COMMENT ON TRADE PRACTICES

By Stephen F. Skehill

I do not intend to say a great deal this afternoon, because I think that the paper that Mr Williamson has written is a very good paper. I think it is very good for the reason that it brings together a great deal of information about the inter-relationship between the Trade Practices Act and joint ventures that has not elsewhere been brought together.

It stipulates also that there is a need to recognise in any joint venture the importance of the Trade Practices Act, especially after its amendment. The Act is of direct and important relevance to all aspects of business in Australia, but particularly so to joint ventures – that is, joint ventures in any industry but maybe with even greater particularity in petroleum and mining joint ventures because of the large capital cost involved. And in that regard I can do no more than echo the plea that Mr Williamson makes in his paper that the implications of the Act should be fully considered before any definitive and irretraceable steps are taken along the line towards full initiation of a joint venture.

The government's policies in relation to joint ventures have been firmly stated by the Minister in his second reading speech and again by the Minister representing the Minister in the Senate, Senator Durack. And those policies have been fully borne in mind in the development of the content of the Bill and the government's deliverations thereon. The government recognises the fact that joint ventures have played, and can and should continue to play, an extremely important role in the economic development of this country.

Mr Williamson's paper recognises the parallel between our present legislation, at least in respect of some of the concepts it contains and American law. There are, however, important differences between Australian and American law and I think they need to be noted and borne in mind.

First the Australian law is more detailed in the manner in which it states its principles and its prohibitions. It does not adopt the "broadbrush" approach which the American law does and that has implications for the manner in which our law can and may be interpreted.

Second, the Act, especially as it is proposed to be amended, is not only detailed but provides specific treatment for the individual groups within the community which are regarded as requiring special treatment. Included amongst those are small business, trade associations, buying groups, joint advertisers, and, of course, joint ventures.

These differences between Australian and American law necessitate that we should not pay undue attention to American law and experience but there are, importantly and particularly so in relation to large joint venture operations, other vastly different factors which also dictate that we should not give undue attention to American law. Probably most important amongst those are the

greatly different size and nature of the Australian and American economies.

Mr Williamson of course has specifically in his paper recognised and noted that it would be a mistake to push these similarities too far. In doing so, I believe however that he has drawn very well upon appropriate American decisions and experience in setting out the factors which he believes are particularly relevant in what you say to the Trade Practices Commission, if you decide that you need to get there. He also states, I think very well, what you should take into account when deciding whether or not you need to go to the Commission.

Mr Williamson also points out that it is the whole of the Act, or at least the whole of part iv of the Act, that area that deals with restrictive trade practices, that should be given regard to in formulating joint venture proposals. There is not a specific section in relation to joint ventures which if you satisfy you avoid every other provision, and it is certainly within the bounds of feasibility that each of s.45 to s.50, including maybe even s.45D which relates to secondary boycotts and which now in its present form (or the form in which I last saw it, last night) is not confined to secondary boycotts by employees but includes also secondary boycotts by persons other than employees. It is possible that even that section could be involved and that possibility will be reflected in the application forms which will become available when the Act comes into operation.

So accordingly every section of the Act has to be looked at. And if I can give one specific example: if a joint venture is to be formulated by the vehicle of a merger, it may well be that the agreement between the parties providing for the acquisition of shares in the capital of the company be taken over is not an infringement of s.50 of the Act, the section which deals with mergers, but that other provisions of the agreement can be infringements of other provisions of the Act, e.g. s.47 relating to exclusive dealing.

Mr Williamson, and I must take him to task on this, says that the Act makes only one special provision in relation to joint ventures. In fact there are two. And the second one, and I certainly do not criticise him for maybe not finding it (it is hidden away in s.90(15)) provides that if the parties to a joint venture make a number of applications to the Commission at one time, then all the applications are to be dealt with together. That is a very important provision because at the moment there is a four-month time limit on the Commission for determining merger proposals. It could, were it not for a provision of that nature, be the situation that the Commission would handle a merger application within the four months, but other related applications would not be handled and the parties would not be willing to proceed until they were handled. Now at present, or after the amending Bill becomes law, it will still be the situation that if you do not have a merger involved in your proposals, you will not get four months, but it is proposed that when the Commission's workload after the amendments settles down, a period of four months will be gazetted so that all applications, regardless of whether or not they are related to a joint venture, will be done within that period. That s.90(15) will still be of, I think, great benefit to joint venturers.

I think that provision does need to be stressed and, related to that provision, is also the situation that if anyone feels they have a joint venture which is too detailed for the Commission to consider within four months, it is possible for them to ask the Commission to take a longer period.

