OFFSHORE TAKEOVERS - AUSTRALIAN FOREIGN INVESTMENT AND ANTI TRUST LAWS.

The control of offshore takeovers may raise problems under both anti trust and foreign investment laws. If the foreign based parents of two local companies merge, the anti trust and foreign investment regulators may be presented with a fait accompli. Australian policy in relation to foreign investment distinguishes offshore mergers and takeovers from "foreign-to-foreign takeovers. A "foreign-to-foreign takeover" is one where a foreign-owned business operating in Australia is the target of a takeover by another foreign interest. An "off-shore takeover" is one where an offshore company which conducts a business in Australia is acquired by another offshore company and the value of the assets in Australia of the target company exceed the limits specified in section 13 of the Foreign Takeovers Act, 1975. "Foreign-to-foreign takeovers" are assessed against the criteria applicable to all acquisitions of Australian businesses and whether they involve any reduction of Australian ownership and control. "Offshore takeovers" normally do not raise issues which would be contrary to the national interest. In cases where such issues are raised, the government indicates that it usually seeks to resolve any concerns through consultations with the parties involved. A separate consideration for the parties will be the law in relation to anti trust or restrictive trade practices.

Australian anti trust law presently regulates takeovers through a control or dominance test: Trade Practices Act 1974 s.50. Takeovers which would result in control or dominance of a market, or substantial strengthening of existing control or dominance are proscribed. In February 1984, the government released a green paper, The Trade Practices Act - Proposals for Change, for discussion and comment. Paragraph 45 made the following proposal:-

> 45. Proposal: The control or dominance test would be replaced by a test of a substantial lessening of competition. This would reintroduce the basic element of section 50 as it applied from its introduction in 1974 until 1977. The existing limitation that the market affected be a substantial market for goods and services, introduced in 1977, would remain. This means that only the more significant acquisitions would be subject to this provision. Moreover, the existing provision for authorization on public benefit grounds would also remain. A pre-merger clearance procedure is also proposed.

The merger policy thus proposed is more rigorous than that presently contained in ss.50(1) of the Trade Practices Act, 1974. A larger number of mergers will, under the proposal, fall for consideration should the Parliament amend the Trade Practices Act along these lines. Whether or not that may happen, different considerations may apply in the application of anti trust law and policy, and foreign investment law and policy. It will be noted that a merger falling for consideration under

ss.50(1) of the Trade Practices Act may or may not fall for consideration under Part 11 of the Foreign Takeovers Act, 1975. Briefly, the latter provides that the Treasurer may intervene where either the 15 per cent or 40 per cent benchmarks are attained or exceeded. These benchmarks are not identical to the test in ss.50(1) of the Trade Practices Act. In addition, in dealing with group corporate structures, the two Acts are not identical. Subsection 4A of the Trade Practices Act not only deems a company a subsidiary of another where there is control of at least 50 per cent of the voting power of that company or ownership of at least 50 per cent of share capital (excluding certain non fully participating shares), the section also incorporates a test based on the control of the composition of the board of directors of the supected subsidiary. The corresponding section of the Foreign Takeovers Act, 1975, section 10, does not incorporate the latter test.

These differences have been said to be of relevance in relation to offshore takeovers. R.J. Reynolds Inc., in an endeavour to block an overseas takeover of Rothmans Tobacco Holdings Ltd. by Philip Morris International, was reported to have made a submission to the Australian government in 1982 and 1983 to tighten its anti trust and foreign investment laws and policy relating to mergers. Reynolds control about 15.9 per cent of world tobacco production, Philip Morris 23 per cent and Rothmans 9 per cent respectively.

Both the Trade Practices Act and the Foreign Takeovers Act express the intention that the respective Act operate extra-territorially. Whether or not either Act would authorise the blocking of a takeover in another country, the likelihood of the authorities of another country accepting such a directive is minimal.

