

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

THE NEW INTERNATIONAL GUIDELINES: AN AGGRESSIVE RESTATEMENT OF SOME CONFRONTATIONAL PRINCIPLES

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The recently issued *International Enforcement Guidelines* (the "1994 Guidelines") are truly new and different — and not only because the Federal Trade Commission (the "FTC") joins the Department of Justice (the "DOJ") for the first time in the "international guidelines" market.¹ The 1994 Guidelines represent a strong statement that U.S. antitrust laws will be used abroad where U.S. export, consumer or taxpayer interests are at stake.

The DOJ's 1977 *Antitrust Guide for International Operations* (the "1977 Guide") (on which I worked extensively) was intended to calm the noisy fears of U.S. multinationals which said that they were being placed in a competitive disadvantage overseas because U.S. antitrust laws were applied to them but not to their competitors.² The centerpiece of the 1977 Guide was analysis of a series of hypothetical business problems (involving joint ventures, licenses, mergers and the like) which had been supplied by an export promotion advisory group appointed by the President. In analyzing these problems, the 1977 Guide kept saying, in essence, "keep calm, the antitrust principles

are much more straightforward than your risk-adverse counsel may have told you." The 1977 Guide was short, written in quite plain English, and its target audience was company decision-makers and the inside company lawyer on the firing line.

The 1988 *Antitrust Enforcement Guidelines for International Operations* (the "1988 Guidelines") were very different and constituted a much longer document: they were a generalized amicus brief urging less intrusive antitrust rules in the fields of joint ventures and intellectual property licensing, among others.³ The target audience for this vintage Reagan Administration message was the judiciary, brief writers and public officials. Thus, the 1988 Guidelines consisted of a very long essay on a great many interesting subjects which affected American firms, both at home and abroad, followed by a series of extensive case examples. Because the 1988 Guidelines were considerably more conservative than the case law and were often theoretical in their terms, they were more often used by defendants' litigation counsel than by counsellors and business planners.

The 1994 Guidelines have the same title as the 1988 Guidelines, while returning to the brevity and plain English of the 1977 Guide — but this time, comfort and reassurance cannot be the goal. Indeed, the word "Enforcement" in the title should

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be underscored (rather than smirked at as it was in 1988). The 1994 Guidelines are intended as a warning, a warning to foreign firms and governments that the U.S. antitrust authorities are willing to get deeply involved in pursuing restraints occurring abroad that distort U.S. markets or thwart U.S. exporters. The target market for the 1994 Guidelines seems to be the legal advisors to foreign cartel managers and their governments.

Having the FTC join in the issuance of the 1994 Guidelines is an important step forward; and yet the Commission's presence underscores the irony of not having the state attorneys general, nineteen of whom brought the modern landmark case, *Hartford Fire Insurance Co. v. California*,⁴ on which the 1994 Guidelines rest so heavily. The state attorneys general are something of a wild card in the U.S. antitrust equation, and they have proven quite willing to take the politically popular course of suing foreign defendants (particularly Japanese defendants) for resale price maintenance and other price enhancing restraints.⁵

Unlike their 1977 and 1988 predecessors, the 1994 Guidelines focus almost exclusively on jurisdiction and its exercise, rather than on typical international business practices and transactions. Thus, the first page makes clear that the 1994 Guidelines:

are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies' international enforcement policy. They do not, therefore, provide a complete statement of the Agencies' general enforcement policies. The topics covered include the Agencies' subject matter jurisdiction over conduct and entities outside the United States and other considerations, issues, policies, and processes that govern their decisions to exercise that jurisdiction: comity; mutual assistance in international enforcement; and the

effects of foreign governmental involvement on the antitrust liability of private entities (Paragraph 1).

Jurisdiction and Cartel Chasing

Antitrust has been a hot source of jurisdictional conflict for almost half a century ever since Judge Learned Hand, in the 1945 *Alcoa* decision, articulated the "effects doctrine" asserting jurisdiction where the adverse conduct has effects within the United States.⁶ Antitrust has been particularly key because of the ripple effects that flow through international markets and because aggressive U.S. antitrust enforcement, including enforcement by private plaintiffs, has generated a succession of "blocking statutes" in the U.K., Canada, Australia and elsewhere designed to thwart U.S. enforcement by preventing implementation of discovery orders or judgments.⁷

The 1994 Guidelines do not retreat from this confrontational history. Instead, they say that "international recognition of the 'effects doctrine' of jurisdiction has become widespread", citing a European Court of Justice decision and "the merger control laws for the European Union, Canada, Germany, France, Australia and the Czech and Slovak Republics, among others" (Paragraph 3.1). They also repeatedly rely on the states' 1993 victory in the *Hartford Fire Insurance Co.* case where a tight 5-4 majority affirmed the states' asserted exercise of U.S. antitrust jurisdiction over London reinsurers of casualty insurance despite the strong protests of the U.K. Government.

