

CURBING CORPORATE COLLUSION IN AUSTRALIA: THE ROLE OF SECTION 45A OF THE TRADE PRACTICES ACT

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[When s 45A was added to the Trade Practices Act 1974 (Cth) in 1977, price-fixing became illegal per se. Since then a large number of cases have been brought successfully, with much higher pecuniary penalties being ordered in recent times. Following the recommendations of the Dawson Committee, new legislation is likely to be passed in 2005 that recognises the need for even higher pecuniary penalties for Part IV conduct (including price-fixing, an offence that several judges have recently characterised as being of great social concern). Also on the horizon is the prospect of jail terms for executives engaging in price-fixing. This article reviews the history of price-fixing legislation and its enforcement in Australia. It highlights the development of jurisprudence on the identification of price-fixing, and on the appropriate penalties for this offence. It presents statistical evidence on the trend in cases, success rates, the firms and markets involved, and on the actual pecuniary penalty levels. In addition, consideration is given to the form of collusion on prices, whether it took place contemporaneously with other anti-competitive conduct, the length of the price-fixing arrangements and their social effects, the degree of culpability, the availability of 'smoking gun' evidence, and the extent to which penalties were fully argued in court or were negotiated with the Australian Competition and Consumer Commission and presented to the court for its approval.]

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I INTRODUCTION

The *Trade Practices Act 1974* (Cth) ('*TPA*') has been in operation for three decades. During that period it has been reviewed several times, had major sections rewritten, and seen significant amendments and additions. It is unquestionably now a tougher law than it was in 1974, in terms of both the breadth and depth of its prohibitions and penalties.

Sections 45(2)(a)(ii) and 45(2)(b)(ii) of the *TPA* prohibit any provisions of contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market. In 1977, s 45A was added.¹ Under s 45A(1) an actual or proposed provision of a contract, arrangement or understanding that has the purpose, or has or is likely to have the effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to certain goods or services (hereafter referred to as price-fixing), is deemed to have had the required anti-competitive effect. In effect, price-fixing became illegal per se from that time.

Since 1977 a large number of cases alleging price-fixing have been brought in the Federal Court of Australia, the great majority of them being public actions taken by the Australian Competition and Consumer Commission and its predecessor, the Trade Practices Commission (collectively, 'the Commission'). The Commission has amassed an admirable string of victories in these cases. On 21 January 1993, the maximum pecuniary penalty per offence by a corporation was increased to \$10 million.² This substantial monetary deterrent might lead one to think that price-fixing would be found less frequently as time goes on. However, this has not been the case. Collusion on prices in Australian markets is far from being eradicated.

Why is this? Has enforcement been reactive rather than proactive? Have the penalties determined by the Federal Court provided little real deterrence to future offenders? Has the increasing willingness of the Commission to negotiate mutually-agreeable penalties with offenders who have been caught with the 'smoking gun' or 'hot document', or who decide to admit their conduct, led to firms who are contemplating collusion to make an economically rational decision to break the law, as the expected benefits of collusion outweigh the expected cost of getting caught?

In discussing these and other enforcement and policy issues, the article starts with a brief history of the law against price-fixing in Australia. The parameters

¹ *Trade Practices Amendment Act 1977* (Cth) s 25. This came into effect on 1 July 1977.

² As a result of s 10 of the *Trade Practices Legislation Amendment Act 1992* (Cth).

of this article are mostly limited to the matters that are unique to s 45A, rather than also being applicable to other sections of the *TPA*.³ This is followed by an examination of the 48 cases heard since 1977 which pleaded s 45A, and a consideration of the nature of the offenders. This is coupled with an analysis of the offences, including the jurisprudence developed in the cases, and the pecuniary penalties that have been handed down, both contested and agreed.⁴ We conclude by suggesting a blueprint for the law and enforcement against price-fixing in Australian markets.

II A BRIEF HISTORY OF SECTION 45A

A *Legislative History*

Section 45A was not part of the original *TPA* introduced in 1974. Rather, it was added three years later. In the *TPA* of 1974, s 45(2) prohibited contracts, arrangements or understandings in restraint of trade or commerce. Price-fixing was referred to in ss 45(3) and 45(4) of the original *TPA*: a contract, arrangement or understanding, including price-fixing conduct, having only a slight effect on competition (so as to be insignificant) was not prohibited. Price-fixing conduct was only prohibited if it had the effect or likely effect of substantially lessening competition. In practice, price-fixing was initially treated no more seriously than other kinds of anti-competitive conduct.

Section 45A was added following the report of the Trade Practices Act Review Committee ('Swanson Committee'),⁵ which recommended that price-fixing be absolutely prohibited and not authorisable (subject to certain limited exceptions) because

such agreements will so rarely be in the public interest that the costs in time and money, both for industry and government, involved in allowing attempts to justify such agreements far outweigh the social benefits which might flow from the possibility of an occasional successful justification ...⁶

Such a perspective was by no means revolutionary, but rather reflected the conventional economic and social wisdom that was the basis of per se prohibitions against price-fixing in other jurisdictions, most notably in the United States.

The Commission stated that the underlying policy of the 1977 amendments was 'to strengthen competition and thereby efficiency in industry and commerce'.⁷ The Commission also noted that 'any administration that is concerned

³ For example, we do not discuss how the interpretation of 'contract, arrangement or understanding' has developed over time, as this wording is used in many other sections in Part IV of the *TPA*.

⁴ We do not seek to analyse the other types of penalty that can be ordered against a price-fixer as the policy focus has been almost entirely on pecuniary penalties and, more recently, on criminal penalties for implicated executives.

⁵ Trade Practices Act Review Committee, Parliament of Australia, *Report to the Minister for Business and Consumer Affairs* (1976) ('Swanson Committee Report').

⁶ *Ibid* [4.59].

⁷ Trade Practices Commission, *Fourth Annual Report* (1978) 1–2.

with encouraging competition must start with price agreements, because if it is not effective there it cannot begin to be effective anywhere else'.⁸

From the time s 45A was introduced, price-fixing was deemed to substantially lessen competition unless an exception applied.⁹ At the same time, s 45 was significantly amended — the substantial lessening of competition test replaced the restraint of trade test for provisions of contracts, arrangements or understandings.

Section 45A is a deeming provision. It does not, of itself, prohibit conduct. In the words of Lockhart J:

Section 45A operates within the general framework of s 45. Section 45A in terms prohibits nothing; that is the work of s 45. What s 45A(1) does is provide that the specific matters to which it is addressed shall constitute the necessary elements of substantial lessening of competition for the purposes of s 45 without additional or other proof. The remaining subsections of s 45A in the main provide exceptions to the operation of sub-s (1) ... The general operation of s 45 is not affected and is not diminished.¹⁰

Section 45A remained virtually untouched from 1977 until 1995 when it was amended following the delivery of the report by the Independent Committee of Inquiry ('Hilmer Committee').¹¹ The Hilmer Committee, established by the Australian Labor Party government to review national competition policy, recommended that s 45A(1) be retained in the *TPA*, stating that it was

warranted on the basis that the occurrence of efficiency-enhancing price-fixing agreements is rare, that the benefits of identifying and permitting efficiency-enhancing price-fixing agreements in a court setting are outweighed by the enforcement and judicial costs of a competition test and the benefit from the certainty induced by such clear rules.¹²

As a result of the Hilmer Committee's recommendations, various amendments were made to s 45A. Since 1977, one of the exceptions to s 45A(1) had related to recommended price agreements that involved the prices to be paid or charged for goods by 50 or more competitors.¹³ This exception, contained in s 45A(3), was repealed following the recommendations of the Committee that:

Price 'recommendations' may be a cloak for underlying price-fixing agreements, and may in reality have the effect of 'fixing' price. With a large group, maintaining adherence to underlying agreements will be difficult, so that an agreed price is more likely to be a 'genuine' recommendation. Nevertheless, even genuine recommendations may have the effect of encouraging greater

⁸ *Ibid.*

⁹ At the time s 45A was introduced into the *TPA*, the Commission was also given the power to authorise price-fixing in relation to services (but not goods) — see *Trade Practices Amendment Act 1977* (Cth) s 54(1) — although this power has only been used infrequently.

¹⁰ *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206, 226 ('*SSA Appeal*').

¹¹ Independent Committee of Inquiry into National Competition Policy, *National Competition Policy* (1993) ('Hilmer Committee Report'). The changes to s 45A of the *TPA* which came into effect on 20 July 1995 are set out in the *Competition Policy Reform Act 1995* (Cth) s 10.

¹² Hilmer Committee Report, above n 11, 36–7.

¹³ The exception was added to 'leave room for possible legitimacy of recommended price agreements for small business': Trade Practices Commission, above n 7, 2.

price uniformity ... If a price recommendation does have the effect of 'fixing, controlling or maintaining' price there seems little reason to treat it differently from other price fixing agreements. ... Removing the exemption ... will ... underline the message that price competition is central to effective competition and will prohibit agreements, however described and comprising however many firms, which have an adverse effect on competition.¹⁴

In addition — and somewhat inexplicably —¹⁵ the government made authorisation possible for price-fixing relating to goods, despite the Hilmer Committee's recommendation that authorisation for price-fixing be removed altogether.¹⁶

The current form of s 45A(1) is as follows:

Without limiting the generality of s 45, a provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price for, or a discount, allowance, rebate or credit in relation to, goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding or the proposed parties to the proposed contract, arrangement or understanding, or by any of them, or by any bodies corporate that are related to any of them, in competition with each other.

