

FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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A Remedy for Unconscionable Conduct in a Competition Law

At present, the *Trade Practices Act* (the legislation which regulates behaviour which is anti-competitive and also which is misleading and deceptive, hereinafter the Act) contains a provision which prohibits unconscionable conduct in relation to certain contractual arrangements, but only in so far as it affects "consumers." Section 52A(1) of the *Trade Practices Act* provides as follows:

A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all circumstances, unconscionable.

The rest of the section attempts to flesh out what unconscionable conduct might mean. The list of items in section 52A(1) might not be regarded as exhaustive, but indicates the type of matter that will be relevant when an appropriate case arises. To date there have been very few cases on the section.

However, the *Contracts Review Act* of the State of New South Wales, which has been in force since 1980, has created a good deal more interest, and has been seen by some as compromising the fundamental nature of the law of contract. In *West v. AGC (Advances) and Others*, McHugh J.A. commented:

[This] is revolutionary legislation whose evident purpose is to overcome the common law's failure to provide a comprehensive doctrinal framework to deal with 'unjust' contracts. Very likely its provisions signal the end of much of the classic contract theory in New South Wales.¹

It is in the light of these comments and developments that there has been a good deal of

public debate in Australia of the proposal by the federal Attorney General's Department to widen section 52A so that it will not only cover unconscionable conduct as it affects consumers, but also apply to commercial contracts generally. That was the intended approach of the Government when it first mooted the introduction of the unconscionable conduct provisions in 1984. However, the federal Government was persuaded at that time that the legislation should not be so wide as to cover commercial contracts. This, it was argued, would undermine the operation of contract law and also would probably run counter to the spirit of the *Trade Practices Act*.

In 1991, the Federal Trade Practices Commission produced a report on the unconscionable conduct provision of the Act.² It recommended against extension of the section to include commercial contracts generally. It recognised that the common law had developed in Australia so as to give an opportunity to persons who were at a disadvantage in certain situations to challenge the contractual arrangements that had been put in place. The courts had granted relief in some such situations. Those situations, however, were usually limited to scenarios where the person challenging the contract was in a significantly disadvantaged position because of his/her education, health or related matters. Rarely has the common law extended relief to persons because of business pressure, although there have been one or two cases in which concepts such as economic duress or significant unfairness in the bargaining strength of the parties have been used as a basis to change the contractual arrangements. Decisions such as *A. Schroeder Music Publishing Company v. Macaulay*³ and *Walton Stores Limited v. Maher*⁴ have suggested that the courts are prepared to grant relief in special circumstances.

The Trade Practices Commission recommended that the *Trade Practices Act* be

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amended to allow the Commission to litigate on behalf of a party to a transaction, where that party was unable to protect its interest and advantage was taken of that inability. The Commission envisaged that the number of cases would be small and that the circumstances would be special.

The Attorney-General's Department, on the other hand, felt that this would not be advancing the law, and chose rather to support a widening of the legislation so that it covered all commercial dealings.

In its report the Commission was concerned at that approach. Any law, especially a competition law, which enables parties to challenge the effectiveness of a contract simply because they are in a weaker bargaining position could undermine the thrust of the competition law. The High Court of Australia, in the leading decision on the *Trade Practices Act*,⁵ indicated that the whole thrust of the Act was to promote vigorous competition:

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way.⁶

A Parliamentary Committee⁷ was appointed in 1991 to review certain sections of the *Trade Practices Act*, including the unconscionable conduct provisions. In its report, it chose to support neither the Trade Practices Commission's view nor the Attorney General's. It recommended instead the removal of the section dealing with unconscionable conduct from the legislation, and its replacement by a new set of provisions. Its recommendations were as follows:

Recommendation 14

14 The Committee recommends that section 52A of the Trade Practices Act be repealed. It recommends that legislation be introduced giving the Trade Practices Commission the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another.

Recommendation 15

15 The Committee further recommends that appropriate funds be made available to the Trade Practices Commission to enable this to be done.

