Resale Price Maintenance – the need for further reform

Julie Brebner

Published version:

'Resale Price Maintenance – The Need for Further Reform' (2001) 9 *Trade Practices Law Journal* 19-29

Abstract

The *Competition Policy Reform Act* extended the resale price maintenance provisions of the *Trade Practices Act 1974* to include services and provide for authorisation where the conduct can be shown to benefit the public such that it should be allowed. This article explores the scope of these changes and their shortcomings. It also seeks to provide some guidance as to their likely application and makes recommendations for further reform.

Introduction

The *Competition Policy Reform Act* 1995 ("CPRA") represented the government's adoption of the key recommendations of the Hilmer Report.[1] It extended the provisions of the *Trade Practices Act* 1974 ("TPA") to individuals and to the State and Territory Crowns and established an access regime for services of national significance. It also reformed many of the existing competition provisions of the Act, including those relating to resale price maintenance ("RPM"). The former have been the focus of much academic attention. By contrast, little has been written about the significant reforms to RPM brought about by the CPRA. This paper seeks to remedy this deficiency by analysing these reforms. It will also suggest ways in which the Australian Competition and Consumer Commission ("ACCC") and the courts may interpret and apply these reforms. An estimate will then be made of the likely scope and impact that the reforms will have on the way in which corporations conduct themselves when supplying goods and services. This paper will then seek to identify other aspects of the RPM provisions that may warrant further reform, and will make recommendations for such reform.

The Prohibition of Resale Price Maintenance

RPM is the most common form of vertical price fixing ("VPF"), that is, the practice of a supplier fixing the price at which a party lower in its distribution chain can sell the goods or services that it supplies. The practice of RPM has long been considered an undesirable one which impedes 'free and open

[1] Report by the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993 ("Hilmer Report"). The Committee responsible for the report was chaired by Professor Frederick Hilmer.

competition'[2] and is prohibited, in one form or another, by all modern competition law regimes.[3] In Australia it has been the subject of strict and specific prohibition under Australian trade practices legislation for over 25 years. The TPA dedicates not only a section but an entire part (Part VIII) to its prohibition.

The TPA prohibits RPM through section 48, which provides that:

> A corporation or other person shall not engage in the practice of resale price maintenance.

What does and does not constitute RPM, for the purposes of this provision, is determined by the provisions of Part VIII,[4] especially s 96 and the new s 96A. Briefly, they define as RPM a supplier of goods or services specifying the price below which those goods or services shall not be sold or re-supplied respectively. They also define as RPM a refusal to supply for the reason that the party supplied has refused to agree to this minimum price. However, an exception is provided for conduct that occurs in relation to loss leader selling[5] and statements of recommended prices are deemed not to constitute, by themselves, RPM.[6] Sections 96 and 96A are limited to the fixing of minimum prices, so that maximum vertical price fixing is not prohibited unless it constitutes an breach of one of the other provisions of the Act.[7]

There has been, and continues to be, considerable debate regarding the merits or otherwise of the practice of RPM.[8] While the legislature continue to impose a *per se* prohibition on the practice, backed up by strict enforcement by the courts, it has been argued by advocates of the legalisation of RPM that in almost all cases the practice will enhance economic efficiency. The Government has, with the passing of the CPRA, given limited recognition to possible beneficial motivations or effects of RPM by making authorisation available to those who engage in the practice. The effect of this will be discussed in the context of the changes brought about by the CPRA; beyond this, the economic merits or otherwise of the practice generally will not be considered further.

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2 It should be noted, however, that there is considerable debate regarding the possible merits of the practice. This has been extensively discussed elsewhere and, while the arguments for and against RPM will be briefly noted below, they will not be discussed in any detail in this paper.

3 For example, in the EC, Article 85 of the Treaty of Rome prohibits certain anti-competitive conduct in terms broad enough to cover vertical price fixing. In the US it is prohibited by §1 of the *Sherman Act*. New Zealand prohibits RPM in substantially the same terms as the TPA: s. 37(1) of the *Commerce Act*. For an overview of the law in other countries see P H Clarke, *Vertical Price Fixing*, The Federation Press, Sydney, 1991, ch 14.

