FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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

Further Protection for Small Business Proposed

The *Australian Trade Practices Act* (the "Act") already contains important provisions in relation to unconscionable conduct. The amendments made in 1992 to the Act to widen the unconscionable conduct remedies (through the insertion of a new part of the Act, Part IVA) has not gone as far as many in the small business sector would want. Small businesses argue that they are particularly hampered in dealing with larger organizations, especially in negotiating contracts in retail shopping centres and in franchising. Large companies, it is argued, are able to use their market power to negotiate very favourable terms for themselves. The Trade Practices Commission in the past, and now the Australian Competition & Consumer Commission (the "ACCC" — this body came into operation on November 6, 1995), have indicated a willingness to intervene in appropriate cases, but these have been few and far between. Side by side with the concern that small business needs to be protected is a clear indication from the High Court of Australia in *Queensland Wire Industries Pty Ltd.* v. *BHP Limited*[1] that competition is harsh and ruthless and people do get hurt. Despite all of this, the Minister for Small Business, Senator Chris Schacht, introduced legislation into Parliament late in 1995 which he believes will provide protection not only for small business, but for all business, in the context of harsh or oppressive conduct and contracts.

The Discussion Paper accompanying this legislation, the Trade Practices Amendments (Better Business Conduct) Bill, has identified a number of scenarios in which small business, in particular, has found itself at a significant disadvantage in dealing with bigger players in relevant markets. In particular, the Discussion Paper focused on retail tenancies and franchising. However, the Bill also deals with the position of a larger corporation that may be held to "economic ransom" in a particular situation — for example in the development of a specialized computer programme.

Senator Schacht in support of the legislation suggested that where such "economic ransom" is present, the markets in which the relevant parties operated are not "perfectly contestable". While he recognized that the conditions for perfect contestability could not be produced at all times, the Government was concerned at developing a comprehensive competition policy (as seen most recently through the COAG reforms discussed in

previous issues of the *Record*[2]). These changes should "improve contestability" and "restore choice in commercial relationships". While Senator Schacht recognized that disparity of bargaining power was not itself a bad thing, it could lead to circumstances for abuse. Accordingly, the Government was prepared to champion legislation to restore the balance, especially in the context of economically captive firms. He rejected industry specific legislation which it was felt would create an unreasonable burden on the Parliament to deal with specific industries in different ways.

The Amendments

The Bill is short and to the point. It abandons an earlier intention to rely on notions of economic duress in framing the basis for relief. Perhaps the Government was concerned that the notion of economic duress, while being recognized by the courts, may not be sufficiently flexible to establish a basis for relief. Rather, the Government chose to rely on the notions of harsh or oppressive conduct or contracts. These terms are used in a variety of legislation already in Australia, for e.g. the *New South Wales Contracts Review Act*, the *New South Wales Industrial Relations Act of 1991* and the *Corporations Law*. Furthermore, the Government was concerned that the legislation should not impact on all contracts and conduct but rather the continuing relationship that existed between parties. Accordingly, the legislation will only apply where there is in existence a commercial relationship between relevant parties and there is "produced" a variation in the balance struck between those parties, thus creating the possibility for exploiting "'economically captive' firms".

The legislation is civil in operation in that no Commonwealth penalties flow from a breach of the relevant provisions. Individuals, however, may be subject to an award of damages or an injunction in the same way as they are for breaches of section 52 of the *Trade Practices Act* which prohibits misleading and deceptive conduct. The legislation is intended to operate from July 1, 1996 (assuming that it is passed by the Parliament and receives Royal Assent). It is further assumed, and the Government has made a clear promise of funding and support, that the ACCC will be primarily responsible for initiating major litigation involving these provisions.

The main prohibition is against corporations:

(a) knowingly engaging in harsh or oppressive conduct; or

(b) engaging in conduct that the corporation ought reasonably to have known would be harsh or oppressive.

