FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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New Government — Full Steam Ahead on Competition Law and Policy

With the election of a conservative Government for the first time in thirteen years at the recently concluded Federal elections there was some concern expressed by observers that the development of a more focused national competition policy illustrated by the *Competition Policy Reform Act 1995* and accompanying agreements might have been blunted. Those concerns have been totally unjustified as the new Government has continued to support the development of a strong co-ordinated competition policy. Indeed, if anything, the moves have generated even more momentum in some respects.

In the first place, the Minister responsible for policy in this area will be the Treasurer. He is a more senior member of the Government (indeed a member of Cabinet), than was the case under the Labor Party. Secondly, in recently introduced proposals to reform the Australian Industrial laws, the Government is seeking to reintroduce into the *Trade Practices Act* (the "TPA") far reaching provisions which will prohibit secondary boycotts. Sections 45D and 45E of the TPA are seen by many as extremely important weapons in combating anti-competitive behaviour by unions. These provisions were inserted into the Australian legislation in 1977 but removed by the Labor Government in 1993. They had been the subject of some fascinating legal decisions and rare intervention by the former Trade Practices Commission (now replaced by the Australian Competition and Consumer Commission (the "ACCC")).

The new Government has also indicated it is continuing to support proposals put forward by the previous government to ensure that the ACCC will be the primary regulator in the area of telecommunications. The telecommunications market is to become open to more vigorous competition across the board from 1997 and this development will now be given additional support as a result of the new Government's clear message to the community that it wishes to push this area of reform very hard.

There have been a few other developments which are a little worrying. The new Government has indicated that it may intervene to exempt from the operation of trade practices law certain activities which have previously been the subject of coverage. This includes an indication by the Government that it wishes to immunize from the operation of the TPA the licensing of newsagents which distribute newspapers by home delivery to Australian homes.

This has been an area of continued irritation and debate in the trade practices area. Government intervention is seen both as unnecessary and unwarranted. Nevertheless, the chances are that this area of business will be given some form of protection. Moves to protect other areas of commerce may be supported by a wider range of interest groups but at this stage the full intentions of the Government are not known.

In this article, we wish to comment briefly on one aspect of the proposals to reform the regulations of telecommunications. This concerns the ability of the ACCC to issue what are to be known as competition directions in certain circumstances from 1997. This power will be limited to the telecommunications industry at this time although history tends to suggest that when innovations of this kind are introduced in one area of the law, if successful, they are sometimes extended to other areas of the law. Other areas of industry which have recently been the subject of rationalization and reorganization (as a result of privatization and other moves) include electricity, gas, the ports, railways, etc. Whether the government will extend this initiative to these areas (and indeed other areas) is a matter of some concern to the business community.

At this point, new legislation has not been introduced to identify how the issue of competition directions will operate. Under the previous Government's draft legislation, which was released in December 1995, the ACCC was to have been given the power to issue a competition direction if it was satisfied that the relevant party (limited to carriers and similar bodies) had "engaged, is engaging or is proposing to engage in any anti-competitive conduct". In those circumstances the ACCC could issue the relevant party a notice which would direct the relevant person "not to engage in the relevant conduct". In circumstances where it was desirable to do so to serve the public interest and to introduce competition in relevant telecommunications markets, the ACCC could make an order to the relevant person "not to engage in conduct that is related to the anti-competitive conduct". Finally, if it was necessary to rectify the relevant conduct the ACCC could issue an order "directing the [relevant person] to do something".

The ACCC was not to give a competition direction unless it had given the parties a reasonable opportunity to present written or oral submissions to the ACCC. However, this constraint would not apply "if the Commission considers that any delay in giving a competition direction pending the completion [of the relevant process of obtaining information and submissions] would be prejudicial to the public interest."

In any event, the ACCC would be given the power under the relevant legislation to issue an interim direction without going through the process of obtaining written submissions. An interim direction would only remain in force for ninety days but could not be challenged.

At the time the legislation was drafted, mechanisms for appealing the giving of a competition direction had not been introduced, but it was clear that some mechanism was to be available to permit parties to review the decision of the ACCC in either the Australian Competition Tribunal (the body which replaces the Trade Practices Tribunal) or in the Federal Court.

To ensure that persons could properly mount a challenge, the ACCC was required to give written notice setting out the reasons for the direction.