The whole enforcement position is illustrated by a series of cartel-like examples in which U.S. antitrust enforcement is applied to overseas actors that have neither direct operations nor subsidiaries in the United States:

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- In Example A, the Agencies promise enforcement against a foreign producers' cartel where its members "make substantial sales into the United States, both in absolute terms and relative to total U.S. consumption" (Paragraph 3.11).
- In Example D, none of the cartel participants even sells into the U.S. market, using an intermediary instead. The Agencies say that this is still illegal, and stress that they "would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the alleged, unlawful conduct itself had the prohibited effect upon interstate or foreign commerce" (Paragraph 3.132). They cite *Summit Health, Ltd. v. Pinhas*⁸ for this extraordinary proposition.
- In Example E, the foreign companies' cartel expressly excludes sales in the United States from its coverage and therefore does not involve U.S. import commerce (thus echoing the celebrated uranium cartel of the 1970s). Somewhat curiously, the Agencies say that: "if the cartel caused the cartel members to dispose of excess production in the United States, the cartel would be affecting output and price in the United States, and the sales into the United States would alleviate pressure on the cartel and would be considered sufficiently direct to satisfy [U.S. jurisdictional] requirements" (Paragraph 3.132). Now what is so curious about Example E is that U.S. consumers would benefit by the activity, while U.S. producers would still have anti-dumping or countervailing duty remedies if this extra supply were being thrown onto the U.S. market at an illegally low price.

Protecting U.S. Exporters and the U.S. Government

The 1994 Guidelines represent the latest twist in an increasingly public debate over the proper focus of U.S. antitrust enforcement. The 1977 Guide asserted that the primary purpose of U.S. antitrust enforcement was to protect U.S. consumers against domestic market and import restraints, but it did leave open the possibility of pursuing a group of dominant U.S. exporters which excluded a U.S. rival from a foreign market. This approach was basically enacted by Congress in the so-called *Foreign Trade Antitrust Improvements Act of 1982* (or the "FTAIA" for the "Inside-the-Beltway" crowd in Washington). However, in the 1988 Guidelines, Assistant Attorney General Charles Rule included what became the famous "Footnote 159": it simply abandoned the "export bully" proviso and said that the only purpose of U.S. antitrust enforcement should be to protect U.S. consumers. Four years later, Rule's successor, James Rill, repealed Footnote 159 in a high visibility pronouncement at the Spring Meeting of the ABA Antitrust Section.⁹

Now the Clinton team has emphatically joined Mr. Rill. Example C illustrates this position (Paragraph 3.13). Two dominant companies in a foreign country agree to take all feasible measures to keep a U.S. competitor out of their home market, which "would clearly have a direct and reasonably foreseeable effect on U.S. export commerce, since it is aimed at a U.S. exporter." The promised enforcement action represents the repeal of Footnote 159 of the 1988 Guidelines with a vengeance!

This message is reemphasized in Example F, where a group of foreign companies conspire to rig the standards-making process in their own country to

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exclude a U.S. producer (Paragraph 3.133). For good measure, the problem includes a boycott by the major foreign companies of any local distributor that handles the U.S. product. The Agencies respond that this situation would appear to give rise to U.S. jurisdiction. Because "a highly-priced capital good" is involved, U.S. jurisdiction could be predicated on "only a few units being excluded from the foreign market".

Finally, Examples G and H reiterate the view that the DOJ and the FTC will exercise U.S. antitrust jurisdiction over anti-competitive restraints by foreign parties on foreign projects funded by the U.S. government or where the U.S. military is the purchaser (Paragraph 3.14). This restates the position taken by the DOJ in several recent prosecutions in Japan.

