The Parliament of the Commonwealth of Australia

House of Representatives Standing Committee on Legal and Constitutional Affairs

MERGERS, TAKEOVERS AND MONOPOLIES: PROFITING FROM COMPETITION?

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FOREWORD

The merger and misuse of market power provisions of the *Trade Practices Act 1974* have been the subject of much recent controversy and debate. That debate has focused on whether the existing legislation adequately protects, in its widest sense, the public interest. This report presents the findings of an inquiry by the House of Representatives Standing Committee on Legal and Constitutional Affairs into the legislative controls over mergers, takeovers and monopolies.

The Committee thanks all interested individuals and organisations for their assistance and support during the inquiry. In particular, the Committee acknowledges the significant contribution made by those who participated in the workshop held in Canberra in October 1988.

The Committee would like to thank Ms Claire Dalla-Costa, who was seconded from the Attorney-General's Department, and Mr Gary Healey, who was seconded from the Department of the Treasury, for their assistance in the preparation of this report. The Committee is also grateful for the specialist advice provided by Ms Anne Hurley.

As Chairman, I would like to thank the Deputy Chairman, Mr Philip Ruddock, MP, and my fellow Committee members for the time and commitment they devoted to the inquiry. Thanks are also due to the Secretary of the Committee, Mr Jon Stanhope, as well as to Mr Andres Lomp and Ms Natalie Raine.

This report will contribute to a greater awareness of the legislative and administrative controls necessary to ensure a genuine and robust competitive environment in Australia. Adoption of the recommendations will help to ensure a continued commitment to the consideration of public interest issues in the implementation of Australian trade practices legislation.

ALAN GRIFFITHS, MP
Chairman

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TERMS OF REFERENCE

To examine and inquire into the adequacy of existing legislative controls over mergers, takeovers and monopolisation with particular reference to:

1) the extent of control of mergers, takeovers and monopolisation necessary to safeguard the public interest;

2) adequacy of existing legislation;

3) the role and effectiveness of the Trade Practices Commission in its implementation of Sections 46 and 50 of the *Trade Practices Act 1974*.

ABBREVIATIONS

ABS	Australian Bureau of Statistics
ABT	Australian Broadcasting Tribunal
ACA	Australian Consumers' Association
Act	*Trade Practices Act 1974*
1906 Act	*Australian Industries Preservation Act 1906*
1965 Act	*Trade Practices Act 1965*
1971 Act	*Restrictive Trade Practices Act 1971*
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977*
AMH	Australia Meat Holdings Pty Ltd
Ansett/Avis case	*Ansett Transport Industries (Operations) Pty Ltd & Ors v Trade Practices Commission* (1978) ATPR 40-071
APC	Australian Press Council
Attorney-General's	Attorney-General's Department
Australia Meat Holdings case	*TPC v Australia Meat Holdings Pty Ltd & Ors* (1989) ATPR 40-932
BCA	Business Council of Australia
BHP	Broken Hill Proprietary Company Ltd
Blunt Committee	Trade Practices Consultative Committee
Borthwick	Thomas Borthwick and Sons (Australia) Ltd
CAI	Confederation of Australian Industry
CASA	*Companies (Acquisition of Shares) Act 1980*
Coles Myer	Coles Myer Ltd

Committee	House of Representatives Standing Committee on Legal and Constitutional Affairs
DITAC	Department of Industry, Technology and Commerce
EPAC	Economic Planning Advisory Council
FIRB	Foreign Investment Review Board
1984 Green Paper	'The Trade Practices Act Proposals for Change', Government Green Paper 1984
LCA	Law Council of Australia
Mark Lyons case	*Mark Lyons Pty Ltd* v *Bursill Sportsgear Pty Ltd (1987) ATPR 40-809*
NCAAC	National Consumer Affairs Advisory Council
NCSC	National Companies and Securities Commission
Papersave case	*Williams & Anor* v *Papersave Pty Ltd* (1987) ATPR 40-818
Queensland Wire Industries case	*Queensland Wire Industries Pty Ltd* v *The Broken Hill Proprietary Company Ltd & Anor*(1989) ATPR 40-925
QWI	Queensland Wire Industries Pty Ltd
Swanson Committee	Trade Practices Act Review Committee
TPC	Trade Practices Commission
TPT	Trade Practices Tribunal
Treasury	Department of the Treasury
Warman case	*Warman International & Ors* v *Envirotech Australia Pty Ltd & Ors* (1986) ATPR 40-714

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Economic Issues

The need for improved economic data on mergers and takeovers

The Committee notes that while economic arguments are being used either in support of the existing framework of competition policy or to advocate reforms, the lack of definitive empirical evidence creates difficulties in assessing the adequacy of that policy or the appropriateness of any reforms.

Recommendation 1

The Committee recommends that the Trade Practices Commission, in conjunction with the Australian Bureau of Statistics, establish from existing sources of *information a minimal set of line-of-business data for use by the Trade Practices* Commission and, where possible, private researchers.

The Committee also recommends that the Australian Bureau of Statistics use existing sources of information to regularly update and publish industry concentration statistics. (paragraph 3.4.12)

Section 46: Misuse of Market Power

The Committee does not believe that sufficient evidence has been presented to support the need for a major redrafting of section 46 of the *Trade Practices Act 1974*. In addition, while it was suggested in some submissions that minor amendments to the Act may bring about improvements in the law, the Committee considers that a compelling case has not been made out to warrant such amendments.

As a result of the evidence before it and in light of the decision in the *Queensland Wire Industries* case, the Committee is not convinced that the existing provisions of section 46 of the Act are not capable of achieving the purposes for which they are intended. This finding is based on the presumption that the Trade Practices Commission will have both sufficient resources and the capacity to actively enforce the existing provisions.

Recommendation 2

The Committee recommends that section 46 of the *Trade Practices Act 1974* be retained in its existing form.

The Committee also recommends that the Trade Practices Commission issue guidelines on the operation of section 46 of the *Trade Practices Act 1974*, having regard to the High Court decision in the *Queensland Wire Industries* case. The guidelines should address the concerns identified by the Committee in relation to possible areas of uncertainty, particularly where a refusal to supply may be found to be in contravention of section 46. (paragraph 4.6.34)

Section 50: Mergers

Pre-merger notification

The Committee considers that it would not be prudent to introduce a scheme of pre-merger notification, which would have significant resource implications for the Trade Practices Commission and could impact on the effective administration of trade practices law in Australia.

