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THE QUIET REVOLUTION IN U.S. ANTITRUST LAW

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I INTRODUCTION

In this paper, I report on a series of recent decisions in antitrust cases by the U.S. Supreme Court. While each decision, read separately, may be only of moderate interest (even to a U.S. audience), the slate of decisions, looked at in its entirety, conveys a significant message, and one that may have meaning for scholars and practitioners in Australia and other jurisdictions outside the U.S. I would suggest that a quiet revolution is occurring in which the arguments economists have been making for nearly fifty years have suddenly been embraced by both the left and the right on the Court. The revolution is not yet complete; there is still substantial tidying up to do. But it will not take long before the entire corpus of antitrust has been transformed to fit the consumer welfare model with the added feature that it has been tailored to a world in which general purpose federal judges and lay juries (unless put on a very tight leash) can make mistakes which not merely can result in an injustice in the particular matter under litigation, but also can have significant dampening effects on the willingness of large, efficient firms to use their efficiency to compete vigorously. The fact that the law is catching up to a body of defendant-friendly economic theory that is fifty years old at about the same time that economic theory has begun to move in a direction that is more plaintiff-friendly is an ironic footnote to the story.

The plan of the paper is, first, merely to summarize the decisions and the attendant issues sequentially, and then, second, to evaluate them as a package. The third part of the paper speculates on further developments. The final section considers the possible implications for Australia.

II A CATALOGUE OF RECENT DECISIONS[1]

A *Setting the Scene*

The flurry of recent decisions began in 2004 with *Trinko*[2] and *Empagran*.[3] However, for completeness, we should refer to two earlier decisions that started us down the path. In 1993, the Supreme Court decided *Brooke Group*,[4] a case which

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1 Not surprisingly, I am not the only person to comment on this recent collection of decisions. Others include, J Thomas Rosch, Commissioner, Federal Trade Commissioner, 'A New Direction for Antitrust at the Supreme Court?' (Speech delivered at the Minnesota State Bar Antitrust Section Meeting, 1 March 2007), available at <http://www.ftc.gov/speeches/rosch/070301minnspeech.pdf> at 18 July 2007; Darren S Tucker and Kathleen N Pessolano, *Supreme Court's Weyerhaeuser Decision Follows Recent Pattern* (2007) Antitrust Source <http://www.abanet.org/antitrust/at-source/07/04/Apr07-TuckPess4=27f.pdf> at 18 July 2007.

2 *Verizon Communications Inc v Law Offices of Curtis V Trinko*, LLP, 540 US 398 (2004).

3 *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004).

4 *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993).

articulated the modern two-part test for establishing unlawful predatory pricing: a) pricing below some measure of cost, and b) a significant likelihood of recouping any profit sacrifice that occurred during the period of the alleged predation. It is clearly recognized today and was acknowledged by the Court at the time that this test sets a high hurdle for plaintiffs. However, an important theme of the Court's decision was that trial court judges and juries make mistakes, and that mistakes of the Type I or false positive variety[5] in a predatory pricing case run a significant risk of deterring perfectly legitimate, pro-competitive and pro-consumer price cutting. Hence the high hurdle represented a conscious effort to minimize the incidence of Type I errors by allowing a plaintiff to succeed only when there was almost no chance that the defendant's conduct was competitively benign. The following passage (one of several echoing the same theme) is worth quoting:

> As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.[6]

The second older decision was *Khan*,[7] overturning the *per se* rule against vertical maximum price fixing. (When the Court declares something illegal *per* se, the plaintiff is spared the burden of proving an anticompetitive effect; such an effect is presumed as a matter of law. Horizontal price fixing is illegal *per se*. Until this decision, so was vertical price fixing.) From an economics point of view, the result was a no-brainer; as far as I know, no respectable economist has supported the *per se* rule for maximum price fixing since the date it was established.[8] What was significant was that the Supreme Court was willing to acknowledge that its prior rule was flatly inconsistent with sound economics and that, despite respect for the traditional doctrine of *stare decisis*, sound economics (at least when there is an overwhelming consensus) must trump the respect usually accorded precedent.

