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COMPANY AND SECURITIES LAW AFTER THE MARKET CRASH

TRADE PRACTICES - A TRANS-TASMAN VIEW WITH SPECIAL REFERENCE TO TAKEOVERS

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As you will know July 1 1990 is a very important day in the development of CER. By this date it is anticipated that a number of things will have happened in the harmonisation of the commercial laws of Australia and New Zealand. You will be aware of the Memorandum of Understanding that was signed between Australia and New Zealand in 1988 which highlights the areas that are regarded as appropriate for harmonisation.

It is my view, and this is purely a personal view, that the 1990 date will have to be varied with respect to some of the areas under consideration because of significant differences in approach that are to be taken by Governments and because of impending elections in both countries. I should indicate that I applaud the move towards harmonisation for I see it as essential recognition of the existence of a common trading environment which knows no artificial boundaries.

The area that I have been asked to concentrate on is that relating to Trade Practices, with special reference to Takeovers. In this paper I will comment not only on the area of Takeovers but also on other areas in which harmonisation of law between Australia and New Zealand will have to be worked

at fairly hard if we are to see a fairly uniform approach to the administration of our respective Trade Practices laws - in Australia the Trade Practices Act (referred to as TPA); in New Zealand the Commerce Act (referred to as CA), and the separate Fair Trading Act (FTA).

In a paper which I delivered on "CER - Towards One Market" at the Conference of the Australia-New Zealand Business Council held in Wellington in 1988, I indicated that there were a number of problem areas which would make it difficult for harmonisation of the commercial laws of our two countries to take place with certainty and without difficulties. I will not discuss these in this paper.

The more important difficulties I identified are as follows (and there are probably others):

1. Australia is a Federation of six States (with two major Territories), whilst New Zealand is a unitary nation.

2. There are, in most cases, two Houses of Parliament in the various Australian governments, including the Federal Government, whilst New Zealand has a unicameral Government. The importance of this will not be lost to those of you who have studied Australian politics.

   Just to give you one example of the kind of difficulty that can arise, with special reference to Trade Practices law, one is referred to the vigorous lobbying that went on at the time that the present Australian Government tried to remove from the TPA the secondary boycott provisions. The Australian Democrats, who control the balance of power in the Upper House (the Senate), were persuaded to maintain the current legislative provisions and the Bill which would have removed the secondary boycott provisions which had been passed by the Lower House was defeated in the Senate.

3. There is a significantly different stance taken in the interpretation of statutes and relevant law in Australian courts than that taken in New Zealand. This is a matter which has not yet been highlighted in any great detail by courts but already one or two interesting developments have occurred which I will comment on in this paper to highlight this particular matter.

In addition to this difference, one needs also to make reference to the fact that we have both State and Federal Courts of Australia. There are different philosophies that govern the approaches taken by various State Supreme Courts, as well as an emerging difference in approach taken by the Federal Court when compared with the State Supreme Courts. These differences are subtle in many cases but in some others are becoming more definite - this will create problems in the interpretation of laws, especially as the State Supreme Courts are now given a role to play in the area of Trade Practices law.

The question of interpretation of statutes and the attitude of the courts is one that will play a vital role, in my view, in ensuring that harmonisation is effective.

4. Part of the difficulty we face in Australia in the area of Trade Practices law (and this applies to other areas of business law such as company law), is the fact that the Commonwealth Government in Australia has limited power to enact legislation. So, for example, the Federal Government must seek co-operation from the State Governments or face legal challenges in a number of areas of business law. This includes Trade Practices law. I want to comment about the problems of the universality of the TPA when compared with the CA in this paper.

There are obviously other areas of difficulty - the different philosophical stances of political parties; attitudes of governments to issues of internationalisation etc.

Before turning to specific areas of law I want to spend a few minutes talking about the courts and the way in which they interpret Trade Practices law.

