "plus factors" is firmly established. In fact only one court has found that the bald assertion of "interdependent consciously parallel actions" states a valid claim under Section 1 of the Sherman Act.[81]

C *Price Information Exchanges — A Double "Plus Factor"?*

Price "information is ... a two-edged sword: it is necessary if the competitive process is to work properly, but it can also facilitate collusion".[82] Accordingly, the purpose and effect of price information swapping in any particular case requires careful consideration.

In concentrated markets, price information swapping can be particularly detrimental to competition. The United States courts have readily recognised this fact and have manipulated the concept of "conspiracy" accordingly.

(1) *Explicit Price Information Swapping by Oligopolists*

In *United States* v *Container Corporation of America et al*,[83] the Supreme Court indicated that United States courts would have little hesitation in finding a "conspiracy" where price information had been explicitly exchanged by competitors in a concentrated market.

The defendants in *Container Corp*, a civil price fixing case, represented about 90 percent of the production of corrugated containers in the south-eastern portion of the United States. Douglas J who delivered the opinion of the court[84] said:

> Here all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. That

---

[80] (1980) 495 F Supp 649.

[81] *Ibid* 674. The case which is referred to as an exception is *Bogosian* v *Gulf Oil Corp* (1977) 561 F 2d 434, cert denied 434 US 1086. It is submitted with respect, however, that *Bogosian's* case supports the "plus factors" hypothesis: *Bogosian* at p 446 and the citation of this case in *AB Iro* v *Otex Inc* (1923) 566 F Sup 419, 471. The passages in *Bogosian* 447 to which Duffy J in *Joel Levitch et al* v *Columbia Broadcasting System Inc et al* (1980) 495 F Supp 649, 674-675 only deal with the issue of whether a complaint can sufficiently state a claim with respect to s 1, Sherman Act, if no specific reference is made to a "combination". The majority declined to rule on this issue. This was possible as the majority had already found that the complaint did allege a "combination": *Bogosian* 445.

[82] Posner, *Antitrust Law* 136.

[83] (1969) 393 US 333.

[84] Fortas J delivered a concurring judgment. Marshall J with whom Harlan and Stewart JJ agreed, dissented.

> concerted action is *of course* sufficient to establish the combination or conspiracy, the initial ingredient of a violation of Section 1 of the Sherman Act.
>
> There was of course freedom to withdraw from the agreement. But the fact remains that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return.[85]

Douglas J, as the passage above indicates, had no hesitation in holding that the defendants had entered into an agreement to exchange price information. Douglas J, with whom the other judges agreed on this point,[86] then examined whether the agreement was in restraint of trade. His Honour surveyed the structure of the market in question, held that it was highly concentrated and concluded that the defendants' agreement was in restraint of trade.

A comparison of *Container Corp* and *Trade Practices Commission* v *Email and Anor*[87] indicates that United States courts in cases of price information swapping *by oligopolists* are far more willing to find a "conspiracy" than are their Australian counterparts in similar circumstances to find an "arrangement". Douglas J had no hesitation in holding that the defendants had combined or conspired to exchange price information. The fact that the defendants had accepted price information from their competitors and had thus affirmed their willingness to supply such information in return was enough for Douglas J to find a conspiracy.[88] Lockhard J, in *Email*, however, was unwilling to find an arrangement in similar circumstances, even though the market in question was a duopoly. Lockhart J's view was that it was not sufficient for one party to have a (mere) hope or expectation as to the future conduct of another party. What was required was for a party to have an expectation of certain behaviour which the other party was at least under a moral duty to perform.[89]

(2) *Implied Price Information Swapping: Price Signalling and Facilitating Devices*

Although courts in the United States have almost uniformly found "conspiracy" where oligopolists have openly swapped price information, this

---

[85] (1969) 393 US 333, 335 (Italics added).

[86] Fortas J accepted the existence of an agreement, by implication as His Honour only says that the judgment of Douglas J should not be taken as indicating that price information swapping is *per se* illegal. Marshall J, with whom Harlan and Stewart JJ agreed, dissented on the result of the case but held that there was an agreement: (1969) 393 US 333, 340.

[87] (1980) ATPR 40-172.

[88] Although *Container Corp* is perhaps the most famous case to enunciate this approach, a similar approach was set out in *Morton Salt Co et al* v *US* 235 F 2d 573, 577. See also *US* v *United States Gypsum Company* (1977) 438 US 422, 457-458.