B *Trinko*

The first of the recent batch of cases was *Trinko*.[9] On the facts, this was a silly case. It involved a scenario that will resonate with an Australian audience, viz., a fight about whether the owner of the local exchange telephony structure has an obligation to make parts of its network available to new entrants or smaller competitors. But the plaintiff was not the disappointed would-be competitor but a class action consisting essentially of telephone consumers claiming they could have enjoyed less expensive telephone service had the incumbent been more cooperative. The would-be competitor, in the meanwhile, had successfully complained to the Federal Communications Commission under a federal statute specifically governing

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5 A Type I Error ('false positive') would be finding a defendant liable for predation when there was no real risk of successful monopolization or harm to competition.

6 *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 223 (1993).

7 *State Oil Co v Khan*, 522 US 3 (1997).

8 The rule, as applied to vertical maximum price fixing, came out of *Albrecht v Herald Co*, 390 US 145 (1968).

9 I wrote about *Trinko* when it first appeared. See George A Hay, 'Trinko: Going All the Way' (2005) 50 *Antitrust Bulletin* 527.

the right of access and the terms on which access should be granted.[10] So, from a 'logical' perspective, one could have imagined the case being thrown out because a regulatory agency, not the federal courts, really had jurisdiction; because this was not the proper complainant; and because the would-be competitor eventually got what it wanted under the access statute. For reasons too complicated to explain here, the Supreme Court decided that this plaintiff was entitled to seek compensation under the antitrust laws, so long as the plaintiff could establish liability. But the Court then decided (taking into account the telephony-specific legislation as part of the background) that the plaintiff had not established liability. This could have been done in a few short sentences that focused on the narrow facts and special circumstances of the case. Instead, the Court, in a unanimous decision with an opinion by Justice Scalia,[11] let loose with a few broad swipes against the notion that a monopolist had some special duty to deal with a would-be competitor. The Court, without overruling it, essentially buried the earlier *Aspen Skiing* decision[12] normally relied on in such refusal-to-deal cases, describing it as 'at or near the outer boundary of §2 liability.'[13] The opinion also effectively disowned the so-called 'essential facilities' doctrine, another frequent vehicle for plaintiffs in refusal cases, saying simply: '[w]e have never recognized such a doctrine …'[14] The opinion suggested (without saying so explicitly) there could never be liability under §2 when the defendant has never sold the intermediate product or service at arm's length,[15] and that, in the absence of a specific regulatory requirement to the contrary, an incumbent is not required to sell at less than the short-run profit-maximizing price.[16] Finally, as in *Brooke Group*, the opinion raised the spectre of false positives counselling that '[m]istaken inferences and the resulting false condemnations "are especially costly because they chill the very conduct the antitrust laws are designed to protect."'[17] As I have argued elsewhere,[18] the opinion could be read as signalling the end of a monopolist's duty to deal except where a specific regulatory statute suggests otherwise.[19] The decision was unanimous although the three Justices who concurred would have decided the case on much simpler grounds. Note: the Department of Justice filed an *amicus curiae* brief siding with the defendant.

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[10] This would be somewhat similar to Part IIIA or Part XIB of the Australian *Trade Practices Act 1974* (Cth) except that there was an industry-specific regulatory agency charged with enforcing the statute and ensuring access on reasonable terms.

[11] Three Justices concurred in the result but would have resolved the matter simply on grounds that the plaintiff lacked standing. *Verizon Communications Inc v Law Offices of Curtis V Trinko*, LLP, 540 US 398, 416 (2004).

[12] *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985).

[13] *Trinko*, 540 US 398, 409.

[14] Ibid 411 (citing *Aspen*, 472 US 585, 611, n 44).

[15] *Trinko*, 540 US 398, 409-410.

[16] Ibid 409.