Under the CA the New Zealand courts have the ability to add to the court lay assessors who will assist, or can assist, the court in dealing with the particular problem which faces the court. This particular issue is one that has certainly been taken advantage of in particular cases, and I refer in particular to the Trutone case (judgement delivered on 19 September 1988 by the New Zealand Court of Appeal). The Australian legislation makes no allowance for the addition of lay persons to the court.

The question of who should sit on cases dealing with competition law is one which has clearly concerned not only Australian and New Zealand law makers, but also law makers in other countries.

Indeed one of the critical matters that has been a factor in the operation of Trade Practices law in Australia has been the question of whether judges, drawn traditionally from the legal profession, are best equipped to handle matters relating to Trade Practices law.

Very early in the history of modern Australian Trade Practices law it was suggested by the then Attorney-General, Sir Garfield Barwick (who later became the Chief Justice of the High Court of Australia and a principal proponent of the literal interpretation of statutes which in itself poses problems for Trade Practices), that it would by inappropriate to leave to lawyers the task of interpreting economic

legislation such as Trade Practices legislation. This warning was repeated by a number of commentators at the time the 1974 legislation was enacted when the Tribunal oriented Restrictive Trade Practices Act 1967 was changed for a more court oriented Trade Practices Act 1974. I would like to quote from a judge in the United States of America who suggested that even their courts had difficulty in coming to grips with the economic base of the Anti-Trust laws of that jurisdiction many years after those laws had been enacted. Judge Wyzanski, in the famous case of United Shoe (U.S. v. United Shoe Machinery Corp 110 F Supp 295 at 347-348 (1953) made these comments:

> "Judges in prescribing remedies have known their own limitations. They do not ex officio have economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. ...In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."

These comments were echoed in different ways by a number of commentators, such as Richard Eggleston the first President of the Trade Practices Tribunal, who noted:

> "It will be ... another generation [from 1974] before [lawyers] are relieved of the task of translating into English [the economic concepts of the Act] for the benefit of the judge."
> [see Hambly & Goldring, Australian Lawyers and Socialist Change (1976) p.500]

Others attending that conference supported this view. One of these is now playing a significant role in the interpretation of the current statute - notably Mr W. Deane QC (now Deane J of the High Court of Australia).

I for one share the concerns that have been expressed by these persons. I stated them, together with my colleague Maureen Brunt, at the time when we reviewed the TPA in 1975 in the Australian Business, and having served now for about a year as Chairman of the Trade Practices Commission am still not convinced that the traditional courts are the best equipped

forae for the handling of these matters - and this is still my view after the Queensland Wire case. I will be commenting on this case orally. It will be necessary for us to provide a change in attitude by judges towards the interpretation of legislation if the full implementation of Trade Practices law is to be effected. Will this occur in New Zealand? This remains to be seen, but is a matter that I would welcome discussion on at this forum.

In enacting the new competition legislation, the legislature conscious of the specific problems of having lawyers sitting in Courts dealing with economic law (and they are not unique problems, they have been stated elsewhere), chose to establish a specialist Tribunal rather than to rely on the work of the courts.

In Australia we have the Federal Court which one can say is almost a specialist Tribunal dealing with these matters, but because of the Cross-Vesting legislation that was enacted in 1987 it is not certain that all Trade Practices matters will be handled by the specialist courts. Should we not go one step further and have a specialist division of the Federal Court? The Cross-Vesting legislation makes it possible for Family Court judges to hear Trade Practices matters in appropriate circumstances. Is this desirable?

The rather complex and unusual concepts of competition, the market, notions of substantial lessening of competition and dominance, and other concepts, do not lend themselves easily to traditional legal analysis. As I have noted earlier, the Commission has been critical of the interpretation of the TPA by judges. Its most trenchant criticism was of the decision in the Tradestock case (TPC v. TNT Management Pty Ltd (1985) 58 ALR 423; see in particular the Annual Report of the Commission 1984-85 at p.14.)

