



200201881

TRANSNATIONALITY MATTERS: Related Party International Transactions in the Australian Food Industry

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In recent years critical debate on transnational companies (TNCs) and globalisation has resonated strongly through Australian politics. The food industry has provided an important arena for these debates. The predominance of TNC-owned products on the nation's supermarket shelves has become a symbol of wider concerns about control and concentration in the Australian economy.

These debates are well illustrated by the nationalist interventions of the entrepreneur, adventurer and civil aviation regulator, Dick Smith. In July 1999 Smith launched a national debate into foreign ownership of the Australian food industry. Using the example of Vegemite as an example of a nationally iconic yet overseas owned product, Smith offered to financially support prospective local food manufacturers to develop a domestically owned alternative called which he called "Ozemite".¹ Subsequently he established a food company (Dick Smith Foods) that manufactures products under license from Australian-owned companies, and repatriates a proportion of profits to Australian charities.

Smith's interventions have evoked savage responses from mainstream interests. In 1999 the Australian Food and Grocery Council (AFGC),

¹ The day after Dick Smith appeared on the national "A Current Affair" television program (23 July, 1999), Kraft Foods Ltd applied for a trademark over the name "Ozemite" (Trade Mark 801454). Smith's use of the trademark may be curtailed in future should Kraft's legal rights over the name be recognised, and the company seek to exercise those rights.

representing foreign and domestic corporate interests in the sector, responded excitably to the questioning of corporate ownership. In a media release headed: "Aussie made creates Aussie jobs – it's that simple Mr. Smith!", the Council argued that ownership is irrelevant. It suggested that debate on corporate ownership needed to be made subservient to the broader imperative of Australia's need to capture globally mobile investment capital, given the supposedly dire straits of the national balance of payments (AFGC, 1999). In 2001 attacks on Smith intensified, from such diverse corners as the prominent News Ltd journalist Denis Shanahan, the media commentator Stuart Littlemore, and former Deputy Prime Minister Tim Fischer. The latter was drawn into this debate through his involvement in the 'Australian Made' campaign, which supports foreign-owned companies manufacturing in Australia. According to Fischer:

The Dick Smith twist to this [i.e., raising corporate ownership issues] is xenophobic, it's fortress Australia, it's ultimately devastating to the longer-term future of Australia (in Macfarlane, 2001, 4).

Smith disputes this claim:

I totally support foreign companies and I totally support free trade. All I'm saying is, if big companies are going to run a marketing campaign exploiting the patriotism of Australian Made, I'll go a step further and say let's exploit Australian-owned (in Macfarlane, 2001, 4).

The debate about Dick Smith Foods raises important questions. Smith's national entrepreneurship targets consumer patriotism. His company's slogan "We're fighting back!" evokes themes of invasion. Yet is an appeal to consumer patriotism an effective or appropriate a point of critique concerning TNCs in the Australian food sector?

An effective and appropriate critique of corporate transnationality in the Australian food sector demands a wider frame of reference than presented by Smith. By focusing on the politics of consumption, Smith emphasises distinctions between the 'local' and the 'foreign'. Although these distinctions may have some currency, the key issue for political economists should not simply be the nationality of a particular company, but how it uses its nationality or transnationality to shape its activities.

This article provides an approach to this debate that neither accepts neo-liberalism (i.e., corporate ownership doesn't matter) nor is constrained by national patriotism.

Contemporary TNC strategy is marked by the extensive use of complex intra-corporate structures that deploy the international mobility of finance capital. A *sine qua non* of these strategies is that they encourage an increasing proportion of international commerce to take the form of non-arms length, related party international transactions (RPITs). These can involve the transaction of *tangible property* (where a company imports from, or exports to, an affiliated company) or *intangible property* (where internal uses of trademarks or patents are governed by intra-company royalty agreements). RPIITs enable companies to be better able to shape and control the terms of their international trading relationships, in particular, their internal price or royalty structures. Because these freedoms are not always possible for national-based competitors, they can be a potent source of competitive advantage for TNCs. At another level moreover, RPIITs may give rise to opportunities for tax minimisation. Although tax authorities usually require companies to structure their RPIITs as if they were arm's length, difficulties abound in ensuring compliance with this requirement. Notwithstanding their evident importance in the global economy, there is minimal published research on the role of RPIITs as sources of (legitimate or illegitimate) competitive advantage. Literatures on these topics are confined to relatively narrow concerns within law and accountancy, and some wider exploratory studies (Pritchard, 1999; Pritchard, 2000).

Three examples of RPIITs in the Australian food industry are explored below. Two examples (Nestlé and Simplot) highlight the ways that transnationality is (legitimately) used to construct RPIITs. The third example, San Remo, highlights the capacity for transnationality and RPIITs to be used illegitimately, as part of a transfer pricing strategy. A case is made for political economists and other critical social scientists to examine the ways that transnationality is constructed and mobilised, as a vehicle for wider debates on globalisation and TNCs.