[17] Ibid 400 (quoting *Matsushita Elec Indus Co, Ltd v Zenith Radio Corp*, 475 US 574, 594 (1986)).

[18] Hay, above n 9.

[19] Despite the unquestioned wisdom of my analysis, plaintiffs have had some success in lower courts since *Trinko*. See Edward D Cavanagh, 'Trinko: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?' (2007) 59 *Maine Law Review* 111. Apparently, incumbents have not yet figured out that a blanket refusal is a lot more risky than simply picking a price that renders it a matter of indifference whether the applicant gains access or not.

C *Empagran*

On its face, *Empagran*[20] did not involve a substantive issue, but merely one of standing and statutory interpretation.[21] The Court, again in a unanimous decision,[22] held that a foreign plaintiff did not have standing to bring a case in the U.S., under U.S. antitrust law, for harm caused by conduct (specifically, a price-fixing cartel) which occurred entirely overseas (so long as the adverse effect on foreign plaintiffs was wholly independent of any adverse effect on U.S. consumers). The opinion, viewed in isolation, would not cause anyone to suspect that it might be part of some broad reform program. Nevertheless, it is worth noting three things about the case: unanimous decision, pro-defendant outcome, and with an *amicus* brief by the Department of Justice, siding with the defendant's position.

D *Volvo*

The *Volvo*[23] case involved the interpretation of the *Robinson-Patman Act* which, generally speaking, prohibits price discrimination which adversely affects competition. Once a significant statute, it now is of such little independent consequence that many law school courses in antitrust law never get around to teaching it.[24] The decision, too narrow to justify detailed explanations, made it incrementally harder for a plaintiff to succeed. Again, viewed in isolation, the case would not be of any great significance. But note three things about the case: near unanimous decision,[25] defendant victory, with an *amicus* brief filed by the Department of Justice siding with the defendant.

E *Dagher*

Another case that, in isolation, would not be remarkable, *Dagher*[26] involved a rather silly application of the *per se* rule to the setting of price by an admittedly lawful joint venture for two of the brands that it marketed. Oversimplifying slightly, Texaco and Shell formed a joint venture, approved by the FTC, which combined the downstream operations (refining and distribution of gasoline and other petroleum products) of the two companies. All control over the marketing of the products was delegated to the operator of the joint venture corporation. As part of the creation of

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[20] *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004).

[21] The statute that had to be interpreted was not the *Sherman Act* but the *Foreign Trade Antitrust Improvements Act of 1982*.

[22] One Justice did not participate.

[23] *Volvo Trucks North America, Inc v Reeder-Simco GMC*, 546 US 164 (2006).

[24] Sometimes, claims of price discrimination are aimed at dominant firms and are combined with claims of predatory pricing; this was true of *Brooke Group*. But, in such cases, the Court has told us to apply traditional *Sherman Act* principles. The infrequency of successful claims against non-dominant firms for injuries caused by non-predatory price discrimination have rendered the Act of very little independent significance, and there are frequent calls for its repeal, although such calls are forcefully resisted by the small business community which usually resolves in a stalemate.

[25] Justice Stevens, with Justice Thomas concurring, dissented. However, it is significant that Justice Stevens made it clear that he thought that the statute served no useful purpose; nevertheless, he dissented because he thought the language of the statute clearly applied to the alleged conduct.

[26] *Texaco Inc v Dagher*, 547 US 1 (2006).

the joint venture, Texaco and Shell agreed that, once the joint venture was up and running, the joint venture operator would be required to sell the Texaco brand at the same price (whatever it was) that it sold the Shell brand. Somehow, the court of appeals found a way to characterize this as horizontal price fixing among competitors, therefore calling for the non-discretionary application of the *per se* rule. The Supreme Court pointed out the obvious, viz., that once the joint venture took over responsibility for the marketing (including the pricing) of the two brands, they could not really be said to be in competition with one another.[27] Hence the agreement between Shell and Texaco did not eliminate any competition that would otherwise have occurred. So this was an easy case and, in isolation, not especially newsworthy. But note three things: unanimous decision, pro-defendant outcome, and *amicus* brief by the Department of Justice on the side of the defendant.

