COMMENT ON TRADE PRACTICES — JOINT MARKETING IMPLICATIONS

By R. Baxt*

I want to congratulate Doug Williamson Q.C. for a most wide ranging and interesting paper on a topic which is clearly a matter of great importance to members of the Association. It is a paper which I hope will be given a wider circulation in due course. I will not be commenting on many aspects of his paper. Some of them relate to legal issues involving the interpretation of specific provisions of the Trade Practices Act. They are matters which are clearly better addressed in the context of specific fact situations dealing with particular cases. They are also better addressed in workshop situations. My remarks will be limited in the time that is available to me, to *two* major issues that have been raised by Williamson and which I regard as central to the administration of the Trade Practices Act, not only in relation to mining and petroleum, but in relation to other areas. These two issues are:

1. the Trade Practices Commission's attitude towards 'persuading' parties down the authorisation route;
2. the so-called new approach to authorisation of joint marketing ventures, especially in relation to time limits and other conditions.

There are probably four major matters on which I will be concentrating my comments: the Pasminco joint venture (merger).[1] I feel it is appropriate to talk about the Fletcher Challenge Ltd. acquisition of 50 per cent share in Australian Newsprint Mills[2] in this context; *Delhi (No.2)*,[3] and the Newsagents authorisation in South Australia.[4] The last-mentioned, whilst not a matter relating to joint ventures, nevertheless does contain some of the philosophy that is driving the Trade Practices Commission in its approach to these matters at this time.

'PERSUADING' PARTIES DOWN THE AUTHORISATION ROUTE

Some might ask why is there a push by the Trade Practices Commission towards authorisation in matters which previously might well have been regarded as either having been 'let go by the Commission', or matters in which the Commission might have entered some 'private arrangements' to allow a particular matter to proceed with some 'adjustments'.

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1 *Pasminco* (1988) ATPR (Com.) 50-082
2 *Australian Newsprint Mills* (1988) ATPR 50-077.
3 (1988) ATPR (Com.) 50-076; see also other oil/gas authorisations *Delhi No.1* (1988) ATPR (Com.) 50-072; *Bridge Oil Ltd.* (1988) ATPR (Com.) 50-073; *Santos Ltd.* (1988) ATPR (Com.) 50-074.
4 *Newsagents* (1988) ATPR 50-083.

The Commission announced in its May 1988 *Priorities and Objectives Paper* that it would be adopting a new approach towards certain types of mergers which previously had been the subject of 'private arrangements' between the Commission and the merging parties. Many of you will not be aware that the Trade Practices Commission has considered well over 100 mergers this last 12 months. They are either brought to its attention directly by the parties to seek what is known as an informal clearance, or the Commission itself feels it should investigate them because of the issues raised by the relevant merger. Since I assumed office in April 1988 the number of mergers being considered by the Commission has risen considerably, although the total value of these mergers may not be much more than the value of mergers in previous years. In very recent times, however, there have been some very large mergers that have been brought to the attention of the Commission.

There were many reasons for this change of approach. The Commission feels it has received the support of large sections of the community in adopting this approach, an approach loudly applauded by the Griffiths Committe (the House of Representatives Standing Committee on Legal and Constitutional Affairs) in its report published in late May 1989. Whilst there are many aspects of that report which I regard as unsatisfactory (it did not canvass with sufficient rigour some issues that were raised), the Commission feels justified (and gratified) by the support for the 'changed' approach taken on mergers. I refer you in particular to the treatment of this matter by the Griffiths Committee at pages 73 and following of its report and specifically to its recommendation No.6.

The recommendation by the Griffiths Committee that the Trade Practices Act be amended so as to provide remedies in respect of breaches of undertakings entered into, both in connection with the authorisation process and the consultative process, is one that the Commission is investigating further with the Attorney-General's Department to see if it can in fact be put into practice on an official basis. All I want to say in relation to undertakings is that unless we receive them in the form of a court order, or there is some other legislative backing, they are in many circumstances not worth the paper they are written on. The Commission does not have the resources, nor would it be able to get the evidence twelve months or eighteen months after the undertaking is given, to show that there has been a breach of the Trade Practices Act which would be necessary to enforce the undertaking. The TPC's involvement with the Ansett East-West merger, for example, is a classic example of why such an approach should not be taken in the future unless there is a variation to the legislation along the lines suggested by the Griffiths Committee or unless we obtain an appropriate court order, or the matter is dealt with via an authorisation.

In its May 1988 paper the Commission indicated that where mergers which 'invoked' public benefit arguments were brought to its attention (and I include in this context joint ventures) the Commission would try to persuade the parties to seek authorisation rather than having the Commission enter into some private arrangement. The Commission also indicated that it would seek a court order to prevent the merger from going ahead, if in its view, the Act would be breached.

There have been two mergers which the Commission has pushed down the authorisation route — the Pasminco merger, which of course is now completed and is part of history, and the TRW takeover of the Kirby Pty. Ltd. (which is still being considered by the Commission at the time of writing) since May. The only merger at the time of writing which the Commission has opposed and which has gone ahead in the face of the Commission's opposition is presently being litigated in the Courts (*TPC v. Arnotts Ltd and Ors*). It is not appropriate to discuss either the TRW or the Arnotts matter as they are at present being adjudicated or litigated.