Recommendation 3

The Committee recommends that provision for pre-merger notification should not be introduced into the *Trade Practices Act 1974*. (paragraph 5.3.15)

The dominance test

The Committee is of the view that there is, at this stage, insufficient justification to recommend any amendments to the dominance test in section 50 of the *Trade Practices Act 1974*. The modified approach to merger regulation by the Trade Practices Commission, as outlined in its statement of Objectives, Priorities and Work Program for 1988/89, should be allowed sufficient time in which to demonstrate its effectiveness.

Recommendation 4

The Committee recommends that the existing provisions of section 50 of the *Trade Practices Act 1974* prohibiting acquisitions which result in or substantially strengthen a position of dominance in a substantial market be retained. (paragraph 5.4.62)

Private injunctive relief in merger cases

The Committee considers that the re-introduction of the right to private injunctive relief in merger cases will bring significant additional resources to the enforcement of the merger provisions of the Act. It will facilitate the testing of section 50 by ensuring that resources other than those of the Trade Practices Commission can be directed towards the enforcement of the existing provisions. However, the Committee favours the imposition of some restriction on the range of private litigants who may apply for injunctive relief in merger cases.

Recommendation 5

The Committee recommends that the private right to injunctive relief in relation to mergers be re-introduced to the *Trade Practices Act 1974*, but that takeover targets and associated persons should be excluded from this right. (paragraph 5.5.27)

Role and effectiveness of the Trade Practices Commission

Modified approach to merger regulation

The Committee welcomes the modified approach to merger regulation by the Trade Practices Commission, as announced in its statement of *Objectives, Priorities and Work Program for 1988-89*. The Committee considers that there should be a consistent and standardised approach to the public scrutiny of public benefit issues in merger regulation.

Recommendation 6

The Committee recommends that the Attorney-General give a direction, pursuant to paragraph 29(1)(b) of the *Trade Practices Act 1974*, that the Trade Practices Commission continue its policy of giving emphasis to the authorisation process in mergers with the potential for market dominance, to ensure that the process of assessing net public benefit is exposed to public scrutiny. (paragraph 6.2.12)

Legislative recognition of the consultative process for mergers

The Committee considers that legislative recognition of the existing informal consultative process for mergers would provide significant advantages in terms of public accountability considerations, the effectiveness of undertakings entered into as part of the process and the effectiveness of cost recovery measures.

Recommendation 7

The Committee recommends that the *Trade Practices Act 1974* be amended so as to provide legislative recognition of the informal consultative process currently utilised by the Trade Practices Commission in relation to mergers.

The Committee also recommends that, should the Government adopt the Committee's recommendation on reintroduction of the private right to injunctive relief in merger cases, the Trade Practices Commission be empowered, as part of the legislatively recognised merger consultative process, to grant immunity from merger enforcement action, including action by private litigants, subject to the condition that the Trade Practices Commission also be empowered to review the decision to grant immunity if it can be shown that the decision was made on the basis of false or misleading information. (paragraph 6.2.20)

Merger authorisations

The Committee considers that the existing process of merger authorisation allows for sufficient public scrutiny of mergers with the potential for market dominance.

Recommendation 8

The Committee recommends that the procedure for authorisation of mergers be retained in its existing form. (paragraph 6.3.8)

Undertakings on merger matters

The Committee considers that there would be significant benefits in amending the *Trade Practices Act 1974* so as to provide statutory remedies in relation to breaches of undertakings given to the Trade Practices Commission in relation to merger matters.

Recommendation 9

The Committee recommends that the *Trade Practices Act 1974* be amended so as to provide remedies in respect of breaches of undertakings entered into both in connection with the merger authorisation process and the recommended legislatively recognised merger consultative process. (paragraph 6.4.12)

Disclosure of information on mergers

The Committee considers that the absence of publicly available information in relation to merger matters considered outside of the authorisation procedure has contributed to the level of criticism generated in recent years as a result of

controversial mergers and has also created some difficulties in assessing the effectiveness of the Trade Practices Commission in the performance of its functions with regard to merger control.

Recommendation 10

The Committee recommends that the Trade Practices Commission extend the use of its public register for merger authorisations to cover all merger matters considered by the Trade Practices Commission, including merger matters considered under the consultative process, subject to appropriate confidentiality provisions.

The Committee also recommends that all merger matters considered by the Trade Practices Commission be placed on the public register within twelve months, unless the Trade Practices Commission declares that the matters should be excluded from the register for reasons of confidentiality or other sensitivity. In such cases, the matters should be placed on the public register once they cease to be confidential or sensitive. (paragraph 6.5.11)

Liaison with other regulatory agencies

The Committee views with concern claims by the Trade Practices Commission that requirements imposed by other legislation may overlap with section 50 of the *Trade Practices Act 1974* and impede the Trade Practices Commission's administration of those provisions.

Recommendation 11

The Committee recommends that the Attorney-General develop appropriate procedures to improve co-ordination between the Trade Practices Commission and other regulatory agencies which deal with various aspects of mergers.(paragraph 6.6.14)

A pro-active role for the Trade Practices Commission

The Committee considers that the Trade Practices Commission, as the regulatory agency responsible for the administration of competition policy in Australia, should not simply provide symbolic reassurance to the community, but should actively monitor and pursue all matters which impact on competition in Australia.

Recommendation 12

The Committee recommends that the Trade Practices Commission maintain a pro-active approach to the regulation of the merger and misuse of market power provisions of the *Trade Practices Act 1974*. (paragraph 6.7.4)

Resources of the Trade Practices Commission

The Committee considers that it would be desirable to implement cost recovery measures in relation to both the authorisation and consultative process for mergers.

Recommendation 13

The Committee recommends that cost recovery measures be introduced in relation to costs incurred in the administration and enforcement of the merger provisions of the *Trade Practices Act 1974*. (paragraph 6.8.10)

The Committee endorses the view that Australia must be prepared to make the essential investment in effective administration of competition law. If sufficient resources are not made available to the Trade Practices Commission, in order that it can pursue a pro-active role in the administration of Australian competition policy, then consideration may need to be given to strengthening the merger and misuse of market power provisions of the *Trade Practices Act 1974*.

Recommendation 14

Pursuant to Recommendation 12, the Committee recommends that the Trade Practices Commission be provided with sufficient resources to enable a pro-active approach to be maintained. (paragraph 6.8.16)

Other issues

Appropriate forum for resolution of trade practices matters

The Committee considers that the Federal Court's role in the resolution of matters under Part IV and related provisions of the *Trade Practices Act 1974* should be retained, but that there are a number of possible avenues for enhancing the effectiveness of the Court in this area.