Today, s 45A(1) has only two exceptions.¹⁷ Section 45A(2) provides that s 45A(1) does not apply to a provision of a contract, arrangement or understanding for the purposes of a joint venture.¹⁸ Section 45A(4) provides that s 45A(1) does not apply to a provision of a contract, arrangement or understanding in relation to the price for goods or services to be collectively acquired, or for the joint advertising of the price for the supply of goods or services so acquired. However, such conduct can still be illegal, if it substantially lessens competition, under s 45(2).

With so few substantive changes having been made to s 45A since its introduction, a widespread legal, economic and political view that it is working well is said to exist. The fact that price-fixing has not been eliminated in Australia is not the fault of the legislation, but rather, we respectfully suggest, the result of:

- the fact that price-fixing can be difficult to detect;¹⁹

¹⁴ Hilmer Committee Report, above n 11, 38–9.

¹⁵ The Hilmer Committee noted that there seemed to be no logical reason for distinguishing between price-fixing in relation to goods, and price-fixing in relation to services: *ibid* 37. It appears that when considering these amendments the government thought that if authorisation regarding price-fixing for services was retained, no good reason existed to disallow granting authorisation in respect of goods.

¹⁶ *Ibid* 34, 37. See also *Competition Policy Reform Act 1995* (Cth) s 16.

¹⁷ These exceptions are still largely in the form in which they appeared in the amending Act: *Trade Practices Amendment Act 1977* (Cth) s 25.

¹⁸ As defined in the *TPA* s 4J. However this is only to the extent that it relates to the joint supply by the joint venture parties of goods jointly produced or services jointly provided by all the parties in pursuance of the joint venture.

¹⁹ The Commission is implementing various procedures to assist it to detect price-fixing and other types of collusion. See below, Part IV(H).

- a risk-averse Commission that has perhaps taken the ‘easier’ cases where the evidence is strong, and avoided the ‘harder’ cases; and
- a conservative judiciary that, until recently, while willing to find price-fixers guilty of breaching the *TPA*, was not prepared to set pecuniary penalties anywhere close to the maximum permitted under the *TPA*.

B *The Development of Jurisprudence*

The first judicial consideration of s 45A was that of Fisher J in *Trade Practices Commission v Nicholas Enterprises Pty Ltd*.²⁰ The application of s 45A has been largely uncontroversial since that time, with a mostly commonsense and ‘plain reading’ approach to its interpretation adopted. Many different types of price-fixing contracts, arrangements and understandings have been considered by the Federal Court. Over time, various questions of interpretation have been considered and addressed, with the Court concluding that:

- Not every party to a price-fixing contract, arrangement or understanding must be in competition with each other, although at least two parties must be.²¹
- The price fixed cannot be momentary or transitory,²² however the price need not be fixed for any length of time.²³
- An agreement on price which lacks specificity may still be found to constitute control of prices but controlling a component of a price as opposed to the overall price will not constitute price-fixing.²⁴
- Section 45A can apply where price controlling is not actually part of the mutual commitments that constitute the contract, arrangement or understanding and is only the effect or likely effect of them.²⁵

As price-fixing is by its very nature difficult to detect and therefore difficult to prove, the Federal Court accepted in the first case heard under s 45A that it was possible to infer a price-fixing understanding from circumstantial evidence.²⁶ In *David Jones*, Fisher J held that the acts of the respondents in selling manchester at particular prices exhibited

a concurrence of ‘time, character, direction and result’ that ... taken in conjunction with the meeting and the circumstances in which it was held, encourage the drawing of the inference that the acts were ‘the outcome of pre-concert’ ...²⁷

²⁰ (1979) 28 ALR 201 (*Nicholas Enterprises*).

²¹ *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1986) 13 FCR 446, 473 (Fisher J) (*David Jones*).

²² *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557, 567 (Lockhart J) (*Radio 2UE Sydney*).

²³ *Trade Practices Commission v Parkfield Operations Pty Ltd* (1985) 7 FCR 534, 540 (Bowen CJ, Smithers and Morling JJ) (*Parkfield Appeal*).

²⁴ *Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd* (1999) 92 FCR 375, 415 (Lindgren J) (*ACCC v CC (NSW)*).

²⁵ *Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd [No 9]* (2000) 22 ATPR ¶41-756, 40 823 (Lindgren J).

²⁶ *Nicholas Enterprises* (1979) 28 ALR 201.

²⁷ (1986) 13 FCR 446, 468.

Additionally, failure to advance an acceptable explanation for an outcome with the appearance of price-fixing will not assist parties to successfully defend a price-fixing action.²⁸ While the prices charged by the relevant parties need not be identical, a lack of uniformity of prices will assist in supporting a conclusion that there has been no price-fixing.²⁹

An arrangement or understanding usually involves communication between the parties, the raising of an expectation, and the acceptance of mutual obligations — more than a mere hope of an outcome.³⁰ At trial in *Trade Practices Commission v Parkfield Operations Pty Ltd*, Fox J said:

At the least, one or more parties will be expected to take steps about prices on the footing that a course is followed, or maintained, by another or others. A 'meeting of minds' may be sufficient, provided that there is an expression of what is in the mind, or some activity reflecting it.³¹

However, in 1980 Bowen CJ noted that 'one could have an understanding between two or more persons restricted to the conduct which one of them will pursue without any element of mutual obligation.'³²

In the *SSA Appeal*, Spender and Lee JJ found (although it was not necessary for the relevant case) that it was

difficult to envisage circumstances where there would be an understanding ... involving a commitment by one party as to the way it should behave, without some reciprocal obligation by the other party.³³

Therefore, whether mutual obligations are necessary in order to establish an understanding under s 45 remains unresolved, a quarter of a century after *Nicholas Enterprises*.³⁴

On occasion, the issue has arisen of whether pro-competitive price-fixing (which to many people, at least to most economists, is a prime oxymoron) is prohibited. For example, in *Radio 2UE Sydney*, Lockhart J said:

It is important to distinguish between arrangements ... which restrain price competition and arrangements which merely incidentally affect it or have some connection with it. Not every arrangement between competitors which has some possible impact on price is *per se* unlawful under the section.

Nor, in my view was s 45A introduced by Parliament to make arrangements unlawful which affect price by improving competition.³⁵

²⁸ Ibid 469.

²⁹ *Trade Practices Commission v Service Station Association Ltd* (1992) 109 ALR 465, 483 (Heerey J) ('SSA Trial').

³⁰ *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 719, 735 (Toohey J).

³¹ (1985) 5 FCR 140, 144 ('Parkfield Trial'); see also *Parkfield Appeal* (1985) 7 FCR 534, 540 (Bowen CJ, Smithers and Morling JJ).

³² *Morphett Arms Hotel Pty Ltd v Trade Practices Commission* (1980) 30 ALR 88, 91.

³³ *SSA Appeal* (1993) 44 FCR 206, 238.

³⁴ This is discussed in *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Ltd* (2001) 23 ATPR ¶41-816, 42 956 (Dowsett J).

³⁵ (1982) 44 ALR 557, 566.

In that case, both radio stations subject to the action had established their advertising rates independently and were free to vary their price at any time, but marketed their rates together. The Court found that no price-fixing existed.

C Proposed Changes to the TPA

On 24 June 2004, the Trade Practices Legislation Amendment Bill 2004 (Cth) was introduced into the Commonwealth Parliament.³⁶ Its aim was to implement some of the Commonwealth Government's responses to the Committee of Inquiry's report, *Review of the Competition Provisions of the Trade Practices Act*.³⁷ The only proposed amendment that relates specifically to price-fixing is one that repeals the existing joint venture exception in s 45A(2).³⁸ In its place will be a defence available to joint ventures that are able to establish that their price-fixing occurred for the purpose of the joint venture and that it did not have the purpose or effect of substantially lessening competition.³⁹ This change will broaden the exemption available to joint ventures as they will in effect need only to ensure that they do not breach s 45 of the *TPA*. Whether this amendment reduces the number of price-fixing cases successfully investigated by the Commission remains to be seen.

Also relevant in terms of deterring potential price-fixers are the proposed additional penalties for breaches of Part IV of the *TPA*:

- corporate pecuniary penalties will be the greater of the current maximum (\$10 million) or three times the value of the benefit. If the benefit cannot be determined, it will be assessed based on 10 per cent of annual turnover over the 12 months preceding the conduct;⁴⁰
- a person implicated in the conduct can be disqualified from managing corporations for a period;⁴¹ and
- corporations will be unable to indemnify officers against pecuniary penalties and associated legal costs for actions that constitute prohibited conduct.⁴²

III THE CASES AND THE OFFENDERS

A The Trend in the Number of Cases Heard

A large number of cases brought under s 45A have been dealt with by the Federal Court. One might expect that since collusion on prices was deemed illegal, and as pecuniary penalties rose, a decline might be observed in the

³⁶ Now known as the Trade Practices Legislation Amendment Bill (No 1) 2005 (Cth) ('TPLA Bill'). The original bill lapsed when the 2004 federal election was called and has subsequently been reintroduced.

