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Resale Price: Australian Experience and Perspectives

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I. INTRODUCTION

The prohibition of RPM occupies a special position in Australian competition law. It was the first anticompetitive practice to be specifically outlawed when Australian competition law commenced in earnest in the 1970s, is a *per se* offense, has been expanded in scope rather than curtailed, and, unlike most other jurisdictions, is not inhibited by the requirement that there be an agreement to fix a resale price. As result, it is a powerful prohibition that applies to unilateral conduct designed to achieve RPM as well as RPM agreements between suppliers and retailers.

II. A BRIEF HISTORY OF AUSTRALIAN RPM LEGISLATION

Australia's earliest attempts to comprehensively prohibit anticompetitive conduct did not deal specifically with RPM and proved ineffectual. Similarly, the common law doctrine of restraint of trade, interpreted sympathetically to RPM, posed little threat to its use by suppliers. However, in the 1960s the ubiquity of the practice and its frequent link to horizontal price-fixing saw pressure grow for a legislative response. This increased significantly following the passage of the UK *Resale Prices Act 1964* and reached a crescendo in 1971 when Australian trade unions organized a boycott of Dunlop Australia Ltd because of that company's adherence to RPM. This caused the value of Dunlop shares to fall dramatically and, after consulting the Prime Minister, the company announced that it would cease RPM. In this climate, the Australian parliament introduced legislation, based on the U.K. act, outlawing RPM in relation to goods. This was carried forward into the *Trade Practices Act 1974*, Australia's first effective comprehensive competition law.

With two exceptions, the prohibition of RPM, now contained in the *Competition and Consumer Act 2010* ("CCA"), has remained unaltered since 1971. The exceptions were introduced by the *Competition Policy Reform Act 1995* following the major review of competition law in 1993 (colloquially known as the Hilmer Review). The first of these extends the prohibition to services as well as goods; the second allows RPM to be authorized where a supplier can show that the public will benefit from the practice.

III. STRUCTURE AND KEY FEATURES OF AUSTRALIA'S RPM LEGISLATION

Although largely a result of its legislative ancestry, the special position of Australia's prohibition of RPM is emphasized by its occupancy of a discrete and extensive set of provisions largely contained in a separate part of the CCA (Part VIII). This approach (which is also adopted in New Zealand) is strikingly different from Section 1 of the *U.S. Sherman Act* and the Article

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101(1) of the *Treaty on the Functioning of the European Union* (TFEU) which prohibit RPM only as part of a broad general prohibition of anticompetitive agreements or concerted practices.

A. The Prohibition of RPM

The actual prohibition of RPM is set out in Section 48 of the CCA, which provides that corporations and other persons "shall not engage in the practice of resale price maintenance." As there is no requirement that RPM have an adverse effect on competition, it is in competition law vernacular a *per se* offense.

B. Part VIII of the Act

The key RPM provisions of the Act are contained in Part VIII, which defines RPM, creates certain presumptions relating to those definitions, and establishes a "loss leader" defense.

C. The Requirement of a Specified Minimum Price

Conduct will constitute RPM only if a supplier specifies (or, in one case, states) a minimum price. Breadth is given to this concept by Section 4(1) which defines "price" so as to include any form of consideration given in exchange for goods or services and Section 96(4) which deems a price to be specified where it is specified by a third party or by reference to a formula. On the other hand, it means that:

- only minimum RPM is prohibited. Furthermore, unlike the position under Section 1 of the Sherman Act, because vertical price-fixing in relation to goods and services is exempt from the CCA's general prohibitions of anticompetitive collusive behavior, maximum RPM is not an offense even if it has the effect of substantially lessening competition.[2] It will contravene the CCA only if it amounts to monopolization under Section 46.
- it is not RPM for a supplier merely to require a retailer to stop discounting or lift its prices. Although a price can be specified within a range or with an element of approximation, if such an entreaty does not in some way specify a minimum price it will not constitute RPM.[3]

D. The Forms of RPM

The forms of conduct constituting RPM are specified in Sections 96(3) (relating to goods) and 96A (relating to services). Although nothing else can be RPM, these forms are broad and cover:

- RPM agreements;
- attempts by a supplier to secure RPM; for example, inducing or attempting to induce a retailer not to sell below a specified price, or offering to enter into an agreement to this effect;
- withholding supply from a retailer because the retailer, or a third person who obtains or wishes to obtain supply from the retailer, has not or will not adhere to a specified minimum price. For this purpose, withholding is deemed by Section 98(1) to include

[2] *See* Sections 45(5)(c) and 44ZZRR(1)(c).
[3] *See TPC v Penfolds Wines Pty Ltd* (1992) ATPR 41-163.

constructive as well as explicit withholding; for example, refusing to supply except on disadvantageous terms, failing to supply as requested, or supplying on less favorable terms than those extended to other customers; and

- stating a price that is likely to be understood by a retailer as a price below which they are not to be sold.

By covering unilateral conduct by a supplier, as well as collusive arrangements between a supplier and dealer, the Australian prohibition has a significantly wider reach than the Sherman Act, or the TFEU. Most importantly, unlike those provisions, it catches one of the most common and pernicious forms of vertical price manipulation; namely, a supplier refusing, or ceasing, to supply one retailer because of pressure exerted by other retailers concerned about facing price competition.

E. Goods and Services

The original prohibition of RPM applied only to goods. This is reflected in Section 96(3) which, with one minor exception, defines RPM in terms covering only the supplier specifying the minimum price of the goods it has supplied. However, as noted above, in 1995 the prohibition was extended to services by the introduction of Section 96A. Unfortunately, instead of specifically addressing RPM in relation to services, this takes the abbreviated form of saying little more than that Part VIII applies to services in the same manner it applies to goods.