Recommendation 15

The Committee recommends that the role of the Federal Court of Australia in the resolution of matters under Part IV and related provisions of the *Trade Practices Act 1974* be retained, but that the Attorney-General adopt procedures to enhance the effectiveness of the Court in this area. Options may include:

- **enabling the Court to refer economic issues to the Trade Practices Tribunal with an associated streamlining of the Tribunal's procedures;**

- **relaxation of the rules of evidence in relation to economic issues considered by the Court; and**

- **the use of assessors by the Court.** (paragraph 7.1.34)

Remedies

The Committee considers that the existing level and range of remedies for contraventions of sections 46 and 50 of the *Trade Practices Act 1974* are inadequate.

Recommendation 16

The Committee recommends that sub-section 76(1) of the *Trade Practices Act 1974* be amended to provide for a substantial increase in the existing maximum pecuniary penalty in relation to breaches of the merger and misuse of market power provisions of the Act.

The Committee also recommends that a range of other appropriate remedies be introduced for contraventions of Part IV of the *Trade Practices Act 1974* and that the Courts be provided with broader discretionary powers in relation to the range and level of penalties which may be imposed for Part IV contraventions. (paragraph 7.2.18)

Advance to GO!

The Committee recognises that both the merger and misuse of market power provisions of the Trade Practices Act 1974 are still in the developmental stage. It also acknowledges that the Act is required to operate in a dynamic and changing environment. Accordingly, the Committee considers that a further review of the merger and misuse of market power provisions of the Act will be necessary once sufficient time has elapsed for the implications of the recent developments in those provisions to be tested.

Recommendation 17

The Committee recommends that the Attorney-General initiate a further review of the merger and misuse of market power provisions of the *Trade Practices Act 1974* within 5 years. (paragraph 8.1.6)

CHAPTER 1

INTRODUCTION

1.1 *Conduct of the inquiry*

1.1.1 On 25 February 1988, the Acting Attorney-General, Senator the Hon. Michael Tate, requested that the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) conduct an inquiry into the merger control provisions of the *Trade Practices Act 1974* (the Act). The terms of reference for the inquiry are set out at page xiii.

1.1.2 The terms of reference for the inquiry were advertised in major Australian daily newspapers. The announcement of the inquiry attracted extensive media coverage which was maintained during its conduct.

1.1.3 Considerable interest in the inquiry was generated among a wide cross-section of the community. Submissions were received from numerous individuals and organisations. A list of all submissions received by the Committee is provided at Appendix A. A list of exhibits is provided at Appendix B.

1.1.4 Evidence was taken by the Committee at public hearings held in Canberra, Melbourne, Sydney and Brisbane during June, July, August and October 1988. A list of witnesses who appeared before the Committee at these hearings is provided at Appendix C.

1.1.5 As a result of the diversity of opinion and breadth of issues which emerged during the inquiry, the Committee decided to conduct a workshop on mergers, takeovers and monopolies (the workshop). The workshop, held in Canberra on 24 and 25 October 1988, provided those who made substantive submissions to the inquiry with the opportunity to test and challenge each other's views in an open forum. A list of workshop participants is provided at Appendix D.

1.1.6 The exchange of views at the workshop was of great benefit to the Committee in the formulation of its recommendations. The concept represents an original and creative mechanism to ensure greater public participation in the work of parliamentary committees.

1.1.7 The Committee also prepared, for the information of the wider community, a newsletter on the progress of the inquiry. The newsletter canvassed the relevant issues.

1.1.8 The submissions authorised for publication and the transcripts of evidence given at the public hearings are available from the House of Representatives Committee Office, the Parliamentary Library and the National Library of Australia.

1.2 *Public interest issues*

1.2.1 In conducting an inquiry into mergers, takeovers and monopolies, the Committee was mindful of the degree of public criticism which has been directed in recent years towards the level of takeover activity and industry concentration in Australia. The Committee was aware of particular public concern that takeovers such as Coles/Myer, News Ltd/Herald and Weekly Times and Ansett/East West may not have been in the public interest.

1.2.2 There have been numerous calls for greater consideration of the *public interest* in merger regulation. There is, however, a great diversity of views concerning the manner in which this should be achieved. There are some who believe that the present threshold in regulating mergers is too high, and that it would be in the public interest for the threshold to be lowered. Others believe that public interest considerations should be incorporated in the threshold test itself. There have been calls for greater consideration of the public interest in the process for authorising mergers, whilst others have called for reform of the enforcement policy of the Trade Practices Commission (TPC) so that public interest issues are given greater emphasis.

1.2.3 The above issues are addressed in various chapters of the report.

1.3 *Developments during the inquiry*

1.3.1 During the inquiry, there were a number of significant developments in relation to the merger and misuse of market power provisions of the Act. These developments, which are discussed in detail in the ensuing chapters of the report, include:

- the announcement of a modified approach to merger regulation by the TPC;
- the High Court decision in the case of *Queensland Wire Industries Pty Ltd* v *The Broken Hill Proprietary Company Ltd & Anor* (1989) ATPR 40-925, relevant to section 46 of the Act; and
- the decision in the case of *TPC* v *Australia Meat Holdings Pty Ltd & Ors* (1989) ATPR 40-932, relevant to section 50 of the Act.

1.3.2 These developments have strengthened the merger and misuse of market power provisions of the Act and have created a more favourable environment for enforcement of those provisions by the TPC. In the absence of these developments, more substantial changes than have been recommended in the report would have been required.

1.4 *The inquiry as a catalyst*

1.4.1 The inquiry has served a useful purpose in focussing public attention on a key area of economic policy. The level of public debate which has been generated on mergers and misuse of market power is unprecedented in the history of Australian competition policy.

1.4.2 The inquiry has brought about an increased awareness of public interest issues in the regulation of mergers and takeovers. The Committee considers that the inquiry, and the public attention it has attracted, has also acted as a catalyst for the more pro-active approach adopted by the TPC in recent times.

1.4.3 The Committee's recommendations are directed at ensuring a continued commitment to the consideration of public interest issues in the implementation of Australian trade practices legislation.

1.5 *Framework of the report*

1.5.1 The history of Australian trade practices legislation, dating from the *Australian Industries Preservation Act 1906* to the current Act, is summarised in Chapter 2. Also included in the Chapter is a brief outline of other existing legislation relevant to merger regulation.