Meaning of Harsh or Oppressive

The Explanatory Memorandum notes that the words "harsh" and "oppressive" have not been defined but are well understood by reference to legislation already noted. Unfortunately, the Explanatory Memorandum contains some language which may cause some difficulty in the interpretation of these words. At paragraph 12, the Memorandum states that in interpreting the relevant legislation regard should be had to a number of factors in determining whether the conduct is harsh or oppressive and exploitative in nature. The words "exploitative in nature" are not included in the legislation at all.

The relevant factors which it is suggested in the Explanatory Memorandum will be helpful in determining whether the relevant benchmark has been established include:

(a) "deviation from established practices of commercial behaviour for the industry sector;

(b) the existence of industry codes of practice, with a substantial degree of industry compliance, which participants are encouraged to follow; and

(c) the degree of consistency of treatment of similar classes of persons by the corporation."

The Memorandum notes that this list is not exhaustive and that the court should have regard to other factors in assessing the relevant conduct. One wonders whether the use of the expression "exploitative in nature" will in any way restrict the operation of the provisions.

It will not apply to existing contracts, but of course if those contracts are varied beyond July 1996 then the legislation may bite. Furthermore, the parties must be in an existing commercial relationship although what that means is unclear and one wonders whether an agreement to negotiate a contract may establish a commercial relationship. One would assume, in light of decisions such as *Walford* v. *Miles*[3] that there is no actual fiduciary obligation between the parties but there may well be a relationship which the courts will protect in the context of such legislation (see for example the discussion of a similar issue by the High Court of Australia in *Waltons Stores Limited* v. *Maher*[4]).

The legislation does create an important defence or argument that the "oppressing" parties may put forward in escaping the impact of the provisions. Section 51AC(3) provides that "conduct is only harsh or oppressive against another person if a reasonable person would conclude, in all the circumstances, that in a fair and competitive market, the conduct would not be reasonably necessary for the protection of the present or future legitimate interest of the corporation".

This subparagraph raises a number of interesting and potentially troubling questions. The court is asked to look at competition and the way markets operate in assessing the relevant transaction. This throws into sharp focus the way in which these provisions may counter the general thrust of the *Trade Practices Act* and in particular the competition provisions of the Act.[5] As Mason CJ and Wilson J noted in the most famous trade practices case yet decided in our courts, *Queensland Wire Industries Pty Ltd.* v. *BHP Limited*,[6] the philosophy of a key provision of the Act, section 46, is based on the fact that "[c]ompetition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away."[7] This will pose some rather interesting questions for the court.

The provision also assumes that parties may wish to protect present or future legitimate interests. That brings into mind the very nature of the bargaining process in a contract. As was noted by Lord Ackner in *Walford* v. *Miles*,[8] "the concept of [negotiating on fair terms] is inherently repugnant to the adversarial position of the parties when engaged in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations."[9] Again, this throws into sharp contrast the thrust of this legislation and the need to ensure that the law of contract is given an appropriate part to play.

The mere institution of legal proceedings will not be seen as harsh or oppressive conduct although the institution of legal proceedings may, in certain

circumstances, amount to a misuse of market power in terms of section 46 of the *Trade Practices Act*. Again, the contrast between the operation of the competition provisions and these provisions will place a court in a dilemma, especially when assessing whether a person is acting harshly or oppressively, it must evaluate the nature of a competitive and fair market, and the need to protect a legitimate interest.

The legislation contains no provision in relation to the funding of relevant litigation. Surely this is the key in developing legislation in any of these areas. If it is intended only to rely on the ACCC to run litigation, then the amendments will provide only a minor concern to business. However, it is proposed that this will be self-enforcing legislation as is section 52. In that context it is likely to be used, as section 52 of the *Trade Practices Act* has been used in the past, by big business against big business or against small business in trying to renegotiate terms of contract or relationships that may not have been as attractive as they could have been at the time of initial negotiation. The potential for this set of provisions to become another section 52 of the Act (and this section has been of little use to consumers) is a matter on which some side bets are no doubt already being taken.