Importantly also, and Mr Williamson did make reference to this, the Bill that came out of the House of Representatives did have some additional words in it, compared to the Bill that went into the House of Representatives, in relation to joint ventures. In fact it had around 13 pages of extra words, but only a few of those related to joint ventures, and they related to s.45A(2)(a) which is the provision which takes joint venture pricing, or certain joint venture pricing, out of the deeming provision and takes it back into s.45. So an agreement between joint venturers as to the price at which they will sell their product stands to be considered on whether or not it substantially lessens competition and there is no deeming made in relation to it. Previously the Bill said that deeming would not apply only where there was to be a joint supply by the parties and it was realised that that joint supply was too limiting. It had, as I understand it, very severe limitations in relation to taxation. And accordingly the words have been inserted that the parties can supply "in proportion to their respective interests in the joint venture".

Now Mr Williamson, I think, in his address today raised the question as to whether that supply "in proportion" needs to be to the one customer. I am very reluctant to say what I think on a lot of the questions that Mr Williamson raised. When you have been very closely associated with the drafting, you tend to want the words to say what you think they say, and it, I think, is not good for people in that position to say in the less clear areas what the words do in fact say. But in my opinion there is nothing specifically there which says that it must be supplied to the one customer and I think it is possible that sensible meaning can be given to the word "proportion" without that necessary implication being drawn, but maybe we may be able to discuss that later.

There is also, for those that have been following our Bills closely, an important variation in relation to joint ventures between the December Bill and the May Bill. In the December Bill, a joint venture for the purposes of the Act could not be constituted by an activity which related only to the sale of goods that had not been produced, mined or acquired by the parties.

There are a couple of specific questions in Mr Williamson's paper that I would like to speak to briefly. The first question is: "Could an agreement between joint venturers for the acquisition of goods for use by the joint venture, fall within the description of an agreement for the purpose of the joint venture relating to the supply of goods in pursuance of the joint venture?" And I think this question is a worthwhile question and I think the answer to it goes some way in demonstrating that the Act is complex but at the same time interlocks well in its provisions. I would think that the answer to that question is "Yes", but I would also think that if the answer is "No" that does not matter, because we have provisions relating to collective acquisition, which I think would achieve the same result.

The second question is: "If we take a step further back along the chain, could an agreement between suppliers to supply goods to a joint venture fall within the description of an agreement for the purpose of the joint venture, relating to the supply of goods in pursuance of the joint venture?" I think the answer to that question is "No", but I think there are certain circumstances in which the suppliers entering into that agreement would not fall particularly foul of the Act. First, if the suppliers themselves were joint venturers and we had a joint venture supplying a joint venture, they would be able to have that price fixing agreement without being necessarily deemed to substantially lessen competition. And second, if they were not joint venturers, but at least one of the joint venturers was a party to an agreement with the suppliers as to the price at which the suppliers would supply the joint venturers, which is all getting horribly confusing, we would have what we call a "multi-level price agreement" which would be at least authorisable.

Mr Williamson says specifically in his paper that the important thing is to keep anti-competitive aspects to the essential minimum so that, upon any balancing exercise, the public benefits can be clearly seen to weigh more heavily. And I think I can do no more than echo that sentiment. I think it is exactly correct.

There is a second sentiment that I would like to echo. That is that everyone would like to see greater predictability in the legislation. But the fundamental problem is to balance certainty and flexibility. Joint ventures, as with most business dealings, are very diverse and varied in the form they take, and in the benefits and detriments that accrue from them. Accordingly it is essential, I believe, that there should be a case by case approach such as the Act provides and that there should not be too many assumptions taken in relation to joint ventures which do not allow the flexibility that at least some joint venturers would want to see.

In closing, I would – because they have not had wide circulation – just like to make mention of a few amendments of the 13 pages that were introduced into the House of Representatives last week, because some of them are very significant.

Firstly, the concept of aggregation has been reinstated into the Act as it was in the December Bill, and that is very significant. I think the second most important point is that, and this is a fairly technical point, for which I apologise, the provision of s.47 which said that a provision which constituted an exclusionary provision but which also fell within the definition of exclusive dealing, was to be treated as an exclusionary provision and not as exclusive dealing. That provision has been deleted and exclusionary provisions are now so defined as to include an element of horizontality.

But that is, as I say, very technical, but for those of you who have been following the Bill I am sure you will recognise the significance of that.