1.5.2 Chapter 3 deals with economic issues relevant to mergers and takeovers. It includes discussion on the economic effects of mergers and takeovers as well as the available empirical evidence on these effects.

1.5.3 Section 46 of the Act is dealt with in Chapter 4. Recent interpretations of the misuse of market power provisions are examined and proposals for reform are considered.

1.5.4 The merger provisions contained in section 50 of the Act are examined in Chapter 5. The adequacy of the existing threshold test for mergers is discussed, along with suggestions for reform. The issues of pre-merger notification and private injunctive relief in merger cases are also dealt with in the Chapter.

1.5.5 The role and effectiveness of the TPC is considered in Chapter 6, with a particular emphasis on the TPC's enforcement policies.

1.5.6 Other issues relevant to sections 46 and 50 of the Act are detailed in Chapter 7. Consideration is given to the appropriate forum for resolution of matters under Part IV of the Act, and the adequacy of existing remedies.

1.5.7 Chapter 8 provides a conclusion to the report.

CHAPTER 2

HISTORY OF AUSTRALIAN TRADE PRACTICES LEGISLATION

2.1 *Australian Industries Preservation Act 1906*

2.1.1 The earliest Commonwealth legislation aimed at controlling restrictive trade practices was the *Australian Industries Preservation Act 1906*. The 1906 Act adopted the proscriptive approach of the *United States Sherman Act 1870*. Sections 4 and 7 of the 1906 Act relied on the Commonwealth's trade and commerce power (paragraph 51(i) of the Constitution) in prohibiting combinations and monopolies relating to trade or commerce with other countries or among the States. Sections 5 and 8 relied on the Commonwealth's corporations power (paragraph 51(xx) of the Constitution) in prohibiting combinations in restraint of trade or commerce by foreign corporations, or trading or financial corporations formed within the Commonwealth.

2.1.2 In *Huddart Parker & Co Pty Ltd* v *Moorehead* (1909) 8 CLR 330, sections 5 and 8 of the 1906 Act were held invalid as being beyond the Commonwealth's constitutional power.

2.1.3 The 1906 Act fell into disuse and was repealed by the *Trade Practices Act 1965*.

2.2 *Trade Practices Act 1965*

2.2.1 The *Trade Practices Act 1965* abandoned the proscriptive approach of the 1906 Act in favour of a prescriptive approach as adopted by the United Kingdom *Restrictive Trade Practices Act 1956*.

2.2.2 Apart from provisions relating to collusive tendering and bidding and, by amendment in 1971, resale price maintenance, the 1965 Act contained no absolute prohibitions. A range of agreements and practices was specified. The agreements and practices were examinable by the Commissioner of Trade Practices on public interest grounds. Section 7 attempted to relate the provisions of the 1965 Act to various constitutional powers of the Commonwealth.

2.2.3 In *Strickland* v *Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, the High Court held that section 7 was too widely cast, therefore rendering the 1965 Act invalid. However, the majority of the Court overruled the *Huddart Parker* case, holding that sections 5 and 8 of the 1906 Act were valid. A broad view of the corporations power of the Commonwealth was adopted. Regulation of the trading activities of trading corporations was held to be a valid exercise of the power, thereby removing the restriction imposed by *Huddart Parker* in relation to intra-State trading.

2.3 *Restrictive Trade Practices Act 1971*

2.3.1 Following the decision in the *Concrete Pipes* case, the Government repealed the 1965 Act and introduced the *Restrictive Trade Practices Act 1971*. While the new legislation contained provisions similar to those of the 1965 Act, it was based on the corporations power of the Commonwealth.

2.3.2 In October 1972, the *Restrictive Trade Practices Bill (No.2) 1972* and the *Monopolies Commission Bill 1972* were introduced into Parliament. However, these Bills lapsed following the change in government in December 1972.

2.4 *Trade Practices Act 1974*

2.4.1 The *Trade Practices Act 1974* came into force on 1 October 1974. It adopts the proscriptive approach of the 1906 Act by prohibiting a range of restrictive trade practices. It also covers a much wider field than previous trade practices legislation and is based primarily on the Commonwealth's corporations power.

2.4.2 The provisions dealing with restrictive trade practices are contained in Part IV of the Act. When enacted in 1974, these provisions contained prohibitions relating to contracts, arrangements or understandings in restraint of trade or commerce (section 45), monopolisation (section 46), exclusive dealing (section 47), resale price maintenance (section 48), price discrimination (section 49) and mergers (section 50).

2.4.3 The legislation established the TPC to replace the Commissioner of Trade Practices. The TPC has a wide range of functions, including enforcement and the provision of immunity from liability under the Act by the granting of authorisations in respect of certain otherwise prohibited conduct. Clearances were also available from the TPC in respect of certain conduct which fell below the prohibited thresholds in the Act.

2.4.4 The Act provides for the continued existence of the Trade Practices Tribunal (TPT).

2.5 *Amendments since 1974*

2.5.1 The Act was extensively amended in 1977 following the report of the Trade Practices Act Review Committee (the Swanson Committee) in 1976. In 1979, the Trade Practices Consultative Committee (the Blunt Committee) also recommended various amendments to the Act. Further major amendments to the Act were effected in 1986 following the release in 1984 of a Government Green Paper entitled 'The Trade Practices Act Proposals for Change' (1984 Green Paper).

2.5.2 The effect of these amendments on the misuse of market power and merger provisions of the Act is discussed in Chapters 4 and 5 of the report respectively.

2.6 *Other relevant legislation*

Companies (Acquisition of Shares) Act 1980

2.6.1 The *Companies (Acquisition of Shares) Act 1980 (CASA)* seeks to regulate takeovers in the interests of fairness and investor protection. It prohibits share acquisitions that would result in a person becoming entitled to more than 20 per cent of a company's shares unless one of the permitted methods of acquisition is adopted. These permitted methods are the making of a takeover offer, the making of a takeover announcement on the floor of the stock exchange or an acquisition in accordance with one of the specified exemptions. This includes an acquisition permitted by the National Companies and Securities Commission (NCSC). There are also related provisions in the Companies Act and Codes which require a person to make disclosures where shareholdings in a listed company exceed ten per cent.

Foreign Takeovers Act 1975

2.6.2 The *Foreign Takeovers Act 1975* provides for the notification and examination of certain acquisitions by foreign interests and empowers the Treasurer to make blocking orders.

Industry specific legislation

2.6.3 Commonwealth and State legislation regulate the level of ownership in certain industries, for example the Commonwealth's *Banks (Shareholdings) Act 1972* and *Broadcasting and Television Act 1942*.

