

acquisition environment, economics controls the marketplace. Accordingly, while tactical litigation can be helpful to the bidder in order to maximise the likelihood that the bidder will be entitled to present fairly a bid to the target company's shareholders, litigation commenced by the offeror is not likely to be outcome determinative.

### **Stockholder Derivative Litigation**

One other type of litigation plays a role in the American acquisition environment — albeit a minor one — stockholder derivative litigation or the plaintiffs' bar.

In virtually every acquisition, whether friendly or unfriendly, derivative litigation is brought by a nominal stockholder on behalf of the corporation. As a general matter, suits of this nature which are brought against a negotiated acquisition result in the payment of attorneys' fees for the plaintiffs' lawyers and sometimes a slightly increased price to all stockholders in transactions involving either management or affiliated entities.

These suits are commenced against management and the board of directors promptly following the announcement of a transaction. In a contested situation, the plaintiffs seek relief from any defensive action taken by the target company, and they may seek to prevent the board from invoking defensive measures which currently exist, such as the poison pill.

The theory behind the plaintiffs' bar in a contested situation is to prevent management from discouraging a bidder from presenting its best bid to shareholders. In friendly transactions which involve management, such as leveraged buyouts or leveraged recapitalisations, the plaintiffs' bar generally claims that the price to be paid to shareholders is not adequate and that there has been a lack of procedural fairness in structuring the transaction. Whether the transaction is hostile or friendly, these suits have a minimal effect, if any, on the outcome of the transaction. Typically in a contested acquisition the stockholder's derivative action follows and takes second seat to the litigation being conducted by the offeror. To the extent the offeror does not pursue vigorously its claims the plaintiffs' bar is not likely to pursue theirs. Generally in a negotiated acquisition, management will factor into the economics of its transaction the likelihood of plaintiffs' suits and thus will save some value with which to settle these suits and to pay attorneys' fees.

### **Conclusion**

Litigation has receded in importance as a strategic element in U.S. contested takeovers. It has retained substantial tactical significance, principally as an adjunct to the matter of principal importance in a takeover — the economics of the transaction. As such it probably serves a useful and appropriate economic purpose — facilitation of a liquid takeover market.

# **Customs Law Committee**

## **Note for Australian Business Lawyer on the Committee's Activities during 1987 and to date**

The Customs Law Committee for 1987 comprised Keith Steele (Chairman), Alan Limbury, Philip Sacks, David Fairlie, Professor Colin Phegan, Charles Sweeney, John Griffiths, Leslie Katz and Jeff Waincymer. It was assisted by Minutes Secretaries Axel Rasmussen and latterly, Aldo Nicotra.

In the course of 1987 the Committee contributed to the Business Law Section submissions which were subsequently lodged by the Law Council with the Federal Government in relation to the following matters:

1. The proposed anti-dumping tribunal and the proposed sunset provisions for the review of the Customs Tariff (Anti-Dumping) Act, 1975 following the release of the Gruen Report in March 1986 and the Government's subsequent announcements in relation to its implication.

2. The Administrative Decisions (Judicial Review) Bill 1986.

3. An interim submission on the Customs and Excise Legislation Amendment Bill (No. 2) 1987.

The Committee most recently has contributed a comprehensive submission which has now been lodged with the Federal Government on the Customs and Excise Legislation Amendment Bill (No. 2) 1987.

The submission in relation to the review of the anti-dumping laws represents a continuation of the Committee's participation and involvement in the review which was triggered by the February 1986 reference to Professor Gruen by the Federal Government. The Committee consulted with and made submissions to Professor Gruen in the course of his inquiry leading to his report. Subsequent to the release of the report the Committee made a submission on its recommendations to the Minister for Industry Technology and Commerce on 31 July, 1986. In that submission, lodged through the Law Council, the Committee substantially agreed with the central thrust of the Gruen recommendations. However, the Committee recommended, inter alia, that the final determination and recommending function traditionally exercised by the Australian Customs Service in assisting the Minister to exercise his powers under the Anti-Dumping Act should be placed in the hands of an independent body which would operate in the same way as the Administrative Appeals Tribunal.