[89] Lockhart J stated that "It is important to bear in mind that there is a fundamental distinction between a hope or prediction of future behaviour on the one hand and the expectation of certain behaviour on the other; that is behaviour which, as a result of communication between the parties, the party restricted is at least morally bound to adopt" (1980) ATPR 40-172, at p 42377. It is unfortunate that His Honour did not indicate how to distinguish between circumstances in which "expectations" arise and circumstances in which mere "hopes" or "predictions" are generated.

has not been the case with indirect and possibly unintentional price information swapping.

In *United States* v *General Motors Corp and Ford Motor Corp*,[90] the Department of Justice alleged that General Motors and Ford had breached ss 1 and 2 of the Sherman Act by exchanging assurances that each would eliminate or substantially reduce the concessions which it offered to fleet owners if the other company did likewise.[91]

The allegations under ss 1 and 2 of the Sherman Act relied on proving that the defendants had entered into a combination or conspiracy. The government alleged that the defendants had reached "agreement" by the use of two devices. First, it was alleged that the defendants had exchanged mutual assurances, as to their proposed conduct, through third party "conduits". Secondly, it was alleged that the assurances had been exchanged by a series of "signals".[92] Most of the alleged signals consisted either of individual public statements by the two defendants or of pricing moves related to fleet sales in the United States and Canada.[93]

Feikens DJ firmly rejected the case advanced by the government. In the opinion of Feikens DJ the defendants had not come to an agreement and accordingly were not able to breach ss 1 or 2 of the Sherman Act. His Honour took his definition of agreement under the Sherman Act from *United States* v *Standard Oil Co*[94] and quoted[95] the following passage with approval:

> The substantive law of trade conspiracies requires some *consciousness of commitment* to a common scheme ... Unless the individuals involved understood from something that was said or done *that they were, in fact, committed* to raise prices, there was no violation of the Sherman Act.
>
> It is the fact of commitment which is really at issue.[96]

Feikens DJ in applying this authority gave a number of reasons for holding that the defendants had not entered into an agreement with each other.[97] His Honour saved his most trenchant comments, however, for the signalling theory which had been led by the government. This theory, Feikens DJ held:

> ... comes dangerously close to precluding lawful pricing activity as part of vigorous price competition. Neither a pricing move by a competitor, nor a

---

[90] [1974-2] Trade Cases para 75-253, 97, 656 (USDC ED Mich Sth'n Div).

[91] *Ibid* 97, 657.

[92] *Ibid.*

[93] *Ibid.*

[94] (1963) 316 F 2d 884.

[95] [1974-2] Trade Cases para 75-253 at p 97, 670.

[96] (1963) 316 F 2d 884, 890. The emphasis was added by Feikens DJ. The requirement of conscious commitment to a common scheme has been alluded to in many cases *eg Edward T Sweeney & Sons Inc* v *Texaco Inc* (1980) 637 F 2d 105 Cert denied 451 US 911; *Health Care Plan of New Jersey* v *West Jersey Hospital* [1982-83] Trade Cases para 65067, 70, 977 at 70979; *White and White Inc* v *American Hospital Supply Corp* (1982) 540 F Supp 951, 1015; *Jonnet Development Corp* v *Caliguiri* (1983) 558 F Supp 962, 964; *Monsanto Company* v *Spray Rite Service Corp'n* US Sup Ct 20th March, 1984 No 82-914.

[97] First, that there was no evidence that either of the defendants had reached agreement with anyone; secondly that the defendants had acted consistently with rational business behaviour and prevailing economic conditions; thirdly that the relevant "decision makers" had given evidence and provided plausible explanations for the impugned conduct and fourthly that the defendants had not really acted in parallel, though even if they had, mere conscious parallelism would not have sufficed to show agreement.

> requested pricing change by a customer, can be regarded as an invitation to conspire which precludes a business from acting in its best economic interest by changing its prices ...
>
> The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react. The government has not shown that either defendant intended its pricing moves to be a signal of its willingness to take specific additional pricing actions.[98]

Feikens DJ therefore showed disdain for the "signalling" theory adduced by the government. It is interesting that in rejecting this theory, Feikens DJ used terminology similar to that which had been used by Lockhart J in the *Email* case.[99] It is important to note, however, that the *Email* case was quite different as in *Email* the information swapping between the respondents was direct and undeniably intentional.

In proceedings brought against General Electric and Westinghouse[100] to modify earlier consent decrees agreeing to avoid price fixing,[101] a United States District Court[102] approved highly detailed injunctions against price signalling.

The Department of Justice had undertaken an investigation of the turbine generator industry which had revealed that from 1963 price competition between General Electric and Westinghouse had been eliminated.