4 Section 4(1) TPA provides that the practice of RPM is that contained in Part VIII of the Act.

5 Section 98(2) TPA.

6 Section 47 TPA.

7 Note, however, that s. 45(5)(c)(iii) TPA exempts such conduct from prohibition under s. 45.

8 For an extensive review of the arguments advanced for and against RPM see: Clarke, above, n 3, ch 2.

The Hilmer Report and the CPRA

The Hilmer Committee received submissions arguing that the current prohibition on RPM should be relaxed either by subjecting it to a competition test or by permitting authorisation or notification and that the prohibition should be extended to services.[9]

After examining the position overseas and the reasons why firms engage in RPM, the Committee recommended that s. 48 and Part VIII remain in tact, but that authorisation be available and the provision be extended to the resale of services.[10] It rejected the submissions that notification be available for RPM[11] and that it be subject to a competition test. The Committee's recommendations were implemented by the CPRA.

1. Authorisation

The predecessor to the current Act, the *Restrictive Trade Practices Act* 1971, provided a facility for exemption from its prohibition of RPM. However, only one application was made for exemption under this provision and this was rejected by the Trade Practices Tribunal.[12] This facility was omitted from the current legislation when it was enacted in 1974.

The Hilmer Committee recommended that authorisation of RPM be made available under the Act.[13] It accepted that efficiency-enhancing reasons may exist for the practice and suggested that the ACCC, the body responsible for granting authorisations, was best suited to conduct the technical analysis of the reasons advanced for RPM, on a case by case basis.[14] This recommendation was implemented through the inclusion of s 88(8A)[15] into the TPA which now allows the ACCC to grant an authorisation to 'engage in conduct that constitutes (or may constitute) the practice of resale price maintenance'. Before such authorisation may be granted, however, the

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9 Hilmer Report, above, n 1, p 50. Scant detail was provided as to the content of submissions or the reasons behind the committees finding.

10 The Committee's evaluation and recommendations on RPM are detailed in the Hilmer Report, above, n 1, ch 3(E).

11 Notification is a procedure by which a party wishing to engage in exclusive dealing can "notify" the ACCC of the proposed conduct which results in immediate protection of such conduct from prosecution under the Act, unless and until such time as notification is revoked by the ACCC. The Committee concluded that efficiency-enhancing reasons for RPM were not likely to be frequent enough to warrant such extension, and consequently, the notification procedure remains restricted to exclusive dealing: Hilmer Report, above, n 1, p 58.

12 *Re Books* (1972) 20 FLR 256. See also I Searles, 'Should Resale Price Maintenance Continue to be Banned?' (1993) 1 *Trade Practices Law Journal* 184 at 185.

13 Authorisation is a procedure by which a firm wishing to engage in particular conduct can apply to the ACCC, the body responsible for policing the TPA, for permission to engage in conduct that would otherwise contravene of the Act (s 88 TPA). While available for most forms of conduct in Part IV (it is not available for conduct which constitutes a misuse of market power under s 46), prior to 1995 conduct prohibited as RPM under s 48 could not be authorised.

14 Hilmer Report, above, n 1, p 58.

15 This was inserted into the TPA by s 16(d) of the CPRA.

ACCC must be satisfied that the proposed conduct will, or will be likely to, result in a benefit to the public such that it should be allowed to take place.[16] What level of benefit will be considered by the ACCC to constitute a benefit to the public such that RPM should be allowed, remains for determination. Public benefit, however, has been given a broad interpretation by the ACCC and the Australian Competition Tribunal, and includes the promotion of competition in an industry, fostering business efficacy, assistance to efficient small business, 'the enhancement of quality and safety of goods and services and the expansion of consumer choice of the range of goods and services that are available', the provision of better information to consumers enabling informed choices, the promotion of cost savings and the reduction of prices at all levels in the supply chain.[17] However, these benefits must be "public"; that is, they must flow beyond the applicant or some other limited group. Because of the requirement that benefits be "public" it has been suggested that the most likely candidates for authorisation of RPM will be new or highly complex products.[18]

For new products, RPM may assist entrants into the market, hence increasing competition. In such cases the current market structure is likely to be a relevant factor in evaluating "public" benefit. For example, allowing RPM by a software manufacturer to assist him in gaining access into an already saturated market may be beneficial to the software manufacturer and certain sectors of the public to whom the software may be particularly well suited, but is unlikely to have a substantial public benefit. If, however, the software market was dominated by only one or two manufacturers, RPM by a third manufacturer to assist it in gaining access to the market may well be beneficial to a large section of the public by providing them with a greater range of products and, ultimately, reducing prices by diluting the monopolistic or oligopolistic market into which it enters. In such cases, however, authorisation should be granted for a limited time only and should not extend beyond what is required to facilitate entry into the market.