³⁷ Committee of Inquiry, *Review of the Competition Provisions of the Trade Practices Act* (2003) ('Dawson Report').

³⁸ TPLA Bill sch 5, item 1.

³⁹ TPLA Bill sch 5, item 2, inserting proposed s 76D.

⁴⁰ TPLA Bill sch 9, item 4, inserting proposed s 76(1A).

⁴¹ TPLA Bill sch 9, item 20, inserting proposed s 86E.

⁴² TPLA Bill sch 9, item 23, inserting proposed s 77A.

annual number of price-fixing cases brought by the Commission. Surprisingly, this has not been the result.

Between 1977 and 2004, we have identified 48 price-fixing cases that were brought to a conclusion, of which only nine decisions were appealed.⁴³ We selected cases for consideration on the basis of whether they were identified as having a s 45A element in the ‘Section Finding List’ or the ‘Consolidated Section Finding List’ (as applicable) of CCH’s *Australian Trade Practices Reports*.⁴⁴ Our cut-off date was the update to the CCH *Australian Trade Practices Reporter* dated 19 August 2004. Further to this, additional unreported cases involving s 45A were discovered in our research and have also been included in our analysis.⁴⁵

As it is by no means easy to determine when a case was filed, we used the date of the first instance decision as the reference point for classifying a case into a particular year.⁴⁶ In matters where there were multiple hearings at first instance, we have classified the case as being in the year in which the first hearing in the case was held. For some long-running matters such as the CC suite of cases,⁴⁷ the Tyco cases,⁴⁸ and the ABB transformer cases,⁴⁹ this will mean that case

⁴³ We have excluded cases where there was a successful strike-out application, those which were procedural in nature only, and those actions that resulted in interim orders only (with no final orders subsequently made).

⁴⁴ We also included any cases that were only listed under s 45 of the *TPA* in the index where other research identified these as price-fixing cases.

⁴⁵ *Australian Competition and Consumer Commission v Inghams Enterprises Pty Ltd*: this case was settled by the parties. See Australian Competition and Consumer Commission, ‘Maximum Penalties in SA Fowl Price Fix’ (Press Release, 15 December 1995); and the recent *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329 (‘*Midland Brick*’). This case was decided before our cut-off date which indicated that we should include it, and it has since been reported.

⁴⁶ Given the lengthy process between the Commission receiving an allegation of price-fixing and the time taken for investigation, decision to prosecute, trial preparation, hearing, and delivery of the written judgment, this method clearly acts as a lagging indicator of price-fixing activity. In addition, it only incorporates actions actually taken formally by the Commission — there may well be instances where for whatever reason (other priorities, lack of sufficient evidence) the Commission has chosen not to take action, and there will always be instances of collusive conduct that escape its attention.

⁴⁷ *Trade Practices Commission v CC (New South Wales) Pty Ltd* (1994) 16 ATPR ¶41-363; *Trade Practices Commission v CC (New South Wales) Pty Ltd* (1994) 125 ALR 94; *Trade Practices Commission v CC (New South Wales) Pty Ltd [No 2]* (1995) 17 ATPR ¶41-406; *Trade Practices Commission v CC (New South Wales) Pty Ltd [No 3]* (1995) 17 ATPR ¶41-415; *Trade Practices Commission v CC (New South Wales) Pty Ltd* (1995) 58 FCR 426; *Trade Practices Commission v CC (New South Wales) Pty Ltd [No 6]* (1995) 17 ATPR ¶41-431; *Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd* (1999) 92 FCR 375; *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd [No 9]* (2000) 22 ATPR ¶41-756.

⁴⁸ *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) 22 ATPR ¶41-740; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) 22 ATPR ¶41-760; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) 22 ATPR ¶41-772; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) 22 ATPR ¶41-788; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2000) 22 ATPR ¶41-789; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2001) 23 ATPR ¶41-796; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2001) 23 ATPR ¶41-798; *Australian Competition and Consumer Commission v Tyco Australia Pty Ltd* (2001) 23 ATPR ¶41-810.

⁴⁹ *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 115 FCR 436; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 3]* (2002) 24 ATPR ¶41-873; *Schneider*

activity has occurred in subsequent years but has not been ascribed to those particular years. At least by ascribing the price-fixing activity to the year of the first case, we are closer to the date at which the conduct actually occurred.

Table 1 shows that court enforcement activity against price-fixing was relatively low and steady from 1979–92. A total of 13 cases were decided in this period, an average of one per year, although no cases were decided in five different years in this period. Few of the matters were of any great substance given the nature of the collusion involved, but some interesting jurisprudence was produced in *Nicholas Enterprises*, *Radio 2UE Sydney* (the only case to involve a private prosecution), *David Jones*, and the *SSA Appeal*. Prosecutions accelerated in 1994 after the increase in maximum pecuniary penalty amounts (to \$10 million for a corporation and \$500 000 for an individual) came into effect. Over the 11 years between 1994–2004, 35 cases were heard, an average of 3.2 a year, with at least one case each year. These cases have included major prosecutions for serious price-fixing activity, which have led to very high pecuniary penalties.

Table 1: Annual Number of Price-Fixing Cases, 1979–2004

Year	Number	Year	Number	Year	Number
1979	1	1991	1	1999	4
1982	1	1992	1	2000	2
1983	2	1994	6	2001	4
1985	3	1995	3	2002	1
1986	2	1996	5	2003	3
1988	1	1997	3	2004	1
1990	1	1998	3		

The nine appealed decisions were spread widely, being heard in 1980, 1983, 1985, 1993, 1996, 2000, 2001, 2002 and 2003. There appear to have been no common threads in the appeals. Five were won in whole or in part;⁵⁰ four were unsuccessful.⁵¹ However, there may be an increasing tendency to appeal in cases

Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission (2003) 127 FCR 170 ('*Schneider*').

⁵⁰ *Parkfield Appeal* (1985) 7 FCR 534; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 ('*Frozen Foods*'); *J McPhee & Son (Australia) Pty Ltd v Australian Competition and Consumer Commission* (2000) 172 ALR 532 ('*McPhee*'); *Schneider* (2003) 127 FCR 170; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339 ('*Safeway*').

⁵¹ *Morphett Arms Hotel Pty Ltd v Trade Practices Commission* (1980) 30 ALR 88, 91 (Bowen CJ); *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361 ('*Radio 2UE Appeal*'); *SSA*

where breach was not admitted, or when guilt has been admitted but pecuniary penalty amounts have not been agreed upon. Five appeals are arguably very important decisions for their jurisprudence: *Morphett Arms Hotel Pty Ltd v Trade Practices Commission*,⁵² *Radio 2UE Appeal*,⁵³ *Frozen Foods*,⁵⁴ *McPhee*,⁵⁵ and *Schneider*,⁵⁶ as will be discussed below.

B Success Rate

The strike rate of the Commission in price-fixing matters brought under s 45A has been very high, as might be expected with a per se prohibition. Of the 47 cases it took to the Federal Court that proceeded to a final hearing, it lost in only five of them⁵⁷ — *Trade Practices Commission v Leslievale Pty Ltd*,⁵⁸ *SSA Appeal*,⁵⁹ *Safeway*,⁶⁰ *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc*⁶¹ (where the Australian Medical Association pleaded guilty but Mayne fought the charge and won) and *Australian Competition and Consumer Commission v Pauls Ltd*.⁶²

While some may argue that this is because the Commission only takes court action in the matters it is confident it can win, this outstanding success rate (losing outright in only three out of 47 cases — a mere 6.4 per cent of them) occurred despite the fact the breach was not admitted in seven cases. The Commission did not lose a single case where it pleaded s 45A between 1994 and 2001 (a period in which 27 cases were determined), and has lost only one case in its entirety from 1994 to 2004. Therefore, the odds that a firm will escape an unfavourable verdict for price-fixing are very low.

C The Judges

Actions in the Federal Court tend to be heard in the state where the respondent is based, or where the alleged conduct occurred. Given the regional nature of the Court, it could be expected that more price-fixing cases would be heard in Sydney and Melbourne than in other capital cities. Of the 48 cases considered, 29 of them at first instance were heard by only nine judges.

In Sydney, Lockhart J sat on six first instance cases and one appeal, and Lindgren J on two.⁶³ In Melbourne, Heerey J sat on four cases, while Goldberg

Appeal (1993) 44 FCR 206; *Australian Competition and Consumer Commission v Ithaca Ice Works Pty Ltd* (2002) 24 ATPR ¶41-851 ('*Ithaca*').

⁵² (1980) 30 ALR 88.

⁵³ (1983) 48 ALR 361.

⁵⁴ (1996) 71 FCR 285.

⁵⁵ (2000) 172 ALR 532.

⁵⁶ (2003) 127 FCR 170.

⁵⁷ Although it was successful in two of these cases against at least one of the respondents.

⁵⁸ (1986) 64 ALR 573.