McGlynn DJ heard the application for the proposed modifications to the consent order to which the parties had agreed in 1962. His Honour explained the case put by the government in the following terms:

> The government does not contend that the elimination of price competition was the result of any direct covert communication between the parties, but rather that it was the result of the conscious adoption and publication of identical pricing policies in 1963-64 and the strict adherence to those policies since that time.
>
> In 1963 both General Electric and Westinghouse published similar and unusually extensive price books enabling each to predict not only the exact price that the other would bid in a particular situation, but also the precise type and size of the machine. Both companies also adopted a price protection plan which provided that if the price was lowered by a manufacturer for a particular customer, any buyer within the previous six month period would be given an identical discount retroactively. Thus, each manufacturer was assured that the other would not engage in discounting because of the substantial self-imposed penalty involved. Also, both companies published a list of outstanding bids whenever there was a price change so that there would be no confusion as to

---

[98] [1974-2] Trade Cases para 75-253, 97 656 at 97 671. In support of these contentions Feikens DJ quoted from *Standard Oil* 316 F 2d 884, 896.

[99] It will be recalled that Lockhart J distinguished between a hope or prediction and an expectation: see *supra* n 89. Feikens DJ drew a similar distinction. His Honour noted that there was considerable uncertainty in the signalling process and hence uncertainty by interdependent oligopolists as to the future conduct of their rivals. This uncertainty, said Feikens DJ, "is the antithesis of the types of assurances needed to constitute a price fixing agreement": *ibid* 97, 667.

[100] *United States* v *General Electric Co and Westinghouse Electric Corp* [1977-2] Trade Cases para 61-659, 72 715 (Civ Action No 28 228, Case No 1549 Antit Div Dept Justice); *US* v *General Electric Co* [1977-2] Trade Cases para 61-660, 72 717; *US* v *Westinghouse Electric Corp* [1977-2] Trade Cases para 61-661, 72 721.

[101] [1962] Trade Cases para 70-488 and para 70-503.

[102] USDC ED Penn.

> which customers were being charged the old rate and thus no suspicions of discounting would be aroused. These practices resulted in a pattern of equal pricing in the sale of large turbine generators and the government contends that contemporaneous internal documents indicate that this result was the deliberate intent of the defendants.[103]

The terms of the consent decree, as modified, provided that General Electric and Westinghouse were enjoined from publishing or distributing "price signalling" information and from offering price protection policies. Each of the companies was enjoined from using a price list other than its own and from communicating details of its price list to people other than its own employees. A similar proscription applied to the publication of information regarding specific sales. The defendants were allowed to change prices consistently with the decree. Each of the defendants was required to keep records of its pricing calculations and to put a warning on its price lists that to reveal them to persons other than employees of the company would constitute a breach of the consent decree. The defendants were also required to keep a log of the persons to whom they had distributed a price list.[104]

This consent decree is interesting in the extent to which it goes in an attempt to force General Electric and Westinghouse to compete.[105]

Strictly speaking the "General Electric–Westinghouse" cases cannot be cited as precedent for an extended operation of the Sherman Act prohibition on price signalling. It may be significant, however, that the defendants thought fit to agree to the proposed modifications to the 1962 consent decree.

D *Section 5 of the Federal Trade Commission Act and the Prevention of Concerted Practices*

Section 5 of the Federal Trade Commission Act[106] provides in part that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful".[107]

This section by enjoining, *inter alia*, unfair methods of competition rather than combinations or conspiracies for proscribed purposes, provides an opportunity to avoid the restrictions evidenced by cases such as *Theatre Enterprises*.[108]

Two "early" cases which preceded *Theatre Enterprises*, namely *Federal Trade Commission* v *Cement Institute et al*[109] and *Triangle Conduit and Cable Co Inc et al* v *Federal Trade Commission*,[110] had indicated that s 5 of the FTC Act could be applied to "non-collusive" behaviour such as

---

[103] [1977-2] Trade Cases para 61-659, 72 715, 72 716.

[104] [1977-2] Trade Cases para 61-660, 72 717, 72 718, 72 720.

[105] Consent decrees are discussed below at pp 96-7.

[106] 15 USC s 45; (hereafter "FTC Act").

[107] S 5a(1) FTC Act.

[108] (1954) 346 US 537.

[109] (1948) 333 US 683.