In closing, I would just like to reiterate that I think Mr Williamson's paper is a very useful bringing together of the major considerations in relation to the inter-relationship between the Trade Practices Act and joint ventures.

COMMENT ON TRADE PRACTICES
By Bruce Donald

This commentary will concentrate on the issues raised by Sections 3, 4 and 5 of Mr Williamson's paper. The first half of his paper summarises most of the provisions of Part IV of the Act as amended by the Bill, together with the relevant procedural provisions, in order to provide a base for the analysis in the later sections.

Trade practices and antitrust laws are no strangers to the mining and petroleum industries. Many major cases have arisen out of activity in those industries; e.g., the famous Australian *Coal Vend Case* (1911) 14 C.L.R. 387; (1912) 15 C.L.R. 65; (1913) 18 C.L.R. 30 (P.C.), involving the pre-First World War coal cartel in the coal fields of northern N.S.W., the *Appalachian Coals Case* 288 U.S. 344 (1933) involving the joint marketing of regional coal in the US; the *Socony-Vacuum Case* 310 U.S. 150 (1940) which outlawed pricing arrangements to stabilise distress sales of Texas oil; the *Cities Services Case* 391 U.S. 253 (1968) involving alleged boycotts by some of the seven sisters against customers of the nationalised Iranian oil industry.

It is also significant that the leading US antitrust case *(U.S. v. Penn-Olin Chemical Co.* 378 U.S. 158 (1964)) on joint ventures arises in the chemical industry, which in its processing aspects is very similar to processing of minerals and oil. There is also the decision concerning the joint venture for the natural gas pipeline, *Northern Natural Gas Co. v. FPC* (1968) Trade Cases, para 72,498.

Joint ventures are a particularly appropriate form of legal relationship for use in mining and petroleum products. Often mineral exploration is carried on by individuals or by smaller companies. If the exploration yields a deposit then the discoverer may prefer to retain an interest in its development even though it has insufficient resources to proceed alone and thus requires a partner for that venture. At the other end of the scale, still at the exploration stage, the sheer magnitude of exploration costs for oil (especially offshore) often mean that no single company is prepared to put up all the funds, preferring to take the risk of failure with other participants. A further obvious factor is that the state of modern technology makes it inevitable that any economic processing plant be of such huge proportions that seldom can one major multinational corporation justify making the investment alone. Hence it is inevitable that joint ventures be used and even then it is noteworthy that the equity contributions of the participants will usually be below 50%, the remainder being provided on a debt basis by international banks and other financing agencies. Hence the nature of exploration and the dimensions of the financing and production mean that the joint venture will usually be the legal form of a mining venture, whether by way simply of a joint venture agreement or else by way of a corporate vehicle jointly owned by the participants.

The second important factor to bear in mind when contemplating the

application of competition law to mining and petroleum joint ventures is that the world markets for most minerals and oil are oligopolistic to begin with. It would be improper, having made that statement, not to advert to the complexities of market definition in the mineral and petroleum field as revealed by *U.S. v. General Dynamics Corp* (1974) Trade Cases para 74,967. The District Court had decided that, for relevant purposes, coal was not a separate market but that since "coal competes with gas, oil, uranium and other forms of energy, the relevant line of commerce must encompass interfuel competition." The Supreme Court majority on appeal found it unnecessary to decide the issue, affirming the District Court on other grounds. The four judge minority, however, produced a spirited market analysis in concluding that coal did constitute a separate market. The issue accordingly remains open. (See also *Northern Natural Gas Co. v. FPC* (supra) in which the District Court had held natural gas to be a market, following *U.S. v. El Paso Natural Gas Co.* (1964) Trade Cases, para 71,073.)

Even if "energy" is accepted in the U.S. and here as the relevant market, the current diversification moves by major participants in that market could well see a high degree of concentration in the future. For other minerals, separate markets will continue to be identified. If energy resources are on the other hand held to form separate markets (a view which I expect our Commission and courts to take), then oligopoly will be the order of the day. The frequency with which mineral and oil cartels either appear or are mooted indicates the high degree of market concentration to be considered. This suggests great care should be taken when examining the competitive impact of any joint venture in a market. It may be argued that if there is little competition to begin with because of oligopoly then nothing can substantially lessen competition. A more accurate analysis would examine the way in which the new venture is allowed to enter production and have impact in the market, because that may be the real source of competition in such a market. Indeed, bearing in mind the approach to competition, taken by the Trade Practices Tribunal in *Re QCMA* (1976) A.T.P.R. para 40,012 which looks at competition as a process occurring over a period of time rather than at a static point, it is the very effect of the new entrant or new development which can be seen to render even apparently uncompetitive markets in fact highly competitive.