⁵⁹ (1993) 44 FCR 206. This case was also lost at first instance: *SSA Trial* (1992) 109 ALR 465.

⁶⁰ (2003) 129 FCR 339. Note that the Commission succeeded in proving the allegations against Safeway, and that George Weston Foods Ltd had earlier pleaded guilty.

⁶¹ (2003) 199 ALR 423 ('*AMA (WA)*').

⁶² (2003) 25 ATPR ¶41-911.

⁶³ Lindgren J, however, sat on the entire CC suite of cases spanning some six years.

and Finkelstein JJ sat on three each. Goldberg J sat on one appeal. From the Adelaide Registry, Fisher and O'Loughlin JJ presided over three cases each, while Mansfield J sat on two. Lee J sat on three cases at first instance in Perth, and on one appeal. No Brisbane Registry judge has sat on more than one s 45A matter. From Perth, Carr J sat on one case at first instance and on two occasions sat on appeals. Burchett, Morling, Northrop, Sheppard, Spender, Wilcox and Woodward JJ each also sat on one case at first instance and on one appeal. Black CJ, and before him Bowen CJ, each sat on two appeals.⁶⁴

Whether deliberate or not, some concentration of judges on s 45A matters appears to have occurred, and it is from a small number of judges that the jurisprudence relating to s 45A has largely developed. Given that so few price-fixing cases have been contested, specialisation by certain judges in this area can only be a good thing as far as a consistent approach is concerned.

D *The Nature of the Offenders*

Collusion with rivals on prices in the cases reviewed do not appear to have been confined to any one kind of market or industry, size of firm, size of expected reward, or firm ownership type.

1 *Industry/Market*

Seventeen of the cases involved price-fixing at the retail level. Petrol was involved in six cases (two of which were lost entirely by the Commission, and in one it failed to prove breach by one of the respondents). This record is not matched by any other industry. Ready-mixed concrete, an industry that has featured internationally for decades for its price-fixing proclivities, was next with four cases. Two cases involved ice, and one case occurred in each of the beer, barbecues, bed linen, windscreen, automotive parts, cars, bread, biscuits, and alcohol markets. The wholesale supply of food, including salmon, milk (a case in which no breach was found), chicken and frozen food was also prominent.

There were 11 s 45A cases involving services. Two each related to commercial building services and road freight, while the others occurred in radio advertising,⁶⁵ tourism, car rentals, internet access, medical services,⁶⁶ roof tiling services, and real estate training.

The remaining cases, with the exception of animal vitamins, involved industrial products such as fittings and valves, steel pipes, scrap metal, fire protection equipment (two cases), industrial flexible polyurethane foam (two cases), polythene building film, electric power and distribution transformers, clay bricks, compressors and compressor parts.

⁶⁴ The trial judges in the five cases where the Commission lost in whole or in part were Carr J: *AMA (WA)* (2003) 199 ALR 423; Goldberg J: *Australian Competition and Consumer Commission v Australian Safeway Stores [No 3]* (2001) 119 FCR 1; Heerey J: *SSA Trial* (1992) 109 ALR 465; O'Loughlin J: *Australian Competition and Consumer Commission v Pauls Ltd* (2003) 25 ATPR ¶41-911; and Pincus J: *Trade Practices Commission v Leslievale Pty Ltd* (1986) 64 ALR 573.

⁶⁵ A private case, in which no breach was found.

⁶⁶ No breach was found against one of the respondents in this matter.

In most cases, the conduct was confined to a single state, or a geographically-concentrated area, typically capital cities. Twenty-one of the price-fixing cases that the Commission won in whole or in part related to conduct confined to a major city. Adelaide and Sydney had five cases each and Melbourne recorded four. Nineteen cases were state-wide or covered a large part of a single state. Queensland dominated with six successful prosecutions, which together with three other cases located in Brisbane, the Gold Coast and Cairns, meant that it hosted more discovered-and-punished price-fixing cases than any other state. Finally, four cases of collusion had national impact (road freight (twice), power and distribution transformers, and windscreens), and one (animal vitamins) was part of an international conspiracy.

2 *The Firms Involved*

Collusion on price may come about through a unilateral effort by one firm in a market, often the largest, or from a 'bottom up' belief by all or most of the firms in the market that the only way to gain greater profits is to conspire to raise prices across the board.

A clear pattern regarding the identity of offenders is not available based on the 45 examined cases where at least one firm was found to have engaged in price-fixing. This is not surprising, given that price-fixing can arise in response to many different triggers and manifest itself in many different ways. In many cases it involved all or most of the firms in the market, especially in markets where the number of rivals was not great; in others, only some of the firms were involved. Small businesses were frequently the respondents, but large firms were no less guilty of price-fixing, occasionally jointly and also in situations where the initiative came from a firm with significant market share or was perceived to be a market leader. Successful price-fixing does appear to have occurred in markets where a handful of firms had a high collective market share, whilst it has also been common in markets where large numbers of small players exist.

Domestic and overseas firms, public and private firms, large and small firms, single product and highly diversified firms, have all been found guilty of price-fixing in Australia. At the time of carrying out the price-fix, many offenders (including their subsidiaries) were amongst Australia's largest companies, including BHP, Boral, CSR, David Jones, TNT, Ampol Petroleum, Pacific Dunlop, James Hardie, Woolworths (twice), and George Weston Foods (twice).⁶⁷

⁶⁷ In *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2000) 22 ATPR ¶41-763, 40 992 ('*George Weston*'), Goldberg J had the relatively rare task of taking into account previous price-fixing contraventions by George Weston Foods Ltd in 1981 and 1997. See *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1981) 3 ATPR ¶40-252 — this case was not included in our analysis because the relevant conduct occurred before the introduction of s 45A — and *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 ('*GWF/Safeway*'). Goldberg J held that, as the 1981 contravention was found not to be part of the same pattern of conduct, it was of marginal significance. The 1997 contraventions were found to be of 'more immediate significance' and were taken into account in imposing the penalty: *George Weston* (2000) 22 ATPR ¶41-763, 40 992. After our cut-off date, George Weston was again found to have engaged in price-fixing conduct and was fined \$1.5 million. See *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2004) 210 ALR 486.

Respondents with prominent overseas origins have included Roche Vitamins, BASF, Aventis, ABB, Alstom, Schneider and SIP.

IV ANALYSIS OF THE OFFENCES

A major characteristic of the price-fixing cases is that judgments have tended to be short on analysis of the causes and effects of the agreements.⁶⁸ Where 'smoking gun' or 'hot document' evidence has not been available, the courts have failed to develop a structured method by which to assess whether price-fixing has occurred. It is nonetheless possible to summarise and evaluate some objective economic and legal characteristics of the cases to date.

A Actual or Attempted Collusion

Attempts to fix prices, even if they do not result in actual collusion, still indicate that potential exists in the market for firms to act in ways that are to the detriment of consumer welfare. Indeed, this is recognised in s 45A. Of the 45 successful cases, six were on the basis of attempted price-fixing, whilst 33 were the result of price agreements being put into effect. Three cases alleged both attempted and actual collusion, and in three other cases it was not possible to distinguish between the two possibilities.

B Other Contemporaneous Illegal Conduct?

If a firm intends or acts to fix prices, it might be expected that it could seek to thwart market forces in other ways as well. On the other hand, firms could reason perhaps that there is no need for further market controls if they can succeed in controlling prices. The evidence here is mixed. In 22 of the 45 cases, s 45A conduct was the only subject of the action. In 16 matters, market sharing conduct under s 45(2)(a)(ii) and s 45(2)(b)(ii) was also alleged.⁶⁹ Price-fixing and market sharing agreements operating together, if enforceable and therefore effective, could be expected to cause greater consumer detriment than situations where price-fixing alone was practised.

Four cases arose where the deeming section for exclusionary conduct under s 4D was utilised, two cases where misleading and deceptive conduct under s 52 was alleged, and four cases (in one of these cases s 46 and s 47 were also alleged by the Commission) where s 48 conduct relating to resale price maintenance was involved.⁷⁰ The joint practice of horizontal and vertical price-fixing gives the

⁶⁸ See David Round and John Siegfried, 'Horizontal Price Agreements in Australian Antitrust: Combating Anti-Competitive Corporate Conspiracies of Complicity and Connivance' (1994) 9 *Review of Industrial Organization* 569.

⁶⁹ In each matter, breaches of s 45 alone as well as via s 45A were found by the Federal Court.

⁷⁰ This was successfully alleged in *Trade Practices Commission v Prestige Motors Pty Ltd* (1994) 16 ATPR ¶41-359 ('Prestige'); *Australian Competition and Consumer Commission v Ampol Petroleum (Victoria) Pty Ltd* (1996) 18 ATPR ¶41-500 ('Ampol'); *Australian Competition and Consumer Commission v Jaycee Rectification & Building Services Pty Ltd* (1996) 18 ATPR ¶41-539 ('Jaycee'); *AMA (WA)* (2003) 199 ALR 423 (for the Australian Medical Association but not for Mayne); and unsuccessfully on ss 47 and 48 in *Safeway* (2003) 129 FCR 339.

firms involved great power over their markets, and the pecuniary penalties in three of these cases were high.

