

## CANADIAN COMPETITION RECORD

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## AUSTRALIAN NEWSLETTER

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### National Competition Policy

On April 3, 1995 the Council of Australian Governments, comprised of the Federal, State and Territory Governments, agreed to the long discussed National Competition Policy Package. Constitutional gaps, legislated exemptions and Shield of the Crown are either to be eliminated or limited under the new regime.

Essentially, adoption of the Package will mean that within some five months Australian competition law will cover the bulk of the Australian economy. Any exemptions to that law are to be transparent and time limited.

Other parts of the Federal/State/Territory agreement relate to structural adjustment, competitive neutrality, pricing policy, access to natural monopolies and regulation review. All are aimed at removing anti-competitive restrictions in the Australian economy unless justified on public benefit grounds.

The Australian Competition & Consumer Commission will be established later in the year. This new

Commission will be a merger of the current Trade Practices Commission and the Prices Surveillance Authority, but with extra functions in the area of access, national coverage of competition law and related issues. A small National Competition Council will also be established to be an advisory body to the Commonwealth, State and Territory Ministers on competition issues.

Legislation is already before the Federal Parliament to implement the package and all States and Territories will be passing complementary legislation within the next fifteen months to complement the Commonwealth law.

States and Territories will still be free to have their own pricing or access schemes for government business operations (i.e., utilities) but they must fit in with the national framework.

### Caltex/Ampol

In this case, Caltex and Ampol (the only Australian owned petroleum refiner and reseller) sought to merge. However, the Trade Practices Commission (the "Commission") took the view that the proposed merger would substantially lessen competition in a number of relevant markets and, particularly, restrict the ability of the independent petroleum sector in Australia to compete.

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After its initial review, the Commission entered into extensive negotiations with the companies who offered various undertakings and eventually entered into an enforceable deed. The main undertakings offered by the parties included:

- the sale by Caltex/Ampol of large oil terminals which would allow the import, storage and distribution of petrol supplies to independent wholesalers and retailers;
- the offer to supply at least a billion litres of petrol per annum on reasonable commercial terms to independent wholesalers, distributors and retailers;
- the sale of a significant number of Ampol/Caltex-owned distributorships to independents, which will facilitate further competition;
- the sale of 35 metropolitan and 15 country retail sites of significant volume in areas where price competition has been very limited. The sales will be to independent retailers and distributors with offers of supplies of petrol;
- the release of restrictive covenants on former independents who had left the industry. This will enable the re-entry of those vendors contributing to continuing fuel discounting;
- guaranteed direct access by independents with supply agreements to Ampol/Caltex terminal facilities throughout Australia; and
- the honouring of all existing supply agreements.

Canadians will note some similarity with the Imperial Oil/Texaco merger.

### **Qantas/British Airways**

Qantas and British Airways ("BA") have sought authorization from the Commission for a price agreement on the Australia/UK route and intermediate destinations. BA already owns 25% of Qantas but, pursuant to Australian Government policy, cannot increase its interest any further.

By way of explanation, authorization in Australian competition law is a process whereby anti-competitive conduct can be exempted from the law if there are countervailing public benefits. Qantas and BA took the view that although the proposed agreement was anti-competitive, there were countervailing public benefits which justified its exemption from the usual rules.

The Commission's draft decision was that it would not authorize the anti-competitive conduct. Pre-decision conferences were called at which extensive discussions were held. An unusual sideline is that four Federal Ministers, including the Commission's own Minister, wrote to the Commission urging it to authorize the agreement.

At the time of writing this note, a final decision had not been issued but there were extensive on-going discussions between Qantas/BA and the Commission on the matter.

### **Health Insurance**

Legislation currently before the Australian Parliament will dramatically alter health insurance arrangements in Australia. At the moment, health insurance arrangements are entered into on a collective basis by health funds and health service providers and are very much regulated by the federal

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government. With the changes, health funds will be permitted to enter into contracts directly with hospitals and other health service providers such as specialists in relation to what the health service providers will charge policy holders.

The proposed changes have significant competition policy ramifications. The concern of the health service providers is that they will be forced into "unfair" arrangements by the health funds, some of which are very large. The concern of the health funds is that the hospitals and the health service providers will enter into collective arrangements so as to avoid competitive negotiation of contracts.

**Australian Law Reform Commission Report on "Remedies under the Trade Practices Act"**

We are aware that Canada is looking at possible amendments to its *Competition Act* and, in particular, at remedies both in the area of marketing practices and competition policy. It may be of interest that the Australian Law Reform Commission (the "ALRC") has recently looked at "Remedies under the *Trade Practices Act*". The ALRC report is currently before the Federal Government for final consideration. Although many of the changes are procedural, the important ones are:

- the current criminal consumer protection prohibitions (marketing practices) will become civil matters, but with an overriding criminal offence where there is intent;
- penalties will go from the current AU\$200,000 for a corporation to AU\$1 million for a civil offence and AU\$2 million for a criminal offence. Penalties for individuals will rise as well;
- the legislation will provide an extension of a current provision in the *Trade Practices Act* where the onus of proof is reversed in relation to predictions as to the future. There will now be an omnibus provision providing that anyone making claims must have a reasonable basis for doing so with the onus on such persons to demonstrate this.

**Enforceable Undertakings**

As part of its legislation review, Canada might be interested in what has happened since Australian trade practices law was amended in 1993 to enable the Commission to accept enforceable undertakings. Such undertakings can relate to any provisions of the legislation and there is no need to prove a substantive breach of the legislation. Breaches of the undertakings attract court sanctions. This power has proven to be a very valuable resource in the administration of the legislation and very cost effective for all concerned.

To date some 100 of such undertakings have been entered into. While the bulk of the undertakings are in the marketing practices area, some relate to anti-competitive conduct and mergers. The most significant is the undertaking that was reported earlier in this article with respect to the Caltex/Ampol merger.

Undertakings are placed on a public register and many of them build in compliance mechanisms, compensation and other important factors.

The Commission is about to release a public guideline on the use of enforceable undertakings and will also, on a regular basis, evaluate their effectiveness.

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Finally, it must be stressed that it is the Commission's firm policy that undertakings will only be accepted where there is sufficient evidence for the Commission to ascertain that a breach of the *Trade Practices Act* has been committed or is likely to have been committed.

### **Interchange between Canada and Australia**

The third Executive Interchange between the Canadian and Australian competition authorities has

begun. David Smith, a Senior Assistant Commissioner in the Australian Trade Practices Commission based in Canberra has just gone to Ottawa to work at the Bureau of Competition Policy. Later in the year, Bill Miller, from the Department of Justice Unit attached to the Bureau of Competition Policy in Ottawa, will start at the Commission in Canberra. Both exchanges are for a year.