[110] (1948) 168 F 2d 175. Confirmed by an equally divided Supreme Court, *sub nom Clayton Mark and Co et al* v *FTC* (1949) 336 US 956.

conscious parallelism and not just to the "combinations" and "conspiracies" which are proscribed by the Sherman Act. Although it was not clear whether the *Triangle Conduit* case was decided on a finding of conscious parallelism, that case and the *Cement Institute* case seemed to extend s 5 of the FTC Act well beyond "simple" "combinations" or "conspiracies".[111]

The *Cement Institute* and *Triangle Conduit* cases "set off a storm of protest from Congress and industry"[112] and under the pressure of the situation the Federal Trade Commission appeared to back away from its conscious parallelism theory.[113]

In the early 1970's the Federal Trade Commission began once again to explore the limits of application of s 5 of the FTC Act. This process was greatly encouraged by the decision of the United States Supreme Court in *Federal Trade Commission* v *Sperry and Hutchinson Co*[114] White J, who delivered the opinion of the court, held that the Federal Trade Commission could define as an unfair competitive practice, behaviour which did not infringe either the letter or the spirit of the antitrust laws. In addition, His Honour stated, *inter alia*, that practices could be proscribed regardless of their effect on competition.[115]

Three cases brought by the Federal Trade Commission under s 5 of the FTC Act are of particular interest. The cases are *Federal Trade Commission* v *Kellog Co et al*[116] (the *Cereals* case), *Federal Trade Commission* v *Exxon Corp et al*[117] and *Federal Trade Commission* v *Ethyl Corp et al.*[118] The *Cereals* case and the *Exxon Corp* case involved allegations by the Federal Trade Commission of "shared monopoly". In both of these cases, the Federal

---

[111] In *Cement Institute*, the US Supreme Ct held that the parallel adoption by members of the Cement Institute of a pricing formula using basing points, evidenced the use of an unfair method of competition in breach of s 5. Black J, who delivered the opinion of the court, indicated that s 5 could be applied to conduct which might "then be short of a Sherman Act violation". (1948) 333 US 683, 708. In *Triangle Conduit*, confirmed by an equally divided Supreme Ct (see *supra* n 10) a Circuit Ct again struck down a base-point pricing "scheme". The FTC had relied on two counts under s 5 FTC Act. The first count had relied on an unlawful conspiracy to suppress competition: (1948) 168 F 2d 175, 176. The second count had relied on a type of conscious parallelism argument: (1948) 168 F 2d 175, 176. In upholding the complaint by the FTC, the Court did not make it clear whether it relied on count one or count two of the complaint. As a result, the scope of *Triangle Conduit* has been the subject of much debate. Turner, for example, thought that the *Triangle Conduit* decision would have been upheld under the Sherman Act. D F Turner, "The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) 75 *Harv L Rev* 655, 677.

[112] *Boise Cascade Corp et al* v *FTC* [1980-2] Trade Cases para 63-323, 75 662 at 75 665 *per* Wallace Cir J, especially the journal articles criticising *Cement Institute* and *Triangle Conduit* to which His Honour refers.

[113] Wallace Cir J in *Boise Cascade*, *ibid*, refers to comments by FTC Commissioners that s 5, FTC Act does not apply to conscious parallelism.

[114] (1972) 405 US 233.

[115] *Ibid* 239. But see *Boise Cascade Corp et al* v *FTC* [1980-2] Trade Cases para 633-323, 75 662 at 75 670 *per* Wallace Cir J.

[116] Dkt No 8883 [1970-73 Trans Bind] Trade Regulation Reporter (US) (CCH) para 19-898, 21915 (1972); [1979-83 Trans Bind] TRR (CCH) para 22003, 22526 (1983).

[117] Dkt No 8934 [1973-76 Trans Bind] TRR (CCH) para 20-388, 20269 (1979); [1979-83 Trans Bind] TRR (CCH) para 21-866, 22120.

[118] Dkt No 9128 [1976-79 Trans Bind] TRR (CCH) para 21-579, 21698 (1979); [1979-83 Trans Bind] TRR (CCH) para 22003, 22526.

Trade Commission attacked the largest companies in oligopolies of significant size.[119] The Federal Trade Commission after expending a great deal of time and money, eventually discontinued proceedings in both cases.[120]

In *Ethyl Corp*, however, the Federal Trade Commission persisted with its case. The Federal Trade Commission attacked the four largest producers of lead-based "antiknock" additives for gasoline. The Federal Trade Commission alleged that the respondents engaged in price signalling by making price "announcements". The Federal Trade Commission also alleged that the respondents lessened uncertainty about price movements by selling on a uniform delivered price basis. In addition, the Federal Trade Commission alleged that all but one of the respondents used "most favoured" customer agreements, which promised a buyer the lowest price which the seller charged any of its other customers.[121]

The *Ethyl* case is outstanding in that the Federal Trade Commission did not allege that existence of a conspiracy, at least initially,[122] and did not allege that the defendants' acts or practices were artificial, without legitimate business purposes or adopted in order to keep their competitors informed of their prices. Instead, the Fedeal Trade Commission complaint alleged that the defendants' acts and practices were "unfair" simply because they helped to reduce the defendants' uncertainty about their competitors' prices thereby facilitating the maintenance of substantially uniform prices and reducing or eliminating price competition in the lead-based antiknock compound market.[123]

The Federal Trade Commission issued a final "cease and desist" order[124] and it seemed that s 5 of the FTC Act was available as a powerful means of controlling price signalling and conscious parallelism.