C *Overt or Tacit Arrangements*

Collusion can be tacit or overt. The former can be hard to identify and prove, as firms can innocently pursue parallel pricing conduct without any meeting of minds or formal expectations as to how they would behave. Overt price-fixing, on the other hand, is usually quite evident and generally not explicable by an innocent action. Forty of the 45 cases won by the Commission could be assessed as involving an explicit agreement or arrangement to fix prices. Insufficient information was available to classify the remaining five matters.

D *Duration of the Price-Fixing Agreements*

The longer a price-fixing arrangement is in operation, the more social damage it is likely to cause. Some price agreements are inherently unstable, due to the nature of the product, or fundamental market conditions like low entry barriers, low growth or excess capacity. Other agreements may continue for some time if their execution is sophisticated, if a strong enforcement and punishment mechanism is used by the orchestrators of the price-fix, or if the collusion is practised against small buyers who have no substitute to which they can turn.

In the 30 cases for which it was possible to discern the duration of the agreements from the judgments, 11 lasted for less than six months. Three lasted for a period of six to 24 months. Somewhat staggering, at least to the authors — given that price-fixing has been illegal since 1977 and that authorisation for it in relation to goods was not available until only recently — is the finding that 16 of the cases (around one-third of all of the cases that we have considered) can be inferred to have lasted for two or more years. Nine price-fixing situations lasted for four years or more, involving ready-mixed concrete, building services, roof tiling services, supply of fire protection systems, road freight services, compressors and compressor parts, polyurethane foam (two instances), and power and distribution transformers.

In these nine markets, the loss to consumers over the years would have been considerable. None of these products were final products bought by consumers, but were used as inputs into various production processes. Distortions caused further back in the chain of production will be amplified as the product moves towards the final consumer, leading to greater social damage. One might therefore argue that the pecuniary penalty should be greater in these types of situation, and also when the price-fixing occurred over a long time period.⁷¹

E *Was the Breach Knowingly Committed?*

Many judgments failed to address the issue of whether the breach was knowingly committed. But in a disturbing number of cases, some quite recently and some involving major Australian companies, it appears that the respondents'

⁷¹ See below Part V.

executives were not aware of the prohibitions contained in s 45A. While this could have been expected in the early days after the introduction of the section in 1977, the success rate of the Commission and the accompanying publicity should have meant that no senior executive of any firm, small or large, would have been unaware of the illegality of price-fixing.⁷² This is to be distinguished from the situation where an executive is aware that the conduct in question is prohibited by the TPA, but on the basis of an expected benefit/expected cost comparison, decides to go ahead and fix prices anyhow.

F The Effects of the Price-Fix

The effects of the price-fixing, which varied greatly, were discussed in 21 of the judgments, but rarely in analytical or mathematical detail (unsurprising perhaps, given the extent to which cases involved the submission of agreed statements of facts and penalties, and given the nature of the offence). In some cases, judges found that even though prices had risen there was no evidence of any real loss,⁷³ or that there were no lasting effects.⁷⁴ In *Trade Practices Commission v TNT Australia Pty Ltd*, Burchett J commented that 'the companies were systematically protected from the effects of competition',⁷⁵ and that effectively customers were not able to compare prices or service as a result. In one of the judgments in the CC suite of cases, Lindgren J was of the strong view that market forces had been corrupted to the detriment of the Commonwealth.⁷⁶ In *Australian Competition and Consumer Commission v FFE Building Services Ltd*, Wilcox J noted that the effect of the actions of FFE Building Services Ltd had deprived buyers of the lowest possible price and that they had the potential to undermine the integrity of the tender system in the market.⁷⁷

Generally, little jurisprudence exists on the determinants of price-fixing and the effects of this conduct in Australian markets, particularly since the increase of the maximum pecuniary penalty.⁷⁸ As we discuss below, with such a large number of pecuniary penalties having been negotiated between the Commission and respondents and presented to the Federal Court for endorsement, this

⁷² Note the distinction between the ignorance of a small firm in *Australian Competition and Consumer Commission v Trevor Davis Investments Pty Ltd* (2001) 23 ATPR ¶41-828 ('Trevor Davis'), and a large firm in *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417 ('Woolworths'), where arguably Australia's largest retailer appeared not to have been educated in its responsibilities to comply with the TPA.

⁷³ *Trade Practices Commission v Cook-On Gas Products Pty Ltd* (1985) 7 ATPR ¶40-560, 46 511 (Fisher J); *Trade Practices Commission v Patterson Cheney Pty Ltd* (1990) 12 ATPR ¶41-059, 51 759 (Northrop J); and *Jaycee* (1996) 18 ATPR ¶41-539, 42 857, where O'Loughlin J observed that the colluders were all 'relatively small operators and that their offending conduct would have had minimal effect in the market'.

⁷⁴ *Trade Practices Commission v Australian Autoglass Pty Ltd* (1988) 10 ATPR ¶40-881.

⁷⁵ (1995) 17 ATPR ¶41-375, 40 166 ('TNT').

⁷⁶ *Trade Practices Commission v CC (New South Wales) Pty Ltd* (1994) 16 ATPR ¶41-363, 42 725.

⁷⁷ (2003) 25 ATPR ¶41-967, 47 803 ('FFE').

⁷⁸ We note that the Full Court of the Federal Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* (2004) 26 ATPR ¶41-993, 48 629 (Branson, Sackville and Gyles JJ) ('Mobil Appeal') stated that in respect to agreed penalties generally there were sufficient cases that involved a contested hearing. However, of the cases the Full Court provided as examples, only two involved price-fixing.

position may become further entrenched, should such negotiations continue to be the norm. This situation could change if the TPLA Bill becomes law.⁷⁹ If price-fixing cases are once again argued at length in the Federal Court, and the amount of the appropriate penalty debated in argument, there will for a period be little jurisprudence to guide both judges and companies accused of breaching s 45A.

G 'Smoking Gun' and 'Hot Documents' Evidence

Firms that are caught fixing prices are sometimes discovered by means of 'hot documents' or other types of 'smoking gun' evidence which directly implicate them in the agreement or arrangement. This occurred in eight cases, the most notable being the ABB transformer cases,⁸⁰ *FFE*, *Midland Brick* and *George Weston*. All respondents were found to be in breach, with pecuniary penalties over \$1 million being handed down in four of the cases. Two of these decisions were appealed. In *Ithaca*, the Commission unsuccessfully appealed on the grounds that the pecuniary penalties imposed on one company and on one individual were 'manifestly inadequate'.⁸¹ In one of the judgements in the ABB transformer cases,⁸² *Schneider* appealed and was successful in obtaining a reduction of the pecuniary penalty from \$7 million to \$5.5 million.

H The Commission's Leniency Policy

There appears to be a growing trend for companies that have been involved in the planning or execution of price-fixing to alert the Commission to the conduct of other participants, in exchange for preferential treatment or immunity from Commission-initiated proceedings or from an application by the Commission for a penalty. The Commission has now formally expressed its part in this approach as Commission policy,⁸³ announcing that the first co-conspirator⁸⁴ to reveal evidence of the collusion (of which the Commission is not already aware) will be offered conditional immunity. Subsequent applications for leniency are consid-

⁷⁹ This assumes that the Federal Court will consider the benefit obtained by the price-fixer in setting penalties. While it is beyond the scope of this article to consider the practical operation of the proposed s 76(1A), it is possible that evidence of benefit may not be readily available and therefore benefit may not be considered in any detail by the Court.

⁸⁰ *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 115 FCR 436; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 3]* (2002) 24 ATPR ¶41-873; *Schneider* (2003) 127 FCR 170.

⁸¹ *Ithaca* (2002) 24 ATPR ¶41-851, 44 539 (Wilcox, Hill and Carr JJ). In this case, by the time penalties were imposed upon the remaining respondents the Commission had agreed penalties with all other parties which allowed discounts for their cooperation with the Commission. The agreed penalties were then taken into account when determining the penalties payable by *Ithaca* and its officer Mr Mee, which resulted in relatively lower penalties being imposed.

⁸² *Schneider* (2003) 127 FCR 170.

⁸³ Australian Competition and Consumer Commission, *ACCC Leniency Policy for Cartel Conduct* (2003).

⁸⁴ Ringleaders are ineligible for leniency under the policy: *ibid* 9.

ered under its *Cooperation Policy for Enforcement Matters*⁸⁵ and each co-conspirator is provided with a level of leniency that decreases with each application received. The Federal Court has referred to the Commission's leniency approach in positive terms.⁸⁶ Clearly, there now exists a strong incentive (and reward) for the first conspirator to break ranks.

Given that the leniency policy is relatively new (in its current form), it remains to be seen whether this will increase the number of price-fixing cases successfully brought by the Commission.⁸⁷ That said, the use of the leniency policy may be a very effective way of discovering the often difficult-to-obtain evidence on price-fixing. In addition, it can be a strong deterrent to the continuation of price-fixing agreements.

