Price fixing and the cremation of dishonesty by the House of Lords

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On 12 March 2008 the House of Lords allowed Mr Norris' appeal against a court order in 2007 for his extradition from England to the USA to face a charge of price fixing under the Sherman Act.

The House of Lords has cast extreme doubt on the workability of dishonesty as an element of the cartel offence under the UK Enterprise Act. The reasons given for the decision shatter the cosy optimism of the Office of Fair Trading that the UK cartel offence will be easy to prove.

The decision in the *Norris* case also shows that it would be madness for the Australian Government to make dishonesty an element of the cartel offences to be introduced later this year.

The extradition request by the US Department of Justice had to show that the price fixing conduct alleged against Mr Norris in the US would be an extraditable offence under UK law if the conduct had occurred in the UK. The requirement of dual criminality could not be met on the basis of the cartel offence under the Enterprise Act because that cartel offence was introduced in 2002 and did not exist at the time of the alleged price fixing. The extradition request was framed on the basis that the alleged price fixing would amount to a conspiracy to defraud if the conduct had occurred in the UK. The Divisional Court upheld that request on the basis that a secret price fixing agreement inherently involved dishonesty and amounted to a conspiracy to defraud at common law.

The House of Lords overturned the extradition order for price fixing. It was held that the conduct alleged in the indictment would not amount to a conspiracy to defraud at common law. Conspiracy to defraud requires more than simply an agreement in secret to fix prices – there must be deception or misrepresentation in addition to any false impression created by a simple price fixing agreement.

Assume that A and B, two competitors, agree to fix the price of airline tickets. They do not lie to anyone that the prices have been set by them independently of each other. They get on instead with implementing their price fixing agreement. Overcharges totalling $50 million result before B gets the wind up and applies for immunity under the ACCC immunity policy and the Commonwealth DPP immunity policy.

Under the House of Lords decision in *Norris* there is no conspiracy to defraud here - it is a simple price fixing agreement with no additional element of deception. It is irrelevant whether the overcharges total $50 million – the result would be the same even if the total overcharges were $500 million.

Would this classic price fixing agreement amount to a cartel offence under the exposure draft amendments to the Trade Practices Act released by the Government for public

consultation in January? Under the exposure draft legislation the Commonwealth DPP would need to prove that A (and B if B fails to get immunity) acted with an "intention dishonestly to obtain a benefit." The issue of dishonesty would be a question for the jury to decide. The verdict would be up to them but skilled defence counsel would have many opportunities to induce a reasonable doubt. The reasoning of the House of Lords in *Norris* will pave the way for easy acquittals in simple yet serious price fixing cases like this example.

First, accused will be able to argue that simple price fixing does not amount to conspiracy to defraud and for that reason they did not know that their conduct was dishonest according to the standards of ordinary people. Secondly, they will often be able to point to some public benefit (eg avoiding loss of jobs). Thirdly, they will always have the possible defence that the price fixed was believed to be a "reasonable" price. Fourthly, they will exploit the view expressed by the House of Lords that there are problems with the notion that mere secrecy can of itself make a price fixing agreement criminal.

The House of Lords decision will thus jeopardise the chance of successful prosecution in simple yet serious cases of price fixing in the UK. Accordingly, the element of dishonesty is unlikely to survive in the UK cartel offence much longer. No other cartel offence in the world is defined in terms of dishonesty and the inability to enable conviction in simple yet serious cases of price fixing will be the kiss of death to this weird experiment.

It is puzzling in the extreme why dishonesty should ever have been included as an element of the new cartel offences in the exposure draft amendments to the Trade Practices Act. Price fixing and other forms of serious cartel conduct do not relate to the dishonest acquisition of property. They relate to collusive market abuse. Other forms of market abuse, including insider trading, market rigging and market manipulation are not defined in terms of dishonesty – they are offences of market abuse, not offences of dishonest acquisition of property. The House of Lords decision in *Norris* highlights that it is a category mistake to think of a cartel offence as an offence relating to the dishonest acquisition of property – simple yet serious cases of price fixing may well not be a conspiracy to defraud but plainly they are a serious abuse of competitive market forces.

Brent Fisse is a Sydney-based competition lawyer. A recent submission by Caron Beaton-Wells and him to Treasury on the exposure draft legislation is available at: http://www.treasury.gov.au/documents/1350/PDF/Dr_Caron_Beaton-Wells_and_Mr_Brent_Fisse.pdf

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