Should Corporate Ownership be an Issue for National Concern?

Within orthodox economics, an emphasis of self-clearing and contestable markets tends to produce myopia with respect to issues of corporate ownership and, especially, RPITs. Although it is estimated that at least one-third of global trade takes the form of RPITs (Dicken, 1998), prevailing neo-liberal wisdom is that intra-corporate transactions operate in the same basic way as inter-corporate transactions. Hence, neo-liberal economists tend not to see issues of transnationality and RPITs as matters for public concern. This perspective generates and rationalises policies of negligible intervention by Australian governments to the rights of international interests to purchase Australian corporate assets. Acquisitions are fettered only by the general anti-competitive principles of the *Trade Practices Act*, which essentially treats alike domestic and offshore interests.² Since the 1980s, the Foreign Investment Review Board has been a toothless tiger, playing only a nominal role in vetting applications for the purchase of corporate assets.³ Clearly, these positions are also consistent with the Australian government's support for the World Trade Organisation's (WTO) project of global economic liberalisation, especially with respect to the Trade-Related Investment Measures Agreement (TRIMs).

Political economy perspectives provide an alternative lens to analyse these issues. The concept of capital circuits (Palloix 1977; Harvey 1982), used extensively in the work of Bryan (1983; 1987; 1995; Bryan and Rafferty, 1999), emphasises the contradictions within the State's role in mediating international capital movements. The nub of this approach is that capital is neither national nor international (Bryan, 1987, p 253). In its 'chase across the globe' in search of profit, capital weaves its way through various institutional (state and non-state) structures, which become implicated and immersed within its contradictions.

2 With the exception of the media sector.

3 The Treasurer's decision in 2001 to disallow the proposed takeover of Woodside by Shell is an important exception.

From this perspective, TNCs can be conceptualised as economic actors positioned within a globalised circulation of capital in the forms of money (M), commodities (C) and production (P). The spatiality of capital is defined as the social relations of value in movement: as capital circulates through the forms of money, commodities and production, value is created (Pritchard and Fagan, 1999). The circulation of capital within particular spatial arenas animates specific social relations within corporations (i.e., management structures, industrial relations); between corporations and other actors (i.e., with competitors, suppliers, customers); and between corporations and state agents (i.e., corporate regulators, taxation offices, politicians). At any one time, any particular TNC is engaged in processes concerned with the spatial embedding and movement of capital in its various forms. This can include production capital (investment or disinvestment in plant and equipment); commodity capital (the sale or purchase of inputs, partly-finished and finished commodities), and money capital (investment or disinvestment in financial securities, or the movement of cash and securities internationally).

This framework explicates the reasons why issues of TNC ownership and management should be of interest to Australian policymakers. TNCs are social actors whose possession of various socio-spatial attributes – economic size, extensive knowledge bases and networks, mobile tangible and intangible assets, certain management techniques – facilitates capital flows internationally. These attributes enable corporations to be embedded within, and to move across, geographical space (Yeung, 1998) and may invoke tensions with national governments, whose jurisdictions are defined by political boundaries.

These points are particularly relevant at the current time because of the emergent complexity of TNC strategy and the difficulties faced by governments in regulating these entities. There is immense diversity of corporate strategies currently being executed by the thousands of TNCs in the world today (Sklair, 1998, p 214). Within this diversity, however, several key trends are identifiable.

Since the early 1990s, researchers have identified a set of structural characteristics within many large TNCs that seem to be emblematic of internationalisation processes in the current period. These developments

pivot around an increasing diversity and complexity in TNCs' internal arrangements. For a number of high profile and fast-growing TNCs in the 1990s, the principal elements of corporate strategy were based on a capacity to act as 'coordinating agents' for vast constellations of subsidiaries, associates, partners, joint-venturers and sub-contractors. The athletic shoes company Nike Inc. represents an exemplar for this kind of global strategy (Donaghu and Barff, 1990; UNCTAD-DTCL, 1994, p 193; Lowder, 1999), although companies in the entertainment, automobiles, retailing and media sectors have adopted similar themes (Pritchard and Fagan, 1999). The importance of these themes was highlighted influentially in UNCTAD's 1994 *World Investment Report* (UNCTAD-DTCL, 1994) which paints a picture of the global economy of the twenty-first century crisscrossed by various forms of networks, alliances and intra-firm commercial relations between and within globally mobile TNCs.