The Green Paper proposed the following new section be inserted in the Trade Practices Act to deal with foreign mergers which have an effect in Australia:-

Acquisitions outside Australia

"50A. (1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8) (b), a controlling interest in any body corporate and, by reason, but not necessarily by reason only, of the application of paragraph (8) (b) in relation to the acquisition of that controlling interest, acquires a controlling interest in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, make a declaration that the Tribunal

(a) is satisfied that, as a result of the last-mentioned acquisition, a substantial lessening of competition in a substantial market for goods or services in Australia or in a State has occurred or is likely to occur; and

(b) is not satisfied in all the circumstances that that acquisition has resulted, or is likely to result, in a benefit to the Australian public that outweighs, or is likely to outweigh, the detriment to the Australian public constituted by the lessening of competition that has occurred, or is likely to occur, as the case may be.

"(2) A corporation to which an application under sub-section (1) relates shall be given notice of the application and may appear in the proceedings.

"(3) An application under sub-section (1) may be made at any time within 12 months after the date of the acquisition first referred to in that sub-section in relation to which the application is made.

"(4) The Tribunal may, on the application of the Minister, the Commission or any other person, or of its own motion, revoke a declaration made under sub-section (1).

"(5) The Tribunal shall state in writing its reasons for making, refusing to make or revoking a declaration under sub-section (1).

"(6) After the expiration of 3 months after a declaration is made under sub-section (1) in relation to the acquisition of a controlling interest in a corporation or in 2 or more corporations, the corporation, or each of the corporations, as the case may be, shall not, while the declaration is in force, carry on business in the market to which the declaration relates.

"(7) Sub-section (1) does not apply in relation to an acquisition first referred to in that sub-section if sub-section 50 (1), (2) or (3) applies in relation to that acquisition.

"(8) For the purposes of this section—

(a) a person shall be taken to hold a controlling interest in a body corporate if the body corporate is, or, if the person were a body corporate, would be, a subsidiary of the person (otherwise than by reason of the application of paragraph 4A (1) (b)); and

(b) where a person holds a controlling interest (including a controlling interest held by virtue of another application or other applications of this paragraph) in a body corporate and that body corporate

(i) controls the composition of the board of directors of another body corporate;

(ii) is in a position to cast, or control the casting of, any votes that might be cast at a general meeting of another body corporate; or

(iii) holds shares in the capital of another body corporate,

the person shall be deemed (but not to the exclusion of any other person) to control the composition of that board, to be in a position to cast, or control the casting of, those votes or to hold those shares, as the case may be.".

The Green Paper explains the rationale for this proposed new section in the following terms:-

> 52. Proposal: Proposed new section 50A allows an interested person within 12 months of the overseas acquisition to apply for a Tribunal declaration that as a result of the acquisition, a substantial lessening of competition etc. has occurred or is likely to result, in a benefit to the Australian public that outweighs the detriment constituted by that lessening of competition.

> 55. Since the provision would only apply to conduct in Australia, and be enforced only within Australia, inappropriate extraterritorial effects are avoided. The provision does not seek to prohibit overseas acquisitions or regulate overseas persons in relation to their overseas acts. Its effect is intentionally limited to operations in Australia.
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> 56. If the corporation (i.e. the Australian subsidiary whose parent was acquired) carries on business contrary to the Tribunal's declaration, the Court would then direct the corporation to dispose of specific assets or grant an injunction restraining the continued carrying on of the business.
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> 57. Foreign corporations proposing action which would bring their respective Australian subsidiaries under common control would be able to apply for a pre-merger clearance if there was no impact on competition, and authorization on the grounds of public benefit would also be available as for section 50.

In explaining the relationship between the new section and the Foreign Investment Policy, the Greenpaper stresses that it is not intended to discriminate in any way against foreign holding companies or to alter the Government's foreign investment policies. It is appreciated that additional constraints would be imposed on overseas companies operating within Australia, but this would be for separate and independently justifiable reasons of competition policy. The Trade Practices Commission drew attention to the Australian competition policy implications of certain overseas mergers in its Annual Report for 1982-83 (para. 4.9.9)... The proposal is merely designed to ensure equality of treatment with companies merging in Australia.

It is of considerable interest that the government proposal avoids any attempt to control such takeovers by a claim to extraterritorial jurisdiction either under the "effects" doctrine or by claiming that as the local subsidiaries were Australian, the parents also somehow shared in that nationality or were subject to the jurisdiction. (See _ICI_ v. _EEC Commission_ 48 ILR 106).

The proposal is also consistent with the Australian position adopted in the face of US claims to extraterritorial jurisdiction.

D.F.