Foreign Mergers

Here, the Agencies stake out a fairly aggressive position in Example B (Paragraph 3.12). They posit a merger between two leading foreign companies, without U.S. subsidiaries, which export to the U.S. market and account for 80 percent of U.S. sales. In these circumstances, the Agencies say that they would exercise jurisdiction over the merger transaction, even though it might be exempt from reporting under the *Hart-Scott-Rodino Act*. These parties do not bother to tell us what kind of relief they might expect to get against these companies. This, of course, is a much more extreme version of the CIBA-Geigy pharmaceutical merger where the Justice Department blocked the combination of the U.S. subsidiaries of two Swiss companies that were merging.¹⁰ In Example B, one can hardly imagine the U.S. Government seeking an injunction to prohibit the foreign companies from merging into

their own markets, doubly so if there was a "blocking statute" there. Therefore, unless the merging parties were combining some competing U.S. intellectual property rights (i.e., "assets" located in the United States), it is hard indeed to see where Example B would actually go in practice.

Comity

Ever since the Ninth Circuit's 1977 *Timberlane* decision,¹¹ comity has been a key idea for limiting U.S. antitrust enforcement in cases where most of the relevant conduct occurred overseas, was punishable by foreign law and the foreign government was interested in the situation. However, the 1994 Guidelines take a narrower approach to comity analysis. The Agencies note that "the Supreme Court made clear in *Hartford Fire* that no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both" (Paragraph 3.2).

The Agencies offer up as illustration Example I, involving a foreign buyers' cartel which injures U.S. sellers in the international market. Example I assumes that "major suppliers of that product are located in the United States and the agreement results in substantial loss of sales and capacity reductions in the United States." The Agencies indicated that they would look at whether the foreign antitrust agency was in a better position to stop the buyers' cartel and if so, whether it was to prepared to do so, but, if not, the DOJ and the FTC would seem to be willing to do so themselves because of "the substantial harm caused by the cartel to the United States" (Paragraph 3.2).

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Foreign Government Involvement

Governments are among the world's great cartelizers and even a private cartel works better if a government will help enforce it. This characteristic is not limited to foreign governments: indeed, the so-called "state action exemption" enshrined in *Parker v. Brown*¹² and its progeny protects state-sponsored cartelizing from federal antitrust enforcement that would otherwise be plainly illegal.

The 1994 Guidelines take a tougher stance vis à vis foreign governments than the U.S. courts have generally done vis à vis U.S. state governments (and their wards) under the "state action" exemption (Paragraph 3.3). Thus, the 1994 Guidelines make it clear that the Agencies will pursue "commercial activity" of a foreign state where it has a "substantial nexus with the United States." This issue has arisen in the past with national flag-carrying airlines, communications carriers, etc., but perhaps the issue will become less pressing as foreign governments increasingly privatize their commercial enterprises.

The 1994 Guideline's toughness is most clearly seen in the discussion of "Foreign Sovereign Compulsion" in Section 3.32. The practical question is what happens when an enterprise receives anti-competitive directions from a foreign government to do something otherwise contrary to U.S. antitrust laws. The Agencies (consistent this time with the principles stated in the 1988 Guidelines) indicate that they will allow this defence only where "the foreign government . . . compel[s] the anti-competitive conduct in circumstances in which refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions." It is also subject to the second condition that "the defence normally applies only when the

foreign government compels conduct that can be accomplished within its own territory."

The Agencies illustrate their tough stance with a wonderfully illuminating Example J which seems to echo the type of competitive problems seen recently with various commodities from the former Soviet Union. The problem explains that the U.S. industry has urged action from the U.S. Government rather than taking the uncertain course of bringing an anti-dumping or countervailing duty case against a flood of imports into the United States. Then, "the officials of three foreign companies meet with foreign firms and urge them to 'rationalize' production by cooperatively cutting back. The foreign firms agree among themselves to limit production, but there are no governmental penalties contemplated for a failure to do so." Under these facts, "the Agencies would not find the sovereign compulsion precluded prosecution of this agreement." This is an extremely interesting and topical position given the high visibility of the aluminum agreement and its apparent closeness to the stipulated situation.¹³

This whole situation should be contrasted to the situation in Example L (which is in the part of the 1994 Guidelines concerned with "Antitrust Enforcement and International Trade Relations", Paragraph 3.4). Here, six U.S. producers bring an anti-dumping action and the Department of Commerce (the "DOC") preliminarily concludes that there are dumping margins. At that point, the foreign producers enter into a "suspension agreement" with the DOC under which each producer agrees to sell its product in the United States at no less than its individual foreign market value as periodically determined by the DOC. The suspension agreement is then provided to the U.S. producers who indicate that they have no objection to the

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proceeding being suspended on these terms. The Agencies give a clear answer on this Example: "While an unsupervised agreement among foreign firms to raise their U.S. sales prices would ordinarily violate the *Sherman Act*, the suspension agreement outlined above qualifies for an implied immunity from the antitrust laws."