Such an approach could mean that the Trade Practices Commission would be nothing more than a legal aid agency for parties who wanted to challenge particular transactions. The

Commission in its report did not envisage that section 52A would be removed. By adding a particular provision to the Act enabling the Commission to challenge certain contractual arrangements, which the Commission described as involuntary transactions, Parliament would be adding some protection for weaker parties under the Act. It would not, however, be undermining the principal philosophy of the Act as evidenced by the judgment in the *Queensland Wire* case.

At the time of writing there is no clear picture as to how the Government will deal with the various alternative recommendations. Clearly the result of the Government's deliberations will be important for the Trade Practices Commission. It will need considerable additional resources if the Cooney Committee recommendations are to be accepted, and also if the Attorney-General's recommendations are adopted.

Postscript

It is anticipated that the test for mergers under the *Trade Practices Act* will be changed during the August session of the federal Parliament to revert to a "substantial lessening of competition." The current test in section 50 of the Act requires *dominance* to be shown. These changes, if introduced, will take up the recommendations of the Cooney Committee.

Also to be accepted by the Government is pre-notification of mergers, an increase of fines to \$10 million for competition law offences, enforceable undertakings to the Trade Practices Commission and extension of unconscionable conduct provisions to commercial deals.

Notes

¹ [1986] 5 N.S.W.L.R. 610 at 621.

² *Unconscionable Conduct and the Trade Practices Act* (June 1991).

³ [1974] 3 All E.R. 616.

⁴ (1988), 164 C.L.R. 387.

⁵ *Queensland Wire Industries Pty Ltd. v. RHP Limited* (1989), 83 A.L.R. 577.

⁶ *Ibid.* at 585, per Mason C.J. and Wilson J.

⁷ The Senate Standing Committee on Constitutional and Legal Affairs, known as the "Cooney Committee" after its Chairman.

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INTERNATIONAL COMPETITION LAW

The following articles are taken from "Update", a newsletter published by the International Bar Association's Business Law Section (Committee) on Antitrust and International Trade Law).

AUSTRALIA**Radical Changes to Merger Law?**

The Senate Standing Committee on Legal and Constitutional Affairs, the second parliamentary committee to investigate the operation of Australia's merger laws from an antitrust perspective in recent years, has recommended major changes to Australia's merger laws.

Australia, like the EEC, has a merger test based on the concept of market dominance.

Taking the view that this is too high a test for antitrust merger control in Australia, the Committee, by majority, recommended that a new test be adopted. The recommendation is that mergers which have the likely effect of substantially lessening competition in a substantial market for goods or services should be prohibited unless authorised on public benefit grounds by the Trade Practices Commission.

The Committee also recommended a Hart-Scott-Rodino type of pre-merger notification for "mergers and acquisitions of a substantial nature". This would bring Australia into line with the position in the USA, the EEC and Canada. [Ed. note: see (1992) 13:1 C.C.P.R. 38.]

DENMARK**Proposed Change to the Competition Act**

On December 10, 1991 a Bill was tabled in the Danish Parliament concerning a change to the *Competition Act* in relation to public access to documents and secrecy.

In administering the Act the Competition Council has realized that there are a number of drawbacks concerning the wide access by the public to documents in the Competition Council and also the limited possibilities of secrecy in relation to international competition.

In the proposal, the access of the public to documents in the Competition Council is restricted in a way that it only concerns agreements and consorted practices, restricting competition in accordance with section 5 of the Act, and concerns the information which the Competition Council can request in order to create transparency where the competition is not sufficient in accordance with section 7 of the Act.

It is expected that the Bill will pass in the spring of 1992.

EUROPEAN COMMUNITIES**Public Undertakings**

The Court of Justice has held that it is contrary to articles 90 and 86 to confer upon RTT, a Belgian public undertaking, the exclusive right to exploit the public telecom network, the power to adopt regulations as to telephone equipment, and the power to verify whether or not companies selling this equipment abide by those regulations.