In the case of highly complex products, such as computer systems or stereo units, the product may require a certain level of service in order to allow consumers to make an informed decision regarding their purchase. RPM may assist in this respect by ensuring a level of profit sufficient to cover the extra outlay needed to promote the product, or to provide services to consumers. On the other hand, in the case of less complex products, such as kitchenware or bedding, it is unlikely that the majority of consumers will require sales assistance to enable them to make an informed decisions, in which case RPM would not have a sufficient public benefit to warrant its authorisation.
Experience in the UK and Europe suggest that the ACCC will be reluctant to grant authorisation except where public benefit is shown to be real and substantial. In these jurisdictions, authorisation has been denied in the

16 Section 90(8)(a) TPA.
17 R Steinwall & L Layton, *Annotated Trade Practices Act 1974*, Butterworths, Sydney, 1997, p 324.
18 *Id*, p 167.

overwhelming majority of cases and appears to be becoming more difficult to establish, rather than less.[19]

Provided an appropriately limited and cautionary approach is taken, the extension of the TPA's authorisation provisions to RPM will provide an appropriate acknowledgment of those limited forms of RPM that can result in an increase in competition and an enhancement of consumer welfare. If it is granted too liberally, however, it may result in a weakening of the *per se* nature of the prohibition which would substantially alter the RPM law of this country.

2. Services

The change that is likely to have the most practical significance is the extension of RPM to services. While many services, by virtue of their personal nature, are not capable of re-supply, the wide definition of services contained in s. 4 of the Act means that there are many that are.[20] The Hilmer Committee concluded that there was no reason why these services should be treated differently from goods:[21]

> RPM should cover the situation where one person selling services to a second person requires the second person to re-sell those services at or above a specified price; or where one person selling goods or services to a second person requires the second person to sell other services, provided in connection with the resale of the original goods or services, at or above a specified price.[22]

In response to this recommendation, s. 96A was inserted into Part VIII of the TPA[23], which provides:

> (1) This Part applies to conduct in relation to services in a way that corresponds to the way it applies to conduct in relation to goods.
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> (2) For the purposes of subsection (1), this Part is to be read with appropriate modifications, including the following modifications:
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> (a) references in this Part to goods are to be read as references to services;
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> (b) references to the sale of goods are to be read as references to the re-supply of services.

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19 Books and medicines were granted exemptions from the RPM prohibitions in the UK: *Re Net Book Agreement, 1957* [1962] 3 ALL ER 751; *Re Medicaments Reference (No. 2)* [1971] 1 All ER 12. All other applications failed. The EC Commission refused to exempt the Net Book Agreement from the RPM provisions so that, where trade between Member States was affected, the Agreement breached article 81(1) of the EC Treaty: *Publishers Association - Net Book Agreements* 89/44 (1989) OJ L22/12. In 1997 the Restrictive Trade Practices Court held that the exemption in relation to books was no longer in the public interest, and it was withdrawn: *Re Net Book Agreement 1957 (M and N)* [1997] 16 LS Gaz R 29. For examples of cases in which RPM has failed to qualify for exemption see: *Hennessy-Henkell* [1981] 1 CMLR 601 (in relation to the distribution of cognac); *Gerofabriek* [1977] 1 CMLR D35 (cutlery distribution arrangements); *Junghans* [1977] 1 CMLR D82 (clock distribution - RPM clauses deleted before exemption allowed).

20 Hilmer Report , above, n 1, p 53-54.

21 *Id*, p 58.

22 *Ibid*. The official recommendation stated merely that 'the provision be extended to the resale of services'.

23 Inserted by s 21 CPRA.

In addition, a new section 4C(f) was inserted to define "re-supply" as it appears in this provision.

The effect of the new provision will be to require service-providers, such as internet service providers, telecommunications companies and electricity companies, who formerly could engage in RPM with impunity, to conform to the same restrictions as those that have governed suppliers of goods. It will also bring the Australian prohibition of RPM into line, in this respect, with the laws of the United States, the European Community and Canada. What remains to be seen, however, is the effectiveness of s. 96A. This will depend on two main factors: the breadth of the term "services" and the extent to which services may be altered before their use downsteam no longer constitutes a "re-supply".