In the 1997 *World Investment Report*, UNCTAD provides data suggesting the number of cross-border commercial agreements of different sorts (joint ventures; franchise agreements; licensing; sub-contracting, etc.) doubled between 1990 and 1996. The organisation concludes that this growth "suggests that TNCs have increasingly used such arrangements instead of, as well as in addition to, foreign direct investment to undertake international production" (UNCTAD-DTCL, 1997, 12). These themes are expanded further in UNCTAD's 1999 *World Investment Report*, where it is argued that, although there has been intense media debate on so-called 'mega' cross-border mergers and acquisitions, the establishment of cross-border strategic partnerships is an equally significant development in the global economy (UNCTAD-DTCL, 1999, p 28). These issues are exemplified through case studies of the automobile and IT&T industries, demonstrating the ways that network and alliance formation has driven the trajectory of recent industry restructuring (UNCTAD-DTCL, 1999, pp 31-36; Vonortas and Safioleas, 1997).

The growth of various kinds of contract-based relationships between TNCs has prompted critical review of how to understand the contemporary global economy. Dunning (1997a; 1997b) typecasts the current era as 'alliance capitalism' in which profit strategies by TNCs are determined by four factors:

- the increasing mobility of firm-specific resources and capabilities – especially knowledge-based intangible assets – across national boundaries;
- the growing significance of cross-border transactions which are either within the same firm or between firms with ongoing cooperative agreements;
- the dramatic reduction in long-distance transportation and communication costs, and of the psychic and cultural barriers between countries;
- the growing importance of location-bound assets, notably and educated labor force and a sophisticated physical infrastructure, in influencing the siting of the value added activities by [TNCs] (Dunning, 1997b, 69-70).

This framework emphasises the 'smorgasbord' quality of corporate strategy in the current era. The liberalisation of foreign exchange and investment laws globally opens new possibilities for how corporations manage their internal and external linkages. International networks of subsidiaries, affiliates, joint venture partners and franchisees provide TNCs with a panoply of options in how they organise international commercial transactions. This has the general effect of enhancing the potential for TNCs to replace arm's length commercial relations with various non-arm's length arrangements based around intra-firm trade, profit-sharing agreements between joint venture partners, and disbursement of exclusive licensing and franchise rights to subsidiaries or affiliates. As the size and importance of these RPITs increases, global geographies of international trade and commerce increasingly become removed from the principles of arm's length, competitive markets so beloved by orthodox economists, and into more institutionally complicated arenas of intra-firm profitability and strategy. These processes are exacerbated further by the flourishing role of tax havens as niche political geographies for the deployment of corporate financial assets (Connell and Pritchard, 1990; Roberts, 1994; Hudson, 1998; Connell and Aldrich, 1999).

There is little reliable global data on the incidence of RPITs in the global economy. According to the US Department of Commerce, in 1997, 26% of total US exports and 17% of US imports comprised transactions between US TNCs and their offshore affiliates (Mataloni, 1999). These

data, however, understate the incidence of RPITs for the US economy because they exclude transactions made by non-US TNCs in the United States (e.g., a Japanese car maker in Ohio buying parts from its Japanese parent). A separate survey of non-US TNCs in 1994 indicated that the intra-firm trade of these companies represents approximately 10% of total US goods trade (Zeile, 1994). These two surveys indicate that the intra-firm transactions of TNCs probably represents between one-quarter and one-third of US imports and exports. These estimates correspond broadly to UNCTAD's estimate that approximately 25% of US and Japanese manufacturing is incorporated within integrated international production (Rossett et. al., 1999, 79). Recent estimates by the Australian Tax Office (ATO) suggest that, in 1997-98, the value of RPITs was AUD\$76 billion, excluding loans (Killaly, 2000). This represented 42.6% of total Australian merchandise exports and imports in that year.

The emergence of increasingly complex TNC structures and more convoluted internal financial arrangements based on RPITs is important for contemporary debates within political economy. Traditionally, a main point of critique for Australian political economists interested in TNC behaviour has rested on arguments relating to the economic subservience of local subsidiaries in a branch plant economy (making Australia 'a client state': Crough & Wheelwright, 1982; Renwick, 1988). These frameworks tend to assume the primary financial relationship between parent and local subsidiary is related to dividend repatriation. In contrast, complex integration strategies are suggestive of an increased diversity in the commercial relations that can be used to incorporate local operations into global profit strategies. The remainder of this article uses three examples from the Australian food industry that illustrate these points.

Case 1: Nestlé Australia Ltd

The general importance of RPITs within food industry corporate strategy can be illustrated by analysing the revealed corporate practices of the foreign interests that in 1995 acquired the Pacific Dunlop food business. In 1995, the Pacific Dunlop food division was sold for AUD\$1.1 billion. The ice cream and yoghurt operations of Peters and Yoplait were sold to the Swiss-owned Nestlé Corporation (until recently the world's largest

food company)⁴, while the Edgell Birds Eye vegetable processing business and Herbert Adams baking operations⁵ were sold to the JR Simplot Corporation of the United States. Issues surrounding this transaction are discussed extensively in Pritchard (1995).