In *E I du Pont de Nemours & Co* v *Federal Trade Commission*,[125] however, the United States Court of Appeal[126] overturned the decisions of

---

[119] In the *Cereals* case, the respondents were the four largest producers of ready-to-eat cereals. These companies accounted for 91% of the market. [1970-73 Trans. Bind] TRR (CCH) para 19-898, 21915. In the *Exxon Corp* case, the respondents were the eight largest US petroleum companies. These companies controlled between 51% and 59% of various facets of the oil industry: G A Fraas, "Structural Shared Monopoly Under FTC 5: The Implications of the Exxon Complaint" (1975-6) 26 Case W L Rev 615, 649.

[120] *Cereals* [1979-83 Trans Bind] TRR (CCH) para 22003, 22625 (1983); *Exxon Corp* [1979-83 Trans Bind] TRR (CCH) para 21-866, 22120. *Exxon* foundered on administrative problems. In *Cereals*, the problem seems to have been, to a large extent, that the FTC could not frame a suitable remedy. Divestiture was too harsh and orders to restrain particular types of conduct may not have been effective.

[121] [1976-79, Trans Bind] TRR (CCH) para 21-579, 21698, 21699.

[122] The FTC later claimed that it also wanted to rely on conspiracy. This issue is covered in the report at [1979-83 Trans Bind] TRR (CCH) para 22003, 22526.

[123] This description of the Federal Trade Commission's complaint is based on the dictum of Latchum ChJ in *E I du Pont de Nemours and Co* v *FTC* [1980-82] Trade Cases para 63-340, 75733 at 75734: Compare *Ethyl Corp* with *US* v *General Motors Corp and Ford Motor Corp* [1974-2] Trade Cases Para 75-253, 97656 and with the "GE-Westinghouse" cases: *US* v *General Electric Co and Westinghouse Corp* [1977-2] Trade Cases para 61-659, 72715; *US* v *General Electric Co* [1977-2] Trade Cases para 61-660, 72717 and *US* v *Westinghouse Electric Corp* [1977-2] Trade Cases para 61-661, 72721.

[124] See n 122.

[125] (1984) 729 F 2d 128.

[126] USCA 2nd Cir.

the Federal Trade Commission. Mansfield Circ J, who delivered the leading judgment, rejected the Federal Trade Commission's case comprehensively. His Honour indicated that even if he accepted the theory put forward by the Federal Trade Commission, he rejected its application to the facts of the case. The Federal Trade Commission had acknowledged that the facilitating device would only breach s 5 of the FTC Act if their effect was to substantially lessen competition.[127]

In the opinion of Mansfield Circ J, however, such significant lessening of competition had not occurred or at least had not been sufficiently demonstrated.[128]

What is more significant for our purposes, though, than Mansfield Circ J's finding on the facts is His Honour's strong indication that he would not find a breach of s 5 of the FTC Act unless there were "at least some indicia of oppressiveness".[129] The examples which His Honour gave of such indicia were:

> (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.[130]

The furthest that Mansfield Circ J was prepared to go was to acknowledge that the argument of the Federal Trade Commission might have "some merit"[131] in cases in which the defendants "were unable to come forward with some independent legitimate reasons for their adoption"[132] of practices which had the "effect of facilitating conscious price parallelism and interdependence".[133]

If Mansfield Circ J's views receive wide acceptance, it seems that s 5 of the FTC Act will add little to the Sherman Act prohibition on collusive, anti-competitive behaviour.[134]

4 REMEDIES

The discussion of remedies in this paper will not cover the whole range of penalties and liabilities which can be incurred by persons who violate antitrust laws. The focus, rather, will be on the problems of law enforcement and remedial action which are particularly relevant to oligopolistic parallel pricing and conscious parallelism. It would be somewhat remiss, however, not to give any attention to criminal sanctions and to private actions for damages. Accordingly, these matters will be dealt with without further ado.