(a) Services

Services is broadly defined in the TPA and has been so interpreted by the courts. Section 4 of the TPA defines services to encompass virtually everything that doesn't fall within the definition of 'goods',[24] including any rights, benefits, privileges or facilities provided in trade or commerce. Examples include electronic data, intellectual property rights and internet access. The breadth of the new provisions it is not likely, therefore, to be hindered by a narrow definition of services.

(b) Re-supply

Section 96A provides that Part VIII applies to services in a manner corresponding to the way in which it applies to goods. To give effect to this extension, s. 96A(2) provides that references to the “sale of goods” are to be replaced with references to the “re-supply of services”. It is notable that re-supply is the term selected for the second transaction in relation to services, whereas the corresponding term used for the second transaction in relation to goods is “sale”. Why different terms are used is unclear. The explanatory memorandum provides no explanation for this difference and the Hilmer Committee Report adds to the confusion by referring, in its conclusion,[25] to services being “sold” and then “re-sold”, but then stating in its recommendation that the provision should be extended to the “re-supply” of services. While it may be that the term “re-supply” was considered necessary to accommodate the inherently different nature of services, the distinction conflicts with s 96A(1) which provides that services are to be treated in a manner “corresponding” to the way goods are. The terms are clearly different in scope, the definition of “re-supply of services” being much broader than that of “sale”. It is, therefore, necessary to examine more closely what conduct will amount to a "re-supply" for the purposes of RPM. The definition of re-supply of services is s. 4C(f) provides that:

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24 Note, however, that it does not include rights or benefits being the supply of goods and performance of work under a contract of service. See CCH, *Australian Trade Practices Reporter*, CCH Australia Ltd, 1990, p 1404 for detail on what constitutes services

25 Hilmer Report, above, n 1, p 58.

a reference to the re-supply of services (the 'original services') acquired from a person (the 'original supplier') includes a reference to:

(i) a supply of the original services to another person in an altered form or condition; and

(ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.[26]

As noted in the explanatory memorandum to the *CPRA*, there are clearly some services which cannot be re-supplied, such as a hairdresser providing a haircut,[27] or the provision of dentistry services. However, in respect of those that can be resupplied, there are three limbs to the prohibition identified in the explanatory memorandum.

(i) Re-supplying services in exactly the same form as they were acquired

Where the service supplied by A to B is exactly the same as that B supplies to C, any attempt by A to fix the price below which B supplies to C will contravene the Act. Conduct falling within this limb would include the situation where a person supplies 'financial information by electronic means to person B' who then supplies that same information, by electronic means, to C.[28] This limb is uncontroversial and will be the easiest to detect in practice.

(ii) Re-supply of services in an altered form or condition

Re-supply includes the supply of goods in an 'altered form or condition'.[29] According to the explanatory memorandum, this would cover the situation where 'A supplies information electronically to B and B amplifies the signal and then supplies it to C.'[30] However, this example appears uncontroversial and therefore does not assist in determining the extent to which a service may be supplied in an 'altered form' or an 'altered condition' before it will escape the ambit of this provision.

The reference to "form" suggests that the very nature of services may be changed, form being ordinarily defined as the mode in which something appears.[31] For example, if company (A) supplies law publisher (B) with electronic cases and legislation in an un-edited format, which B then sells to its customers electronically, after editing it and making it more accessible, it is suggested this should constituted an alteration in form, such as to fall within the ambit of the limb. "Condition", on the other hand, is more likely to be

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26 Inserted by s 5 CPRA.

27 Competition Policy Reform Bill 1995, *Explanatory Memorandum*, AGPS, clause 5(6).

28 Explanatory Memorandum, above, n 27, clause 5(7). The explanatory memorandum also provides, as an example of conduct falling under this limb, the situation whereby an entertainment centre sells tickets to a ticketing agent which entitles the bearer 'to sit in a particular seat at a particular time' and the ticketing agent then sells those tickets to its customers. While there is little doubt this conduct would be prohibited as RPM under s 96A it is not clear that it would fall under this limb.

29 Section 4C(f)(i) TPA.

30 Explanatory Memorandum, above n 27, clause 5(9).

31 As the term has no specific definition in the Act the courts are likely to adopt its ordinary meaning.

restricted to situations where the service, while remaining essentially the same, has been altered in quality. In the example provided, the amplification of the signal could be categorised as an alteration in 'condition', although it could fall within either category.