The Pasminco matter was brought to our attention when there was a leak to the press of the proposed joint venture. The Commission immediately wrote to the two companies concerned and were advised by the companies that they were aware of their trade practices responsibilities and would contact the Commission when and if it was necessary to do so. Half an hour before the merger was publicly announced I received a telephone call from one of the companies advising me that the joint venture was to proceed and that the companies would provide us with documents but that there were no trade practices issues of concern. I indicated to the caller that we were concerned about the implications of the joint venture, but obviously could not do any more than await the submission of any documents to us. In due course the Commission received most of the documentation involved in the joint venture; but not all of the documentation was provided at that time. Immediately the TPC conducted market investigations on the impact of the joint venture and within a relatively short period of time we formed the view that there were trade practices implications for the joint venture. This was not based on a theoretical evaluation but on the basis of strong feedback from the market. The Commission then sought senior counsel's advice. The advice we received from senior counsel was that there were probable breaches of the Trade Practices Act either in terms of section 50 or in terms of section 45. A number of meetings were held with the lawyers (including the barristers) for the joint venturers. The Commission continually put to the parties its views that the joint venture was a matter that could well be authorised because we saw identifiable public benefits flowing from the arrangement. There were also competition issues which the Commission could not turn a blind eye to despite the strong submissions by the parties that the sections of the Act were not breached. Some of the arguments turn on technicalities which of course are important but which we did not find provided a very satisfactory way of dealing with the issues concerned in the context of this very large joint venture.

We were satisfied that the issues did not involve mere technicalities. The Commission stood firm and indicated to the parties that if the joint venture was to proceed without authorisation the Commission would have to take advice on what action it might pursue. We understood later that one of the reasons for the parties not proceeding initially with the authorisation was a concern that a shareholder in one of the companies might seek an appeal from any authorisation granted (because it was unhappy with the shareholding arrangements proposed for the joint venture company, Pasminco Ltd.), or that one of the disgruntled users might appeal. To cut a long story short, the parties did apply for autho-

risation some weeks after the Commission had indicated to them that such a process would be the appropriate way to go. Following the Commission's non-official public meeting of all parties at which issues relating to the arrangement were discussed with all the parties concerned, the joint venture was authorised. The Galvanizers Association asked the Commission to impose conditions into the authorisation decision, but the Commission refused to do so as it did not believe it could enforce them. Indeed the imposition of conditions in merger authorisations is an extremely difficult and troublesome matter and has been the subject of debate in other merger decisions (*e.g. Henderson Springs*[5]).

Doug Williamson raises the question as to why the Commission has invited the parties to come back to seek a variation to the authorisation in the context of the joint marketing arms of Pasminco. The parties put to the Commission that they would prefer to have one marketing company, and that Pasminco should market both internationally and within Australia. The Commission felt that if there were two marketing arms which were truly separate from each other, there was still a strong likelihood of some competition as to price and related matters that might occur in the Australian market. If there was only one marketing arm then this potential competition would disappear. Indeed it is my view that the Commission's decision to impose the joint marketing arm scenario was justified when, within six months of the merger authorisation being granted, we had to consider certain complaints as to alleged misuse of power by Pasminco. The subsequent investigation suggested that there were different approaches, indeed some elements of competition, between the two marketing arms. This is a matter on which there are alternative arguments — for example, costs might have been reduced if marketing was done by one body in Australia rather than by two.

The question has been asked as to whether the Commission adopted a commercially sensitive approach to this merger, or whether it adopted too legalistic an approach. My retort to that is to invite you to appreciate the special nature of our Act. Had there been no authorisation procedure available under our law a different approach might well have been adopted by the Commission to this and other mergers. In evaluating whether a merger can result in an efficient operation which might outweigh the possible anticompetitive detriments that might flow from the merger (or a joint venture) the Commission would be hard put adopting a pro litigation approach in opposing a merger. Certainly I would adopt a very different approach.

But we *do* have the authorisation process. Time limits are imposed on the Commission and the Commission has shown a commercially sensitive way of dealing with these authorisation applications. We saw this in the *Fletcher Challenge* matter where the Commission's approach was widely applauded. The Pasminco merger has also resulted in very positive responses from the companies concerned about the way the Commission approached the matter. Even though the companies may have disagreed with the Commission's interpretation of the law, that interpretation was

5 (1987) ATPR (Com.) 50-054.

backed up by counsels' advice — counsel who are very widely experienced in trade practices matters.

CONDITIONS

There has been some concern expressed in sections of the community at the decision of the Trade Practices Commission to impose conditions, or raise broader issues in recent authorisation determinations (see, for example, *Delhi No.2* decision). Of course, the imposition of conditions is not a new device. It will be well known to all of you that the Trade Practices Commission is becoming more heavily involved in areas in the economy which were previously seen as outside the ambit of the legislation. Since 1983 we have seen a strong deregulatory push in Australia by governments at all levels, although many would regard this push as not strong enough, comparing Australia with New Zealand where deregulation has gone much further. The areas in which the Trade Practices Commission has become more heavily involved as a result of deregulation include banking and financial services, petroleum and related areas, telecommunications, the rural industry, airlines and, if the relevant changes come into effect, the waterfront.

