

## A NOTE ON THE PROPOSED AMENDMENT TO COMBINES ACT

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A reading of the Background Information and Explanatory Notes to the Combines Investigation Act Amendments 1984 reveals a certain inconsistency between what might be called the apparent philosophy of the amendments and the means to be adopted for the carrying out of this philosophy.

The apparent philosophy underlying the amendments may best be indicated by a few quotations from the Background paper.

At p. 6, in the discussion of the merger proposals, reference is made to the notions of "lessening competition significantly", "gains in efficiency" and "substantial real net savings of resources". The discussion of the "abuse of dominant position" proposals includes reference to "lessening competition substantially" and an "efficiency defence".

Later on, at p. 8, the document, in discussing the merger proposals, notes that it is a "complicated task requiring economic analysis and judgment" to determine the effect of a merger on the "nature and intensity of competition in individual markets". And at p. 9 it is stated that "until a detailed assessment is made of the specific economic circumstances surrounding a particular merger or proposed merger, it is not possible to make a reasoned judgment whether it is adverse to the public interest".

One would expect, therefore, that the Restrictive Trade Practices Commission, as the body best suited to undertake the task of economic analysis and judgment required by the proposed amendments, and with many years of applicable experience, would be authorized to undertake the public interest assessment called for. Similar reasoning applies to the new "delivered pricing" provision. That the RTPC might have to be expanded to perform this task, as well as the tasks with which it is already charged, is obvious.

It is, accordingly, a cause for surprise, and regret, that the RTPC will not be given the responsibility to adjudicate on these matters. Instead, the civil courts, whose ability to reach informed conclusions on the matters that the amended provisions will bring before them must be suspect, will be given the task. This is, no doubt, an improvement on the criminal courts, but, nevertheless, a peculiar choice given the apparent stress on the need to apply economic analysis to the sorts of cases that the amendments will generate.

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To make matters even worse, the reader of this document also learns that the RTPC will lose its jurisdiction over the civil reviewable matters for which it is now responsible: refusal to deal, consignment selling, exclusive dealing, tied selling, market restriction, and so on. The RTPC has some experience with at least some of these matters, and a reading of its judgments in those cases with which it has dealt will convince most readers that it is well equipped to perform this function. Hence, the wonderment at the reasoning that produced the decision that these matters would be better handled by a civil court. Whereas the proposal that mergers and dominant positions should be civil court responsibilities can be understood (though not necessarily agreed with) as an alternative to the criminal court (and hence an improvement) the removal of such matters as exclusive dealing, tied selling, and so on from the RTPC cannot be accorded even that justification.

It is difficult to escape the conclusion that the RTPC has become unacceptable to the business community whose support was so important for the Minister and that the emasculation of the RTPC was part of the price extracted from the Minister. One can appreciate the desire of the Minister to have business approval of the proposals to be made, in view of the past success of business in preventing the passing of anti-combines legislation which it disliked. If the downgrading of the RTPC was needed to obtain that approval, the price paid seems to have been pretty generous. And, while the RTPC will have responsibility for approving specialization agreements, a task for which it is clearly well suited, the amendment is careful to limit the ultimate power of the RTPC by reserving for the Cabinet the right to overrule any negative decision by the RTPC on a specialization agreement application.