In 1995 Nestlé merged the Peters and Yoplait businesses within its Australian corporate umbrella (Nestlé Australia Ltd), effectively removing from public scrutiny key corporate financial data relating to these businesses. Under Australian corporations law companies are not required to publicly report full financial accounts of individual subsidiaries. Nevertheless, financial information for the group as a whole (Nestlé Australia Ltd and its controlled entities) is publicly available through annual reports lodged with the Australian Securities and Investment Commission (ASIC). Analysis of these documents provides a basis to assess the use of RPITs by the Nestlé group of companies in Australia, and to infer the implications of Nestlé's acquisition of Peters and Yoplait. It is to be emphasised that there is no implication or inference that Nestlé's use of RPITs was not in accordance with legal requirements.

Table 1 summarises key financial information relating to the Nestlé group in Australia over the period 1993-2000. Nestlé experienced strong revenue growth in this period, with sales increasing in nominal terms by 65.2% over seven years. The acquisition of the Peters and Yoplait businesses formed a major component of this growth, judging from the sizeable jump in sales between 1994 and 1996. In the two years following this acquisition, Nestlé Australia's payment of company taxes fell appreciably. Coinciding with lower taxes being paid, Nestlé Australia Ltd repatriated substantially lower dividends to its Swiss parent, with no dividends at all being repatriated in 1996 and 1997.

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- 4 In June 2000 Unilever purchased the US food TNC Bestfoods, and thus became the world's largest food company.
- 5 The Herbert Adams operations included three main branded food products areas: Four'n'Twenty pies and pastries; Nanna's frozen cakes and pies; and the Herbert Adams general pastry business.

Table 1: Key Financial Data Concerning Related Party Transactions Undertaken by Nestlé Australia Ltd (Consolidated), AUD\$ million, 1993-2000

	1993	1994	1995	1996	1997	1998	1999	2000
Operating revenue:								
Sales	1,231	1,307	1,603	1,806	1,799	1,919	2,081	2,033
Other	20	19	7	32	11	20	34	14
Total	1,252	1,326	1,610	1,838	1,810	1,939	2,115	2,047
Income taxes paid	44	36	68	11	23	2	24	47
Payment of dividends	75	59	52	0	0	10	67	30
Royalties & technical payments made to related parties:								
Ultimate parent entity	23	22	27	35	36	38	43	41
Others	14	12	14	11	12	12	12	15
Total	37	34	41	46	48	50	55	56
Exports to related parties:								
Finished goods	143	203	205	225	242	249	315	370
Equipment and spares	0	0	0	0	0	0	0	1
Services	0	0	14	4	6	9	13	18
Total	143	203	219	229	248	258	328	389
Imports from related parties:								
Finished goods	57	49	63	96	112	104	108	82
Raw and/or packaging materials	16	30	31	30	23	16	13	10
Equipment and spares	0	0	1	1	1	1	3	1
Services	0	0	1	2	5	4	4	7
Total	73	79	96	129	141	125	128	100

Source: Nestlé Australia Ltd financial returns lodged with the ASIC (documents: 00001131E, 00001131G, 014059108, 017155648).

Notes: Nestlé operates on a calendar year basis. Dollar amounts have been rounded to the nearest million.

The extensive use of RPITs was integral to Nestlé's Australian operations over this period. Firstly, the company constructed a series of intra-firm financial transactions to facilitate the offshore flow of royalty payments. By the year 2000 these mechanisms provided the basis for upwards of AUD\$50 million annually to be repatriated to Nestlé interests outside of Australia, mainly to Switzerland (Table 1). Secondly, during

the 1990s Nestlé greatly boosted its Australian exports. The vast majority of these exports were sold through RPITs to Nestlé affiliates in other countries.⁶ During this same period, Nestlé also increased its RPIT imports, especially of finished goods. Taken together, Nestlé's related party royalty payments, export and imports comprised 20 - 27% of the company's sales during the period 1993-2000.

Nestlé's extensive use of RPITs underscores the important role these activities play for the company. By organising much of its international trade and commerce within the framework of non-arm's length transactions, the company is better able to control the terms of its international commercial dealings. Nestlé Australia Ltd submits that the terms of its RPITs are constructed as if they were arm's length transactions, in accordance with Australian taxation obligations. However, the company's RPIT pricing practices have a history of scrutiny and challenge by the ATO.