CHAPTER 3

ECONOMIC ISSUES

3.1 *Background*

3.1.1 In assessing the adequacy and effectiveness of the merger and misuse of market power provisions of the Act, the Committee recognised that due consideration needs to be given to the economic issues relevant to Australian competition policy. The Committee is of the view that an analysis of the existing provisions of the Act must be based on an understanding of the prevailing economic climate under which those provisions are required to operate.

3.1.2 In recent years, considerable emphasis has been placed on the need for Australian industry to become more efficient and internationally competitive. The rationalisation and restructuring of Australian industry has been encouraged where this would result in improved efficiencies and increased competitiveness. The Trade Practices Act has formed an integral part of this strategy.

3.1.3 In 1977, when introducing amendments to the Act, the then Minister for Business and Consumer Affairs, the Hon. John Howard, MP, stated:

> There should be no unnecessary impediment, legislative or administrative, to the attainment of rationalisation of Australian industry. It is in Australia's best interest to achieve economies of scale and improved international competitiveness.[1]

3.1.4 Continuity in this approach was maintained when, in 1986, the Attorney-General, the Hon. Lionel Bowen, MP, upon introducing further amendments to the Act, stated:

> The Trade Practices Act plays an important role in ensuring that the maximum benefits are obtained through an efficient allocation of our national resources, as well as protecting the interests of the consuming public and reputable businesses. The Government attaches great importance to ensuring that the Act is effectively and appropriately achieving its dual aims of promoting efficiency through competition, and thereby ensuring goods are provided to the consumer at the cheapest price, and providing consumers and business people with an appropriate measure of protection against unscrupulous traders.[2]

3.1.5 The need to promote efficiency and international competitiveness in industry, while ensuring the protection of consumers, has clearly attracted bipartisan support.

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[1] Parliamentary Debates, House of Representatives 3 May 1977, p1478.
[2] Parliamentary Debates, House of Representatives 19 March 1986, p1626.

3.1.6 Since the 1986 amendments to the Act, there has been considerable public debate about the level of takeover activity and the degree of industry concentration in the Australian economy. Much of that debate has focused on the effects of mergers and takeovers.

3.2 *The economic effects of mergers and takeovers*

The basis of competition policy

3.2.1 Competition policy is based on the principle that competitive markets generally lead to a more effective allocation of resources.

3.2.2 The theoretical approach argues that perfectly competitive markets lead to more efficient and cost-effective production. Firms which are technically efficient and progressive reap the benefits of the competitive process, while those which are not are penalised. In perfectly competitive markets, resources both within and between industries are allocated to efficient firms which are able to meet demand effectively.

3.2.3 In practice, competition involves a number of complex processes through which market participants attempt to exploit their position and power in a market for their own advantage. Mergers and takeovers form an integral part of this process.

3.2.4 Firms in a market for goods or services can increase their control over that market by acquiring rival firms in that market (horizontal merger). Alternatively, firms can attempt to improve their position in a market by acquiring both the sources of production and supply (vertical merger).

3.2.5 However, mergers, by definition, decrease the number of competitors in a market and increase levels of concentration. Higher concentration in a market increases the potential for anti-competitive practices, although such practices are not always realised. The adverse consequences of a highly concentrated market can include:

- increased barriers to entry for new firms;
- collusive behaviour;
- technological backwardness and lack of innovation; and
- predatory or discriminatory pricing.

3.2.6 Competition policy is aimed at limiting undue concentration of economic power. It reflects the reality that effective competition is not always self evident, but often needs to be encouraged and, where necessary, protected.

3.2.7 A recent report by the Economic Planning Advisory Council (EPAC) noted that:

> ... it is undesirable that firms should be allowed to exercise market power in a self-perpetuating way in order to eliminate existing rivals or to erect barriers against would-be entrants to their market, or to restrict competition in adjoining (upstream or downstream) markets.[3]

3.2.8 EPAC argued that the best safeguard against such developments is an ever-present threat of competition.

3.2.9 At times, though, a balance needs to be achieved between competition policy and other economic or social objectives. Such objectives could include, for example, the need for increased industry efficiency and international competitiveness, or, from an alternative perspective, increased protection for consumers.

3.2.10 The public concerns which led to this inquiry suggest that the balance has shifted away from competition. Statistics which show that, in Australia, over 60 per cent of the output in 24 out of 52 manufacturing industries was in the hands of four or fewer firms in 1982-83,[4] indicate the basis of those concerns. Such statistics suggest a need to consider the merits or otherwise of mergers and takeovers.

The potential benefits of mergers and takeovers

3.2.11 The potential benefits of mergers and takeovers were noted in a number of submissions. The potential benefits include:

- economies of scale arising from the integration of productive processes;
- savings in formerly duplicated output (eg. route coverage), which can be particularly important in transport and other service industries;
- reductions in transaction costs associated with financial operations;
- asset rationalisation;
- higher returns from the introduction of superior management techniques (and new managers);
- risk reduction through diversification of operations; and
- capital formation as new entities are formed and new capital is raised for investment.

[3] Exhibit 21 p21.
[4] Evidence pS207.

3.2.12 All of the above can offer financial benefits to the proponents of a takeover and can also represent gains in efficiency for the economy as a whole. The Department of the Treasury (Treasury) emphasised the potential efficiency benefits when it noted that:

> ... trading in shares establishes a market for corporate control which can promote more efficient use of existing corporate assets by rewarding those who successfully identify opportunities for increasing profitability.[5]

3.2.13 Even the threat of a takeover is considered a useful mechanism for promoting efficiency. Treasury stated:

> The possibility (or threat) of takeovers provides a continuing stimulus to existing managements to maintain and improve profit performance and share prices. Discipline is thereby exerted on managements in directions which encourage economic efficiency...[6]

3.2.14 Coles Myer Limited (Coles Myer)[7] and the Business Council of Australia (BCA)[8] supported this view by indicating that the threat of takeover is an important stimulus to improved efficiency.