I *Were the Penalties Contested or Agreed?*

Section 76(1) of the TPA requires the Federal Court to set an appropriate pecuniary penalty having regard to all relevant matters.⁸⁸ Up until early 1994, all penalties for those found guilty of price-fixing were determined by the Court on the basis of evidence and submissions. Since then, beginning with *Trade Practices Commission v Hymix Industries Pty Ltd* in 1994,⁸⁹ the vast majority of penalties have been determined by negotiation between the Commission and the respondents.⁹⁰ In the 34 cases it has heard since *Hymix*,⁹¹ the Federal Court has decided on the quantum of pecuniary penalties in their entirety in only six out of the 24 cases in which a pecuniary penalty was determined. However, in another six cases it set the penalty for at least one of the respondents where not all of them had reached agreement with the Commission.⁹² In *Frozen Foods*, Heerey J had rejected the negotiated pecuniary penalty of \$900 000 and replaced it with

⁸⁵ Australian Competition and Consumer Commission, *Cooperation Policy for Enforcement* (2002).

⁸⁶ For example, Wilcox J in *FFE* (2003) 25 ATPR ¶41-969, 47 804.

⁸⁷ For a discussion on the success of the US Department of Justice Corporate Leniency Program see James Griffin, 'An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program' in Barry Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law & Policy* (2004) 29, 37-8.

⁸⁸ There are 12 factors recognised as relevant matters to take into consideration. Nine factors are from French J in *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR ¶41-076, 52 152-3. Note that this was not a price-fixing case. The remaining three factors are from Heerey J in the first instance decision of *Frozen Foods* (1996) 18 ATPR ¶41-515, 42 444-5.

⁸⁹ (1995) 17 ATPR ¶41-369 ('*Hymix*').

⁹⁰ There is now a long line of cases that confirm the acceptability of agreed penalties. These are summarised by Finkelstein J in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41-815, 42 935-6. Also see below n 128. It is well accepted that it is still for the court to reach its own conclusions, however it is acknowledged that the agreeing parties and the Commission have greater knowledge of all relevant facts and therefore are arguably better placed to work out an acceptable agreed settlement. For example, see Lockhart J in *Australian Competition and Consumer Commission v Pioneer Concrete (Qld) Pty Ltd* (1996) 18 ATPR ¶41-457, 41 581-2 ('*Pioneer*').

⁹¹ (1995) 17 ATPR ¶41-369.

⁹² A pecuniary penalty was not sought in either *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79; *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 95 FCR 114; or *Australian Competition and Consumer Commission v Tasmanian Salmonid Growers Association Ltd* (2003) 25 ATPR ¶41-954.

\$1.2 million, but this was overturned on appeal.⁹³ In the two most recent cases included in our analysis, *FFE* and *Midland Brick*, the agreed pecuniary penalties submitted to the Federal Court were not accepted by the two judges (Wilcox and Lee JJ respectively).⁹⁴

Of the six cases that were fought on penalty, breach was admitted in all but one of them.⁹⁵ Two of the cases involved small firms⁹⁶ and one involved a mix of firm sizes,⁹⁷ but the other three cases involved large firms,⁹⁸ and resulted in pecuniary penalties that, while not amongst the highest recorded, were nevertheless above the average.

The effect of the penalty negotiation process, whereby judges are presented with a brief statement of facts and agreed penalties, on the development of jurisprudence on price-fixing is beyond the scope of this article. However, we think it is worth asking whether society is well served by this development, and whether the court has lost control of the penalty-setting process. The fact that some judges have also expressed concern about the trend towards presenting agreed penalties to the Federal Court for ratification⁹⁹ led to Gyles J deciding in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* that the reservations expressed by those judges should be resolved by the Full Court of the Federal Court.¹⁰⁰ The Full Court confirmed that judges need not impose the penalty agreed to by the parties and are bound to determine that the amount proposed is appropriate.¹⁰¹ However, the trend of accepting the proposed penalty indicates that the Court relies heavily on the Commission's view of whether the penalty is appropriate — as it must, given that only a relatively brief account of the facts is typically presented to the Court — and as a result has the effect of keeping pecuniary penalties at a relatively low level.

V ANALYSIS OF THE PECUNIARY PENALTIES

Table 2 presents the cases displaying the 11 largest individual corporate pecuniary penalties handed down for price-fixing to date (those with a highest individual penalty of \$1 million or more). It displays for these cases any other corporate penalties of \$500 000 or more.

⁹³ *Frozen Foods* (1996) 18 ATPR ¶41-515; rev'd (1996) 71 FCR 285.

⁹⁴ We are not aware if, at the time of writing, either case had been appealed.

⁹⁵ *McPhee* (1998) 20 ATPR ¶41-628.

⁹⁶ *Trade Practices Commission v Caravella* (1994) 16 ATPR ¶41-293; *Trevor Davis* (2001) 23 ATPR ¶41-828.

⁹⁷ *Prestige* (1994) 16 ATPR ¶41-359.

⁹⁸ *Woolworths* (2003) 198 ALR 417; *George Weston* (2000) 22 ATPR ¶41-763; and *McPhee* (1998) 20 ATPR ¶41-628.

⁹⁹ See, eg, Finkelstein J in *ABB* (2001) 23 ATPR ¶41-815, 42 936 and Weinberg J in *Australian Competition and Consumer Commission v Colgate-Palmolive Pty Ltd* (2002) 24 ATPR ¶41-880, 45 064. Note that the latter was not a price-fixing case.

¹⁰⁰ (2003) 134 FCR 370, 375 ('*Mobil Trial*').

¹⁰¹ (2004) 26 ATPR ¶41-993, 48 621 (Branson, Sackville and Gyles JJ).

In addition, the table identifies the total corporate pecuniary penalties (and the number of them) handed down in these matters, and also gives the highest penalty imposed on an individual executive who took part in the price-fixing conspiracy.

The highest total pecuniary penalties for price-fixing to date occurred in the ABB transformer cases,¹⁰² where the penalties imposed on the five companies involved (three were overseas-owned) totalled \$35 million.¹⁰³ This case involved market sharing and price-fixing over many years by the key suppliers of power and distribution transformers in Australia. This case also produced the highest penalty on an executive. A total penalty of \$225 000 was imposed on the Managing Director of the Australian-owned Wilson Transformer Company, who was aware that price-fixing was illegal but acted in the interest of financial gain.

The highest total pecuniary penalty imposed on a single corporation to date, \$15 million, was paid in *Australian Competition and Consumer Commission v Roche Vitamins Australia Pty Ltd*¹⁰⁴ by Roche Vitamins Australia Pty Ltd. This was closely followed by ABB in the ABB transformer cases,¹⁰⁵ with \$14 million. It is interesting to note that in both these cases, the most heavily penalised respondents were overseas-owned companies or Australian subsidiaries of such organisations,¹⁰⁶ whose total penalties of \$52.5 million account for most of the total penalties (\$63.8 million) imposed on all of the other firms listed in Table 2.

¹⁰² *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 115 FCR 436; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169; *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 3]* (2002) 24 ATPR ¶41-873; *Schneider* (2003) 127 FCR 170.

¹⁰³ Australian Competition and Consumer Commission, 'ACCC Transformer Cartel Bust: Record \$35 Million Penalties' (Press Release, 7 April 2004).

¹⁰⁴ (2001) 23 ATPR ¶41-809 ('Roche Vitamins').

¹⁰⁵ *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2004) 26 ATPR ¶42-011.

¹⁰⁶ However, two important respondents in the ABB transformer cases were Australian owned — the family-owned Wilson Transformer Company and the privately-owned Tyree. See *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169.

Table 2: The Highest Corporate Penalty Price-Fixing Cases, 1979–2004

Case	Year	Highest Corporate Penalty (\$m)	Additional Corporate Penalties more than \$500 000	Total Corporate Penalty (\$m (number of firms))	Highest Executive Penalty (\$)
<i>Roche Vitamins</i>	2001	Roche 15	BASF 7.5 AANA 3.5	26 (3)	none
<i>ABB Transformer</i>	2001	ABB 14	Alstom 7 Schneider 5.5 Wilson 4 Tyree 3.5	34 (5)	225 000
<i>Pioneer Concrete</i>	1995	Pioneer 6.6 Boral 6.6 CSR 6.6	Excel 0.5	20.3 (4)	none
<i>TNT</i>	1995	Mayne 6	TNT 4.1 Ansett 0.9	11 (3)	75 000
<i>Tyco</i>	1999	FFE 5	Grinnel 3.3 Tyco 1.4 Patrick Fire 0.75 Fire Sprinklers 0.5	13.4 (18)	100 000
<i>FFE</i>	2003	FFE 3.5		3.5 (1)	50 000
<i>McPhee</i>	1998	McPhee 2.5		2.5 (1)	80 000
<i>Ampol</i>	1996	Ampol 2.5		2.7 (2)	60 000
<i>Tubemakers</i>	1999	Tubemakers 1.2	Associated Water 1 Coastline 0.55	2.85 (4)	none
<i>Foamlite</i>	1997	Foamlite 1.2	Vita Pacific 0.6	1.8 (2)	100 000
<i>Midland Brick</i>	2004	Midland 1.0		1 (1)	25 000

The growing pace of globalisation indicates that collusion can no longer be regarded as a purely domestic phenomenon, indicated by the recent push by current Chair of the Commission, Graeme Samuel, to be at the forefront of an attack on global cartels,¹⁰⁷ following on from his predecessor at the Commission, Professor Allan Fels.¹⁰⁸ This recognises that for international cartels to be

¹⁰⁷ See Graeme Samuel, 'Australian Competition Policy and World's Best Practice' (Speech delivered at the Australian Institute of Company Directors Annual Conference, Port Douglas, 28 May 2004).