In 1985, the ATO issued Nestlé with amended taxation assessments alleging that the company had unpaid taxation liabilities of approximately AUD\$20 million. These liabilities were said to have accrued from alleged international transfer pricing by Nestlé's Australia's operations over a 12 year period from 1971 to 1982. Nestlé challenged the process by which the ATO reached these determinations in the Federal Court of Australia (*Nestlé Australia Ltd v Commissioner of Taxation* [1985] NSW G184). The court heard that, during the period in question, much of Nestlé Australia Ltd's international sales was invoiced through another Nestlé subsidiary, Nestlé Products Ltd, incorporated in

6 The Business Review Weekly/ Export Finance Insurance Company survey of Australia's largest exporters (*Business Review Weekly*, 1997) reports that Nestlé's Australian exports were AUD\$214 million in 1994, and AUD\$241 million in 1995. Comparing this information to the data in Table 1 indicates that for 1994 and 1995 respectively, RPITs comprised 95% and 91% of Nestlé's Australian exports. No readily available information is published currently on the export performances of Australian-based companies. The BRW/EFIC survey last published in 1997, and personal correspondence with both BRW and the Department of Foreign Affairs and Trade confirms that neither body now publishes this information. In an era when the volume of economic and commercial data has expanded enormously, the absence of any reliable and accessible data on this subject is extraordinary.

the Bahamas, a Caribbean tax haven (*Nestlé Australia Ltd v Commissioner of Taxation* [1985] NSW G184, at p.2). In 1987 Nestlé succeeded in having the determinations set aside.

Table 2: Ratios of Related Party Transactions to Total Operating Revenue, Nestlé Australia Ltd (consolidated), 1993-2000.

	1993	1994	1995	1996	1997	1998	1999	2000
Related party royalty payments as a percentage of operating revenue	2.9	2.6	2.5	2.5	2.6	2.6	2.6	2.7
Related party exports as a percentage of operating revenue	11.4	15.3	13.6	12.5	13.7	13.3	15.5	19.0
Related party imports as a percentage of operating revenue	5.8	6.0	6.0	7.0	7.8	6.4	6.1	4.9
Total of the above	20.1	23.9	22.1	22.0	24.1	22.3	24.2	26.6

Source: Nestlé Australia Ltd financial returns lodged with the ASIC (documents: 00001131E, 00001131G, 014059108, 017155648).

Case 2: Simplot Australia Pty Ltd

The large, privately owned JR Simplot Company of the US had no presence in Australia until it purchased the Edgell Bird's Eye and Herbert Adams operations of the Pacific Dunlop food group. As discussed in Pritchard (1995), Simplot was lured to Australia largely on the prospect of capturing Edgell Birds Eye's Tasmanian french fries operations, which are a major supplier to McDonald's and other fast food chains. The JR Simplot Company of the US is the world's largest supplier of french fries to McDonald's.

JR Simplot incorporated Simplot Australia Pty Ltd in 1995 to operate its Australian businesses. This company was established as a wholly-owned subsidiary of Simplot Australia (Holdings) Pty Ltd, a holding company having the purpose of providing a conduit for equity and loan transactions between Simplot Australia Pty Ltd and its ultimate US parent. In 1995 JR Simplot provided its newly incorporated Australian operations with AUD\$485 million. Some AUD\$458 million of this was used to purchase the Edgell Birds Eye and Herbert Adams food

businesses of Pacific Dunlop, leaving a thin margin for working capital. At the end of its first year in Australia, Simplot Australia Ltd reported just \$3.5 million in cash reserves (Simplot Australia Pty Ltd, 1997, p5). In 1997, JR Simplot injected a further AUD\$25 million to its Australian subsidiary. Until 2000, Simplot Australia Pty Ltd recorded significant losses (Table 3), had never paid dividends to its US parent, and made no reference in its Annual Financial Reports to having ever paid any Australian company tax.

Table 3: Operating Activities, Retained Deficits and Management Charges. Simplot Australia Pty Ltd, 1996-2000 (AUD\$ millions)

	1996	1997	1998	1999	2000
Receipts from customers	580.9	595.8	694.5	703.7	729.3
Payments to suppliers and employees	571.5	545.2	650.0	657.8	667.1
Net cash from operating activities(a)	9.5	46.8	41.6	42.4	58.6
Management fee paid/payable to (received from) parent	32.3	31.7	31.5	28.4	(5.8)
Operating loss (profit) before income tax	14.4	17.7	35.2	10.7	(21.3)
Retained deficit at end of financial year	8.8	24.5	81.8	102.4	85.1

Sources: Simplot Australia Pty Ltd financial returns lodged with ASIC (documents: 008631890, 012586412, 016185780, 016022913)

Notes: Simplot operates on a financial year ending 31 August.

(a) excluding 'management fees and charges paid/payable to parent.

Detailed reading of Simplot's financial accounts underscores the significant role of RPITs in generating the company's financial outcomes. From 1996 to 1999 Simplot Australia Pty Ltd incurred an annual expense to its parent company (Simplot Australia [Holdings] Pty Ltd) of approximately AUD\$30 million, variously labeled in Simplot's accounts as management fees or charges. In 2000 no management fees were apparently levied. Instead, Simplot received AUD\$5.8 million in management fees from its parent. From Simplot's accounts alone it is unclear why these related party fees were levied or received, and what implications they have for the company's taxation liabilities. Nevertheless, it is apparent that their imposition over the period of 1996-99 severely handicapped the company's financial performance, contributing to its failure to announce an operating profit. Taking the year 1999 as an example, the company posted an operating loss before

tax of AUD\$10.7 million, despite generating a net cash inflow from operations of AUD\$42.4 million.