Finally, the Agencies also take a very clear position on the persistently uncertain subject of whether the *Noerr-Pennington* doctrine applies to petitions of foreign governments. Consistent with the DOJ positions in the 1977 Guide and 1988 Guidelines, the 1994 Guidelines simply say that "whatever the basis asserted for *Noerr-Pennington* immunity (either as an application to of the First Amendment or as a limit on the statutory reach of the *Sherman Act*, or both), the Agencies will apply it in the same manner in the petitioning of foreign governments by the United States Government" (Paragraph 3.34).

Reality Check

One of the appropriate criticisms of the 1988 Guidelines is that the issues described seemed relatively far from many ongoing enforcement activities. Thus, for many, they lacked a practical bite. The same cannot be said of the 1994 Guidelines.

The Clinton Administration and the new activist Assistant Attorney General Anne Bingaman have taken the "Footnote 159" debate the full route.¹⁴ In *U.S. v. Pilkington*, Bingaman's Administration pursued a series of overseas territorial allocations allegedly based on intellectual property licenses that barred U.S. companies from building flat glass plants abroad;¹⁵ and, in *U.S. v. BT-MCI*, the DOJ secured equal access to the British telephone network to U.S. competitors of MCI.¹⁶ Meanwhile, in cases involving

fax paper from Japan and plastic dinnerware, the DOJ brought criminal cases against foreign cartels based on close cooperation with the Canadian Bureau of Competition Policy and the Royal Canadian Mounted Police under the *Canada-U.S. Mutual Legal Assistance Treaty*.¹⁷

The 1994 Guidelines come when the DOJ and the FTC have been substantially strengthened by the passage, in October, of the modestly named *International Antitrust Enforcement Assistance Act of 1994* (which might be better entitled, the "Antitrust Enforcers License to Collude Act of 1994").¹⁸ This means that the Clinton Administration's higher level of intervention under the antitrust laws against conduct occurring abroad can be pursued with greater vigour if foreign governments are willing to agree to cooperative efforts along the lines of the *Canada-U.S. Mutual Legal Assistance Treaty*. Whether the 1994 Guidelines will, in fact, encourage such cooperation is a terribly interesting, but not yet answered question.

Notes

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¹ Justice Department Release (October 13, 1994), reprinted in Trade Reg. Rep. (CCH) No. 388 at 39.

² *Antitrust Guide to International Operations* (January 26, 1977) reprinted in [1977] Trade Reg. Rep. (CCH) No. 266.

³ *Antitrust Enforcement Guidelines for International Operations*, reprinted in 55 Antitrust & Trade Reg. Rep. (BNA) at s. 21 (November 17, 1988).

⁴ 113 S.Ct. 2891 (1993).

⁵ See, e.g., *States of New York and Maryland v. Nintendo of America, Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,614 (S.D.N.Y. 1989); *State of Maryland ex rel. Curran v. Mitsubishi Electronics of America, Inc.*, Civ. No. S-91-815 (D. Md. March 27, 1991); *In re Panasonic Consumer Electronics*

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Products Antitrust Litigation, 1989-1 Trade Cas. (CCH), ¶ 68,613 (S.D. N.Y. 1989); and *In re Minolta Camera Products Antitrust Litigation*, 668 F. Supp. 456 (D. Md. 1987).

⁶ See *U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2d. Cir. 1945); and *W. Fugate*, Foreign Commerce and the Antitrust Laws, §§ 2.10 and 2.25 (1991) (hereinafter referred to as "Fugate").

⁷ See *Fugate*, §§ 2.16, 3.11 discussing the *Foreign Extraterritorial Measurers Act*, R.S.C. 1985, c. F-29, *Protection of Trading Interests Act*, 1980 (U.K.); and similar statutes.

⁸ 111 S.Ct. 1842, 1847 (1991). *Summit Health* is a domestic case involving a claim that a boycott of a single surgeon would have no effect on interstate commerce (and hence be outside the *Sherman Act*). The Supreme Court held (citing an earlier decision) that the *Sherman Act* jurisdiction could be premised on intent or effect. The *Summit Health* decision has no reason to face the interplay of this idea and various comity principles that might come into play in an international jurisdiction case. See discussion of the *Timberlane* decision at note 11.

⁹ "Sixty Minutes with the Honourable James F. Rill", (1992) 61 Antitrust L. J. 229 at 245-247.