3.2.15 In several submissions, it was also noted that the efficiency benefits pertaining to mergers and takeovers are liable to enhance international competitiveness. BCA argued:

> ... rationalisation and development are a necessary, desirable and ongoing part of improving the competitiveness of Australian industry. It is virtually certain that continuing rationalisation of Australian industry will be necessary if we are to become more competitive.[9]

3.2.16 In a similar vein, the Department of Industry, Technology and Commerce (DITAC) noted that, in fostering greater industry concentration, mergers and takeovers can often allow local producers to become larger and attain cost-reducing scale of production. This enables them to produce for export and to replace imports.[10]

3.2.17 DITAC provided evidence of several Australian industries in which mergers and takeovers have produced benefits. It noted that the whitegoods industry, which underwent a process of major rationalisation involving a series of mergers and takeovers in the late 1970's and during the 1980's, has increased its productivity, as measured by real value added per employee, by more than 100 per cent in the last

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[5] Evidence pS439.
[6] Evidence pS440.
[7] Evidence pS268-269.
[8] Evidence pS507.
[9] Evidence pS506.
[10] Evidence pS135.

decade.[11] DITAC also considers that the process of rationalisation in the engineering industry will lead to a leaner, more competitive industry sector. It noted that investment in plant and machinery is increasing and exports are rising.[12]

The potential costs of mergers and takeovers

3.2.18 A number of potential costs arising from mergers and takeovers were also noted in submissions. The potential costs include:

- increased corporate debt, arising from the debt-financing of takeovers, with subsequent tax revenue implications and foreign debt consequences (if overseas borrowings are used to finance takeovers);
- detrimental effects on management, including emphasis on short term profits at the expense of long term planning;
- diversion of funds from investment;
- lessening of competition in a market, with the potential for collusion, market dominance and monopoly;
- concentration of industry which is not in the public interest, eg. media; and
- detrimental social consequences, including loss of employment.

3.2.19 DITAC stated:

> ... although mergers and takeovers can be an effective vehicle for the rationalisation of industry, it is not possible to conclude that all these transactions produce desirable results. Transactions which fail to do so effect a relative waste of investment resources. Such waste would tend to inhibit potential development of the manufacturing and service sectors.[13]

3.2.20 The Australian Consumers' Association (ACA) highlighted concerns about the effects of mergers and takeovers on consumers. ACA submitted that the evidence of gains to consumers as a result of recent mergers and takeovers in Australia is very thin. It argued that the increased clout arising from mergers is leading to many uncompetitive practices, many of which would not contravene the anti-competitive practices outlawed by the Act, but which have the same impact. ACA noted that some of the practices are beginning to emerge in the food and retailing industries.[14]

3.2.21 Treasury also recognised that there is potential for mergers and takeovers to have a detrimental effect on consumer interests. It commented:

[11] Evidence pS138.
[12] Evidence pS139.
[13] Evidence pS141.
[14] Evidence pS227.

> Where takeovers or mergers result in reductions in competition ... they may allow prices to be raised at the expense of the consumer so that the private gains to the companies will not represent improvements in efficiency to the economy as a whole.[15]

3.2.22 The Australian Federation of Consumer Organisations (AFCO) and Professor Mills (University of Sydney) emphasised the difficulties which could arise if a merger left two well-matched competitors in a market. Mills referred to the possibility of tacit or explicit collusion among sellers which may occur even when no one seller can be said to be dominant.[16] AFCO considers that a market consisting of two evenly matched competitors is likely to result in significant disadvantages for consumers.[17]

Research on the benefits and costs of mergers and takeovers

3.2.23 During the inquiry, the Committee had the benefit of considering two Australian research studies on takeovers.

3.2.24 In *The Determinants and Effects of Corporate Takeovers in Australia, 1970-81*, by McDougall and Round, accounting data is used to conclude that:

- a strategy of corporate acquisition resulted in a deterioration in the performance of merging firms;
- shareholders in target firms benefited most from corporate takeovers;
- acquiring firms in Australia had superior performance characteristics to their overseas counterparts in the pre-takeover period, but emerged from the takeover experience in a poorer state than did the acquiring firm overseas; and
- takeovers, on balance, appear to have been caused by so-called managerial motives, or by a desire to develop or enhance market power.[18]

3.2.25 In contrast, in *Australian Takeovers: The Evidence 1972-1985*, by Bishop, Dodd and Officer, share market data is used to conclude that:

- large increases in shareholders' wealth are generally associated with takeovers;
- takeovers, on average, lead to more profitable uses of company assets and, as such, play a vital role in the capital allocation process; and
- the clear economic benefits of takeovers suggest that reforms should enhance the incentives for firms to engage in takeover activity, not reduce them.[19]

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[15] Evidence pS441.
[16] Evidence pS240.
[17] Evidence pS422.
[18] Exhibit 4 passim.
[19] Exhibit 5 passim.

3.2.26 The differing conclusions in the two Australian studies may be due to the alternative sources of data relied upon in each study. However, these differences may also reflect varied corporate strategies with regard to takeover activity. In one submission, it was suggested that while diversification was once considered to be an essential factor in attainment of profitability, current corporate attitudes indicate an increasing emphasis on consolidation in specialised areas of activity.[20]

3.2.27 Evidence by Messrs. Chapman and Junor (University of NSW) suggested that international studies also reach varying conclusions in relation to the effects of mergers and takeovers. Chapman and Junor emphasised the difference of opinion between the so-called financial economists and industrial economists in the United States. They noted that financial economists have used share market data to conclude that if the abnormal increase in the value of shares of the acquired firm is greater than any decline in the price of the acquiring firm, then the takeover is value increasing and, subsequently, efficiency increasing. In contrast, industrial economists have used accounting data to demonstrate that the result of a takeover is very often a less efficient firm than the two firms which had been operating prior to takeover.[21]

3.2.28 It should be noted that the conclusions which can be drawn from share market data can be influenced by the state of the market at the time the data is collected. Variance in results can be expected between statistics gathered in a period of heightened share market activity (a so-called *bull market*) and data collected in times of reduced trading, say in a post-October 1987 crash context.

Conclusions

3.2.29 The existing evidence on mergers and takeovers is inconclusive. While mergers and takeovers perform an important role in promoting efficiency in the economy and enhancing international competitiveness, there are also costs involved. Scrutiny of the evidence suggests that there is no steadfast rule as to whether a particular merger or takeover will achieve the benefits which are desired, or indeed result in unacceptable costs. Rather, it is clear that the outcome of any given merger or takeover will be influenced by the circumstances surrounding the acquisition.

3.2.30 Much of the public debate about the level of merger activity in Australia has focused on the motives for specific mergers and takeovers. While there can be a range of motives for undertaking an acquisition, there are considerable difficulties in determining the precise motives in any given case. The Committee considers that the acceptability of a particular merger or takeover should not be judged on the basis of the motives for which it is undertaken, but rather on whether its outcome will result in a breach of the regulations. On the basis of these considerations, the Committee is of the view that competition policy should neither actively encourage nor discourage mergers or takeovers, but should, as a primary function, ensure that unacceptable levels of dominance and misuse of market power are prevented.