I do not think joint venture relationships will experience unusual problems under the Trade Practices Act. I think that by sensibly applying the attitudes towards competition which even the Trade Practices Commission has endorsed (as indicated by Mr. Williamson's survey of some relevant decisions) the lawyer working closely with the client will be able to make a meaningful decision as to a joint venture structure which will not have difficulty under the Act. Nor do I wish to be taken as saying that special treatment needs to be given to mining projects or to joint venture projects (other than the obvious necessity for variations to the price fixing provisions in ss. 45A and 88(3)). I must disagree with Mr Williamson in this respect. I think that efforts towards rationalising the application of the Trade Practices Act in this area would be much better spent in

working through and examining the application of the provisions to the mining industry and the joint venture as a structure within it. If properly thought through the Act will apply fairly and may assist rather than impede development in the sector.

The Approach of the Sections

The first major change in the Bill is the deletion of any need to find a restraint or restriction on trade. Instead, any agreement which has the *purpose or has or is likely to have the requisite effect* on competition is unlawful. Thus the mere agreement between parties to act jointly in a project must be examined as to its competitive impact, whether or not it contains restraints on competition. This was not so under the original 1974 Act.

The second crucial change is that the competitive test for illegality has been changed from one of significance of effect as between the parties and others (which made it very hard for joint ventures) to the more sensible test of whether competition in the market has been substantially lessened. Mr Williamson has identified the questions to ask in applying this fundamental test; to summarise, two important general questions are first whether the venturers could have proceeded alone and second whether there was another equally willing and able venturer with whom the venture would have been less anti-competitive.

Mr Williamson correctly points out the limited extent to which s.45(6) takes a corporate vehicle Shareholders Agreement out of s.45 and makes it examinable under the new far narrower provisions of s.50. Hence non-competition clauses in a Shareholders Agreement would not be excluded from s.45 and so the likelihood of the parents or their subsidiaries competing in markets against the joint venture child, would have to be considered. A most intricate question is whether a Shareholders Agreement which merely sets up the corporate vehicle but without any other clauses in terms affecting competition would be characterised only as an agreement providing "for the acquisition of any shares in the capital. . . of a body corporate", or would it, on the other hand have a broader character as one pursuant to which the parties will act together in this venture, thereby making it examinable under s.45. I do not think it would be unfair if the latter were the result because it would simply put corporate vehicle type joint ventures on an equal footing with co-ownership type joint ventures.

Many of the concepts developed under the old s.50 and the various clearance rulings will continue to have great relevance for evaluating joint ventures. This is particularly so in the mining field where companies may enter into joint ventures in particular product markets in which they operate through a division, the joint venture being similar to a merger in that market between two participant or potential participants. So, if a company with say a 10% share of the local production and sale of mineral X were to enter a joint venture to exploit a major new deposit accounting for 10% or so of the expanded market, s.45 may prohibit a joint venture between the company and say a 5% market sharing producer of mineral X (unless perhaps there was no joint marketing)

while a merger under s.50 involving similar shares would not produce dominance or control.

Problem of Price Competition

It seems that the great difficulty with mining joint ventures in relation to the Act is not so much the effect of joint exploration or joint production themselves but rather the competitive implications of joint marketing. While the amendments effected by s.45A correct the error in the previous law and allow proper scope for joint pricing it can safely be said that in many cases there is simply no problem at all if the venturers take their share of output from the joint production facility (whether it be a mine, a refinery or a smelter) and sell it themselves. The advantages of joint venture as opposed to partnership often make it preferable to take in kind (see Oser and Nicholls "The Structure of Mineral Resource Ventures – Tax Aspects" *Committee for Post Graduate Studies – Mining Law Seminar* Sydney, May 1977, pp. 5-10). For U.S. anti-trust and tax reasons this also often happens. Now there may be advantages under the Trade Practices Act for it to happen. Whether as a matter of competitive effect or public benefit, joint venturers usually have little trouble making out a case for joint production; but it is conversely very difficult to support joint marketing.

However, in many circumstances it is either not practical to separate the product; or one of the participants has no marketing expertise; or else it may just be easier not to sell separately. Then one must analyse what is likely to happen in the market.

For that part of the output which a participant by its independent decision decides to sell at export, then the exemption in s.51(2)(g) seems quite sufficient to enable the joint venture to take all such designated product and sell it at export on an agreed basis. That still leaves of course local joint marketing.