¹⁰ *U.S. v. CIBA*, 1970 CCH Trade Cas. (CCH) ¶ 63,269 (S.D.N.Y. 1970) (Consent Decree).

¹¹ *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).

¹² 317 U.S. 341 (1943).

¹³ See e.g. "Aluminum - Smelt a Rat", *The Economist*, July 23, 1994, at 64.

¹⁴ See Anne K. Bingaman, *U.S. Antitrust Policies in World Trade*, Chicago, Illinois, May 16, 1994 at 8-9.

¹⁵ *U.S. v. Pilkington plc*, Trade Reg. Rep. (CCH) ¶ 50,758 (D. Ariz. 1994) (Proposed Consent Decree), Press Release reprinted at ¶ 45,024 (at 44,680-90) (May 25, 1994).

¹⁶ *U.S. v. MCI Communications Corp. and BT Forty-Eight Co.*, 1994-2 CCH Trade Cas. (CCH) ¶ 70,730 (D.D.C. 1994).

¹⁷ *U.S. v. Clement Izzi, et al.*, CR 94-00243, and companies cases release reprinted in Trade Reg. Rep. (CCH) ¶ 45,024 (at 44,496-7) (June 9, 1994) (plastic dinnerware); *U.S. v. Kanzaki Specialty Papers, Inc.*, CR. No. 94-1076NMG, release reprinted at ¶ 45,024 (at 44, 706-7) (July 14, 1994) (fax paper).

¹⁸ S. 2297 and H.R. 4781, *International Anti-Trust Enforcement Assistance Act 1994* (103d Cong. 2d sess.) (1994).

AUSTRALIAN NEWSLETTER

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1994 was one of the busiest years for the Trade Practices Commission (the "TPC") since the introduction of the *Trade Practices Act* in Australia in 1974. Certainly, the TPC had a very busy and productive time (especially from its point of view) in enforcing the *Trade Practices Act*. The year ended with the TPC reviewing a very important application for authorization by Qantas Airlines (Australia's national air carrier) and British Airways for a market sharing and price fixing arrangement affecting the popular kangaroo-route (Australia to England and return). The TPC, in its initial Draft Determination, rejected the application and a conference was called by the parties (as is permitted under the *Trade Practices Act*) at which further submissions were made to the TPC. The TPC is now considering these submissions including one from the Australian Government which is anxious for the TPC to take a different attitude towards the application, a matter that the TPC will need to consider very carefully in the context of the difficult onus that faces parties seeking authorization of such an agreement. The Government's attitude is partially affected by a desire to "float" Qantas Airlines. By the time this article appears in print the decision of the TPC will have been made public and will be reported on in the next issue of the *Record*.

Meanwhile, on the enforcement side of the activities of the TPC the largest fines handed down by an Australian court in a trade practices matter were ordered in the *Freight Express* litigation. In the last

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issue of the *Record* it was noted that significant penalties were imposed on TNT and Ansett General Transport.¹ Now, in the second part of this case even larger penalties were imposed by Burchett, J. on Mayne Nickless Ltd. and certain of its officers totaling over AU\$7 million. Costs were also awarded against the company. These "penalties" were agreed between the TPC, the company and the officers concerned.

These recent penalties were imposed under the old regime (maximum penalties of AU\$250,000 for corporations and AU\$50,000 for individuals for each offence). If the matters had been brought under the new regime where the maximum penalties are AU\$10 million for corporations and AU\$500,000 for individuals, then the penalties could have been significantly higher. Whether the parties would then have fought the particular matter, rather than settle out of court, is of course another issue.

Compliance Policy

The importance of these penalties is made more significant by the fact that there is a general concern in the Australian community with corporate compliance. Indeed, the new proposed *Australian Corporate Criminal Code* (the "Criminal Code") contains some rather fascinating insights on how the Australian Government views the question of corporations' guilt under the criminal law. The Criminal Code will eventually impact on the operation of the *Trade Practices Act* and will have very significant ramifications for all Australian business transactions including, in particular, those involving corporations which will be concerned with the operation of trade practices law and consumer protection law (as well as other laws).

The Criminal Code is part of an ambitious legal simplification programme, which aims to set out general principles of criminal responsibility which will apply to all Commonwealth offences committed within 5 years of the proclamation of the Bill. These principles will eventually be applicable to any offence, irrespective of how the particular activity is currently governed. Once the legislation comes into effect there will need to be a series of amendments of other relevant Commonwealth legislation to ensure that it "meshes in" with the Criminal Code.