F *Illinois Tool*

Illinois Tool[28] involved a simple point of law, viz., whether, in a tying case, a patent necessarily confers market power on the patent holder.[29] Everyone knows there are lots of worthless patents, but there was nevertheless enough case law to support an appellate court decision that market power could be presumed from the existence of a patent. The Supreme Court said that such a presumption was not warranted and that the plaintiff had the burden to prove market power in the traditional way. Again, in isolation, there is nothing remarkable about this. But note three things: unanimous decision,[30] pro-defendant outcome, and *amicus* brief by the Department of Justice in favour of the defendant's position.

G *Weyerhaeuser*

Weyerhaeuser[31] was the first of the four decisions to come from the Court thus far in 2007. It is a full-fledged opinion on a substantive issue of antitrust law, although it involves conduct which has rarely been discussed heretofore in the case law or the literature (and may be quite rare in practice), viz., predatory buying or predatory bidding.[32] Predatory buying is on the buying side what predatory pricing is on the selling side. A buyer of inputs buys more inputs than it would if it were maximising short-term profits and, if the supply curve slopes upward, will wind up paying a higher price for those inputs as a consequence.[33] The object of the exercise

[27] Thus, for example, had it been the manager of the joint venture, not Shell and Texaco, that made the decision to price the two brands equally, no one would have even considered the possibility that this might violate §1 of the *Sherman Act*.

[28] *Illinois Tool Works Inc v Independent Ink, Inc*, 547 US 28 (2006).

[29] This is significant because, if the defendant possesses market power in the tying product, then a tying arrangement involving two separate products will be unlawful *per se* so long as a non-trivial amount of dollar commerce in the tied product is foreclosed to competitors by the tie.

[30] One Justice did not participate.

[31] *Weyerhaeuser Co v Ross-Simmons Hardwood Lumber Co, Inc*, 127 S Ct 1069 (2007).

[32] The economics of predatory buying and the decision in *Weyerhaeuser* are discussed in a forthcoming article. See George A Hay, Rhonda L Smith and Alexandra Merrett, 'Predatory Bidding: The Weyerhaeuser Decision and its Implications for Australia' (forthcoming) *Competition and Consumer Law Journal*.

[33] It can also be characterised in such a way as to reverse the causation: A buyer offers to pay more than it needs to in order to acquire the amount of input it requires for short-run profit maximisation, and suppliers will therefore seek to sell more than they would at lower prices. It does not really matter which way the causation is expressed, since the

is to drive competing purchasers of inputs from the market and ultimately wind up as the sole buyer. When that time comes (if it comes) the predator expects to be able to buy inputs at a monopsonistically low price.

It is clear that, while monopoly power and monopsony power are completely symmetric from a technical economic viewpoint, courts and commentators have always struggled with the concept of monopsony power. The most common misconception is that monopsony power, by allowing the monopsonistic buyer to acquire inputs at a lower price, will actually be good for the consumer since some or all of the lower input costs will be passed on to the consumer of the final product. This is wrong because the mechanism by which monopsonistic buyers push down the purchase price of the input is by buying a smaller quantity of inputs. Therefore, in the downstream market, the monopsonist's production will actually decrease, not increase, and thus cannot make consumers better off.[34] Not surprisingly, the few efforts to deal with predatory buying have fared no better. In *Weyerhaeuser*, the appellate court, in a thoroughly garbled opinion, tried to distinguish predatory pricing and predatory buying and concluded that, while unsuccessful attempts to acquire a monopoly through predatory pricing could be good for consumers, unsuccessful attempts to acquire a monopsony through predatory buying would not provide any consumer benefit. Therefore, the appellate court rejected defendant's claim that the *Brooke Group* tests for alleged predatory pricing[35] should be adapted and applied symmetrically to alleged predatory buying. The Supreme Court did not get it quite right either, but on balance, came closer.[36] The Court stressed the symmetry of predatory pricing and predatory buying, repeated the rationale for a conservative approach to predatory pricing (successful attempts to engage in predatory pricing are rare; failed attempts are good for consumers; Type I errors in prosecution will deter socially desirable aggressive price competition) and determined that the same conservative approach should apply to alleged predatory buying.