Subsequently the Government announced in October 1986 that it proposed to implement the central recom-

mendations of the Gruen Report and specifically that it intended to establish an anti-dumping tribunal whose function it would be to make recommendations to the Minister as to whether or not the requisite grounds existed to exercise the power to impose dumping or countervailing duties.

Following that announcement the Committee prepared the further submission to which reference has been made and which was subsequently lodged by the Law Council. In that submission the Committee welcomed the Government's decision to establish an anti-dumping tribunal but urged the Government to ensure that through its composition the tribunal was seen to be truly independent of the Government. The Committee also emphasised the need to ensure that the tribunal possessed the requisite relevant skills and expertise to remove the increasing tension and allegations of bias which were being made by many of Australia's trading partners to which Professor Gruen had made reference in his Report. In September 1987 the Government made a further announcement that the proposed anti-dumping tribunal would be known as the Anti-Dumping Authority and that legislation would be drawn to establish it. That has not yet occurred but is believed to be imminent.

In its submission on the Administrative Decisions (Judicial Review) Bill 1986 the Committee made the following points:

1. There was no evidence of abuse of the ADJR Act in relation to interlocutory customs decisions which would warrant such measures applying in this field.

2. It was wrong and inappropriate to impose a show cause onus on an applicant to establish an entitlement to the review of an interlocutory decision.

3. The provisions in the Bill relating to the availability of alternative avenues of review required clarification particularly in the context of the anti-dumping laws and the right to a reference to the Industries Assistance Commission, given that it could make recommendations only to the Minister who was not obliged to accept them.

The Bill is currently still before the Senate Standing Committee and has not yet been passed.

Finally in relation to the substantive submission on the Customs and Excise Legislation Amendment Bill (No. 2) 1987 the Committee's submissions, which have been adopted by the BLS Executive and lodged on behalf of the Law Council, contain a comprehensive analysis and review of the proposed legislation and point out numerous areas of difficulty and potential injustice posed by the Bill in its present form. Although the Committee clearly acknowledged and accepted the legitimate objective of the Government to stamp out what it perceives to be widespread customs fraud, the Committee has expressed very real concern about both the substantive and formal structure of the Bill. The Committee has expressed opposition to the very complex recasting of the valuation provisions, particularly when the Bill seeks to introduce a self assessment system with exposure to

administratively imposed penalties. The difficulties of comprehending the new valuation provisions are further exacerbated by its timing coinciding with Australia's adoption of the new harmonised tariff and the initial classification uncertainties which are likely to arise from that. The Committee has also expressed concern about the width of the powers proposed to be given by the Bill to Customs to enter and search for documents to verify data and has submitted that the proposed warrant divisions do not provide sufficient safeguards if they are to be issued by Justices of the Peace.

The Committee has had the benefit of discussions with one of the senior legal advisors to the Minister on the Bill and at the time of writing its future passage through the Parliament is uncertain. Although it has passed through the House of Representatives, opposition, including an interim submission by the Law Council through the Committee, resulted in the deferral of its introduction to the Senate with a view to its subsequent introduction in the current autumn session. This has been done to enable the weight of the opposition and the substance of the arguments against the Bill to be assessed.

In addition to the specific submissions which have been noted, the work of the Committee is currently looking at the current operation of the search and seizure provisions and the need for their reform. The Committee has been invited to make contributions to the Australian Law Reform Commission in relation to the reference recently sent to it by the Government concerning the need for reform of the Customs Act.

The Committee has been essentially Sydney based to date. However, the workload which the Committee is required to undertake, together with the growing involvement of practitioners in other States in the customs law area, combine to require a strengthening of the Committee, both in terms of its numbers, and its need to be represented by practitioners across Australia and not just those practising in Sydney. Representations are being made to the Business Law Section Executive with a view to achieving these objectives. Inquiries from members of the Law Council who are practising in the customs law area and who have an interest in contributing to the work of the Committee would be welcome.

**H. K. C. Steele**  
Chairman  
Customs Law Committee

## Trade Practices Committee

The Committee has under review at present the operation of section 46 of the Trade Practices Act, in relation to abuse of market power, in particular the question as to whether the existence of certain conduct should give rise to an inference of taking advantage of market power.