One very important issue is raised by the Criminal Code in relation to proving corporate criminal liability. Where negligence is not a fault element in the offence (eg. where recklessness needs to be established), the relevant corporation's attitude to the particular activity (i.e. its "corporate culture") may be examined to see whether it "directed, encouraged, tolerated or led to non-compliance with the relevant provision". As defined in the Criminal Code, "corporate culture" includes the relevant "attitude, policy, rule, course of conduct or practice existing within the body corporate generally, or in the part of the body corporate in which the relevant activities" occurred. This development emphasizes the need for a culture of compliance within all corporations which is clearly an issue highlighted by the recent heavy fines imposed in the *Freight Express* case.

Competition Policy

In the last issue of the *Record*, we also commented on the progress (or lack thereof) in relation to the development of a comprehensive national competition policy based on the implementation of the Hilmer Report.² A meeting of relevant Ministers (Federal

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and State and Territory) will now not be held until April 1995 (originally scheduled for February 1995). This delay will put back the start-up date of any reforms to the *Trade Practices Act* with respect to the matters noted in the last "Australian Newsletter".³ The relationship between the Commonwealth on the one hand and the States and Territories (or at least some of the States and Territories) on the other, is becoming even tenser as arguments continue on how the States and Territories are to be "compensated" for giving up some of their powers in controlled State and Territory monopolies. Some experts are suggesting that the Commonwealth should "go it alone" and introduce legislation irrespective of the views of the States and Territories. However, while legally possible, to "go it alone" would be politically insensitive and probably disastrous in the writers' view. Further, it would make the work of the TPC (or rather the new Australian Competition Commission) quite difficult in the context of its new role in so many areas previously "exempted" from the operation of the *Trade Practices Act*.

Pre-Notification of Mergers

The Department of Treasury has issued a Discussion Paper in which it is suggested that all mergers over a certain value (AU\$25 million is a suggested acquisition benchmark but this is likely to be increased. An alternative benchmark is a total value of the merged business of AU\$150 million) should be the subject of pre-notification to the TPC (or the Australian Competition Commission). Such a proposal, if it is enacted, will be in line with developments in other jurisdictions.

The Discussion Paper has been the subject of considerable anticipation in the business and legal communities. It comes at a time when some

difficulties have been experienced by certain sections of the community in evaluating mergers that may be anti-competitive. The TPC has certainly been more heavily involved in mergers since the test to evaluate whether a merger is in breach of the Act was changed from the "dominance" test to the "substantial lessening of competition" test in 1993.⁴

There has been some criticism of the TPC's administration of the current regime. In this respect, it is suggested that parties are left in a very uncertain state of mind as to whether they should proceed with mergers. Even if the TPC were to give an informal "clearance" to a merger, this will not necessarily stop others from later seeking divestiture after the merger is completed. Also, further aspects of the merger may be examined by the TPC which could decide to review its previous evaluation of the proposal if new information comes to hand.

The TPC is placed in a difficult position in the current regime. Often, parties approach it on a merger on the basis that the merger is highly confidential, and the TPC can only undertake very limited market enquiries because of the confidentiality constraint. The TPC needs to obtain more detailed information before it can provide a considered view as to whether the merger may be anti-competitive. On other occasions, parties approach the TPC just a day or two before the merger asking for its informal "blessing". That is insufficient time in many cases. Finally, the TPC can only provide an informal "blessing" the "clearance" has no effect in law.

The formal pre-notification of mergers will give the TPC greater responsibility, and parties in the community greater certainty, as a result of the evaluation of the merger by the TPC. Twenty-one business days has been suggested as the time frame

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in which mergers are to be reviewed although twenty-eight days would seem to be more reasonable. Mergers by their very nature require very speedy evaluation. Once the TPC has vetted a merger and given it "clearance", it is anticipated that it will not be subject to further challenge on normal grounds. While this certainty will be welcomed by the community, enough time still must be made available to ensure that the TPC can complete a satisfactory evaluation of the relevant merger.

It is anticipated that the pre-notification of mergers will get the "go ahead" and come into force during 1995 or, at the latest, early 1996.

Notes

¹ R. Baxt and H. R. Spier, "Austrialian Newsletter" (1994) 15:3 Can. Comp. Rec. 13 at 15.

² *Ibid.*, at 13.

³ *Ibid.*

⁴ H. R. Spier and R. Baxt, "Austrialian Newsletter" (1993) 14:1 Can. Comp. Rec. 18.