My own take on *Weyerhaeuser*, independent of any minor quibbles with the Court's technical analysis, is that if you think *Brooke Group* is the right approach to alleged predatory pricing (which I do, at least in the U.S. context), then it is hard to see why a symmetric approach should not be used in connection with alleged predatory buying. Of course, whether as a matter of statutory interpretation Australia can import *Brooke Group*, or whether as a matter of policy it should, is a more complex question.[37] But for now, let me observe the following: unanimous decision, pro-defendant outcome, and an *amicus* brief by the Department of Justice essentially taking the defendant's position. Note also the emphasis on the possibility and cost of Type I errors as justifying a conservative enforcement approach.

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higher prices paid and the greater quantities purchased are two-sides of the same predatory coin.

[34] Whether consumers will actually be worse off depends on the structure of the downstream market. If that market is competitive, then the equilibrium price will be essentially unchanged even as the monopsonist produces less. See Hay, Smith and Merrett, above n 32.

[35] See above n 4 and accompanying text.

[36] See Hay, Smith and Merrett, above n 32. The main argument we have with the Court's analysis is that it seemed to discount any benefits to sellers of inputs from unsuccessful attempts to engage in predatory buying, and overstated the likely benefits to consumers.

[37] Discussed in ibid.

H *Twombly*

The very fact that the Court took this case[38] suggests that there is an agenda to tidy up antitrust law. The case involved an alleged conspiracy among incumbent local telephone exchange owners to refuse to share their facilities with smaller competitors or new entrants. If this sounds generally familiar, it is not surprising. When the Supreme Court threw out the *Trinko* claim, stating that an incumbent has no general duty to deal, some clever lawyers transformed it from a §2 monopoly case to a §1 agreement case by alleging that the incumbents in all the various local areas had agreed with one another that each would resist the applications for sharing in their respective areas, and that each would refrain from entering adjacent territories where their neighbours were the incumbent monopoly.[39] Before knowing any more facts, one would naturally be suspicious of the first part of the claim, given that each had an independent reason not to want to share its facilities with potential competitors. Hence, while one might expect to observe defendants acting in parallel (each refusing to share), this could be the result of independent decision-making by each incumbent. With respect to the second part of the claim, there are at least three potential explanations for the failure to enter adjacent territories: a) given the incumbent's refusal to share on reasonable terms, it would simply not have been profitable; b) it would have been profitable in the 'short-run,' but would invite incumbents to retaliate, and hence the rational strategy would be to engage in oligopolistic interdependence and hold one's fire in the hope that the other incumbents would do likewise; c) the incumbents agreed to stay out of each others' territories.

In any event, plaintiffs filed a complaint alleging a conspiracy. They said little to support the first allegation and, with respect to the second, cited an executive's statement which, charitably read, could support either the oligopolistic interdependence explanation or the conspiracy explanation. Defendants moved to dismiss the case based on 'failure to state a claim,' and the trial judge granted the motion saying, in effect, 'I don't believe your story; it is simply not plausible given what I know about the context.'[40] The court of appeals reversed, saying, in effect: 'this has nothing to do with the merits. The plaintiff alleged a conspiracy; the i's were dotted and the t's crossed, and all the words were spelled correctly. That should be enough to survive a motion to dismiss. We'll get to the merits later, and defendants can move for summary judgment at the appropriate time (which would be following at least some discovery).'[41]

The standard for drafting a complaint that can survive a motion to dismiss is normally not the kind of stuff that makes it to the Supreme Court. But defendants (and defendants' bar) made the following, not unreasonable, plea: 'this just isn't fair. If this motion is denied we will be subject to millions of dollars of costs in complying with discovery demands. This shouldn't be allowed to happen just because the plaintiff utters the word "agreement" in association with parallel conduct. So, regardless of the relaxed standards usually applied to the filing of a

38 *Bell Atlantic Corp v Twombly*, 127 S Ct 1955 (2007).