The International Relocation of Australian Brand Assets by Nestlé and Simplot

A striking example of the use of RPITs in corporate strategy relates to the ways Nestlé and Simplot have moved trademarks offshore. Upon acquiring the former Pacific Dunlop food business, Nestlé and Simplot took possession of a large cache of trademarks. Many of these trademarks possessed lengthy histories and were linked intimately with the nation's cultural journeys through the twentieth century: trademarks for 'Leggo's' were first registered in 1948; 'Four'n'Twenty Pies' and 'Chiko Rolls' in 1958; and 'Icy Pole' in 1932. From the time of their registration until being incorporated within Nestlé and Simplot, these trademarks underwent multiple changes of ownership as they were shunted successively between different subsidiaries of their corporate parents. Trademarks associated with the Edgell brand, for example, were owned ultimately by the Edgell family until 1961; then Petersville Ltd until 1980; HC Sleigh Ltd until 1982; the Adelaide Steamship Company Ltd until 1992, and Pacific Dunlop Ltd until 1995. Yet throughout these ownership tribulations, the immediate legal owner of these trademarks was always an Australian-incorporated company; that is, the direct ownership of these trademarks remained within the legal jurisdiction of the Australian nation.

The acquisition of the Pacific Dunlop food group by Nestlé and Simplot did not negate these legal structures. Although the *ultimate parent company* of these trademarks obviously changed with the sale of these businesses, for legal purposes they continued to be owned by subsidiary companies incorporated under Australian law. Hence, these trademarks remained within the jurisdictional space of the Australian nation state, notwithstanding the shifts to their ultimate corporate parentage.

Although there was no legal imperative for Nestlé or Simplot to alter these legal arrangements, within four years of the 1995 acquisition these trademarks had been all shifted offshore. In 1996, Nestlé transferred the

ownership of its newly acquired trademarks to the ultimate parent of the Nestlé group, Societe des Produits Nestlé SA, registered in Switzerland (Pritchard, 1999). In 1998 and 1999, Simplot transferred the ownership of its Australian trademarks to a wholly owned subsidiary in the United States, STM Inc of Boise, Idaho.

Evidently, these transactions demonstrate that both Nestlé and Simplot have taken the view that for legal purposes, trademarks should be held within head office jurisdictions. There is no evidence or suggestion that the transactions related to these decisions were linked in any way to improper conduct, but the mere fact that these companies chose to relocate these intangible assets offshore invites the question of what legal, financial or taxation advantage such actions generate.

In the case of Nestlé the decision to relocate these trademarks to Switzerland is consistent with its global strategy for managing intangible assets. Nestlé holds direct ownership of its entire stable of trademarks and patents in Switzerland, enabling the company to licence and charge its own subsidiaries with the right to use this property (Perrier, 1998, p.109). Through these means, Nestlé establishes the basis for intra-firm royalty streams that can facilitate the repatriation of monies from international subsidiaries to its head office in Switzerland.

Australian corporate law does not require the public disclosure of the specific terms and conditions of related party licensing and royalty arrangements, so it is difficult to comment precisely on the monetary significance of Nestlé's decision to relocate the legal ownership of trademarks offshore. However, financial data reported in the company's annual financial returns lodged with the ASIC provide a broad sense of the magnitude of these payments. In the seven years to 2000, Nestlé reported AUD\$311 million in related party royalty payments to the company's ultimate parent in Switzerland (Table 1).⁷

In Simplot's case, the relocation of trademarks to the US was explained by corporate management as occurring "so that the global group could

7 Because these payments relate to patents as well as trademarks, caution must be exercised in their interpretation.

offset accumulated tax losses" (Oldfield, 2000, p24). In 1998 and 1999 Simplot Australia (Holdings) Pty Ltd received AUD\$30 million and AUD\$54 million respectively from the sale of Australian trademarks to related party offshore interests (Simplot Australia [Holdings] Pty Ltd. 2000, 5). These sales generated important cash injections to the company's Australian operations. However, the fact that these trademarks now reside with companies outside Australia means that the uses of these names and symbols locally may potentially incur the payment of related party royalties. Thus since 19 January 1999, when the trademark for 'Chiko Rolls' was shifted from a subsidiary in Cheltenham, Victoria, to STM Inc. of Boise, Idaho, it appears to have been potentially legally permissible for JR Simplot to levy a royalty payment on the local manufacture and sale of this product.⁸ It is certainly perverse, if nothing else, that trademarks devised in Australia and possessing uniquely Australian cultural meanings (such as 'Billabong' ice creams or 'Four'n'Twenty' pies) may need to be licenced from offshore interests for their uses in Australia. Related to this, the valuation of intra-firm trade and intangible assets is notoriously flexible, giving rise to opportunities for tax minimisation or avoidance. The Australian Commissioner of Taxation has issued several important rulings on the treatment of related party royalty transactions, and the companies analysed here have stated their compliance with these requirements. Nevertheless legitimate questions remain in the broader sense over the extent to which taxation strategies drive TNC practices of trademark relocation.