Furthermore, granting *Merci Convenzionali Porto di Genova SpA*, an Italian public undertaking, the exclusive tasks of loading, unloading, transport and storage of goods in the port of Genoa, runs the risk of abuse, according to the Court.

Telecommunications

A joint venture between two potential Irish competitors, *Bord Telecom Eireann* and *Motorola Ireland Ltd.*, has been granted a 10-year exemption under article 85(3) after the parties had modified their plans at the request of the Commission. Although the creation of a joint subsidiary, *Eirpage Ltd.*, which is to provide a nation-wide radiopaging service, was found to violate article 85(1), its benefits to the development of telecommunications services in Ireland resulted in the Commission giving the green light. This was the first Commission decision applying the guidelines on the application of EC competition rules in the telecommunications sector (see *Update* 1991, vol. 4 no. 2).

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Mergers

Since the last UPDATE, some 25 proposed mergers have been brought before the Commission under the Merger Regulation.

- The first prohibition taken under the Merger Regulation concerned the plans of the French company Aerospatiale SNI and the Italian company Alenia e Selenia SpA to acquire the Canadian de Havilland division of the Boeing Company. The Commission found that this would create a dominant position for turbo-prop ("commuter") aircraft; the world's number one producer would have bought the world's number two. The decision provoked strong criticism, mainly as to its definition of the relevant market. [Ed. note: see (1991) 12:4 C.C.P.R. 36.]
- A decision compatible with the common market concerned the acquisition by Tetra Pak International SA, by far the biggest manufacturer of liquid packaging machines, of all the share capital of Alfa-Laval AB, one of the world's leading manufacturers of processing equipment. Taking into consideration the different markets in which the parties operate, the Commission found that the proposed merger would neither create nor strengthen a dominant position.
- Also approved was the creation of a new company, Starter-batterie GmbH, in which Varta Batterie AG and Robert Bosch GmbH concentrated their starter battery activities. The new entity's high market share of 44% on the German market was offset by the undertaking of Varta to cut all links with another competitor by the end of 1993 and the fact that Fiat had taken over two other competitors as a result of which its market share in Germany had increased from 1% to 10%.

GERMANY

In an October 26, 1990 judgment (Kart 29/89), the Berlin Court of Appeal (Kammergericht), while authorizing a merger that had been prohibited by the Federal Cartel Office even though it only led to a market share of 21%, not only

referred to German precedents but also to the EEC Merger Control Regulation's recital no. 15. Pursuant to this recital, a market share not exceeding 25% indicates that the concentration is not liable to impede effective competition and may be presumed to be compatible with the common market.

The Frankfurt Court of Appeal held that a contractor's participation in a meeting with the aim of rigging bids is not illegal if the participants fail to agree (Judgment of June 6, 1991, 6 U (Kart) 79/90).

ITALY

The "Single Barrier" and "Double Barrier" Principles in Competition Law

Italy's new Antitrust Law (Law No. 287 of October 10th, 1987, entitled *Norme per la tutela della concorrenza e del mercato*) has adopted the so-called "single barrier" principle in order to determine the area of enforceability of national competition rules with respect to the EEC ones.

This principle has been explicitly adopted only in Italy, while the Court of Justice of the European Communities has adopted the "double barrier" principle.

The "Single Barrier" Principle

According to the theory of reciprocal exclusion, or the single barrier principle, EC rules have an absolute predominance and, therefore, the relevant national rules can only imitate the former.

Under the law, the Italian Authority shall suspend its investigations when dealing with a case which is already being examined by the Commission, except for the aspects which have an "exclusive national relevance."

On the basis of the above considerations, the activities which are not subject to EEC competence appear to be the ones which, without affecting the common market, concern the Italian internal market.

Given the uncertain border between national and EEC competence, it shall be necessary to have strict cooperation between the Italian Antitrust Authority and the Commission in order to avoid superimposition and empty spaces in the

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control of restrictive practices.

The "Double Barrier" Principle

The double barrier principal does not involve a predominance of EEC rules over the national ones. The Community has not an exclusive competence with respect to certain practices affecting competition, and therefore the same activity has to comply both with national and EEC rules.