39 In the U.S., the original AT&T monopoly was broken up along regional lines twenty years ago. Hence, unlike the situation in Australia where Telstra is dominant everywhere, there is a different incumbent 'monopolist' in each region of the U.S., although, as a result of various mergers, there are now in total only 3 or 4 independent incumbents.

40 See *Twombly v Bell Atlantic Corp*, 313 F Supp 2d 174, 188-9 (SDNY, 2003).

41 See *Twombly v Bell Atlantic Corp*, 425 F 3d 99, 118-19 (2nd Cir, 2005). This is obviously a very loose paraphrasing of the court's analysis but I think it captures the flavour of the basic rationale for the decision.

complaint, the Court needs to do something to save us from these plaintiffs' lawyers who simply want to coerce settlements and have no interest in the underlying merits of the case.'[42] So the Court accepted the case, thereby turning what looked to be a minor issue of procedure into a more substantive inquiry into the legal and economic analysis of conspiracy.

Not surprisingly, the Court, by a 7-2 margin, reversed the court of appeals and dismissed the complaint. There was no dispute between the majority and the dissent about the substance of antitrust law – mere parallel conduct is not enough to support a conspiracy claim, either because parallel conduct can be independent (and a competitive response to common cost drivers) or because parallel conduct can be the result of oligopolistic interdependence without the need for any prior agreement. But the majority wanted to protect defendants against the costs associated with defending (ultimately) meritless complaints that would be incurred in-between the filing of a complaint and the appropriate time for a motion for summary judgment (after at least some discovery had occurred). The Court even invoked the 'problem of false positives.'[43]

Is this decision a surprise? Probably not. Will it have any effect on substantive antitrust doctrine? Probably not. Will it weed out large numbers of spurious complaints? Too early to tell. But, in placing this opinion in context, again notice the presence of the three recurring factors: decision for defendants, nearly unanimous (and certainly unanimous with respect to substantive antitrust doctrine), with *amicus* participation by the Department of Justice on the side of the defendants.

I *Credit Suisse*

This case[44] does not involve any substantive issues of antitrust but simply the issue of when plaintiffs can sue under the antitrust laws for conduct that is very clearly regulated by another body, in this case the U.S. Securities and Exchange Commission. The Court, in a 7-1 decision, ruled that, in this particular case, the application of antitrust law was in conflict with the regulatory scheme and therefore that the application was pre-empted. The one reason for mentioning the case at all was that the Court used some of the language referred to above to the effect that nonexpert judges and nonexpert juries can frequently make mistakes that result not only in the inconsistent application of antitrust law but also in underwriters (the would-be defendants) acting 'in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).'[45] Again, a near unanimous decision, favouring defendants.[46]

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42 See Appellees' Br. At 29-30. Similarly, this is a paraphrase of the defendants' argument designed to provide a flavour of the policy arguments that underlay the legal analysis.

43 The dissent merely observed, although forcefully, that there was legislative support and a long-established judicial tradition of not requiring anything more than a simple statement of the claim in the complaint itself and expressed substantially more optimism about the ability of the trial judge to control discovery costs. See *Bell Atlantic Corp v Twombly*, 127 S Ct 1955 (2007).

44 *Credit Suisse Securities (USA) LLC v Billing*, 127 S Ct 2383 (2007).

45 Ibid 2396.

46 In this case, the Justice Department submitted an *amicus* brief that tried to balance the interests of antitrust enforcement and securities regulation.