The TPC had expressed its concerns on this issue to the Griffiths Committee (the House of Representatives Committee

established to review Trade Practices law in Australia) but this will be reassessed in the light of what appears at first reading to be a most encouraging decision of the High Court of Australia in the Queensland Wire case (judgment delivered 8 February 1989).

It is true that the TPA has only been in place for fifteen years but the question is, how long do you wait before one gets the right forum to deal with these matters? In one sense it may be regarded as too late already to do anything about it in the context of rationalisation and concentration in Australian industry. Indeed one might be cynical enough to suggest that no courts are likely to handle the questions of divestiture and the break-up of industries and organisations that have accrued dominance or misuse their power. There has been little success with the divestiture remedy in any jurisdiction and certainly none as yet in Australia. Whether New Zealand courts would handle these matters better in the light of the existence of a lay assessor on the relevant court hearing the matter, and in the light of the different approach to the interpretation to which I referred previously, remains a matter of some doubt. Again, I would welcome comment from participants on this issue.

Takeovers and mergers

In the first place it is important to note that as yet New Zealand does not have a comprehensive Takeover Code (in the context of companies legislation). This is a matter that is the subject of other papers at this Conference.

There are a number of marked differences between the TPA and the CA. Our Takeover (or Merger) Law is different, not only in the context of the threshold that has to be "reached" before a relevant merger is liable to be "caught" by the legislation, but also in the administration of the legislation. To date we have only seen two reported decisions on s.50 of the TPA and I do not believe that there are many

cases in New Zealand either before the Commission or the Courts.

When Bill Coad, the recently retired Deputy Chairman of the TPC, and I visited New Zealand in August 1988 we were rather surprised at the number of mergers that were being examined by the Commerce Commission. This, we understood, was required by the nature of the legislation and by the processes under which mergers (or takeovers) were to be assessed. The compulsory pre-notification of most mergers over a certain benchmark is something that we have never had in Australia. The only parallel I can draw is the fact that when we had the clearance provisions in the Australian TPA the Commission was under a similar workload to that faced by the New Zealand Commerce Commission today. With the removal of "clearance" from the TPA in 1977, the whole attitude of the Australian Commission towards mergers and takeovers changed. I understand that the recent discussion paper on New Zealand legislation calls for a retention of the pre-notification mechanism, but allowing for some mergers to fall through the gateway (as it were) rather than require detailed evaluation by the Commission.

Perhaps I can explain briefly the process that we follow in Australia in relation to mergers or takeovers to illustrate the difference. If companies are concerned that a particular merger (or takeover) might run into trouble from the context of s.50 of the TPA they seek what is known as an informal clearance from the Commission. They will approach us on a confidential or non-confidential basis (we would always prefer the latter), set out the details of the proposed merger, and then get our assessment of the particular transaction. In very few cases will we have to do a great deal of market research because of the high threshold that is set by s.50 of the TPA. We have available to us a good deal of information which we use in assessing the relevant merger. Whilst we will make market inquiries in many cases, this will be done fairly quickly and it is only in a couple of dozen cases a year where we will have to go into detailed investigation of the

particular merger. By "detail" I mean (usually) work lasting more than a week. It has been very rare for us to throw up doubts in relation to a particular merger and we have only gone to Court on a very few mergers, and on many occasions these Court proceedings are quickly "terminated" by the agreement of the parties. There has been, as I have indicated above, only two decided cases, whilst a third case is now in the Courts i.e. Arnotts' Biscuits.

We have taken the view in Australia (which you may gather from the Merger Guidelines that were issued by the Commission in 1986) that very few mergers will trouble the Commission. As a rule of thumb as long as there are at least two well matched competitors left in the relevant market the Commission is rarely troubled by a particular merger. Whether this should or should not be the position is, of course, another matter - an issue which is presently being assessed by the Griffiths' Committee set up to look into Australian Merger and Monopoly Law in February 1988. That Committee is about to report on its findings and I will be commenting orally on these.