This is the principle which is in force in Germany and which has been adopted by the Court of Justice. In the *Wilhelm* case, the Court stated that two proceedings, national and European, may take place in parallel with respect to the same case.

JAPAN

Criminal Accusation (KOKUHATSU) for Alleged Violation of Price Fixing

The Japanese Fair Trade Commission ("JFTC") filed with the Public Procurator General a criminal accusation against eight food-wrapping manufacturers, including corporate executives of the eight, for alleged violations of article 3 (price fixing) of the Anti-Monopoly Law on November 6, 1991.

This was the first criminal accusation brought under the Anti-Monopoly Law since the Oil Cartel case in 1974.

On December 16, 1991, the eight accepted the JFTC's Recommendation, and as a result the JFTC will render its decision on the lines of the Recommendation without resorting to hearing procedures.

Recommendation (KANKOKU) Issued to Nomura Securities and Warning Issued to Daiwa Securities, Nikko Securities and Yamaichi Securities in Respect of their Shareholdings

On October 17, 1991, the JFTC issued a Recommendation to cease and desist from unfair trade practices to Nomura Securities and ordered them to delete the clauses restricting the transfer of shares in Nomura Tochi Tatemono (one of Nomura's Securities' subsidiaries) from the share purchase agreement between Nomura Securities (as seller) and other companies (as buyer).

The JFTC also warned Daiwa Securities, Nikko Securities and Yamaichi Securities immediately to cease similar conduct.

Subsidy for Loss Constitutes Customer Inducement by Unjust Benefits

On November 20, 1991, the JFTC issued a Recommendation to cease and desist to four major securities companies (Nomura, Daiwa, Nikko and Yamaichi) for violations of article 19 of the Anti-Monopoly Law, since these four securities companies had paid subsidies for losses suffered by customers, which constitute customer inducement by unjust benefits.

Increased Penalty for Corporations' Antitrust Violations

The NIHON KEIZAI SHIMBUN, the leading economic newspaper in Japan, in its November 23, 1991 issue, reported the JFTC plans to increase the maximum penalty for corporations violating the Anti-Monopoly Law from 5 million yen to 300 million yen, a 60-fold increase. However, on December 18, 1991, the NIHON KEIZAI SHIMBUN reported that strong opposition from Anti-Monopoly Law sectors of the Liberal and the Democratic Party had forced the JFTC to suspend filing the amendment with the legislature.

NEW ZEALAND

Commerce Act Developments

The Ministry of Commerce is seeking submissions on its discussion paper reviewing the *Commerce Act 1986*.

The areas for discussion include the role and objectives of competition law; the nature of the public benefit test and whether it should be limited to efficiency factors; the features and relative merits of voluntary pre-notification of proposed mergers versus "strike down"; the nature and quality of enforcement of the Act, both public and private; and the application of the Act to markets for primary product, and to labour market practices which affect markets for goods and services.

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Recent Decisions

The recently privatised New Zealand Telecom is finding itself deep in competition law waters at present.

The Court has upheld the Commission's disapproval of Telecom's acquisition of the AMPS-A band as it would strengthen Telecom's dominant position in the "voice telephony (mobile) market", given its already dominant position in the fixed market. The High Court endorsed the Commission's conclusion that the competitive detriments from the strengthening of dominance outweighed any public benefits from the acquisition.

In a concurrent proceeding, the High Court also ruled against Telecom acquiring the TACS-B band by disallowing an agreement between Telecom and the Commission. Telecom undertook to divest TACS-B if it successfully acquired AMPS-A. However, in an application for judicial review by the second highest bidder for the TACS-B band, the Court held that there was a breach of natural justice by the Commission, and also that the Commission applied the wrong test in assessing the likelihood of strengthening of dominance.