The Commission is very sensitive to the fact that an authorisation granted by the Commission, or on appeal by the Tribunal, is a very important exemption or immunisation to the relevant parties from the operation of the Trade Practices Act. Obviously, the granting of an authorisation should occur only after a careful consideration and evaluation of all of the issues, for it can only be granted if the relevant anticompetitive detriments resulting from a particular arrangement are outweighed by the public benefits produced by the relevant arrangement. In the case of a merger, especially if there is to be an unscrambling of the assets, the imposition of conditions is an extremely difficult matter. As I pointed out earlier, it was suggested that conditions be imposed in the Pasminco matter. Similarly, in the *Henderson Springs* matter the Commission felt that it was not practical to place conditions relating to price (see in particular paragraph 182 of that decision). Nevertheless, in both matters the Commission did take into account certain assurances that were given by the parties. In the *Fletcher Challenge* matter the Commission was aware of assurances made by Fletcher Challenge in relation to future developments.

In the context of joint venture and other arrangements involving the mining and petroleum industry we are acutely aware of the arguments that the placing of time limits on the relevant authorisations might be seen to create uncertainty. Alternatively, some people are suggesting that the Commission is using a 'back door' method of review of the authorisation which is available to it only under section 91 of the Act. I do not believe that this is the case. The restrictive powers of review in section 91 are justifiable in the context of the need for commercial certainty in business decisions. The provision relating to material change in circumstances is relevant to situations where unforeseen circumstances develop. Section 91 does provide a mechanism that recognises that markets themselves are not static particularly when there is a newly developing industry. The

question is whether the Commission should only allow itself the section 91 avenue of review when, at the time of the determination, it recognises that factors within the market may change in an ensuing period such that the basis for the determination may itself alter? Is the section 91 process the only appropriate way to handle such a situation of foreseen, as distinct from unforeseen, changes?

It is my belief that the Commission should not be so limited in its approach. The *Delhi (No. 2)* decision provides a clear example of the Commission's attitude in this regard. In both South Australia and in Queensland there was a new development of the relevant resource. There was also the potential that in years to come the industry would take on a different appearance depending on the progress of that development. In our view it could be foreseen that the very basis of our determination could change within a relatively short time frame. The Commission saw it as appropriate in such circumstances to limit the authorisation to a period that was sufficient to allow the development of the resource, while at the same time giving the Commission the flexibility of reviewing the matter to consider whether the foreseen circumstances had developed. Should there not be the changes foreseen, it is more than likely that similar considerations will apply to the Commission's reconsideration of the matter if we are again approached. The recent decision with respect to the South Australian Newsagency System is another matter where the Commission limited the authorisation. Again that was in the context of foreseen developments in the market which the Commission felt it must have opportunity to consider within an appropriate period. It is arguable that such an approach is in fact less uncertain than the Commission announcing 'out of the blue' its decision to review a past authorisation. The industry is on notice of the Commission's attitude in the market and can respond accordingly. At the same time the Commission does not lock itself into a more complicated review procedure.

In summary it is our view that it is both a more sensible and responsible approach in markets where changes can be foreseen, to incorporate within its determination a mechanism whereby those changes can be considered within a stated period of time. We also see section 91 as providing a mechanism to handle unforeseen developments. The alternative sees the Commission not exercising its powers in this regard and perhaps being faced in the future with a formal legal process to achieve a review which (it is at least arguable) it was able to foresee at the time of the determination. It is, in our view, more responsible for us to cater for foreseen circumstances by, for example, limiting the authorisation, rather than leaving a future Commission to pick up the pieces.

The very dynamic nature of some of the industries in which the Commission has had to consider authorisation requires it to balance out the permanent grant of an authorisation, exempting the particular practice or arrangement from the operation of the Act, against the placing of some time constraints which, in essence, gives the Commission an opportunity to review the matter on the basis of certain set criteria which are known to all the parties in advance. The Commission does not act, as I have noted above, out of the blue by seeking a review of the authorisation,

but simply says to the parties: 'Five years ago we told you we would be looking at this matter again in the context of changes that were seen as possible at the time; now let us examine whether those changes warrant any departure from the previous decision and approach to the Commission.' Of course no changes may have occurred, or they may be regarded as so insignificant as to enable the Commission to deal with the matter very quickly. As against that, of course, there is the possibility that someone new will wish to challenge the Commission's decision if it grants authorisation again. That new entrant would not have been able to do so if the authorisation was a permanent one but might well have persuaded the Commission to review the authorisation in the appropriate circumstances. This issue is an important one.

CONCLUSION

In the May 1988 *Priorities and Objectives Paper* we announced the Commission would be a very open Commission in dealing with various matters that came to its attention. I think we have delivered on that score. Our aim is to expose our thinking to the community for critical comment and observation. If we are shown to be wrong through constructive comments from the community we will certainly be happy to reconsider our approach. Williamson has accepted that challenge in a very positive and constructive way in his paper.