Case 3: San Remo Macaroni Co. Pty Ltd

The possibilities that RPITs can form wider strategies of taxation minimisation or avoidance are highlighted in recent litigation between the ATO and San Remo Macaroni Co. Pty Ltd, a well known pasta company. The basis of this litigation involved a determination by the

8 This is not mentioned on the official Chiko website (<http://www.sarahjane.com.au/directory/chikochick.htm>), which discusses the history of this Australian icon. Incidentally, Chiko Rolls were invented by Gerald McEncroe and made their first appearance at the Wagga Wagga Show in 1951.

ATO that from 1985 until at least 1993, San Remo imported Italian-made pasta through a series of RPITs that were established with the express purpose of reducing the company's Australian tax liabilities. Under Division 13 of the *Income Tax Assessment Act* the ATO is empowered to amend companies' taxation assessments where it has taken the view that transfer pricing has occurred. In such instances, the ATO is permitted to substitute deemed arm's length prices for the pricing arrangements submitted in a company's taxation return. Following lengthy investigations, in 1995 the ATO issued San Remo with amended taxation assessments for the years 1985 to 1993. By replacing what it considered to be artificially high prices paid for pasta imports with lower estimated arm's length prices, the ATO's determinations increased San Remo's taxation liabilities.

In 1997 and 1998 San Remo instigated two sets of legal actions challenging these determinations. In 1997, the company lodged an appeal in the Administrative Appeals Tribunal (AAT) that contested the ATO's determination of amended assessment. Shortly afterwards, the company took action in the Federal Court of Australia (FCA) on the separate issue of whether the ATO's actions constituted bad faith; in other words, whether they were influenced by preconceived views held by ATO staff towards San Remo. The presiding judge of the FCA on this matter (Hill J) offered to hear these cases at the same time, but San Remo rejected this opportunity. Consequently, the AAT proceeding was held over until the FCA case was determined. On 27 October 1999 Hill J dismissed with costs San Remo's claim of bad faith by the ATO (*San Remo Macaroni Co v Commissioner of Taxation* [1999] FCA 1468), opening the way for the case to be heard by the AAT.

The litigation between San Remo and the ATO has particular relevance to the issues raised in this article because it demonstrates the deliberate construction of *transnationality* as a corporate spatial strategy designed to use the geographical mobility of finance capital as an element of competitive advantage. Prior to 1985, San Remo possessed no significant offshore interests. In that year, company directors travelled to Europe to discuss pasta procurement and the incorporation of a Swiss company to act as a purchasing agent. Although this Swiss company (incorporated as Bigalle SA) was not owned directly by San Remo, the ATO held nonetheless that it was a related party. In his ruling, Hill J of the FCA

notes that Bigalle was incorporated so that 98% of its shares were owned by a Swiss accountant affiliated with San Remo's Australian accountants, and with whom San Remo had deposited 50,000 Swiss Francs (*FCA 1468*, par 16).

Once established, Bigalle entered into highly generous commercial arrangements with San Remo. ATO investigations established that San Remo obtained its Italian pasta by instructing its shipping agent (an Italian company called Geimex) to place orders with Italian manufacturers. The Italian pasta manufacturers, however, did not invoice San Remo or Geimex, but instead invoiced Bigalle in Switzerland. Bigalle would pay the manufacturers and then invoice San Remo in Australia. During the period 1984 to 1991, Bigalle bought pasta from Italian manufacturers for between 720 lire and 1200 lire per kilogram, and resold this to San Remo for a FOB price of between 1125 lire and 1860 lire per kilogram. The ATO interpreted these data as indicating that Bigalle was marking up its product by between 30 - 50% without having performed any legitimate economic function. According to the ATO:

Bigalle merely performs a re-invoicing function and acts as a conduit for the flow of funds from San Remo to the Italian pasta manufacturer. In reality all commercial and financial risks are borne by San Remo (*FCA 1468*, par 37)

Because of Switzerland's tax haven status, it can reasonably be assumed that the significant earnings amassed by Bigalle through these commercial activities attracted little tax. However, there was little advantage to San Remo in these monies remaining in Switzerland. Consequently, San Remo entered into a series of loans with Bigalle. These loans were structured so that San Remo borrowed significant sums from Bigalle in Swiss Francs at relatively high interest rates, prompting Hill J to comment:

[these loans] gave rise to large claims for interest deductions and of course foreign exchange losses... The inference that this provided a mechanism for the Bigalle profit to be returned to the San Remo interests and an even greater tax deduction (now for interest) would not be difficult to draw (*FCA 1468*, par 23).