Huge Fines Imposed on Concrete Companies for Price Fixing

In a major victory for the ACCC, the Federal Court (Lockhart J) on December 4, 1995, handed down the largest penalties yet awarded in cases involving breaches of the *Trade Practices Act*. Almost AU$21,000,000 were awarded against three of Australia's largest manufacturers of concrete products, Pioneer Concrete (Qld) Pty Ltd., Boral Resources (Qld) Pty Limited and CSR Limited and a number of their officers for allegations of price fixing and market sharing. Penalties under the *Trade Practices Act* were increased in 1992 to AU$10,000,000 for each offence (maximum) and AU$500,000 for individuals (maximum).

The Chairman of the ACCC has warned that if these penalties do not achieve the desired effect, i.e. bring about a culture of compliance within Australian corporations, he may have to seek amendments to the Act which will see the introduction of jail sentences for breaches of the Act in so far as they relate to price fixing and similar practices. No reaction has yet been given to this suggestion by the Government.

Notes

1 (1989), 83 ALR 577.
2 See the "Australian Newsletter" in (1995) 16:3 Can. Comp. Rec. 46; (1995) 16:2 Can. Comp. Rec. 28; (1995) 16:1 Can. Comp. Rec. 33; (1994-1995) 15:4 Can. Comp. Rec. 30; and (1994) 15:3 Can. Comp. Rec. 13.
3 [1992] 1 All ER 453.
4 (1988), 164 CLR 387.
5 See also discussion of this issue in 66 ALJ 43.
6 (1989), 83 ALR 577.
7 *Ibid.* at 585.
8 [1992] 1 All ER 453.
9 *Ibid.* at 460.

FAILURE TO DISCLOSE PATENT DURING INDUSTRY STANDARDS APPROVAL PROCESS MAY COST U.S. COMPUTER MANUFACTURER

By: Jeffery D. Jenkins, Student-At-Law
Fraser & Beatty, Ottawa

A proposed consent decree entered November 22, 1995 by the U.S. Federal Trade Commission against Dell Computer Corporation[1] may have an impact on U.S. intellectual property owners who belong to

standards-setting organizations. At issue is the obligation of these owners to search for and disclose their intellectual property rights when the setting of standards by the organization would infringe those rights.

Dell participated in the non-profit Video Electronics Standards Association ("VESA") beginning in February 1992. By June, VESA's Local Bus Committee, with Dell representatives sitting as members, approved a design standard for the manufacture of VL-bus components used to convey information between computer CPU and peripheral devices. After committee approval, the standard was given final approval by VESA voting members in August 1992. The Dell representative certified that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights or patents" that Dell possessed.

Dell had in fact received a U.S. patent in July 1991 for the motherboard configuration of the VL-bus card. After the successful use of the standard in over 1.4 million computers in the eight months following its adoption, Dell informed certain VESA members manufacturing with the new standard that their "implementation of the VL-bus standard is a violation of Dell's exclusive rights".

The FTC has accepted an agreement with Dell that would settle charges of an alleged violation of section 5 of the federal *Trade Commission Act* by engaging in practices that restricted competition related to VL-bus design standards for personal computing systems. Under the consent agreement, Dell would lose its rights to enforce the patent until August 1, 2008. The decree was open for public comment until mid-January 1996, at which time the FTC was to decide whether to either finalize or modify the agreement.

Dissenting Commissioner Azcuenaga has stated that allegations Dell made an intentional misrepresentation in adopting the standard and acquired market power as a result are not supported by the evidence. She was also concerned about "creating a new antitrust-based duty of care for participants in the voluntary standard setting process" and felt the assumption of an affirmative duty to identify intellectual property rights and warn of potential conflicts "may affect a range of standard-setting organizations."

It will be interesting to monitor the FTC's increased interest in industry technical standards to see if such rights are a special situation requiring increased federal enforcement, or whether the incentive to license broadly and invent around such technology will provide adequate competition protection instead.

Notes

1 *In the Matter of Dell Computer Corp.*, Agreement Containing Consent Order to Cease and Desist, Federal Trade Commission File No. 931-0097.