The High Court has also upheld the Commerce Commission's decision declining clearance or authorisation for the takeover of the Paccr Kerridge cinema chain by Hoyts, the only other major cinema operator in New Zealand. The Court agreed with the Commission in holding that, for the purposes of considering the issue of dominance, in the present case it was appropriate to treat distribution and exhibition of motion pictures as separate functional markets and "cinema viewing" as a discreet and separate market from "movies from video shops" and "movies on television". Thus, the argument for a wider market of film viewing generally was rejected. The Court was satisfied that the merged entity would be dominant in both the relevant markets identified.

These latest decisions of the New Zealand High Court contain a very detailed discussion of the relevant legal principles and latest competition law developments, and will be of considerable assistance in future analyses of competition law.

POLAND

Competition Development Policy 1991-1993

Due to the unique post-Communist economic system, the Polish Antimonopoly Office cannot be seen as a typical anti-monopoly agency. Its activities are seen as "essential" because of the need to implement market ethics, attitudes and habits. Therefore, it is not enough to liquidate monopolies to obtain smaller bodies which will comply with supply and demand rules.

Being conscious of all the problems, the Anti-Monopoly Office has worked out principles of competition development policy which are based on:

1. traditional anti-monopoly activities, such as dividing dominant, artificially built enterprises which restrict competition by being the only suppliers of goods and services, or counteracting monopolies which impose unfavourable dealing conditions, decreasing output to raise prices, and charging exorbitant prices; and
2. deregulation of the present system which should make the Polish economy more open and flexible.

The aim is to ease formal barriers of entry into the market. From the external point of view, it means the opening of a domestic market to foreign firms by encouraging them to invest and liberalize imports.

The Anti-Monopoly Office's main task in reforming the economy is not to allow the transformation of state owned monopolies into private ones. As for big investors, the Antimonopoly Office applies a "rule of reason", meaning that the basic criterion is the existence of some economic advantage for the Polish economy.

The competition development program recommends a vigorous competition policy in those market segments where there are already the grounds for free competition (commerce, the food industry, enterprises dealing with services for agriculture, light industry, tourism).

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SPAIN

The Establishment of a Maritime Conference is Considered as an Exempted Practice by the Court of Defense of the Competition

The Court of Defence of the Competition has authorized the establishment and activities of a "Maritime Freight Conference". Although it should be considered as a forbidden practice due to the fact that it implies an important restriction of competition in transportation, it can nevertheless be considered exempted taking into account: (i) its beneficial effects upon maritime traffic, since the "conferences" provide increased safety and regularity; (ii) the recognition obtained in comparative and international law; and (iii) the permissive and tolerant attitude shown by the Spanish administration towards them.

Proceedings were brought by a third party under the former Law 110/63 seeking a court order that the activities of the Association were in breach of the law. However, the ruling finds that the defendant shipowners' association has been carrying out a stabilizing role in maritime regular line transportation between continental Spain and the Canary Islands.

In order to achieve these goals, the shipowners concluded agreements concerning tariffs, control of the offer, freight distribution, and even the sharing of earnings. Notwithstanding all these facts, the system proved to be extremely efficient based on the following: (i) competition in the rendering of services is maintained, since shippers are free to choose a shipowner among the members of the Conference; (ii) availability of ships belonging to companies not part of the association, who are authorized to carry out the same regular line traffic; (iii) the actual mobility of the fleets; and (iv) the intervention of the Administration in every aspect of the regulation of maritime transportation, etc.

In conclusion, the Conference meets the requirements established by article 5.1 — formerly Law 110/1963, 20 July (Restriction of anticompetitive practices — now repealed) in order to obtain an exemption.

UNITED KINGDOM

Mergers and Acquisitions
Photocopiers

The MMC's Report on its enquiry into photocopiers has been published. The enquiry followed a complaint by Rank Xerox about the practice of Japanese companies linking the supply of ink with photocopier sales and the alleged refusal of some manufacturers to supply spare parts and manuals to companies.

The MMC found that very strong competition had developed since the market was last examined in 1976. In view of this, it concluded that photocopier suppliers were free to draw up contracts linking the supply of machines with the supply of toners, spare parts, and maintenance and to insist on selective or exclusive dealerships. Rank Xerox itself was released from its undertaking not to tie toner to the supply of machines.