¹⁰⁸ See Australian Competition and Consumer Commission, 'Global Cartels on Rise: Increased Vigilance Required' (Press Release, 15 December 2000).

exposed, there must exist international cooperation between governments as well as between competition agencies, in terms of sharing information and pooling resources.

In *Roche Vitamins*, Lindgren J noted that the submissions by the respondents admitted that the contraventions were seen by the Commission as ‘uniquely serious in Australia’s trade practices history’,¹⁰⁹ and that

[t]here is a need for a significant level of penalty well in excess of any quantum of penalties previously imposed in Australia in respect of cartel arrangements to deter the multinational corporate groups behind the Australian contraveners from engaging ... in similar conduct affecting Australia in the future. A high level of penalty is also required for general deterrence of similar conduct affecting Australia by other large multinational corporate groups.¹¹⁰

There is a strong warning here for overseas-owned firms that might be contemplating price-fixing in any market that involves Australia.

It is worthy of note that of the 11 cases listed in Table 2, all of them (with the exception of *Ampol*) relate to goods or services that are entirely or substantially inputs into a subsequent stage of the production process. As we noted earlier, the further back in the chain of production that price-fixing occurs, the greater is its potential for social damage and so, other things being equal, the greater the penalty that should be incurred. It is difficult to determine whether judges (and the Commission) have followed this line of reasoning, but at least the penalties are not inconsistent with it. It is also worth noting that the price-fixing involved in seven of the 11 cases listed in Table 2 lasted for more than two years, and in some cases for a much longer time. This relationship accords with our earlier discussion.

Twenty-three companies have now each been penalised over \$1 million for price-fixing in Australia. It would be satisfying to conclude that all of the 11 cases listed in Table 2 were decided after the increase in maximum penalties came into effect, but this was not so for five of these cases. The conduct at issue in *TNT* occurred between 1987 and 1990 and the decision confirmed that the old penalties governed the case. The conduct in *Pioneer* occurred from 1989 to 1994, but the decision does not discuss how the penalties related to the different legislated maxima, not surprising given the fact that it was a negotiated settlement. In *Ampol*, the behaviour under consideration occurred both before and after the new penalties came into force, and were apportioned accordingly by the judge. In *Australian Competition and Consumer Commission v Foamlite (Australia) Pty Ltd*,¹¹¹ the price-fixing occurred for well over a decade prior to 1995 but the judgment is silent as to whether the penalty amounts were split into old and new components. Similarly, in the Tyco cases, while most of the offending conduct occurred after the move to a higher penalty regime, the judgments are silent on whether the penalties were apportioned according to the time of occurrence of the conduct.

¹⁰⁹ (2001) 23 ATPR ¶41-809, 42 810.

¹¹⁰ *Ibid* 42 812.

¹¹¹ (1998) 20 ATPR ¶41-615.

Of course, to put these penalty amounts in perspective, it must be realised that the maximum penalty per offence is \$10 million and that in almost all price-fixing cases, there is usually more than one instance of price-fixing listed in the pleadings or findings. Yet generally the Commission seems to have made little attempt to seek penalties for each offence pleaded, and judges appear to be content with setting an overall penalty, even in situations where they have in fact addressed separate offences.¹¹² This fails to maximise the deterrent effect, premised on the notion that the greater the number of offences, the greater the pecuniary penalty should be. Under the status quo, price-fixers will be motivated to engage in multiple offences as the expected penalty will rise less than proportionally to the number of offences, creating an effective discount per offence which compounds as the number of breaches increases.¹¹³ We consider it is contrary to policy, which is now strongly against price-fixing. A more transparent approach would be for the Commission to arrive at a total pecuniary penalty amount by placing a value on each separate breach.

For example, in *Roche Vitamins*, no mention was made in the judgment of how many instances of price-fixing were involved. It may well have been a continuum, and the decision talked only of ‘understandings’ and ‘contraventions’.¹¹⁴ This ‘lump sum’ approach to penalty setting appears at least in part to be an outcome of the process of negotiating penalties, but it may also reflect an attitude, either administrative or judicial or both, that it is very difficult objectively to set a precise penalty for any given breach. It follows that a total penalty that appears to fit the overall seriousness of the breach may be a more efficient use of a judge’s time, even though it may not provide the socially efficient penalty or signal to potential future price-fixers.

Apart from the cases listed in Table 2, there were an additional six cases (*Frozen Foods*, CC suite of cases, *Australian Competition and Consumer Commission v Joyce Corporation Ltd*,¹¹⁵ *Australian Competition and Consumer Commission v Alice Car & Truck Rentals Pty Ltd*,¹¹⁶ the SIP cases,¹¹⁷ and *GWF/Safeway*) in which the highest corporate penalty was \$500 000 or more (respectively, \$900 000, two firms receiving \$500 000, \$850 000, \$500 000, \$580 000, and \$750 000). In two of these matters, *Alice Car & Truck*, and the

¹¹² For example, in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd [No 2]* (2002) 190 ALR 169, 177–83 Finkelstein J sets out the number of acts engaged in by Wilson Transformer Company, Tyree and Schneider and then imposes one penalty per company for the contravening conduct as a whole. Compare this with *Australian Competition and Consumer Commission v Cromford Pty Ltd* (1998) 20 ATPR ¶41-618 (‘Cromford’), where four offences were found by Lockhart J and a penalty of \$10 000 for each offence was payable by the corporation.

¹¹³ For a discussion on the role of deterrence in price-fixing cases see Michael Block and Joseph Sidak, ‘The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?’ (1980) 68 *Georgetown Law Journal* 1131.

¹¹⁴ *Roche Vitamins* (2001) 23 ATPR ¶41-809, 42 810–11 (Lindgren J).

¹¹⁵ (1999) 21 ATPR ¶41-671.

¹¹⁶ (1997) 19 ATPR ¶41-582 (‘Alice Car & Truck’).

¹¹⁷ *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) 21 ATPR ¶41-702; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2002) 24 ATPR ¶41-877; *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2003) 25 ATPR ¶41-937.

SIP cases, there were recorded the second and third highest penalties handed down so far against an individual — \$150 000 in *Alice Car & Truck* and \$120 000 in the SIP cases. While these amounts fall well short of the post-1992 legislated maximum for an individual of \$500 000, their level should provide a warning to executives who might have to face the prospect of paying such amounts (in addition to legal costs) out of their own pockets if they are caught in a price-fixing conspiracy.¹¹⁸

There are two notable cases of recidivism in Table 2, which occurred in the supply of fire-protection systems (sprinkler and alarm markets) and of road freight services. In the former, FFE Building Services Ltd was caught fixing prices, four years apart, in both a regional market (Queensland and northern New South Wales) and in Sydney. In the 2003 case, even though Wilcox J observed that there had been an earlier breach by FFE Building Services Ltd, the judgment does not make it clear whether that breach was taken into account in setting the penalty. In *TNT*, the holding company TNT Ltd was the parent of two of the respondents, TNT Australia and Ansett; and in *McPhee*, McPhee was also a subsidiary of TNT Ltd.

At the other end of the scale, some notoriously low penalties for price-fixing have also occurred,¹¹⁹ even allowing for the class of the offenders. In *Trade Practices Commission v Axive Pty Ltd*,¹²⁰ a 1994 case involving price-fixing in the Sydney and Newcastle ice retailing markets, two respondents (admittedly owner-operators on a very small scale) were penalised a mere \$10 each by Sheppard J (citing special circumstances including ill health), while the maximum penalty imposed in that case was \$7500. In *Ithaca*, another price-fix in the supply of ice, a court-imposed penalty of \$100 000 on Ithaca, the largest supplier of ice in the price-fixing group, was regarded by the Commission as ‘manifestly inadequate’,¹²¹ while other suppliers received Court-approved negotiated penalties of from \$7500 to \$25 000. In *Jaycee* the small firm was penalised \$10 000 and its managing director \$5000 for fixing prices in the market for the provision of waterproofing services to buildings in the Sydney metropolitan area. In *Cromford*, an attempt to fix prices in the market for polythene building film was met with a penalty of \$10 000 for each of four separate attempts to fix prices.

Finally on penalty amounts, *Woolworths* is an atypical price-fixing case that involved a number of alcohol retailers who agreed not to sell or advertise certain beverages at a discount, allegedly to address problems with alcohol consumption in the Nhulunbuy area in the Northern Territory. Three of the involved parties donated a total of \$385 000 toward alcohol rehabilitation, their promise provided

¹¹⁸ To the authors’ knowledge, the extent to which executives currently pay pecuniary penalties themselves is an issue that has not yet been researched. We note that the *Corporations Act 2001* (Cth) s 199A currently contains a prohibition on companies indemnifying officers and auditors against pecuniary penalties and associated legal costs.

