

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

By: Robert Baxt, Arthur Robinson Hedderwicks
Melbourne, Australia and
Hank R. Spier, Australian Competition and
Consumer Commission
Dickson, Australia

Joint Ventures and Co-production Agreements under the Australian *Trade Practices Act*

Like any arrangement between competitors, joint ventures and co-production arrangements can have anti-competitive consequences. That is, while a joint venture may aim to facilitate exports, it may also establish a platform for the joint ventures parties to engage in conduct that may substantially lessen competition in a domestic market. It is due to the latter point that joint ventures and strategic alliances may raise concerns under Part IV of the *Trade Practices Act* (the "TPA") (the anti-competitive conduct provisions).

In Australia such proposals are becoming common and have to be assessed under the TPA. The driver for this is increased rationalization speeded up by the current Asian crisis.

The Australian Competition and Consumer Commission (the "ACCC") is currently reviewing its approach to joint ventures and co-production arrangements.

Review of approaches to joint ventures is also currently occurring among other jurisdictions. The Federal Trade Commission (the "FTC") in the United States announced on January 23, 1997 that it would set up 'The Joint Venture Project' to clarify and update antitrust policies regarding joint ventures and other forms of competitor collaborations. The ACCC is liaising with the FTC and the Antitrust Division of the Department of Justice in relation to joint ventures. The ACCC has also been liaising with DGIV of the European Union in relation to EU approaches to joint ventures. Joint ventures/competitor collaborations were topics for informal discussion at the OECD meeting in June 1998.

The focus is upon a large number of joint ventures and co-production arrangements which fall short of a 'merger' in the sense of a full integration of ownership or production, but where there is some degree of integration of either/both.

Range of structures/conduct between the two extremes of a complete merger/integration and price fixing/market sharing, including joint ventures, product swaps/production specialization and tolling.

Arrangements may involve production, distribution and/or marketing or may relate to the joint production of inputs or access to intellectual and

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industrial property through pooling and cross-licensing and there may be horizontal and/or vertical elements to the arrangement.

Joint Ventures and Co-production Arrangements

Joint ventures are prohibited under the TPA if they substantially lessen competition. A joint venture may be examined under either s. 50 (mergers) or s. 45 (anti-competitive agreements) of the TPA, depending upon how it is structured.

Section 45 and s. 50 employ a 'substantial lessening of competition' test, but s. 45 can rely on purpose or effect, while s. 50 is a pure effects test.

The conduct of joint ventures may also be subject to s. 46 (misuse of market power) and the Part IIIA access provisions (essential facilities).

There are certain exemptions for price fixing by joint ventures and an exemption for joint buying and selling groups, which may include co-production arrangements.

There is a limited exemption for pure export arrangements.

Authorizations under the *Trade Practices Act*

There is a process under Australian law whereby conduct can be exempted from the law if there is countervailing public benefit. This is often a very transparent process.

For merger matters the TPA provides that the Commission shall grant authorization only if it is satisfied, in all the circumstances, that the proposed

acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

The TPA requires that in relation to mergers the ACCC regard export enhancement and import substitution as public benefits, as well as take account of all other relevant matters that relate to the international competitiveness of Australian industry.

For s. 45 matters, the TPA provides that the ACCC shall grant authorization only if it is satisfied, in all the circumstances, that the conduct would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public constituted by any lessening of competition resulting from the joint venture arrangement.

Export enhancement, import replacement and other relevant matters relating to international competitiveness will be regarded as public benefits but are not specifically directed by the TPA in non-merger situations.

Competition Issues

The likely competition effect of any arrangement will depend on the usual factors considered under merger analysis: concentration, import competition, barriers to entry, countervailing power, supply elasticity of participants, market demand elasticity etc., i.e. what constraints exist on the exercise of market power by the parties to the joint venture or co-production arrangement? Similar arrangements may or may not raise concerns according to the surrounding market circumstances.

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There is a need to consider both unilateral (of the joint venture and/or of the parties to the joint venture/tolling arrangement) and co-ordinated effects on competition.

To the extent that co-production arrangements involve less integration and constraints than mergers, may be temporary, and preserve the existence of independent rivals, they may pose less of a problem for competition than mergers.

Where a co-production arrangement raises competition concerns, it may be possible to negotiate undertakings, and/or impose conditions in an authorization context, to change the 'rules' of the arrangement and therefore alter its competitive impact.

Efficiencies and Authorization

Authorization allows the competition and efficiency effects of a joint venture or co-production arrangement to be balanced.

There may be (static) efficiency benefits from production rationalization/economics of scale and/or reduced transportation costs. In some areas, particularly skill-intensive services such as health, increased throughput is related to increased skill levels and quality of service.

A marketing joint venture may overcome free riding problems associated with product (rather than brand) advertising.

Particularly for R&D, joint ventures may involve internalizing externalities and significant transaction cost savings (difficulty of contract specification, incentives and feedback loops from product market);

on the other hand, joint ventures or fixed term contracts may be able to build in better incentives and decision making than 'in house' research.

Possible disincentives for innovation include both parties operating with same technology/costs and an inability to hide new product plans.