The MMC further considered selective or exclusive dealership systems an appropriate method of distribution because of the nature of photocopiers and because service quality had become an important aspect of competition.

Although finding that a scale monopoly situation existed in that Rank Xerox supplied 31% of the market and that three other complex monopoly situations existed because of distribution terms, the MMC did not conclude that this operated against the public interest.

Gas

The Director-General of Fair Trading has deferred the reference of British Gas to the MMC to see if British Gas will voluntarily implement changes to encourage competition in the gas market.

Necessary changes to increase competition include the creation of a second subsidiary to run the transmission and storage of gas at arm's length from the company on a non-discriminatory basis; the abolition of the tariff threshold; the release of gas from British Gas; and wider access to sources of gas supply. The OFT requires these measures inter alia to reduce British Gas' share of the contract gas market to 40% by 1995 from its current 80% share.

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British Gas is currently seeking undertakings from its regulator of gas to make the OFT proposals more palatable.

Telephones and Electricity

The OFT is considering investigating British Telecom's Yellow Pages business for anti-competitive procedures and British Telecom may also find itself the subject of an MMC referral when its high prices are reviewed this year.

Leading British companies are calling for an MMC enquiry into the high prices in the electricity market. In particular, they claim National Power and PowerGen are acting to keep pool prices unnecessarily high.

UNITED STATES

EC Attorneys Allowed to Represent Clients in FTC Proceedings

According to an interim final rule adopted by the U.S. Federal Trade Commission on September 23, 1991, foreign lawyers who are not licensed in the U.S. but are licensed to practice in a European Community Member State and authorized to represent clients before the European Commission, can appear on behalf of clients in FTC antitrust and consumer protection proceedings. This amendment to Rule of Practice 45.1 would allow qualifying foreign attorneys to appear before the FTC upon certification of good standing in the jurisdiction in which they are admitted or qualified to practice. The EC Commission has already permitted U.S. attorneys to appear on behalf of clients before the EC Commission.

Change of Policy Regarding Prosecution of Foreign Firms in U.S.

According to some reports, the Justice Department has determined to extend the reach of federal antitrust laws to allow U.S. prosecutors to go after foreign cartels that lock out American exports. Prosecutors could sue U.S. subsidiaries of the firms in a U.S. court where there was proof of illegal collusion by foreign companies. [ed. note: see (1992) 13:1 C.C.P.R. 33.]

Court Refuses to Apply Noerr Exceptions to FCC Intervenor

In October of 1991, the U.S. Court of Appeals for the Tenth Circuit ruled in *TeleSTAR Inc. v. MCI Communications Corp.* that neither the improper means exception nor the sham exception to the Noerr doctrine applied to efforts to oppose the issuance of licences by the FCC. TeleSTAR alleged the opposition to the licence by MCI and two other communications companies violated the antitrust laws and, on appeal, contended the district court erroneously failed to consider the improper means or sham exceptions. The Court concluded that, without a factual showing that defendants were attempting to use the FCC process for an anticompetitive effect, the sham exception is inapplicable. Relying on the Supreme Court holding in *City of Columbia*, the Court held there was no conspiracy exception to the Noerr doctrine and, therefore, TeleSTAR could not show improper means based on that ground alone. In *City of Columbia*, the Supreme Court concluded that there can be no conspiracy between private parties and the legislative bodies which they lobby and, therefore, no conspiracy exception to the immunity granted under Noerr.

Broad View of Essential Facilities Doctrine Rejected

The U.S. Court of Appeals for the Ninth Circuit in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) declined to broaden the essential facilities doctrine to encompass a computerised reservations system controlled by an airline. The Court held that even though the airline gained some leverage over competitors through control of the system, a facility will be considered "essential" only if control of the facility carried with it power to eliminate competition in the downstream market. The Court explicitly rejected the Second Circuit Court of Appeals' holding in *Berkey v. Kodak*. Unless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, the Court held there is no section 2 violation.