¹¹⁹ Finkelstein J commented on the need for penalties to be imposed at a meaningful level in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41-815, 42 938.

¹²⁰ (1994) 16 ATPR ¶41-368.

¹²¹ (2002) 24 ATPR ¶41-851, 44 539 (Wilcox, Hill and Carr JJ).

by way of s 87B undertakings (and noted by the Court). Although the decision does not confirm this, it appears that the donation was accepted by the Commission in lieu of it seeking a penalty, presumably as a more direct way of compensating the community for the loss of price competition (even though this competition may well have been socially damaging).

As already noted, with so many of the cases having been decided on the basis of agreed statements of facts and penalties, there has been little judicial evaluation of the effect of the price-fixes, either on individual consumers, society as a whole, or on the guilty parties' profits.¹²² Occasionally, when it has had to determine penalties, the Federal Court has had regard to how the corporation has profited from the conduct.¹²³ Lindgren J asked the parties in *Roche Vitamins* to address the following questions:

- (a) By how much was each respondent better off as a result of its contraventions?
- (b) What was the additional amount the market paid to each respondent as a result of its contraventions?¹²⁴

The parties were unable to answer the questions because they did not have the records necessary to do so. Given their speculative nature, Lindgren J was not surprised that he did not obtain precise answers.¹²⁵ His Honour was, however, provided with information that enabled him to determine the relationship between the proposed penalty and estimated profit.¹²⁶ On this basis, Lindgren J was satisfied that '[t]he suggested penalty either exceeds, or is a significant percentage of, the estimated profit figure. It is also a significant percentage even of the sales figure.'¹²⁷

We are likely to see more of the analysis of the type attempted by Lindgren J if the TPLA Bill is passed, although we are not confident that it will be possible to calculate the benefits that accrued to the price-fixer with any accuracy, given the current requirements of corporate financial reporting.

Given the law as it applies to penalties is not specific to price-fixing, we do not discuss the jurisprudence on the setting of penalties.¹²⁸

¹²² There are, in our view, jurisprudential, social equity, informational and factual problems associated with this. For example, when the court comes to set a pecuniary penalty for price-fixing, the fact that most of the previous penalties have been agreed is of little assistance in determining whether the penalty is within the range that the court would fix. See Finkelstein J in *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd* (2001) 23 ATPR ¶41-815, 42 936. Cf *Mobil Appeal* (2004) 26 ATPR ¶41-993. Of course, if the TPLA Bill is passed, judges will have to at least enquire as to the benefit obtained from the price-fixing conduct: TPLA Bill sch 9, item 4.

¹²³ Some of the relevant authorities are usefully summarised by Lindgren J in *Roche Vitamins* (2001) 23 ATPR ¶41-809, 42 814.

¹²⁴ *Ibid* 42 812.

¹²⁵ *Ibid* 42 817.

¹²⁶ *Ibid* 42 813.

¹²⁷ *Ibid* 42 815.

¹²⁸ For a brief overview of the jurisprudence on the setting of penalties and acceptance of a proposed agreed penalty, see the recent case of *Australian Competition and Consumer Commission v D M Faulkner Pty Ltd* [2004] FCA 1666 (Unreported, Bennett J, 30 September 2004), particularly [51]-[63].

VI CONCLUSION

Australia's legislation, enforcement, jurisprudence, penalties, and corporate and social attitudes towards price-fixing have developed significantly since 1974. It is no longer an element of corporate behaviour that is looked upon with mere annoyance or ignored. Internationally, domestic and global conspiracies to fix prices are now at the top of every competition regulator's hit list. In Australia, the maximum pecuniary penalties for price-fixing were 40 times higher in 1993 than they were in 1974 when the *TPA* first came into operation. Actual pecuniary penalties are now much higher than previously, but are often settled by negotiation between the Commission, the price-fixing firms and their executives. As a result, there is limited price-fixing jurisprudence being developed by the courts.

Arguably, the culture of price collusion persists. An effective means of control needs to be found. The penalties imposed to date in Australia appear to have failed to slow down the incidence of price-fixing, at least on the measure of court cases. Companies appear to be able to limit their exposure to full judicial enquiry into the causes and consequences of price collusion by way of the negotiation process endorsed by the Commission. Although this process may be an efficient use of Commission and judicial resources, it is also effective surety for firms that are consequently able to calculate and cap the risk of incurring a high penalty. In part, it appears that firms now greatly influence the process.

The Commission's role in the bargaining process is undeniable, but we do not suggest that it agrees to anything less than what it believes is the socially most efficient penalty. In reality, the Commission has budgetary constraints to consider and must therefore act according to its priorities. The Commission might reason on occasion that it is better to accept a statement of guilt and a penalty that both the Commission and the firm are comfortable with as a matter of administrative and commercial reality (which leaves extra resources to investigate other cases), rather than fight to prove the case and to secure a higher penalty through the courts (with the added risks of being involved in litigation).

Short of the prospect of a jail sentence for price-fixing,¹²⁹ nothing may deter executives with a penchant for fixing prices more than the prospect of facing the unknown from a judge who is prepared to use the full arsenal of remedies that are available under the *TPA*. But this means that judges need to be prepared to demand more information as to the breadth and depth of the price-fix; who initiated it; how tightly it was enforced, and by whom; how long the price-fix was in operation; who profited from the conduct and by how much; how many and which consumers suffered; whether they had any other options available to

¹²⁹ To this end, the government announced its in-principle acceptance of the Dawson Report recommendations that criminal sanctions be introduced for breaches of Part IV of the *TPA*, subject to further consideration of the issues: Peter Costello, Treasurer, 'Working Party to Examine Criminal Sanctions for Cartel Behaviour' (Press Release, 3 October 2003). For a convincing argument on why criminal sanctions are appropriate for price-fixing offences, see Justice Ray Finkelstein, 'Criminalising Hard-Core Cartels: Competition Law Enters the "Moral Universe"' (Paper presented at the Cracking Cartels: International and Australian Developments Conference, Sydney, 25 November 2004).

them and so on.¹³⁰ It has been rare in Australia to estimate the social damages caused by collusion on prices.¹³¹ Judges have not been provided with the necessary information and most have shown no inclination to do so anyhow, even if some of the necessary data could have been made available. However, there is a new breed of judges appearing in the Federal Court who are now displaying some interest in the nature, purpose and quantum of penalties for infringements of the *TPA*, and especially for those that involve price-fixing.

So what blueprint do we put forward for the next 30 years of dealing with price-fixing? Much will depend on whether jail terms and the proposed changes to the *TPA* discussed above are legislated. In the meantime, we suggest that for the cases that involve agreed penalties, the Federal Court should aim as a matter of policy to provide more guidance as to what the submissions should address, and also to consider what is properly the domain of the Court. We believe that it should be possible for the Commission and the parties to agree that breaches have occurred, and we think it appropriate for judges to be informed fully of the private and social damages caused by the price-fixing.

However, we do not believe that the parties should be able to agree on the specific amount of the penalty. We note the view of the Full Court in *Mobil* that a precise figure is more helpful to the Court than a range of pecuniary penalties (although it did not explain why). The Full Court thought that

a better way of reinforcing the Court's responsibility to determine penalty is for the Court to scrutinise the material presented to it carefully, and satisfy itself that the information is sufficient to determine whether the proposed penalty is appropriate.¹³²

We hope that the Court is already performing that function, and believe that if the parties were only permitted to propose an indicative range this would further encourage the process of an independent evaluation by the Court.

In addition, to keep firms on their toes and to get an independent judicial assessment of guilt and penalties, we believe that the Commission should on occasion not engage in plea-bargaining but should allow price-fixing case to proceed directly to the Federal Court as a keeper of social standards through the creation of precedent.

Regardless of whether cases are contested or agreed, the Court should develop its own method for fixing penalty amounts, in the form of a structured analysis of how and why the price-fixing occurred, how it was implemented and enforced, what financial gains it brought to the colluders, and who was damaged by this conduct and by how much — and this information should be detailed in each judgement. This means that the agreed statements need to contain considerably more information than they typically do at present. If this material is not provided to them, judges should be able to compel rather than merely request its

¹³⁰ See *Mobil Appeal* (2004) 26 ATPR ¶41-993, where the Full Court confirmed that judges are permitted to request such information.

¹³¹ For an assessment of damages actions under the *TPA* see David Round, 'Consumer Protection: At the Mercy of the Market for Damages' (2003) 10 *Competition and Consumer Law Journal* 231.

¹³² (2004) 26 ATPR ¶41-993, 48 630 (Branson, Sackville and Gyles JJ).

production. We also believe that judges should be bolder in setting pecuniary penalty amounts, and in setting penalties per offence. Unfortunately, the judiciary has tended to move slowly on issues such as penalties, and a similar conservatism is likely to be observed for some time, even if the TPLA Bill is enacted.

Over 30 years have passed since the commencement of the *TPA* and we now stand at a crossroad in its future development. Will policy and judicial strength and leadership go forward into uncharted territory with respect to 'fixing' price-fixers, and in the process enhancing social welfare; or will a conservative approach manifested in the cases to date be taken, along with insufficient deterrence and indeed punishment?