---

[127] 729 F 2d 128, 141.
[128] *Ibid* 142.
[129] *Ibid* 139.
[130] *Ibid.*
[131] *Ibid* 140.
[132] *Ibid.*
[133] *Ibid.*
[134] Lumbard Circ J said as much in the course of dissenting from Mansfield Circ J's views as to the scope of s 5 FTC Act 729 F 2d 128, 143.

A *Criminal Sanctions*

A criminal violation of ss 1 or 2 of the Sherman Act is a felony punishable by fines and/or imprisonment.[135] The fine for a corporation can be up to $1 million and for other persons the fine can be up to $100,000.[136] The imprisonment which can be ordered for a breach of ss 1 or 2 of the Sherman Act is for a period not exceeding three years.[137]

The standard of proof which must be satisfied by the prosecution is to prove its case "beyond a reasonable doubt".[138]

Violation of the Sherman Act can also lead to prosecution under s 14 of the Clayton Act. Under this section, a director, officer or agent of a compmany who has violated any of the penal provisions of the anti-trust laws[139] may be guilty of a misdemeanor punishable by a fine not exceeding $5,000, and/or imprisonment for a term not exceeding one year.

Naturally, the possibility of incurring a criminal conviction with the attendant punishment and social stigma must play a significant role in dissuading people from engaging in pricing practices which could be in breach of the Sherman Act.[140] The problem of defining the scope of legal behaviour, however, still remains.

B *Private Actions for Damages*

Section 4 of the Clayton Act provides, in part, that

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws[141] may sue therefore ... and shall

---

[135] The sanctions are set out in ss 1 and 2 themselves.

[136] The corresponding maxima under the TPA are $250,000 for bodies corporate and $50,000 for other persons. See TPA s 76.

[137] There is no provision in the TPA for the imposition of terms of imprisonment.

[138] Trade Regulation Reporter (CCH) para 8750, 14301. In Australia, s 78 of the TPA provides that criminal proceedings shall not be brought for offences involving Part IV of the Act. This is the part of the Act in which ss 45 and 45A are situated. Nonetheless, given the size of the penalties which can be imposed, it is appropriate to describe proceedings for breaches of Pt IV of the TPA as being "quasi-criminal" in nature. This has been recognised by the courts. In *TPC* v *Allied Mills Industries Pty Ltd and Ors* (1981) ATPR 40-237, for example, Sheppard J described the relevant standard of proof as being "upon a balance of probabilities but taking into account very much the seriousness and gravity of the allegations which are made". (1981) ATPR 40-237, 43143, 43155. His Honour relied on *Briginshaw* v *Briginshaw* (1938) 60 CLR 336, 361-362 *per* Dixon J.

[139] The term "anti-trust laws" is defined in s 1 of the Clayton Act and its scope includes the Sherman Act.

[140] The FTC Act does not provide for sanctions for the types of practices which we are considering here. The Federal Trade Commission can issue "cease and desist" orders but "these orders carry no criminal or civil penalties for past conduct ..." P Areeda and D F Turner, *Antitrust Law* Vol II (1978) para 305e, 15. Additionally, penalties cannot be imposed on the directors, officers or agents of a corporation under s 14 of the Clayton Act as the definition of "antitrust laws" in s 1 of that Act does not include the Federal Trade Commission Act.

[141] As noted in *supra* n 139, the definition of "antitrust laws" in s 1 of the Clayton Act includes the Sherman Act. The FTC Act, however, is not included in the definition. Accordingly, "private suits based upon a violation of this law are not authorised". 2 Trade Regulation Reporter (CCH) para 9022, 15022.

> recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee ...[142]

It would seem to be reasonable to conclude that a possible liability to a suit for treble damages would have a strong deterrent effect on the minds of potential price-fixers.

C *Equitable Relief*

Government actions for equitable relief for violations of the Sherman Act[143] are based on s 4 of that act. Section 4 invests the district courts of the United States with "jurisdiction to prevent and restrain violations" of the Sherman Act and directs the government "to institute proceedings in equity to prevent and restrain such violations". These provisions have been interpreted very liberally to allow courts to grant wide ranging affirmative relief.[144] Indeed, the jurisdiction conferred by s 4 of the Sherman Act has even been extended to the structural remedies of divestiture, dissolution and divorcement.[145]

Private actions for equitable relief for violation of the Sherman Act are not based on a provision of that act but, rather, are based on s 16 of the Clayton Act. Section 16 entitles any person, corporation or association to seek "injunctive relief" when affected by a violation of the "antitrust laws".[146] Injunctive relief under s 16 of the Clayton Act, like orders under s 4 of the Sherman Act to "prevent and restrain violations" of that Act, has been given a very wide scope. One important difference between the two provisions, though, is that divestiture will probably not be allowed in an action for injunctive relief based on s 16 of the Clayton Act.[147]

---

[142] Section 82 of the TPA allows private actions for damages resulting from breaches of the TPA. Only actual damages, however, can be recovered.