While this presents no difficulty where the retailer re-supplies to consumers the same service it obtained from the supplier, it presents considerable difficulty where the supplier uses the supply of service A to control the price at which the retailer supplies consumers a service of which A is merely a component.

F. Agency

It is not RPM for a supplier to specify the minimum price at which its agents sell goods or services to consumers. Provided that the agency arrangement between supplier and retailer is not a sham, this provides a means by which the former can lawfully fix minimum retail prices if it wishes to do so. In Australia, the use of news agencies to distribute newspapers at uniform prices was an example.

G. Loss Leader Defense

Section 98(2) creates what is colloquially referred to as a "loss-leader" defense to those forms of RPM that involve a supplier withholding the supply of goods from a retailer because of the price at which the latter has sold those goods to consumers. Normally, this would constitute RPM. However, it will not do so where the retailer has sold the goods as a "loss-leader," that is, at less than their cost for the purpose of attracting its customers to purchase other goods, or otherwise to promote its business. This defense does not operate in relation to other forms of RPM, or where the goods were sold as part of a genuine seasonal or clearance sale or with the supplier's consent.

H. Recommended Prices

It is not RPM to merely recommend a retail price so long as this is a genuine recommendation and not an attempt to disguise what is actually an obligatory minimum price. This is reinforced for two particular situations by Section 97; they are where:

- a recommended price is affixed to the goods in question, or
- the supplier issues a list of recommended prices.

However, in both cases the statement of price, or price list, must state, or make clear, that it is a recommendation only and that the retailer is under no obligation to comply. Furthermore, merely saying that a price is recommended only will not protect the supplier if other conduct on its part indicates to retailers that the price is actually obligatory.

I. Penalties and Remedies

The general enforcement and remedy provisions in Part VI of the CCA apply to RPM. While these do not make RPM a criminal offense, they do expose anyone engaging in that practice to significant penalties and liability pay compensation to victims. This includes:

- the imposition of a pecuniary penalty of up to $10,000 or three times the benefit obtained from the contravention or, if this cannot be determined, 10 percent of the firm's annual turnover during the preceding 12 months;
- the grant of an injunction on such terms as the Federal Court thinks fit;
- non-punitive orders such as those for community service, disclosure, or advertising;
- being required to establish compliance programs or revise internal procedures to detect or prevent future contraventions from occurring; and/or
- compensatory damages to anyone who suffers loss or damage.

J. Inducing or Attempting to Induce RPM

Australian case law is replete with instances in which suppliers engage in RPM, not of their own initiative but at the behest of competitors of the targeted retailer, unhappy with the price competition it is providing. Conduct of this nature is not specifically prohibited by the CCA, which is surprising in view of the detailed treatment RPM receives in the Act and the frequency with which such conduct occurs. It also contrasts with the position in New Zealand.[4]

However, those who engage in such conduct can be liable under the CCA in the following ways:

- The general remedy and enforcement provisions of the CCA empower the Federal Court to impose a pecuniary penalty on anyone who aids, abets, counsels, or procures another person to contravene the competition provisions of the Act.[5] As a result, should, for example, a competitor of a retailer persuade, pressure, or even merely suggest to the

[4] *See Commerce Act 1986*, s. 38.
[5] *See* Section 76(1).

retailer's suppliers that they engage in a form of conduct that amounts to RPM, that firm will be liable to such a penalty.

- In addition to being liable to pay a pecuniary penalty, a firm inducing a supplier to engage in RPM will be liable to pay compensatory damages to the victim. Although it cannot receive double compensation, this allows the victim to proceed against the supplier who engaged in RPM, the firm that induced it to do so, or both.

IV. AUTHORIZATION

Since 1995 it has been possible for a firm wishing to engage in RPM to obtain permission to do so by using the authorization provisions in Part VII of the Act. These provisions (which are conceptually similar to the exemption provisions in Article 101(3) of the TFEU) empower the ACCC to grant an authorization that, in effect, allows a supplier to engage in RPM if they can establish that this will result, or is likely to result, in such a benefit to the public that it should be allowed. This requires an assessment to be made of the benefits to the public of allowing RPM in the particular case and weighing these against any detriments, competition related or otherwise, it may cause. Only if the former outweigh the latter can authorization be granted.

In 18 or so years since authorization has been possible not a single application or grant has been made.

V. RPM AS A *PER SE* PROHIBITION

Australia has not been isolated from the debates that have raged in recent decades concerning whether RPM should be prohibited *per se*, or only when actual (or likely) anticompetitive effect is established.[6] This issue was considered as part of the Hilmer Review which concluded that there was insufficient "evidence that 'efficiency-enhancing RPM' occurs with such frequency that the *per se* prohibition should be relaxed." Instead, as noted earlier, it recommended that authorization be possible.

Since 1995 this has allowed suppliers to engage in RPM, provided that they can establish that there are beneficent or pro-competitive reasons for them to do so producing a net benefit to the public, with the result that Australia has not experienced the angst about the *per se* prohibition of RPM that has occurred in certain other jurisdictions, most notably the United States. Currently, there appears to be little pressure for Australia to emulate the Supreme Court's decision in *Leegin Creative Leather Products, Inc v PSKS, Inc*[7] and, given the specious nature of the arguments in favor of allowing RPM when authorization is available, this is unlikely to change.

[6] *See.* for example, *ACCC v Jurlique International Pty Ltd* (2007) ATPR 42-146.
[7] 127 S Ct 2705 (2007).