

**Building a World class Competition culture ( Outline of speech to conference organised by Business Unity South Africa( BUSA) and the Competition Commission – Thursday 19 November 2009. ( Westcliff hotel)**

Two things have become increasingly clear to me after 10 years at the Tribunal . One is that the number of businesses who think they don't have to comply with competition law is far more pervasive than we ever thought and secondly that ordinary citizens are far more aware of completion law than we thought and are far angrier with transgressing companies than we thought.

This portends a gloomy scenario as transgressors and the transgressed diverge – the one preferring increased defiance and the other increased sanction. But it need not have to be that way if we can build up a world class competition culture a task that is not just for us in Block C in a building in Sunnyside Pretoria to develop.

Let me say at the outset that I do not take a stereotyped view of business. The business community has had a varied response to the legislation and many companies have adopted a responsible and ethical approach to compliance which needs to be acknowledged. Indeed I am sure that those in the room would not be here if they did not care enough about the issues to spend the day debating with the Commission authorities. Nor am I suggesting that because Business may have some criticisms of the system and how it is implemented that this necessarily places them in the same camp as the serial miscreants who want the system to fail.

But since this is an audience of opinion leaders in business I want to make some points about what you can do address this divergence problem that I have identified.

It is of course easy to see why some business people at the wrong end of completion law enforcement can ask themselves the question – what's in it for us to obey the competition laws. After all what 's the worst that can happen we can get a fine for 10% or our turnover and unless you're stupid enough to get caught out twice it wont even be 10 %. Weigh up a percentage of turnover against the number of years we have run our cartel or abused our dominance the length of time that it takes between a complaint and final resolution, particularly if are well paid legal team spend time on that Gautrain of legal appeals that runs from Sunnyside Pretoria to |Constitutional Hill in braamfontein taking stops via Cape Town and Bloemfontein on the way and you don't have to have watched Gilbert and Sullivan to realise that the punishment does not fit the crime.

But this is a false sense of security. Yes it may be true that in some cases fines are under deterrent when compared to the gains made from unlawful activity. But fines are not the only cost to contravening firms.

Criminal remedies as you have heard will be introduced. Views may differ in this room as to whether this system will work. But I would want to be the first executive charged under the new system even if the constitutional court finally comes to rescue you from holding the next cartel meeting with your erstwhile associates in striped pyjamas. The publicity will be intense you will be better known than Bernie Maddoff and not much better loved and the NPA will be motivated to showing that it can do as good a job on these cases as the Competition Commission.

Next firms particularly in dominance cases should not think that fines are the only remedies. A behavioural remedy can be imposed on a firm and operate as a remedy going forward in a way that may not show immediately on the balance sheet but will be felt going forward and is not confined to a single financial year.

Divestiture lurks ..

Civil damages claims have been the Cinderella of the system but won't be going forward. Lawyers will soon start becoming more creative and daring in this area as shown in other countries. Damages remedies are not confined to a single year. The trend in other countries is that this type of case will increase if only because law firms need to chase new areas of business. What more fertile than large claims against well heeled businesses

Reputational damage. Again not quantifiable on the balance sheet. But a few minutes of prime time tv with your logo in the background allegations of collusion in the current climate – add the numbers in yourself just think what you would pay to buy that advertising in the first place and here the viewer is not exiting to drink teas

Popular response . Dont think the public and on their behalf elected representatives are going to be passive . Criminalisation amendments are a response to the alleged lack of response of corporates to fines. Whether this assessment is correct or not is now beside the point. The popular groundswell to punish monopolists is growing not diminishing. When I went to parliament this year the overwhelming subliminal message from all parties that is – is you are not getting the bad guys. In contrast to what was said 10 years ago when we introduced the legislation there was no voice in the room saying you are overdoing it you're killing business.

Then we can approach the matter from a less utilitarian point of view and appeal to rationality. If you are unconcerned about anticompetitive activity say collusion for instance imagine if that was the view of all business.

Maker of widgets ---

What can business do

Refuse to do business with colluders

Change your internal culture -