This limb, therefore, has the potential to capture a broad range of services and will be limited only by the restrictions placed upon it by the courts as to the extent to which such alteration in form or condition may occur. The legislature, through its extension of the *per se* prohibition of RPM to services, has sent a clear message that it opposes such conduct and it is hoped that the courts will refrain from placing any restrictions on the breadth of these terms. The public detriment associated with fixing the price of the services that have been altered to a very large degree - manifested most directly in an increase of the price of such services to consumers - is no less severe than that where only a slight alteration has taken place.

This may be best demonstrated by example. Assume a film distributor, *Moviemasters*, supplies the rights to a cinema group, *Entertainment Ltd*, to screen a feature film and; (a) sets the price below which tickets to view that film must not be sold[32] and (b) sets the price below which the cinema group must not sell these rights to a third party. The detriment suffered as a result of price fixing in each of these situations is substantially the same, with both likely to increase the cost to consumers of tickets to view the film.[33] However, while scenario (b) is clearly covered by the first limb of the prohibition, scenario (a) must fall for consideration under this limb. A wide interpretation of this limb would result in such conduct being prohibited. While clearly different from the original service, it is a manifestation of the original service in an altered form which, but for the original service, could not have been supplied.

If a supplier of services is able to impose sanctions or threaten non-supply to a party who refuses to adhere to a minimum re-supply price of the altered service, it is suggested that the extent to which such service is altered should be entirely irrelevant, and the conduct should be strictly prohibited. If this is the interpretation placed on this provision, it is suggested that it should have a significant role to play in removing any such existing vertical price restrictions and deterring the establishment of such restrictions in the future.

It would be unfortunate, however, if the courts were to narrowly interpret the provision, allowing only the re-supply of services that have had their form or condition altered to a negligible degree. Given the nature of services, this would severely inhibit the effectiveness of the new provisions, and would lead to the undesirable situation in which the supplier in the scenario (b) would have its conduct prohibited as unlawful RPM, but the supplier in scenario (a)

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32 Clarke, above, n 3, p 60. This conduct may breach s. 45 if it has the necessary anti-competitive purpose or effect.

33 An increase in cost could be expected to result in the second scenario, because the higher the cost of the rights to screen the film, the higher the ultimate costs of tickets to the consumer are likely to be.

could lawfully impose his restrictions.[34] Such an interpretation would clearly eliminate from prohibition a large range of services that undergo significant change before reaching the ultimate consumer, a result that is clearly undesirable from the perspective of the consumer public, who's interests the provisions are designed to protect.

(iii) Re-supply of services that are substantially similar to those originally supplied

The third limb to the prohibition relates to s. 4C(f)(ii) which defines as re-supply 'a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier'. According to the explanatory memorandum this 'covers cases where the re-supplied service is a different bundle of legal rights from the original service', an example being 'where A supplies information in electronic form to B and B manipulates the information to transform it into a more easily understood form and then supplies the transformed information to C.'[35]

Again, this explanation is limited in its ability to provide direction as to the degree of similarity required between the original services and the re-supply. It is suggested that most conduct falling under this limb would also fall within the 'altered form or condition' limb, detailed above. However, there will be circumstances in which the limbs do not overlap. One example would be where a computer service-provider provides an internet access service which is re-supplied to consumers along with installation and set-up services. Here, the original service (the internet access) has not itself been altered, as required by the second limb. Nevertheless, the new service is different in that it is constituted by a package made up of a number of services, one of which was that originally supplied. It is unclear whether this limb covers this situation - that is, the situation where the original service is supplied together with a separate, but associated service, which could not have been supplied if not for the original service. It is suggested that the practice of the supplier setting the price below which this combined service can not be supplied should constitute a 're-supply' under this limb and, therefore, be prohibited as RPM.

Conduct escaping the ambit of the RPM provisions

While the reforms to RPM brought about by the CPRA as a result of the Hilmer Committee inquiry were a positive step toward capturing conduct which had previously escaped the Act's ambit, further reform is still needed to capture other forms of vertical price fixing. There are four key areas in which it is suggested further reform is desirable: (1) combinations and mixtures of goods and services; (2) where goods are not exactly the same as those originally supplied; (3) fixing the price of competitors' goods or services; and (4) anti-competitive maximum resale price maintenance.

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[34] Provided, of course, that they did not breach other provisions of the TPA.