[143] The FTC is empowered by s 5 of the FTC Act to issue "cease and desist" orders. These orders are very similar to judicial injunctions and like judicial injunctions can extend well beyond "a mere negative injunction against repetition of the challenged practice" P Areeda and D F Turner, *Antitrust Law* Vol II (1978) para 305e, 16.

[144] In *United States* v *Glaxo Group Ltd and Imperial Chemical Industries Ltd* (1974-1) Trade Cases para 74883, p 95978 and para 74884, 95982 the order which was made mandated compulsory patent licensing for five years on reasonable terms. See also the cases digested in 2 Trade Regulation Reporter (CCH) para 8822.

[145] Henceforth all three of these variants of structural relief will be referred to collectively as "divestiture". In *US* v *Clovis Retail Liquor Dealers Trade Association* (1978-1) Trade Cases para 62-022, 74400 an order was made to dissolve the trade association in question. Extensive prohibitions on exchanging price information were also decreed. In *United States* v *Western Electric Co Inc and American Telephone & Telegraph Co* (1982-2) Trade Cases para 64900, 72555 American Telegraph and Telephone Co was ordered to divest itself of its operating companies. See also the cases digested in 2 Trade Regulation Reporter (CCH) para 5824.

[146] As noted in *supra* n 139, the Sherman Act comes within the definition of "antitrust laws" in s 1 of the Clayton Act. As noted *supra* n 141, however, the Federal Trade Commission Act does not come within the definition.

[147] There has been some doubt on this point. In *Mr Frank Inc* v *Waste Management Inc* (1984-1) Trade Cases para 66024, 68535 (CUSDC N Dist Ill ED) it was stated that divestitute has never been allowed on a private suit and that "injunctive relief" in s 16 of the Clayton Act does not include divestiture: see pp 68538-68539. Divestiture *may* be available to private litigants in anti-merger cases: see 2 Trade Regulation Reporter (CCH) para 9020, 15201 and P Areed and D F turner, *Antitrust Law* Vol II (1978) 328b, 136. In Australia, s 81 of the Trade Prac-

Injunctions, to stop anti-competitive practices such as price signalling and the adoption of artificial pricing formulas, are clearly of direct and major importance as a remedy for poor competitive performance by oligopolists. One problem which has arisen, however, is the extent to which injunctions may validly proscribe lawful behaviour. This problem is of especial significance for the promotion of competition in oligopolies as much of the anti-competitive behaviour of oligopolists is in itself, at least arguably legal.[148]

In the United States it has long been recognised that "to ensure that the relief in an antitrust case is effectual, otherwise permissible practices connected with the illegal acts must sometimes be enjoined".[149] In *United States* v *Paramount Pictures Inc*,[150] for example, the Supreme Court stated that "equity has the power to uproot all parts of an illegal scheme – the valid as well as the invalid – in order to rid the trade or commerce of all taint of the conspiracy".[151]

Similar statements by the Supreme Court abound[152] and the principle is firmly entrenched.[153]

Consent decrees in government antitrust suits benefit from the wide ranging jurisdiction of United States courts to grant relief which was noted above.[154] Consent decrees in government antitrust suits, however, are sub-

---

tices Act provides that compulsory disposal of shares may be ordered where there has been a merger or acquisition in breach of s 50 of the Act. Application under s 81 can be made by the Minister, the Trade Practices Commission or "any other person". Serious doubts have been raised as to the constitutionality of s 81: see (1985) 1 Trade Practices Reporter (1985) (CCH, Australia) para 18265, 13233-13234.

[148] The problem is greatly obviated with respect to actions brought under the FTC Act by cases such as *Federal Trade Commission* v *Sperry and Hutchinson Co* (1972) 405 US 233. In this case it was recognised that the scope of s 5 of the FTC Act extends beyond either the letter or the spirit of the antitrust laws. See p 91 above.

[149] 54 Am Jur 2d para 380, 876.

[150] (1948) 334 US 131.

[151] *Ibid* 148.

[152] See for example *National Society of Professional Engineers* v *United States* 435 US 679, 696-699; D B Levendusky, "Propriety and Scope of Injunctive Relief in Federal Antitrust Cases – Supreme Court Cases" (1977) 55 L Ed 2d 892 especially paras 14 and 15, 910-913.