Parties often contend that to deny to the market the competitive selling by the venturers of their separate product is quite insignificant because of world market price influences on the local market. This may well be true but it should be carefully examined. Depending on the stage along the production process in respect of which the question is being asked, freight costs will have a greater or lesser significance as a protection for local marketers. A detailed examination of the market may in fact reveal that the world price, while providing a ceiling, is nevertheless not determinative in the local market which has its own competitive forces.

Another factor rendering analysis of price competition quite difficult is the fact that minerals are normally sold on term contracts with spot markets being very limited so that price competition is not operating as it were day to day but only at contract renewal time. Furthermore, most contracts are written for large lots so that parties may argue that the product from the joint venture forms too small a lot to be sold separately and thus could never exert substantial price pressure as separate lots. Again this should be carefully examined because often it may not be correct.

Note that it is dangerous to look at total tonnages produced and compare

the joint venture tonnage with that total because in vertically integrated industries, large tonnages apparently forming part of a market are used by a subsidiary of the producer and hence have no competitive effect.

There will be many cases in which the pricing behaviour in the market will not be substantially lessened by joint marketing. Proper and careful examination of the way product is marketed will enable a clear decision to be made.

Other Competitive Effects

Because of the vertically related nature of mineral industries, it will be important to analyse the effects of the joint venture at one level upon other levels. Thus if participation in the venture by a vertically integrated producer may deny supplies of a particular material (either raw material or processed to some degree) to an important competitor of that vertically integrated producer at another level, there may be a problem.

This introduces perhaps the major non-price competitive factor in mineral and oil markets which is that access to a source of supply is usually far more important than the price one has to pay. It was earlier noted that long term contracts are normal and combined with vertical integration this means that the general availability of product on the market may be more apparent than real. It also means that the process of competition in such markets can only be examined over a period. Insofar as joint ventures may provide broader access to product then they will be pro-competitive. But insofar as participation by a major can be seen as a method of gaining foothold control of new developments careful thought should be given to the effect on the competitive impact of the venture in terms of potentially curtailing access for competitors to sources of supply.

It is important that there in fact be a market in Australia which is affected because the need even to comply with the export exemption in s.51(2)(g) may be avoided if the product which the venturers propose jointly to sell, simply has no market in Australia. There may for example be no smelting capacity for that concentrate or even if there is smelting capacity it may be tied to an existing producer of the concentrate.

Ancillary Restraints

There is a great range of ancillary restraints which may be part of a joint venture; the parties may be prevented from competing with the venture either absolutely or in certain areas or products; the parties may agree to restrict the range of products of the venture; there may be controls on the rates of output from the venture or from other mines or plants of the parties; there may be agreement that any further discoveries be developed together and that all future exploration be carried on together. The list has no end and any restriction must be examined as part of the analysis of the effect of the total joint venture. Many such ancillary restraints will be questionable; some will be essential to the proper implementation of the venture.

The Commission has considered a non-competition clause in the

Phillips/Siemens Case (1975-6) CCH 16,503, involving a joint venture company formed to market and service various medical products manufactured by the partners who agreed not to compete during the life of the joint venture company. Another ancillary restraint was the mutual pre-emptive right over the shares in the joint venture company. Because the competition test under the old s.45 obviously gave no comfort to the partners in terms of chances of a clearance, they sought authorisation. The Commission accepted the necessity of the ancillary restraints for the continuation of the venture, accepted as a public benefit that the venture enabled more efficient provision of high quality technology to the Australian market and granted authorisation.

It is difficult to predict any trend in Commission attitudes to such ancillary restrictions. Obviously the strength of other competitors in the market will be crucial but I would incline to the view that long term ancillary restraints willn not fare well before the Courts or before the Commission. One should recall a case like *Timken Roller Bearing Co. v. U.S.* 341 U.S. 593 (1951) where an apparent joint venture was revealed to be no more than a market sharing arrangement.

Conclusion

The trade practices lawyer must not shrink from telling the client that aspects of the joint venture or indeed the personality of the participants will create problems. U.S. anti-trust lawyers do it all the time and their advice is heeded. Nor need the client be advised always to take the matter to the Trade Practices Commission for an authorisation because even though a vast project like the Northwest Shelf will obviously appeal to the Commission as having substantial benefit for the public, many lesser mineral joint ventures, while having benefits for the parties and ensuring development of a project, nevertheless may not pass the new public benefit test. But that is not to say that ventures cannot be organised on an entirely legal basis which does not have the requisite effect on competition. The solution to this problem is to become thoroughly familiar with the way the markets operate and to reach an informed opinion on the basis of that complete information.