[35] Explanatory Memorandum, above, n 27, clause 5(10)

1. Combinations and mixtures of goods and services

While the CPRA recognises that the provision of services is capable of re-supply and therefore should be subject to the prohibition of RPM, the definition of services adopted is not wide enough to cover combinations or mixtures of goods and services. This limitation exists both where goods and/or services are provided "in connection" with each other and where one vertical transaction relates to goods and the other services, or vice-versa. This is demonstrated by the following examples:

- Car dealer (A) sells cars to rental agency (B) and sets the price below B can not rent those cars to its customers (C). While it could be expected that such conduct would have the same economic consequences as a dealer who set the price below which those cars could not be *sold*, the latter is prohibited and the former is not.[36]

- The owner of a fast food franchise (A) sets the price below which its franchisee (B) can not sell its food to its customers (C). Here it is a service that is being sold in the first transaction and goods which constitute the second transaction. The current RPM provisions fail to capture this situation regardless of the anti-competitive consequences. [37]

- Computer distributor (A) sets a price below which retailer (B) can not sell a package, consisting of a computer and the service of setting up and installing programs on that computer, to customers (C). Here the price being fixed is for a combination of both goods and services.[38]

It is suggested that the failure to capture this final example, at least, represents a deviation from the recommendation of the Hilmer Committee. While the formal recommendation of the Hilmer Committee stated simply that the prohibition of RPM 'be extended to the resale of services', their more detailed conclusion on this issue states that RPM should cover the situation 'where one person selling goods or services to a second person requires the second person to sell *other services*, provided *in connection* with the resale of the original goods or services, at or above a specified price' (emphasis added). This conclusion covers the situation whereby A, the supplier of goods or services to B, fixes the minimum price B can supply related goods or services to its customers (C).

In the above example, where B sells internet connection services (supplied by A) to C, along with installation and set-up of the necessary software, RPM would occur, according to the conclusion of the Hilmer Committee where;

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[36] Unless it can be shown to result in a substantial lessening of competition pursuant to s. 45 or a misuse of market power.

[37] Another example may be where an intellectual property licence is supplied enabling the manufacture of goods, and the price below which such goods must not be sold is specified by the supplier.

[38] Not that in *O'Brien Glass Industries Ltd v. Cool & Sons Pty Ltd* (1983) ATPR 40-376 at 44,467 Franki J stated that 'I do not see anything in the Act to indicate that the sale of goods embraces the sale of goods together with the provision of services.'

(a) A sets the price below which B can not supply the connection service to C.

(b) A sets the price below which B can not supply the installation & set-up service to C.

(c) A sets the price below which B can not sell a "package" made up of both the connection service and the installation.

The CPRA, however, when seeking to implement this aspect of the Hilmer recommendations, has referred only to the "re-supply" of "those services" that were originally provided. It has then defined "re-supply" in such a way that it does not encompass the fixing of prices in relation to *other* services provided *in connection* with those originally supplied.[39] As a result, only situation (a) and possibly (c)[40] in the example above will be prohibited.

A "package" which consisted of *goods* originally supplied, distinguished from *services* originally supplied in the previous example, and *other* services would also fail to fall within the prohibition. Thus, if A supplied computers to B, who sold them to C, A could lawfully set the price below which B could not;

(i) sell services in relation to those computers;

(ii) sell a package consisting of the computer and the service.[41]

The manner in which services were added to the RPM prohibition means that goods and services are separately defined as RPM, but combinations are not, whether the mixture is vertical or horizontal. While this omission may have been deliberate, it is unfortunate, as it leaves a wide range of conduct subject to blatant RPM. Setting the price below which goods or services must not be sold is no less offensive to free competition where a combination of goods and services is involved. While currently this practice may be prohibited if it can be shown to substantially lessen competition under s. 45, or constitute a misuse of market power under s. 46, the prohibition would more appropriately be dealt with under the RPM provisions. This could be achieved by repealing the current s. 96A and replacing references to 'goods' in s. 96 with references to 'goods or services'.

2. Where goods are not exactly the same as those originally supplied

The requirement in s 96 (RPM in relation to goods) that the second transaction be a sale - rather than a supply or re-supply - means that the goods sold must be identical to those originally supplied. On the other hand, where services are involved, the term 're-supply' of services in s 96A is broad enough to encompass the situation where services have been altered before their re-supply.

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39 Unless they are supplied in conjunction with other goods or services from another source and the price fixed is for the combination. Refer to the discussion of re-supply, below.