J *Leegin*

Leegin[47] is one of those antitrust cases where, at least at the appellate level, the detailed facts really do not matter. The defendant, a manufacturer of women's accessories such as handbags, instituted a 'Retail Pricing and Promotion Policy,' under which it would sell its products to only those retailers that followed its suggested resale prices. Arguably, under the *Colgate* doctrine[48] as re-vivified in *Monsanto*,[49] that is lawful so long as it represents a unilateral statement of policy and pattern of enforcement by the manufacturer. Subsequently, however, the defendant took action that even a C-student of antitrust law would warn against – it insisted that its retailers pledge to comply with the pricing policy in order to become an authorised retail outlet. It should hardly have come as a shock when one of the retailers that were suspended by the manufacturer filed suit claiming that it was suspended because it would not comply with an unlawful resale price maintenance (rpm) agreement.

The defendant argued in court that its conduct should not be treated under the *per se* rule and offered testimony by a highly-regarded (conservative) economist to the effect that Leegin's policy (which it referred to euphemistically as 'Suggested Retail Prices') was pro-competitive. The trial judge excluded the testimony as irrelevant given the *per se* rule, which the court refused to abandon, feeling itself bound by the unambiguous prior statements of the Supreme Court. So the case went to the Court on the purely legal issue (albeit imbued with economic analysis) of whether rpm should continue to be *per se* illegal.

The *per se* rule is supposed to be reserved for conduct which is so frequently anticompetitive (and so rarely pro-competitive) that blanket condemnation is justified on grounds of administrative convenience. Whatever the views of individual economists on whether rpm *can* be anticompetitive under certain conditions,[50] few would support the proposition that it is almost always anticompetitive. Hence, for most economists, the argument that, like vertical non-price restraints, rpm should be evaluated under the rule of reason is not a difficult one.[51] Economists, of course, are less concerned with *stare decisis*.

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47 *Leegin Creative Leather Products, Inc v PSKS, Inc, dba Kay's Closet … Kay's Shoes*, 127 S Ct 2705 (2007).

48 *United States v Colgate & Co*, 250 US 300 (1919).

49 *Monsanto v Spray-Rite Service Corp*, 465 US 752 (1984).

50 The most extreme position would be that, unless it is imposed on an unwilling manufacturer by colluding retail dealers, rpm is pro-competitive or, at worst, neutral. A more common position would be that, absent significant market power on the part of the manufacturer, a unilateral decision by the manufacturer to impose rpm on its retailers cannot significantly harm competition.

51 The first step in the rule of reason analysis would be an evaluation of the manufacturer's market power. Absent significant market power, the presumption would be that rpm does not adversely affect competition to any degree worth worrying about. A small community of rpm die-hards would oppose a full scale rule of reason approach (especially one with a market power screen), but few would maintain that rpm should always be unlawful. Those who oppose a full scale rule of reason approach typically propose some kind of rebuttable presumption of illegality. See, for example, Pamela Jones Harbour, Commissioner, Federal Trade Commissioner, *An Open Letter to the Supreme Court of the United States from Commissioner Pamela Jones Harbour, 26 February* 2007 (2007) <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf> at 18 July 2007. See especially pages 18-20.

The Court explicitly aligned itself with what it perceived to be the prevailing (by a wide margin) view among economists and indicated that, while *stare decisis* is generally to be respected, it cannot be sustained in the face of such overwhelming economic authority. Hence, rpm, like other vertical restraints, will henceforth be evaluated under the rule of reason. Hence, another victory for defendants, and another *amicus* brief by the Department of Justice in favour of defendant's position. The one difference is that this case was decided not by a unanimous or even near-unanimous opinion but by a 5-4 majority. Had it been the only antitrust case decided this term, the narrow majority would have allowed those writing in or about other jurisdictions to discount its significance. But in the face of all that preceded *Leegin*, the message is clear: this Supreme Court wants to re-make antitrust law to bring it into accord with (what it perceives to be) accepted economic doctrine.

