FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

AUSTRALIAN NEWSLETTER

By: R. Baxt, Arthur Robinson & Hedderwicks
Melbourne, Australia and
H.R. Spier, Trade Practices Commission
Belconnen, Australia

Competition policy in Australia is going through exciting times both at the policy and administration levels. Indeed, it is now part of the fabric of national economic policy and the Australian Federal Government is trying to bring the governments of the States and Territories onto the same agenda. At the same time, major Court decisions have also brought Australian competition policy and its administration to maturity.

Competition Policy Developments

On August 19, 1994, in Darwin, Australia, the Prime Minister and Premiers/Chief Ministers met to consider further steps in the adoption of a national competition policy. The members of the Council of Australian Governments had before them a draft bill (the Competition Policy Reform Bill 1994) and Competition and Conduct Principles Agreements. Essentially, the reform package proposed the following:

- Universal application of competition law to all business operations in Australia with new Federal and State legislation to fill any constitutional gaps, overcome Shield of the Crown issues and limit exemptions from competition law (ie. the Canadian "deregulated conduct defence").
- Changes to the conduct rules of the *Trade Practices Act* including extending authorization on public benefit grounds to price agreements on goods as well as services, abolishing the price discrimination prohibition, authorizing resale price maintenance on public benefit grounds and extending the resale price maintenance provisions to services as well as goods.
- The merger of the current Trade Practices Commission ("TPC") and Prices Surveillance Authority into the new Australian Competition & Fair Trading Commission which would administer the new legislation.
- The establishment of an Australian Competition Council to advise governments on competition and pricing issues.
- The negotiation of an agreement on principles in relation to the following matters:
  - prices oversight of government business enterprises;
  - competitive neutrality policy and principles;
  - structural reform of public monopolies;
  - legislation review; and
  - access to services provided by means of essential facilities.

Some of the above competition principles will be administered by the new Commission while others will be administered by States/Territories on their own but in line with the agreed principles.

CANADIAN COMPETITION RECORD

Although the States, Territories and the Australian Government disagreed on compensation levels to be paid to the States and Territories, some of the States and Territories agreed to adopt the proposals outlined above. Despite this lack of complete support, the general proposals remain on the table and a further meeting has been scheduled for February 1995. The new legislation and structure should be in place by July 1, 1995 and will result in Australia entering a new era of competition policy and enhanced enforcement of competition law.

Other Policy Initiatives

- **Gas Pipeline:** The sale of the Moomba to Sydney natural gas pipeline was recently completed. The pipeline was previously owned by the Australian government and has been sold to a consortium of an Australian gas utility (51% ownership) and Canadian and Malaysian partners (49% ownership). The sale legislation passed by the Australian Parliament includes a detailed access regime which is to be administered by the TPC and its successor.

- **Postal Services:** Australia Post's long mail handling monopoly is being broken down with respect to overseas incoming mail and bulk mail. Included in legislation that is currently before the Australian Parliament, are provisions regarding access to the Australia Post network for such mail. Any disputes over access are to be referred to the TPC or its successor for reports to the relevant Minister.

- **Victorian Regulator-General:** The State of Victoria has established and appointed a Regulator-General to oversee the privatization of State monopolies, particularly in gas and electricity and, in some cases, the functional separation of these utilities. The Regulator-General will have extensive powers and will work in conjunction with the new national competition policy. The establishment of the office of the Regulator-General is seen as an interim step to cover a structural adjustment period until such specific legislation is no longer necessary. Similar steps are being taken in Western Australia in relation to gas and, in Queensland, with respect to electricity. It is anticipated that other States may follow with similar regulatory initiatives.

- **Health Care:** The Australian Government is seeking to open up the health care industry to foster competition between doctors and hospitals, hospitals and private health funds and doctors and private health funds. This action will involve considerable competition policy considerations as well as the enforcement of existing competition laws to avoid the establishment of unauthorized anti-competitive agreements between industry participants. To date, the area of health care has not been subjected to much attention by competition law regulators in Australia.

Enforcement Issues

It has also been a dramatic time for enforcement with respect to mergers and major conspiracy cases.

- **Rank/Coles Myer - Proposed Acquisition of Foodland - Grocery Wholesaling:** A New Zealand company, Rank Commercial Ltd., in close co-operation with Australia's major grocery retailer, Coles Myer Ltd., sought to acquire Foodland, a grocery wholesaler in Western Australia. The proposal was such that Coles Myer effectively underwrote the Rank bid and would eventually buy from Rank the Western Australian operations of Foodland while Rank would keep the New Zealand food operations of Foodland.

