

## CANADIAN COMPETITION RECORD

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## AUSTRALIAN NEWSLETTER: AT LAST A TRUE COMPETITION POLICY FOR AUSTRALIA

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The Federal Parliament of Australia has now enacted the *Competition Policy Reform Act*. Under this legislation which we have commented on previously,<sup>1</sup> a number of significant changes have been made to trade practices law in Australia. These are as follows:

- the extension of the operation of the *Trade Practices Act 1974* (the "TPA") to businesses and professions previously beyond its scope, including Commonwealth, State, Territory and local government enterprises;
- the establishment of two new competition bodies the Australian Competition and Consumer Commission (the "ACCC") (comprising a merged Trade Practices Commission and Prices Surveillance Authority) and the National Competition Council (the "NCC"). The Act provides for the Trade Practices Commission and the Prices Surveillance Authority to be replaced with a single body exercising the powers of each, viz the ACCC. The Act also establishes the NCC,

which will perform advisory and research functions, particularly in relation to access and pricing recommendations;

- the revision of the competitive conduct rules in Part IV of the TPA; and
- the establishment of an access regime pursuant to which parties can apply for access to facilities of national significance.

### Amendments to Part IV of the TPA

A number of modifications have been made to the competitive conduct rules in Part IV of the TPA, which contains the rules prohibiting price fixing, anti-competitive agreements and conduct, misuse of market power, etc. The effect of these changes are:

- the newly-formed ACCC will be able to authorize arrangements between competitors fixing the price of goods, and also the practice of resale price maintenance;
- the current notification regime, which provides some protection for certain exclusive dealing arrangements, will be extended to arrangements involving third line forcing. However, in the case of third line forcing, the protection will only apply once the ACCC has

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reviewed the notification application whereas in other exclusive dealing cases, protection operates from the date of filing;

- prohibitions on resale price maintenance, price fixing and exclusive dealing arrangements (which previously only encompassed conditions attaching to the re-supply of services) will be extended to refer also to conditions regarding the re-supply of services;
- the prohibition against price discrimination will be abolished; and
- the ability of the States and Territories to grant specific legislative exemptions from the operation of the TPA to particular contracts or conduct will be restricted, and depend upon the States and Territories complying with the Council of Australian Governments (the "COAG") Agreements.

### Access Regime

The legislation provides a mechanism for enabling corporations and individuals to obtain access to certain services provided by facilities which are of national significance as well as the means by which such access may be obtained. The regime seeks to solve the inefficiencies associated with resource duplication and monopoly power which arises from ownership of a facility which cannot be readily duplicated.

The NCC has a recommendatory role in determining whether access to certain services should be allowed. In forming its recommendation, it is required to take into account a number of factors, including whether access would promote competition. The relevant Minister, upon receiving the NCC's recommendation

must consider those same matters and publish his or her decision within 60 days.

Once a service has been declared nationally significant, anyone may negotiate with the provider of that service for access to it. Where negotiations are unsuccessful, either party may notify the ACCC, which will conduct an arbitration of the dispute. In making its determination, the ACCC is obliged to take into account specified matters such as the legitimate business interests of the service provider and the provider's investment in the facility. However, it cannot make a determination which, for instance, prevents an existing user of the service from obtaining a sufficient amount of the service.

Both the processes of declaration and arbitration are open to review by the Australian Competition Tribunal (the renamed Trade Practices Tribunal) which will reconsider the declaration or re-arbitrate the access dispute. Other provisions address the revocation of a declaration, variation of arbitration determinations, enforcement of determinations, registration of access contracts and voluntary access undertakings by providers of services.

The major area of deficiency of this regime is the absence of time limits on the decision-making process (other than the decision of the relevant Minister to accept or reject the NCC's recommendation). As a result, the access regime is unlikely to be speedy and, in matters involving access disputes, the processes involved are likely to favour participants with "deep pockets".

### COAG Agreements Between the Commonwealth, States and Territories

Under the COAG Agreements, the States and Territories have agreed to review all anti-competitive

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statutes by the year 2000 in return for significant financial reimbursements over a period of time. In addition, all the States and Territories will review the operations of public monopolies, and other bodies over side of government, to ensure that they comply with the spirit of competition. This will be particularly relevant in the context of the access regime described earlier.

Furthermore, whereas in the past it has been possible for States and Territories to exempt particular activities from the operation of the TPA, under the COAG Agreements and the new legislation it will now be much more difficult for the States and Territories (and the Commonwealth) to exempt practices and agreements from the operation of the TPA pursuant to one of the provisions in the TPA, *viz* section 51(1). The aim of these changes is to ensure that there is appropriate disclosure of the arguments for exemption.

### Timing

The legislation will come into effect in three stages. By August 1995, the States and Territories should pass competition codes (which replicates Part IV of the TPA that is banning anti-competitive conduct, etc).

By February 1996, the ACCC will be established (the Trade Practices Commission and the Prices Surveillance Authority will be abolished); in addition the NCC will be established. The access regime will also come into operation.

By August 1996, the TPA will apply to all States and Territories business activities and the State and Territory conduct rules will apply.

To give parties time to adjust to the new regime, pecuniary penalties will not apply until July 1997 in respect of conduct which is subject to the TPA for the very first time. Other remedies will apply after July 1997. Pecuniary penalties will not apply to the Crown.

### Other Proposed Changes to the TPA

The Justice Statement issued by the Commonwealth Government in June 1995 has foreshadowed a number of other significant changes to the TPA. These include making it easier for the ACCC to litigate representative actions on behalf of consumers and others damaged by unfair or anti-competitive conduct.

The penalties for breaches of the consumer protection provisions of the TPA (Part V) will be increased from the current level of AU\$200,000 for corporations and AU\$40,000 for individuals to AU\$2,000,000 for corporations and AU\$400,000 for individuals. It will be recalled that the penalties for breaching the competition provisions of the TPA are AU\$10,000,000 for corporations and AU\$500,000 for individuals.

The courts will also be given power to make a wider range of orders against corporations and others for breaching the TPA. For example, the courts will be able to require corporations and others to undertake community service obligations rather than pay pecuniary penalties.

### Notes

<sup>1</sup> See R. Baxt and H.R. Spier, "Australian Newsletter" (1995) 16:1 Can. Comp. Rec. 33.

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