It is safe to say that neither ocountry has yet developed any jurisprudence that we can speak about with confidence. The decision of Wilcox J in the Australian Meat Holdings case decided in 1988 [(1988) ATPR 40-876] is not very satisfactory, and his decision has been made less satisfactory by the way in which he handled the question of the orders to be made. That case has gone on appeal to the full Federal Court. It's decision is reserved. It is my guess that the case could go all the way to the High Court.

In discussions held in Wellington between the two Commissions in August of 1988 it was recognised that there are a number of difficulties in dealing with the problem of how Australian and New Zealand laws could be harmonised, or whether the administration could be harmonised in an effective way.

It is safe to say that we agreed to disagree on what might be the best approach. The Trade Practices Commission has indicated to the Griffiths' Committee that it did no wish to have a pre-notification system introduced. We are satisfied that the present voluntary informal notification system does bring to our attention most mergers that are likely to cause problems. There has been, to our knowledge, only one or two situations where mergers have been consummated or attempted to be consummated "behind the Commission's back". The existence of a sophisticated financial press, and legislation which regulates takeovers in the context of company law (the Companies (Acquisition of Shares) Act and Codes) means that we have "a kind of notification system" (not directly relevant to operations) which does give the TPC an opportunity to review those mergers which might come within the broad ambit of the legislation.

The approach taken in New Zealand to the question of notification will no doubt be the subject of a report to be issued shortly and could be influenced by the fact that your Government has now chosen to introduce Company Law Takeover legislation.

Trans-Tasman mergers

The problem of mergers and takeovers which have trans-Tasman implications is quite a difficult one. It can create a number of interesting tensions. Indeed there is a matter that is presently before our Attorney-General which raises the very issue of what happens when mergers are being discussed between Australian and New Zealand companies.

The matter can become quite complicated if the parties approach both Commissions for a "clearance": how do we handle the matters? Do we look at each other's acquisition? Do we only examine those that are relevant to our particular jurisdiction? What power do we have to involve ourselves in the other country's acquisition? How do we assess the overall

takeover in that context? What relevance is there in the fact that the Australian process is informal whilst the New Zealand process is formal? How do we identify markets in this situation? What public benefits could be taken into account if authorisation is regarded as necessary? What enforcement can be relied on in appropriate cases? Will the Courts adopt the kind of approach taken by Hodgson J in the New South Wales Supreme Court Rainbow (Woolworths) case?

The Commissions agreed to try to work on this matter but regrettably time has prevented a great deal of progress being made. A working party was established to look at the question of the definition of market. This is an issue which is yet to be resolved. All I can say at this stage is that when the Trade Practices Commission considered the Fletcher Challenge merger (joint venture) in 1988 it took a rather unusual position of what was meant by "market". Despite the fact that there was nothing in the legislation to allow us to do so, we chose to look at the market in question (for the purposes of determining a number of issues) as being a trans-Tasman market.

We have recommended the creation of joint working groups between the two Commissions, the appointment of Associate Commissioners to each others Commission, and other matters, but these have yet to be acted upon by the relevant Ministers.

It is vital that the two Governments and the two Commissions formulate some clear sets of guidelines as to how trans-Tasman mergers are to be looked at. If this is not done then we could find ourselves facing many difficult situations.

Let me take one hypothetical situation. Company A, operating in Australia, wishes to merge with company B (a New Zealand company). Company A is the only supplier of a particular good in Australia, and company B is the only supplier of that good in New Zealand. Imports from other areas are virtually non existent for various reasons. Company A and company B, for

financial and other reasons, form a joint venture company in New Zealand. A number of restrictions that have previously operated in the New Zealand market at the behest of Company B are to be removed as a "sweetener" to permit the joint venture company to be formed and operated. What if the merger is not opposed by the NZ Commerce Commission? The Australian Commission, when faced with a similar situation some years previously, had questioned whether the merger or takeover should be allowed to go ahead.