Coles Myer was very keen to stress that there would not be a competition law issue until a much later stage when it would be seeking to exercise its option to buy the Western Australian arm of the Foodland operations. Hence, according to Coles Myer, there was no need for TPC intervention at the bid stage. The TPC, however, did not share Coles Myer's view. Rather, the TPC's position was that once the bid for Foodland was made, certain strategies would emerge in the market place and, if the bid was successful, Rank would effectively run the Western Australian wholesaler for Coles Myer.

The TPC immediately moved in court on an *ex parte* basis and obtained interim orders to restrain the bid being lodged with the corporate affairs regulator. The matter went to court again soon after on a motion to extend the interim restraint period, which was granted subject to the trial commencing within two weeks and finishing within a month. There were 17 days between the date the initial interim injunction was obtained and the proposed start of the substantive hearing.

After the subsequent appeal of Rank and Coles Myer was dismissed by the Full Federal Court, the bid for Foodland was withdrawn.

It is interesting to note that all of the events surrounding the proposed bid by Rank and Cole Myer occurred over a matter of weeks. As part of the process, the Federal Court signaled a willingness to consider matters urgently, to streamline procedure and to take into account public benefit and related matters when considering the balance of convenience as to whether or not to order an interim injunction. Until now, commercial considerations such as the effect upon the securities market and shareholders, etc., have been a paramount consideration while the public interest of preventing breaches of merger law has been largely disregarded. The TPC has always argued that a breach of the law, which carries up to AU$10 million in penalty, should not be allowed in such situations as divestiture is not an adequate remedy. While the Federal Court seems to agree with the TPC, for reasons of equity it still wishes to ensure that the substantive hearing is promptly conducted. Hence, the tight timetable for the final hearing with many pre-trial processes such as discovery being dispensed with.

- **TNT/Ansett and Others - Conspiracy Case - Freight Express:** Since 1990, the TPC has been investigating a major price conspiracy and market sharing case in the Australian express freight industry. This matter has been a long running fight, with the respondent companies involved challenging the TPC at every instance. The hearing on the substantive case has been set down for April 1995.

Recently, two of the parties, TNT and Ansett approached the TPC to see if the matter could be resolved. Following their negotiations, the TPC and TNT/Ansett came to an agreement which included approaching the court for approval of a penalty. This was breaking new ground as the court had in the past always been suspicious of agreements on penalties. This judicial stance has seemed to be weakening in Australia, even since before the TNT/Ansett case. In any event, the TNT/Ansett case was the first major test involving the use of the courts to sanction a negotiated penalty and settlement. Under the agreement, TNT/Ansett withdrew its defences to the hundreds of charges and participated in a joint submission made with the TPC to the court with respect to the agreed penalty regime and other orders. The submission made to the court included:

- a penalty of AU$5 million to be levied against the two firms, (AU$4.1 million against TNT and AU$900,000 against Ansett);
- penalties to be levied against a number of company officials ranging between AU$50,000 and AU$75,000;
- TPC costs of AU$1 million to be paid by TNT/ Ansett;
- injunctions against the companies;
- implementation of a corporate compliance program, subject to TPC approval;
- that the 150 statements that were filed in the court by the TPC would be tendered without objection (summaries of these statements were eventually tendered to the court and ultimately made public); and
- no restraint on publicity on either side.

On August 10, a Federal Court judge considered the joint submission by the parties and, after a short adjournment, issued the orders sought on the same day.

While two of the respondents and their officials have been fined, etc., the third corporate respondent and its officials have indicated that they will fight on.

The above penalties were assessed under the old penalty regime which was limited to AU$250,000 per offence and AU$50,000 for individuals. Since January 1993, these fines have been increased to AU$10 million for companies and up to AU$500,000 for individuals.

- **Gillette/Wilkinson Sword - Merger - Razor Blades:** The long running divestiture case involving Gillette's acquisition of Wilkinson Sword is coming to an end with the TPC and Gillette agreeing to an arrangement whereby the 'Wilkinson Sword' brand in Australia will be marketed by a totally independent company. Additional safeguards will be built into the arrangement developed with the TPC. Finally, Gillette is required to pay the TPC's costs.

Enforceable Undertakings in Merger Review

The TPC is beginning to make greater use of its power to accept enforceable undertakings in merger matters. This power has been in the *Trade Practices Act* since January 1993 and applies to all areas of the TPC's jurisdiction, not just mergers.

In a recent grocery wholesaling matter (not the earlier reported Coles Myer matter), on the announcement of the bid the TPC immediately sought and obtained an undertaking as to divestiture. The facts of the case involved a bid made by a grocery wholesaler in one State for a grocery wholesaler in another State, the target having a large stakeholding in a competitor of the bidder. It is this stakeholding that is to be divested pursuant to the undertaking if the TPC requests it.

Similar undertakings have been entered into in a broadcasting industry merger before the bid was made.

Failure to adhere to an undertaking would result in Court ordered compliance without any need on the part of the TPC to show substantive breach of the merger law, only a breach of the undertaking.