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This competition direction is quite similar in thrust to the power vested in the Federal Trade Commission in the United States to issue cease and desist orders.

There has been a good deal of criticism of this proposed amendment. The reason why the previous government wished to pursue this route was because it felt that the court was too slow in dealing with matters where anti-competitive or potentially anti-competitive conduct might be engaged in by a dominant or significantly powerful player in the relevant market. The relevant Minister introducing the legislation felt that processes through the courts took too long and placed the ACCC at a significant disadvantage in obtaining appropriate court orders.

The new Government has generally supported the thrust of these provisions but has indicated that there will need to be some tinkering with the procedures, etc., to be put in place. The creation of such a new power in the ACCC is seen as a very significant development in our competition laws and we will await the progress of such development with great interest.

Revised ACCC merger guidelines issued

On July 18, 1996 the ACCC issued revised guidelines on how it assesses mergers. The revised guidelines reflect the ACCC's experience in assessing over 500 mergers since the publication of the draft Merger Guidelines in 1992, just before the "substantial lessening of competition" test was introduced (in place of the "dominance" test).

Changes have been made in the application of the guidelines in the light of experience in the past four years. There has been greater recognition of (a) the role of merger law in deregulatory sectors and (b) the increased exposure of business to global markets.

In Australia, regulation of anti-competitive mergers has been an important part of national competition policy. Trade practices merger law conforms with the principles of national competition policy agreed to by all Australian Governments when the "Hilmer" Review on national competition policy was established. These principles included:

- no participant in the market should be able to engage in anti-competitive conduct against the public interest; and

- conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and evidence of the public costs and benefits claimed. (Hilmer Inquiry - terms of reference).

At the time of release of the revised guidelines the ACCC stated that "merger policy is critical to ensure competitive input markets for trade exposed sectors." The ACCC's priorities remain with mergers in the non-traded goods and services sector.

"Merger policy is of special importance to sectors undergoing privatization and deregulation." It is important that the pro-competitive effects of deregulation not be undone by anti-competitive mergers.

The ACCC gave a hypothetical example of what could occur if an electricity generation monopoly is split up into a number of competing generating businesses. A subsequent merger of them could be anti-competitive and inefficient. Similarly, if the monopoly is split up "vertically" so that generation, transmission and distribution are run as separate businesses, a vertical reintegration merger could be anti-competitive and inefficient.

The ACCC when on to state that "increased exposure to global markets is placing pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. Mergers can play an important role in achieving such efficiencies. These factors are reflected in the revised Guidelines."

The revised guidelines provide:

- greater emphasis on the relevance of efficiency considerations under the merger law. Traditionally, when firms argue that a merger may lead to greater efficiency this has been regarded as most relevant to applications for authorization of mergers.

  The Guidelines now expressly recognize that in some circumstances a merger that reduces costs may contribute to improved competition and that this may be taken into account at the stage of considering whether or not a merger is likely to breach the merger law;

- adoption of indicative position of not opposing mergers where a sustained and competitive level of imports exceeds ten percent of the market;

- a review of other less direct impacts of internationalization of trade and commerce on domestic competition to see whether any further general revisions should be made to the Guidelines;

- adoption of the Australian Industry Commission's (the "IC") suggestion to consider the implications of liberalizing the market share thresholds below which mergers will not be scrutinized. The ACCC will in 1996-97 review all mergers against both the current thresholds and those suggested for consideration by the IC and publish the results of that review;

- in the (many) cases where mergers are notified but fall below the existing thresholds (and possibly those suggested by the IC) there will be a "fast track" review process. (This is already underway);

- the impact of deregulation and privatization on market definition and the Commission's role in reviewing privatizations and mergers in deregulating industries, have been specifically dealt with in the revised Merger Guidelines;

- the impact of changes over time and functional dimensions of competition on market definition has been clarified;

- detailed guidance on the Commission's approach to "accepting" section 87B undertakings (enforceable undertakings) in merger cases;

- discussion on the circumstances in which the Act will apply to overseas transactions and partial share acquisitions.

- discussion of the recent extension of the Act to mergers in the non-corporate sector and the removal of State Government powers to exempt mergers; and

- clarification and further discussion of the Commission's approach to efficiency factors in the "authorization" process (authorization provides exemption from the Act where there are off setting public benefits).