[153] In Australia, the power of the Court to grant injunctions under the TPA derives from s 80 of that Act. An injunction may be granted "in such terms as the Court determines to be appropriate" s 80(1) and this includes mandatory injunctions – s 80(5). It would seem, therefore, that the Court has a free hand to enjoin legal as well as illegal behaviour. This is not entirely correct, however, as the Court can only make orders under s 80 where it "is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute" a contravention of Pt IV or Pt V of the TPA, or else constitutes or would constitute a related contravention (see s 80(1)). This restriction raises special problems with respect to consent orders. See *infra* n 155.

[154] See E J Branfman, "Antitrust Consent Decrees – A Review and Evaluation of the First Seven Years under the Antitrust Procedures and Penalties Act" (1982) 27 *Antitrust Bulletin* 303; J A Glenn, "Supreme Courts Views Regarding Consent Judgments, Decrees, or Orders in Proceedings Under the Federal Antitrust Laws or Federal Trade Commission Act" 43 L Ed 2d 807, paras 3 and 4, 813-815.

In Australia, the power of a court to make a consent order under the TPA is hampered by the provision in s 80(1) (the injunctions section) that a court may only make an order under the section if it "is satisfied that a person has engaged, or is proposing to engage" in conduct that would constitute one of the contraventions referred to in the section. In *Visy Board Pty Ltd* v *Trade Practices Commission* (1984) ATPR para 40-435, 45006 Woodward J, by way of obiter, indicted that discontinuance of proceedings had been sought rather than a consent order

ject to detailed public notification procedures.[155] The proposed, consent decree must be filed in court and published in the Federal Register at least sixty days before the proposed consent decree is to become effective. Any written comments on the proposed consent decree and any government responses must be published within the sixty day period. Copies of the decree and of the documents, on which the United States government relies, must be available to the public at the district court at which the proposed consent decree was filed.

The United States government is required to prepare a "competitive impact statement" which must set out, *inter alia*, an explanation of the consent decree and the alternatives to the decree that were considered by the government. The competitive impact statement and a summary thereof must be published. Certain other relevant documents must also be published.

Members of the public may file comments and apply to participate in the court proceedings concerning the proposed consent decree. The United States government is required to receive and consider the views of the public and at the end of the sixty day period to publish responses in the Federal Register unless it has already done so.

Finally, after the review procedure outlined above, the court must decide, on the basis of an examination of the "public interest", whether or not to accept the proposed consent decree.[156]

D *Legislative Intervention*

When considering the "remedies" for oligopolistic parallel pricing, it may be worthwhile noting the possibility of legislative intervention. Such intervention could involve amendment of the substantive law on "price fixing" and unfair competitive practices.[157] Such legislative intervention could also involve the adoption of legislation designed to break up monopolies and oligopolies.[158] Another alternative that should not be overlooked is market regulation.

---

under s 80(1) because that provision "did not permit a consent judgment unless the Court could be satisfied that the facts justifying it had been established – and this was not possible without an extensive hearing": (1984) ATPR para 40-455, 45008. Although His Honour was referring to an illegal mergers case, his comments regarding the need for an exensive hearing would seem to apply to most if not all of the contraventions of the TPA for which relief under s 80(1) might be sought.

[155] The procedures are set out in s 5(b)-(h) of the Clayton Act. The procedures apply to consent decrees in government actions brought for violations of the "antitrust laws". This does not cover proceedings under the FTC Act. The consent procedures for the FTC Act cases are contained in 16 CFR s 2.34. These procedures are roughly similar to those which apply to consent orders in antitrust cases. See 3 Trade Regulation Reporter (CCH) para 9595, 17096-17097.

[156] *Thompson Australian Holdings Pty Limited* v *The TPC and Ors* (1981) ATPR 40-234 illustrates some of the problems which can be incurred in Australia as a result of not having a consent-order review procedure along the lines of the US model.

[157] Legislation could be passed, for example, to ban various *unilateral* acts by competitors which are conducive to collusion or which are inherently anticompetitive.

[158] See, for example, the "Concentrated Industries Act" which was proposed by US Senate Bill 2614, introduced in 1971 92nd Congress 1st Sess (Sept 30, 1971 s 15442-15449). This act was recommended by the White House Task Force on Antitrust Policy. The Act is reprinted in (1971) 4 (4) Antitrust L and Econ Rev 40-46.

5 CONCLUSION

The Australian law on oligopolistic conscious parallelism is still in its infancy and much is still to be learned. The more mature, United States materials provide a rich source of information which can be of invaluable assistance in interpreting our own law, predicting its future development and assessing the desirability of various possible avenues of law reform.

It is hoped that the Australian law on oligopolistic conscious parallelism will not be trapped in a parochial parthenogenesis.