40 It is suggested that such a package should be captured by the "substantially similar" limb of the definition of 're-supply' for the purposes of the RPM prohibition.

41 Note, however, that such conduct risks infringing s 46 if A has market power, or s 45 if a substantial lessoning of competition can be proved.

Had the term 'supply' been used in relation to goods, the placing of vertical price restrictions on goods which are to be leased, hired or hire-purchased,[42] or goods supplied together with other property or services, or both,[43] would have being captured by the definition of RPM in Part VIII.[44] This would have encompassed some of the 'combination' situations referred to above, such as where a car manufacturer fixes the price below which a retailer can not lease those cars.

Had the term 're-supply' been used, as it is for services, it would be RPM for a supplier to fix the price below which a retailer sells goods that have been altered in 'form or condition', or are 'substantially similar' to those originally supplied. This may cover the situation where, for example, a manufacturer of furniture sets the price below which a distributor, who first paints and polishes the manufacturer's furniture, must not sell the final product to retailers. It would also be RPM for the supplier to fix the price below which the retailer could not supply to another person goods in which the original goods have been incorporated. This would capture situations where, for example, the manufacturer of a primary produce (such as limestone), sets the price below which a retailer may not sell derivatives of that product (such as cement).

The use of these terms, it is suggested, would be more appropriate and would mean that goods and services would be dealt with in substantially the same manner. It would also be more in keeping with the stated intention of the Hilmer Committee and the legislature, and would substantially broaden the prohibition in relation to goods. It is recommended, therefore, that the term 'supply' should be used in relation to both goods and services for the sake of consistency, and this term should be defined in the same manner that re-supply is defined in relation to goods and services respectively.

3. Fixing the price of competitors' goods or services

One important limitation on Australia's current RPM provisions is their failure to prohibit the fixing of prices below which *competitors'* goods can not be sold,[45] as demonstrated by the following example.

> Wholesaler (W) supplies Panadol (P) to a retailer (R). A different wholesaler (TP) supplies Herron Paracetamol (HP) to R. R sells both P and HP to its customers. In addition, R manufactures and sells its own brand of pain relief tablets (X) and sells it to its customers in competition with both P and HP. W, unhappy about the competition, agrees to supply P to R only on the condition that R agrees (or withholds, or threatens to withhold, supply because R has not agreed) not to sell below a specified price, either:

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42 Section 4(1) of the TPA defines 'supply' to include goods supplied by way of sale, exchange, lease, hire or hire-purchase..

43 Section 4C(c) of the TPA provides that 'a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both'.

44 See definition of supply in s 4(1) TPA.

45 Such conduct may, however, breach section 45 if a substantial lessening of competition can be demonstrated, and section 46 where the conduct constitutes a misuse of market power.

(a) Panadol (P)
(b) Herron Paracetamol (HP)
(c) The retailers Home Brand (X)

Currently, the RPM provision captures only situation (a). Conduct (b) and (c) therefore are not prohibited as RPM under s. 48.

This limitation is disturbing, given the obvious attraction of such conduct and the potential of such conduct to be even more harmful than fixing the price below which the supplier's own goods are not to be sold. Unlike the latter situation, where pro-competitive arguments are often advanced, there can be no suggestion that vertical price fixing in relation to *competitors'* goods has the potential to benefit consumers through the enhancement of economic efficiency, or by any other means. While generally this type of conduct will only be possible by firms with substantial market power, in which case it is likely to infringe s. 46 of the TPA, this may not always be the case, and in any event the very nature of the conduct suggests that it should more appropriately fall to be considered under the RPM provisions as a per se violation of the Act.

It should be noted that one limited exception to the requirement that the goods (or services) whose price is fixed must emanate from the original supplier is provided in section s. 96(3)(e), although it is questionable whether this was intended by the drafters of the provision.

Section 96(3)(e) defines, as an act constituting engaging in resale price maintenance:

> The supplier withholding the supply of goods to a second person for the reason that a third person who, directly or indirectly, has obtained, or wishes to obtain, ***goods from the second person***:
>
> (i) has not agreed not to sell those goods at a price less then a price specified by the supplier; or
>
> (ii) has sold, or is likely to sell, goods supplied to him or her, or to be supplied to him or her, by the second person, at a price less than a price specified by the supplier as the price below which the goods are not to be sold; [emphasis added]

Unlike the other sub-sections in s. 96(3), s. 96(3)(e) does not appear to require that the goods whose price are fixed emanate from the supplier. This would apply to a limited range of circumstances where a third person, to whom the second person supplies goods, has not agreed not to sell goods or services,[46] or has sold or is likely to sell goods or services, supplied to him by the second person, at less than the price specified by the supplier as a price below which the goods are not to be sold.[47] The most common scenario may arise as follows:

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46 Services are covered by virtue of s 96A.

