

Australian Treaty Series 1982 No 13

DEPARTMENT OF FOREIGN AFFAIRS

CANBERRA

**Agreement between the Government of Australia and the Government of the
United States of America relating to Cooperation on Antitrust Matters**

(Washington, 29 June 1982)

Entry into force: 29 June 1982

AUSTRALIAN TREATY SERIES

1982 No. 13

Australian Government Publishing Service

Canberra

(c) Commonwealth of Australia 1995

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA RELATING TO COOPERATION ON ANTITRUST MATTERS

**THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE
UNITED STATES OF AMERICA;**

RECOGNIZING that conflicts have arisen between the interests reflected in United States antitrust laws and policies and those reflected in Australian laws and policies, and that such conflicts may arise in the future;

RECOGNIZING the need for such conflicts to be resolved with mutual respect for each other's sovereignty and with due regard for considerations of comity;

CONSIDERING that intergovernmental consultations may facilitate the resolution of such conflicts;

DESIRING to establish an appropriate bilateral framework for conducting consultations; and

CONSIDERING that, in the absence of conflicts, cooperation between the Governments of Australia and the United States is desirable in the enforcement of antitrust laws;

Have agreed as follows:

Article 1

Notification

1. When the Government of Australia has adopted a policy that it considers may have antitrust implications for the United States, the Government of Australia may notify the Government of the United States of that policy. If practicable, such a notification shall be given before implementation of the policy by persons or enterprises.
2. When the Department of Justice or Federal Trade Commission of the United States decides to undertake an antitrust investigation that may have implications for Australian laws, policies or national interests, the Government of the United States shall notify the Government of Australia of the investigation.
3. A notification under paragraph 2 of this Article shall be effected promptly and, to the fullest extent possible under the circumstances of the particular case, prior to the convening of a grand jury or issuance of any civil investigative demand, subpoena or other compulsory process.
4. The content of a notification made pursuant to paragraph 1 or 2 of this Article shall be sufficiently detailed to permit the notified Government to determine whether the matter may have implications for its laws, policies or national interests.
5. Notifications undertaken in accordance with paragraphs 1 and 2 of this Article shall be transmitted through diplomatic channels.

Article 2

Consultations

1. When it appears to the Government of Australia through notification pursuant to paragraph 2 of Article 1 that the Department of Justice or Federal Trade Commission of the United States has commenced, or is likely to commence, an antitrust investigation or legal proceeding that may have implications for Australian laws, policies or national interests, the Government of Australia shall communicate its concerns and may request consultations with the Government of the United States. The Government of the United States shall participate in such consultations.
2. When it appears to the Government of the United States through notification pursuant to paragraph 1 of Article 1 that a policy of the Government of Australia may have significant antitrust implications under United States law, the Government of the United States shall communicate its concerns and may request consultations with the Government of Australia. The Government of Australia shall participate in such consultations.
3. Either Party may seek consultations with respect to potential conflicts which come to its attention other than by notification.

4. Both Parties during consultations shall seek to identify any respect in which;
 - (a) implementation of the Australian policy has or might have implications for the United States in relation to the enforcement of its antitrust laws; and
 - (b) the antitrust enforcement action by the Department of Justice or the Federal Trade Commission of the United States has or might have implications for Australian laws, policies or national interests.
5. Both Parties during consultations shall seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity.
6. In particular, in seeking to avoid conflict:
 - (a) the Government of Australia shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws; and
 - (b) The Department of Justice or the Federal Trade Commission of the United States, as the case may be, shall give the fullest consideration to modifying or discontinuing its existing antitrust investigation or proceedings, or to modifying or refraining from contemplated antitrust investigations or proceedings. In this regard, consideration shall be given to the interests of Australia with respect to the conduct to which the proceedings, or contemplated proceedings, relate, or would relate, including, without limitation, Australia's interests in circumstances where that conduct:
 - (1) was undertaken for the purpose of obtaining a permission or approval required under Australian law for the exportation from Australia of Australian natural resources of goods manufactured or produced in Australia;
 - (2) was undertaken by an Australian authority, being an authority established by law in Australia, in the discharge of its functions in relation to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;
 - (3) related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources or goods manufactured or produced in Australia; or
 - (4) consisted of representations to, or discussions with, the Government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the Government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia.

7. Each Party during consultations shall provide as detailed an account as possible, under the particular circumstances, of the basis and nature of its antitrust investigation or proceeding, or its national policy and its implementation, as the case may be.

Article 3

Confidentiality

Documents and information provided by either Party in the course of notification or consultations under this Agreement shall be treated confidentially by the receiving Party unless the providing Party consents to disclosure or disclosure is compelled by law. The Government of the United States shall not, without the consent of the Government of Australia, use information or documents provided by the Government of Australia in the course of notification or consultations under this Agreement as evidence in any judicial or administrative proceeding under United States antitrust laws. The Government of the United States shall not, however, be foreclosed from pursuing an investigation of any conduct which is the subject of notification or consultations, or from initiating a proceeding based on evidence obtained from sources other than the Government of Australia.

Article 4

Procedure after consultations

1. When consultations have been held with respect to an Australian policy notified pursuant to paragraph 1 of Article 1, and the Department of Justice or the Federal Trade Commission of the United States, as the case may be, concludes that the implementation of that policy should not be a basis for action under United States antitrust laws, the Government of Australia may request a written memorialization of such conclusion and the basis for it. The Government of the United States shall, in the absence of circumstances making it inappropriate, provide such a written memorialization. Where a written memorialization has been provided, the Government of the United States shall expeditiously consider requests by persons or enterprises for a statement of enforcement intentions with respect to proposed private conduct in implementation of the Australian policy, in accordance with the Department of Justice's Business Review Procedure or the Federal Trade Commission's Advisory Opinion Procedure, as may be appropriate in the case.

2. If, through consultations pursuant to this Agreement, no means for avoiding a conflict between the laws, policies or national interests of the two Parties has been developed, each Party shall be free to protect its interests as it deems necessary.

Article 5

Cooperation in antitrust enforcement

1. When a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interests of the other, each Party shall cooperate with the other in regard to that investigation or

action, including through the provision of information and administrative and judicial assistance to the extent permitted by applicable national law.

2. The mere seeking by legal process of information or documents located in its territory shall not in itself be regarded by either Party as affecting adversely its significant national interests, or as constituting a basis for applying measures to prohibit the transmission of such information or documents to the authorities of the other Party, provided that in the case of United States legal process prior notice has been given of its issuance. Each Party shall, to the fullest extent possible under the circumstances of the particular case, provide notice to the other before taking action to prevent compliance with such legal process.

Article 6

Private antitrust suits in United States courts

When it appears to the Government of Australia that private antitrust proceedings are pending in a United States court relating to conduct, or conduct pursuant to a policy of the Government of Australia, that has been the subject of notification and consultations under this Agreement, the Government of Australia may request the Government of the United States to participate in the litigation. The Government of the United States shall in the event of such request report to the court on the substance and outcome of the consultations.

Article 7

Entry into force

This Agreement shall enter into force upon signature by both Parties, and shall remain in force unless terminated upon six months notice given in writing by one of the Parties to the other.

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Washington this twenty-ninth day of June, 1982.

FOR THE GOVERNMENT OF FOR THE GOVERNMENT OF

AUSTRALIA: THE UNITED STATES OF AMERICA:

[Signed:] [Signed]

PETER DURACK WILLIAM FRENCH SMITH

Attorney General Attorney General

By direction of the Federal Trade

Commission

[Signed:]

J C MILLER III