[20] Evidence pS1153.
[21] Evidence pp765,766.

3.2.31 In assessing the costs and benefits of mergers and takeovers, it is acknowledged that there are some concerns about the effect of the takeover process on specific areas within the economy, such as effect on taxation revenue and foreign debt. The Committee considers that if there are difficulties in such areas, it would be more appropriate to make adjustments to policies applying in those areas, rather than take any action to restrict the merger or takeover process. For example, reforms to the taxation system have reduced the bias towards debt-financing of takeovers. That bias was cited as a cost of takeovers during the inquiry.

3.3 *The economics of competition*

The potential conflict between efficiency and competition

3.3.1 The premise upon which the amendments to the Act were introduced in 1977 and 1986 was to encourage industry rationalisation and restructuring where this would result in increased efficiency and international competitiveness. At issue during the inquiry was the extent to which that premise is still valid, given the degree of concentration which has occurred in Australian industry in recent years.

3.3.2 Central to this issue is the potential conflict between efficiency and competition. While on the one hand industry rationalisation can contribute to the attainment of efficiencies, on the other hand the increased concentration in industry which can result becomes a potential threat to effective competition in a market. The merger and misuse of market power provisions of the Act have been directed at maintaining the balance between the attainment of efficiency objectives and the protection of competition. However, public concern about the levels of concentration in industry has focused the debate on whether the existing balance is appropriate.

3.3.3 The TPC, in its Annual Report for 1987-88, stated:

> It is evident that high concentration is necessary in some Australian industries to obtain the efficiencies offered by scale economies and to match the technical efficiency in production (improved products, processes and cost structures) of foreign competitors. However, this is not necessarily so for all industries and should not become an article of blind faith. It is important not to lose sight of the much broader objectives underlying measures taken to promote production efficiencies, vigorous domestic competition and business deregulation.[22]

3.3.4 In several submissions, emphasis was placed on the competition side of the equation. Consumer groups in particular argued that the growing level of concentration in Australian industry has increased the potential for firms to engage

[22] Exhibit 24 p1.

in anti-competitive behaviour. AFCO considers that concentration increases the opportunity for collusion. [23] ACA submitted that concentration allows corporations to reduce or manipulate market price.[24]

3.3.5 ACA argued that in recent years the prime goal of maintenance of competition, as espoused by the TPC, has been subordinated to that of pursuing perceived gains in efficiency. It believes that this position should be reversed. ACA stated:

> Efficiency gain should only be a ground for an exception to the maintenance of competition rules when the proponent can demonstrate substantial and lasting net benefits to the consumer as a result.[25]

3.3.6 In other submissions though, it was clearly emphasised that competition policy should continue to reflect the need to achieve economic efficiency. Treasury indicated that policies to maintain competition in product markets are based primarily on the contribution which competition makes to efficiency. Treasury argued that competition is not an end in its own right, but rather a means to an end. It stated:

> The pursuit of competition cannot ... be an absolute objective but should be assessed against the potential benefits of larger economic units. A small domestic market (as in Australia) may offer scope for only one or two efficient producers operating on a world scale; in that situation efficiency considerations may require a relatively high degree of concentration. Regulation should not be aimed at avoiding small numbers of producers simply because the competitive ideal suggests that larger numbers should be involved.[26]

3.3.7 BCA emphasised that continuing rationalisation of Australian industry will be necessary if it is to become more competitive. It considers that 'the need for rationalisation and efficiency in industry and commerce is stronger than ever before'.[27]

3.3.8 As for the potential effects of a growing concentration in industry, both Treasury[28] and BCA[29] consider that the increased openness of the Australian economy and the integration of many Australian markets into world markets is likely to promote competition, even in industries with few sellers on the domestic market. BCA submitted that concentration measured by the share of home production is not a guide to whether there is competition. Rather, it noted the importance of imports

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[23] Exhibit 25 p26.
[24] Evidence pS226.
[25] Evidence pS203.
[26] Evidence pS446.
[27] Evidence pS506.
[28] Evidence pS446.
[29] Evidence pS508.

in providing competition to domestic producers. BCA also considers that measures of concentration based on actual market shares can be misleading, as the potential threat of competition may be enough to produce competitive behaviour.

3.3.9 It should also be noted that changes in levels of concentration will not only be due to mergers and takeovers. Other factors which can influence market structures include technological changes and underlying limitations on corporate growth, such as the internal problems of maintaining managerial control and efficiency which tend to develop in large organisations.

Conclusions

3.3.10 Australian competition policy must reflect economic realities both at the domestic and international levels. Since the 1977 amendments to the Act, recognition has continuously been given to the need for Australian industry to become more efficient and internationally competitive.

3.3.11 The Committee considers that the need for improved efficiency and increased international competitiveness has not diminished in the last decade. Indeed, the contrary is the case. In this regard, it notes the comments in the 1988-89 Budget Statement No.2 that, while a number of policy reforms have been implemented in recent years which are likely to result in improved efficiency, the recenct nature of some of these changes, together with the relative abundance of the remaining inefficiencies suggest further reforms will be necessary to improve the efficiency of the Australian economy.[30]

3.3.12 The Committee also acknowledges the need for increased efficiency, given the rapidity with which structural reforms are spreading throughout many parts of the world.[31]

3.3.13 Accordingly, the Committee does not see any reason for altering one of the basic tenets which has governed Australian competition policy since the 1977 amendments to the Act, ie. that there should be no impediment to the attainment of efficiency and international competitiveness through industry rationalisation and restructuring.

3.3.14 Nevertheless, the Committee accepts that there are concerns about increasing levels of concentration in industry, and the effect this has on competition and, subsequently, on consumer welfare. In this regard, the Committee emphasises the importance of the Act in ensuring that an appropriate balance is maintained between the attainment of efficiency objectives and the protection of competition. The Committee has given due regard to that balance in framing its recommendations in the report.

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[30] 'The Budget and the Economy', Budget Statements 1988-89, AGPS Canberra 1988, p48.

[31] As noted in the 1987 Report on *Structural Adjustment and Economic Performance* by the Organisation for Economic Cooperation and Development.

3.3.15 There was, however, a notable lack of definitive empirical evidence in support of the arguments about the economic rationale behind the existing merger and misuse of market power provisions of the Act. This has created difficulties for the Committee in fully testing the various economic arguments relevant to competition policy in Australia.

