

## CANADIAN COMPETITION RECORD

# FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

## AUSTRALIAN NEWSLETTER

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

It has been a while since this Newsletter has updated developments in Australia.

### Small Business - Government Proposals

The Australian Government has announced a special program for small business to be included in the *Trade Practices Act*. The proposals include an extension of the current unconscionability provisions of the *Trade Practices Act* relating to consumers, to small business and to fund the Australian Competition and Consumer Commission (the "ACCC") to run "test" cases to set precedents for small business issues under the *Trade Practices Act*.

Two business codes will be made mandatory and enforced by the ACCC. These relate to the petroleum industry specifically and to franchising generally. Other mandatory codes may follow. Small business education is also part of this program.

A national approach to commercial rental disputes is to be negotiated between the Commonwealth, States and Territories.

Legislation is expected to be passed by the Australian Parliament in the first quarter of next year but the ACCC will move on some of the proposals before then.

### National Electricity Market - Authorization Application

The ACCC has issued a draft decision granting authorization to the national electricity network subject to extensive conditions. This authorization brings together a national electricity grid involving the bulk of Australian electricity utilities some of which are privately owned, although most are public sector agencies.

A pre-decision conference was held and a final determination will be issued shortly. The authorization involves collective pricing arrangements, pooling and third party access undertakings.

### Financial Services - Government Announcement

The Federal Government has responded to a report on the Australian financial system (the "Wallis Report") and has accepted most of its recommendations. However, in relation to bank mergers the Government is still prohibiting mergers

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of the big four Australian banks although insurance companies and banks will be able to merge subject to the normal competition law requirements. The Wallis Report recommended no limit leaving any such mergers to competition law.

Generally, the financial system is to be opened up and, in particular, the payments clearing system.

In the consumer protection area there is to be one regulator to handle all consumer issues. This regulator will have close links with the ACCC as it will take over from that body some of its consumer work in the financial sector. Competition issues will be handled by the ACCC.

The necessary legislation is expected early next year.

### **Enforceable Undertakings - Parliamentary Enquiry**

Following a report of a Parliamentary Committee the ACCC is looking at ways of making its enforceable undertakings in its merger administration more transparent and in particular to take account of the interests of third parties. Canada has had similar concerns in relation to consent undertakings in the Canadian Competition Tribunal.

Under the Australian *Trade Practices Act* the ACCC can accept enforceable undertakings and has done so in relation to some mergers. There has been some criticism from third parties that they were not properly consulted during the negotiation process. Undertakings are public once finalized.

The ACCC was to report back to the Parliamentary Committee in November on this issue as well as on proposals for post merger market place evaluation.

### **Westpac/Bank of Melbourne Merger**

The ACCC did not intervene in this merger on the condition that certain enforceable undertakings were given including access by small players to the ATM network of Westpac.

### **Australian Payment Clearing Association - Authorization Application**

The ACCC refused to authorize the EFTPOS clearing rules which are part of the Australian payments system because the rules were incomplete and the appropriate public benefits were not realized. The ACCC did indicate that with changes there may be the necessary further benefit to outweigh any anti-competitive detriment.

### **Export Guidelines**

The ACCC has issued a publication entitled *Exports and the Trade Practices Act*. It aims to give Australian exporters assistance in utilizing the *Trade Practices Act* and provides a guide to the ACCC's approach to mergers, acquisitions and other type of arrangements that aim to enhance exports and the international competitiveness of the Australian economy. This guideline is an adjunct to the ACCC's more expansive mergers guidelines.

### **Telecommunications Regulation - New Regime**

On July 1, 1997 the ACCC took over the economic regulatory role in the telecommunications sector. The following developments have occurred:

- a report to the Government on the "Free" directory assistance calls;
- access pricing guidelines;

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- access undertakings guidelines;
- number portability;
- consideration of anti-competitive conduct of Telstra; and
- a draft telecommunications access code.

Technical and consumer regulation is the role of the new Australian Communications Agency (the "ACA").

### Broadcasting - Government Announcement

After much public discussion the Government has decided not to change the current media ownership rules in Australia, particularly the cross media rules. Under these rules a proprietor of a metropolitan newspaper cannot own a "free to air" TV station in the same location.

### Unions - Secondary Boycotts

The ACCC has instituted the first proceedings against a trade union under the secondary boycott provisions of the *Trade Practices Act*. These provisions were recently returned to the Act. The action is against the Transport Workers Union in Queensland.

### ACCC Second Annual Report Released

The Second Annual Report for the ACCC for the period 1996-97 was tabled in the Australian Parliament on October 22, 1997.

### Australian Competition Tribunal - Gas Contracts Discussion

The Tribunal has ruled on an ACCC decision to revoke authorizations of long term natural gas contracts and related arrangements. The Tribunal

agreed with the ACCC that there was a material change in circumstances but refused to revoke as it found a continued public benefit in the long term contracts. The Tribunal gave views on various aspects of the contracts that will be of relevance to future such authorizations.

### ACCC Litigation

Some major current cases:

- the ACCC has instituted proceedings against a number of anaesthetists and their Association for price fixing and a boycott;
- the ACCC has brought proceedings to stop a merger between two pay TV companies;
- car rental companies in Alice Springs have been heavily fined for price fixing - a total of more than AU\$1 million; and
- a national bread company has been fined AU\$1.25 million for resale price maintenance and price fixing on bread.

### Global Enforcement Issues

The ACCC has issued a discussion paper on global enforcement issues and ways to handle emerging issues in competition and consumer law.

### National Competition Council (the "NCC")

An important aspect of the role of the NCC is to assess applications for the "declaration" of access to major infrastructure facilities. Such declaration creates a right under the *Trade Practices Act* to negotiate access.

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Matters considered or under consideration by the NCC for such declaration are:

- the computer network of a Federal Government Department;
- a Western Australian gas distribution network;
- air cargo terminals;
- the Queensland Rail System;
- a South Australia/New South Wales rail facility; and
- a new South Wales rail facility.

**Postal Services**

The NCC is conducting a review of the Australian Postal Corporation and the current regulatory framework.

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