47 This provision only applies to the withholding of supply for this reason; not the conditional supply.

> Manufacturer (M) of product X supplies his product to a wholesaler (W). W then supplies to a retailer (R). M is aggrieved by the conduct of R who is selling product Y, in competition with product X, at a lower price than product X. To prevent M's product being subject to price competition from product Y, M may withhold supplying W with product X unless R agrees not to sell product Y at or below a specified price.

As the Act does not require that product Y in this scenario originate from M, in this situation the definition of RPM would be broad enough to capture the fixing of prices of a competitor's goods or services. This now applies equally in relation to services under s. 96A.

This, while foreseeable, is likely to be rare in practice. It is clear, in any event, that this provision does not sufficiently address the deficiency whereby the fixing of the price of a competitors goods escapes the ambit of the RPM provisions. Had the second aspect of the Hilmer conclusion regarding RPM in relation to services been implemented, it would have gone a small way to combating this situation, however still would have proved inadequate in fully addressing this deficiency.

It is suggested, therefore, that the definition of RPM should be extended to prohibit a supplier fixing a price below which a distributor or retailer can not supply or re-supply goods or services received from a third party, whether in combination with other goods and services, or individually. This could be achieved by replacing references to 'those goods' with references to 'those or other goods'. The use of the term 'supply' rather than 're-supply', as recommended above, will enable the definition of RPM to cover the situation where the goods or services whose price is fixed emanate from the second party, so that there need not necessarily be, strictly speaking, a 're-supply'.

4. Anti-competitive Maximum Resale Price Maintenance

There are currently three exceptions recognised in Part VIII to the RPM prohibition. They are maximum RPM, recommended prices and loss-leader selling. The Hilmer Committee did not recommend any changes to these exceptions and consequently the CPRA made no changes in this respect. While there is little controversy over the exclusion of these practices from the *per se* prohibition of RPM, the exemption in relation to maximum RPM goes further and specifically excludes that conduct from prohibition under s. 45 of the TPA even where it can be shown to substantially lessen competition.[48] This, it is suggested, is unjustifiable. While situations in which maximum vertical price fixing will have such an effect may be rare, those rare cases should be subject to scrutiny under s. 45. It is recommended, therefore, that this exemption be removed. This could be achieved simply by repealing section 45(5)(c)(iii).

[48] See s 45(5)(c)(iii) TPA. The conduct may, however, contravene s 46 in certain cases.

Conclusion

The extension of RPM to cover services is both desirable and essential. Technology is enabling new and improved methods of supply, which can only lead to a greater range of services having the potential for re-supply and consequently the potential for RPM.[49] The use of the term 're-supply' and its associated definition means that the prohibition of RPM for services is at least as wide, potentially much wider, than the prohibition of RPM for goods, save for the natural limitations regarding the ability to re-supply certain services. This definition is, on its face, very broad and has the potential to cover almost all manifestations of secondary supply of services. If this provision is given the expansive interpretation it deserves it will capture a wide range of anti-competitive conduct previously immune from the RPM provisions of the Act. While previously such conduct may have been subject to prosecution under the general prohibition of conduct which substantially lessens competition, its prohibition is more appropriately and effectively addressed by the RPM provisions. The extension provided for by s. 96A therefore constitutes an appropriate and welcome development in Australia's RPM laws. However, there remains a wide range of pernicious vertical price fixing which escapes the ambit of the current prohibition of RPM. It is suggested, therefore, that the RPM provisions of the TPA are in need of further reform.

Several recommendations for reform have been suggested which, if implemented, would provide a more comprehensive and consistent prohibition than that currently existing in Australia. Each gap filled by the recommendations made translates into a current exclusion from the RPM provisions of the Act which may have a significant deleterious effect on competition and, consequently, consumer welfare. The implementation of these recommendations would provide Australia with an appropriately strict RPM regime which would have a desirable effect on consumer welfare and lead to greater and more free competition in the marketplace - the very ideals which the Act seeks to promote.

[49] Searles, , above, n 12, p 186.