In addition to highlighting how companies can deploy their transnationality in legally questionable ways, the San Remo litigation

emphasises the increasingly important role played by the ATO in an open economy.

In the early 1990s the ATO established an International Tax Division and strengthened the reporting requirements for companies engaging in RPITs. The ATO has also utilised the principle of global profit allocation to attempt to estimate the share of profits that could be attributable to a TNC's Australian operations. These strategies are designed to establish more robust accountability by TNCs engaging in RPITs. They mark a systematic shift in the ways that the ATO operates; in the words of one of the ATO's Deputy Commissioners, "from confrontation to cooperation" (Killaly, 2000, p5). Although the ATO retains the right to institute legal proceedings against taxpayers under the *Income Tax Assessment Act*, current management principles focus on encouraging compliance, rather than relying on usually drawn-out and expensive legal contests.

Conclusion

The construction of international RPITs, including such processes as trademark relocation and the establishment of related party royalty transactions, is illustrative of recent trends in TNC corporate strategies. The *transnationality* of these companies provides the spatial referents enabling the construction of international RPITs that facilitate a flow of monies to head offices. There are three general points to be made about this.

First, economic globalisation ultimately facilitates and promotes the incidence of RPITs in the global economy. As suggested by UNCTAD, the emerging global economy is featured increasingly by networks of related parties, whether they be between or among wholly-owned subsidiaries, joint ventures, affiliates or partners, or other forms of corporate alliances. Hence, the capacities of companies to engage in RPITs, both legal and illegal, is a *systemic* outcome of contemporary globalisation. This reinforces the argument, made by Clark (1997), for a critical review of the roles of agency and institution in the contemporary global economy. Recent economic history has been replete with

instances of corporate and banking fraud, often associated with particular personalities (Alan Bond, Nick Leeson, Robert Maxwell, Christopher Skase). Yet to chime a fundamental tenet of Marxist political economy: men [*sic*] make history in circumstances not of their own choosing. Without exonerating these personalities, neo-liberalism provides the stage for their notorieties.

Second, the arguments here bring into context the nationalist rhetoric of Dick Smith. The establishment of Dick Smith Foods creates a space for resistance to TNCs by encouraging nationalist consumption practices. Evidently, consumption is an important field for economic interventions, particularly in the food sector (Lockie and Pritchard, 2000). However, most of the TNC competitors to Dick Smith Foods manufacture their products in Australia, largely using Australian raw materials. Consequently, the point of difference between Dick Smith Foods and foreign TNCs rests with the allocation of profit. This article does not wish to take aim at Dick Smith. His actions represent a savvy response by an individual entrepreneur to undeniable public concern over economic concentration in the food sector. Yet it is important to highlight the narrowness of this intervention. TNCs should be judged by their actions, not by their country of origin. The case of San Remo, discussed above, illustrates that there is no necessary harmony between *Australian* ownership and national economic interests.

Finally, there are evident policy implications arising from these issues. In recent years there has been considerable media attention to some of the wealthiest individual and corporate citizens of the country paying minimal or zero tax. Very largely, the opportunities to engage in this behaviour are provided through transnational geographies: the opportunity to stash assets in tax havens, to transfer price, or to develop labyrinthine international corporate structures. From the standpoint of emancipatory politics, inability to collect taxation revenue from obviously rich individuals and companies may well highlight the inherent impotence of the state in regulating global capitalism, and give sustenance to calls to develop an alternative global economic order.

Yet from the perspective of progressive representative politics, the issues raised here might point alternatively to specific arenas for intervention in public debate and public policy. The most evident of these is to promote

greater public disclosure of corporate affairs. Large companies in Australia do not have onerous public disclosure requirements. Enhanced disclosure laws, especially with respect to international RPITs, would bolster public scrutiny of these companies: as orthodox economists remind us, markets supposedly work better when there are freer information flows among participants. Additionally, increased financial and legislative resources should be made to key frontline public sector agencies concerned with regulating corporate behaviour, especially TNC behaviour. These agencies include the ATO, ASIC, Intellectual Property Australia and the Australian Customs Service. The past decade has witnessed the burdens of cost cutting and restructuring, common to all areas of government, befall these institutions. They have also been especially prone to the loss of professional staff through poaching by the big accountancy firms. Anecdotal evidence indicates there remains a substantial salary difference between legal and accounting professionals in the public and private sectors, and while this remains, there will be a continued brain-drain from these agencies. Supporters of progressive representative politics should identify these areas of government as strategically important national institutions within an open economy. This would be tangible recognition that *transnationality matters*.

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