

When a 'wink and a nod' is not OK

ANY AGREEMENT BETWEEN A BUSINESS AND A COMPETITOR TO FIX PRICES IS ILLEGAL UNDER THE TRADE PRACTICES ACT. PRICE FIXING AGREEMENTS DO NOT HAVE TO BE IN WRITING. THEY CAN BE A 'WINK AND A NOD', MADE OVER A DRINK IN A LOCAL PUB, AT AN ASSOCIATION MEETING OR AT A SOCIAL OCCASION.



What's important is not how the agreement was made, or even how effective it is, but that competitors are working out their prices collectively and not individually.

Price fixing is a per se offence—that is, no matter what the effect is on competition in a market, price fixing agreements between competitors are illegal.

Price fixing includes agreements that purport to 'recommend' prices but which in reality fix prices.

Agreements to fix, maintain or control any discount, allowance, rebate or credit for goods or services are also considered to be price fixing under the Act.

However, there are some exceptions. In certain circumstances, selling arrangements made by joint venture participants and collective buying arrangements are exempt from the per se price fixing provision. If there are other competition concerns with these arrangements, parties may apply for authorisation. The ACCC can authorise particular conduct that would normally breach the Act if it is satisfied that the public benefit outweighs the detriment.

Amendments are likely to be passed later this year to provide a new joint venture defence for price fixing. Under the new amendments a price fixing arrangement will not breach the Act if it is for the purposes of a joint venture and does not substantially lessen competition.

A case in point

It took nearly three years for the ACCC to win a case against petrol companies operating in Ballarat.

But in the Federal Court in March 2005 penalties of \$23.3 million were imposed on the respondents for price fixing conduct in the Ballarat petrol market.

The case began in May 2002 after the ACCC had investigated allegations by a service station operator, who was supplied by one of the participants at the time.

The ACCC instituted the case against 16 companies and individuals, alleging they had a long-standing price fixing arrangement.

The ACCC alleged the companies arranged to increase prices by telephoning each other, communicating the size and approximate time of price rises and then contacting retail sites to implement the rises.

The ACCC alleged when a company became aware that a service station had not raised its price, further calls were made to participants to encourage the site to raise its prices.

A number of respondents made admissions and proceeded to early penalty hearings, while the contesting respondents went to trial.

In December 2004 the presiding judge in the Federal Court found the contesting respondents had engaged in price fixing conduct in breach of s. 45 of the Trade Practices Act.

Some of the respondents are now appealing the decision and penalties to the Full Federal Court. The ACCC has also filed a cross-appeal seeking greater penalties against one of the respondents.