The consummation of the merger would make it less important for the two companies to compete in either market. In the Australian context in this situation there is the removal of a potentially well-matched competitor; in the New Zealand market one has achieved economies of scale which might be regarded as very important. On the other hand, the potential for competition by one company against the other in either country is very much blunted. The two pieces of legislation (TPA and CA) do not provide for official exchanges of views and other interaction between the two Commissions; we will have to be circumspect in the way in which we handle a merger and inquiries flowing from it. If authorisation is the relevant route in either country, then again the fact that the relevant legislation does not contain any guidance on such issues as the market and public benefits (in a trans-Tasman context) is a considerable hurdle faced by the parties and by the Commissions.

I should say that I have raised this specific matter with the Federal Attorney-General and I am hopeful that he will be discussing the matter shortly with his New Zealand counterpart.

Misuse of market power and the anti-dumping regime

Sections 46 and 36 of our respective pieces of legislation will have received a considerable boost as a result of the High Court of Australia's decision in the Queensland Wire

case, to which I have referred previously. There are significant differences in the language of the two pieces of legislation and if we are to see harmonisation of our laws in relation to the developments in anti-dumping (to be effective from 1 July 1990) then a considerable amount of work has to be done. I am pleased to say that some work is already being done on this particular issue, and it is one that must and does cause concern to the business community generally. In the paper that I delivered last October to which I have referred previously I commented more specifically on the questions relating to monopolisation but, as I think you will appreciate, the Queensland Wire case may make some of those comments of less significance.

Some concluding comments

The Griffiths' Committee, which has conducted a fairly detailed inquiry into the operation of the TPA in the area of mergers and monopolisation, is unlikely to come down with any major recommendations relating to s.50 of the Act. There may be some recommendations which relate to its administration (for example calling for a user pay approach to work done by the Trade Practices Commission in dealing with mergers). My guess it that it will not call for any significant lowering of the threshold in s.50. This means that there will have to be some analysis of just how the two countries will rationalise their laws in this area.

The Griffiths' Committee will no doubt be encouraged to take this view by the fact that we now appear to have a fairly strong s.46, as a result of the Queensland Wire case. But as I have indicated in my oral presentation on the Queensland Wire case, it still leaves a number of questions unanswered. It does not in any way deal adequately with the problem of potential misuse of market power on a continuous basis by a corporation that happens

to be in a dominant position. It will not affect dominance which may have been created by mergers (or as a result of effluxion of time etc). There is little doubt, however, that where such dominance has resulted from mergers where the conduct complained of is against the spirit of s.46 that the dominance should not be condoned. If we are to continue to encourage a high degree of rationalisation with oligopoly and monopoly being the order of the day, then we must be satisfied that we have not only adequately resourced Trade Practices and Commerce Commissions reviewing cases, but also must be satisfied that the Courts will deal with cases of misuse of market power by such dominant firms in a way that recognises the approach to issues of market taken in Queensland Wire. Failure to adopt a pragmatic approach to definitions of market (in contrast to the Full Court's decision in the Queensland Wire case) will lead to frustration and quite considerable concern in the business community in Australia at least. I cannot judge whether the same concerns will exist in New Zealand.

Any unwillingness or inability of the Governments of the two countries to recognise the fact that offshore transactions will be utilised to overcome jurisdictional and other limits of each others Trade Practices law is another matter that needs to be emphasised. Lawyers are of course very adept in organising their clients' activities in such a way as to take full advantage of a loophole that may exist in the law. Approaches by the Courts to this type of activity will vary from jurisdiction to jurisdiction, and whilst there may be some short term successes in over-coming the operation of the law, one imagines that the cure which will be imposed if these successes become too blatant may be much harsher than would otherwise have been necessary.

There are significant changes facing the two Governments

on the question of whether we should identify markets on the basis of a trans-Tasman market. Whilst this may be very sensible in certain situations, it may result in rather unfortunate situations in other cases. The challenges that face both the Governments on the one hand, and the Commissions and the professions (legal, economic and other) on the other hand is indeed a most interesting and challenging one. I look forward to being involved in meeting the challenge and to assist in helping find some of the solutions to the problems that may arise.