III EVALUATION

With the possible exception of *Leegin*, which overturned a century old precedent, not one of these decisions, looked at in isolation, is revolutionary. But when they are examined as a package, a very different picture emerges. All of the decisions were in favour of the defendant; all but one invoked *amicus* participation on the part of the Department of Justice in favour of the defendant's position; and most were unanimous or nearly so. Especially given the last point, it is hard to attribute this development to some kind of laissez-faire packing of the Court by Reagan, Bush I, and Bush II. Justices Breyer, Stevens, and Ginsberg are clearly in the liberal (in the American sense) camp on almost all social issues. Nor can it be attributed to the wool being pulled over those Justices' eyes by more antitrust-knowledgeable members of the Court. Justice Breyer taught antitrust law at Harvard; Stevens was an experienced antitrust practitioner; Ginsberg had strong connections to the talented, left-leaning group of antitrust academics at Columbia such as Milton Handler and Robert Pitofsky. So what is going on?

I would suggest that what is happening is that the Court has finally realised that much of the traditional antitrust doctrine of the 20th century is badly out of step with basic industrial organisation economics, and has been for some time. Moreover, the Court has been sensitised to the possibility that over-reaching antitrust doctrine has real consequences, not just for the unlucky corporations caught by one of the fly-by-night plaintiffs' class action lawsuits, but for other corporations who may feel the need to compete less aggressively as a result, and therefore for consumers as well. The frequent reference to Type I errors is significant and cannot be attributed to the esoteric leanings of a lowly law clerk who managed to sneak the phrase into a judgment when no one was paying attention.

Moreover, I think the flurry of decisions suggests that the Court may see itself as on some kind of mission to clean up antitrust, and there is certainly more cleaning up to do: bundled discounts; the unfortunate legacy of *LePage's*,[52] the extreme treatment of conduct characterised as a tying arrangement as compared to the more lenient treatment of essentially the same conduct when treated as exclusive dealing or simply as an act of monopolisation or attempted monopolisation; the difference between the way exclusive dealing is treated under §1 and under §2 as exemplified in the *Microsoft* opinion.[53] I predict, therefore, that we have not seen the end of this

[52] *LePage's Inc v 3M*, 324 F 3d 141 (3rd Cir, 2003).
[53] *United States v Microsoft*, 253 F 3d 34 (DC Cir, 2001).

train and that subsequent decisions will be no less defendant-friendly. There is of course an irony in this pattern of defendant-friendly results in that, over the last decade or so, economists have been working frenetically to develop more plaintiff-friendly explanations for much of the same conduct that the Court has been blessing as pro-consumer, but this is the material for another essay altogether.[54]

IV IMPLICATIONS FOR AUSTRALIA

Why should anyone 'down under' care what has been happening in the U.S.? After all, Australia has its own statutes, not at all identical to the *Sherman Act*, and its own growing jurisprudence. So what if U.S. courts have gone off in a particular direction? But with all due respect to the independence of Australian courts, the economic analysis of markets and conduct is global, not country-specific, notwithstanding differences in industry structure across different jurisdictions that may affect the actual application of economic analysis. To the extent the reform movement is driven by fundamental (even if somewhat simplistic) economic principles, it cannot be so easily dismissed as being 'not our problem.' Add to this the political support for global convergence on antitrust jurisprudence, and I think there is a force here that must be reckoned with. Developments in antitrust jurisprudence in the U.S. will certainly be brought to the attention of courts in Australia by parties who would benefit from an adaptation of Australian law to these developments. I am sceptical that courts here can or will want to adopt a 'hear no evil' approach.

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[54] Caution is urged in reading too much into this recent development in the literature. Inherent in the academic nature of most economists is the need to develop theories that challenge the prevailing wisdom. Whether these new theories are either genuinely relevant to the analysis of real-world behaviour, given the complex assumptions that underlie many of the modern theorems, or whether, despite their occasional relevance and 'correctness,' these newer models are simply too complex to provide useful guidance for judges and lay juries remain unanswered questions.