3.4 *The need for improved economic data on mergers and takeovers*

3.4.1 A number of individuals and organisations commented on the level and nature of empirical evidence currently available in relation to mergers and takeovers.

3.4.2 The TPC is unaware of any empirical studies of any substance which would allow a judgement to be made as to whether the underlying rationale behind competition policy in recent years has translated into what was intended. The TPC noted that, in the context of mergers, the only research which has been done has been in relation to the efficiency of the share market and to the benefits for shareholders resulting from takeovers.[32]

3.4.3 The Attorney General's Department (Attorney-General's) indicated that lack of empirical evidence was also a problem during the consideration of proposals for change in the 1984 Green Paper. It stated:

> We had to reach a subjective decision on the basis that there was not enough data around to be confident of.[33]

3.4.4 Chapman and Junor advised that, while line-of-business data, which provide information about market shares of sales of companies in different lines of business, are available in the United States, such data are not available in Australia. They consider that this makes it difficult to monitor how market shares of sales in a particular industry are changing and, therefore, to anticipate the impact of a merger or other industrial activity on that market structure.[34]

3.4.5 A number of broad proposals for improving the availability of economic data on mergers and takeovers were discussed at the workshop. These were that:

- empirical data be collected by the TPC;
- the TPC monitor and regularly publish information on mergers, takeovers, industry concentration ratios and industry ownership; and
- the Australian Bureau of Statistics (ABS) make information publicly available to enable compilation of data relevant to an economic analysis of the effect of mergers and takeovers.

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[32] Evidence p122.
[33] Evidence p1007.
[34] Evidence p769.

3.4.6 Consideration was also given to a specific proposal contained in a submission by Chapman and Junor. They suggested that the ABS construct a minimal set of line-of-business data from existing ABS statistics, particularly from the Economic and Manufacturing Censuses, covering profits, sales, change in stocks, and some selected expenses. Under the proposal, the TPC would have access to data at the firm level and would use it in its assessment of mergers and takeovers. Chapman and Junor also consider that outside researchers might be permitted to undertake econometric investigations using some of the data.[35]

3.4.7 The Law Council of Australia (LCA), former TPC Chairman Mr McComas and ACA support the suggestion that more data on mergers and takeovers be made available. They favour the ABS as the agency to collect such data.[36] LCA suggested that the collection of data should be under the auspices of the ABS unless the TPC is given adequate additional resources. McComas noted that the TPC has no general power to require information on concentration and ownership, except in respect of possible contraventions of section 50 or other sections of Part IV of the Act.

3.4.8 At the workshop, there was broad support for ABS involvement in providing more data on mergers and takeovers and for the Chapman and Junor proposal. However, the TPC, Treasury, Coles Myer and the Confederation of Australian Industry (CAI) questioned whether such data would necessarily improve the quality of economic analysis on mergers and takeovers.[37] Coles Myer also expressed concern that it would require an additional effort from business. Chapman and Junor pointed out, though, that the extra effort would be required from ABS programmers, as it was simply a matter of aggregating the existing data differently, and that no additional data would need to be collected from industry or business.[38]

Conclusions

3.4.9 The Committee is concerned at the lack of empirical evidence available in relation to mergers and takeovers. While economic arguments are being used either in support of the existing framework of competition policy or to advocate reforms, the lack of definitive empirical evidence creates difficulties in assessing the adequacy of that policy or the appropriateness of any reforms. The lack of data on industry concentration rates and ownership levels precludes a precise assessment of Australia's market structure.

3.4.10 The Committee is pleased to note that, at the time of reporting, the TPC is supporting a study by the Bureau of Industry Economics on the efficiency benefits of mergers and takeovers. This study will go some way towards addressing the concerns about the availability of empirical evidence on mergers and takeovers. The Committee awaits the outcome of the study with interest.

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[35] Evidence pp S945, 946.
[36] Evidence pp S937, S955, S1030.
[37] Exhibit 25 pp67, 114, 115, 119.
[38] Exhibit 25 p123.

3.4.11 However, a single study will not be sufficient to satisfy the demand for increased economic data and should be complemented by a regular source of information which can be made available to the TPC and other interested parties. While there may be limits to the usefulness of some data, this should not preclude more data being made available.

3.4.12 Accordingly, the Committee supports the proposal suggested by Chapman and Junor. It is noted, though, that there are concerns about whether the proposal would require additional effort from industry and business. The Committee stresses that the information which is made available should be compiled from existing data already provided to the ABS and that at all times commercial confidentiality should be maintained.

Recommendation 1

The Committee recommends that the Trade Practices Commission, in conjunction with the Australian Bureau of Statistics, establish from existing sources of information a minimal set of line-of-business data for use by the Trade Practices Commission and, where possible, private researchers.

The Committee also recommends that the Australian Bureau of Statistics use existing sources of information to regularly update and publish industry concentration statistics.

CHAPTER 4

SECTION 46 : MISUSE OF MARKET POWER

4.1 *Development of the section*

4.1.1 From 1974 to 1977, the monopolisation provisions contained in section 46 of the Act prohibited a corporation in a position to substantially control a market from taking advantage of that market power to:

- eliminate or substantially damage a competitor in that or another market;
- prevent the entry of a person into that or another market; or
- deter or prevent competitive behaviour in that or another market.

4.1.2 In 1976, the Swanson Committee recommended that it be made clear that, to be prohibited, the conduct should be undertaken with the *purpose* of achieving any of the effects set out in the section. The 1977 amendments to the Act incorporated this recommendation.

4.1.3 In 1979, the Blunt Committee recommended that section 46 should have a lower threshold of *substantial degree of market power* so that it would have application to a wider number of corporations. The same proposal was canvassed in the 1984 Green Paper.

4.1.4 The lower threshold for section 46 was introduced in the 1986 amendments to the Act, which extensively strengthened the provision. The 1986 amendments also inserted sub-section 46(7) into the Act, which enables the Court to infer the required predatory purpose from conduct or other relevant circumstances. As stated in the explanatory memorandum to the amendments, the section was changed from monopolisation to misuse of market power to more accurately characterise the kind of conduct to which the section is directed.

4.1.5 It was intended, through these amendments, that section 46 would be applicable to the conduct of a wider range of corporations. It was also intended that it would no longer apply only to corporations in an absolute or near monopoly situation, but also to major firms in a market which had an oligopolistic structure and, in some cases, to a leading firm in a less concentrated market.

4.2 *Current provisions*

4.2.1 sub-section 46(1) of the Act provides that:

> a corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;

(b) preventing the entry of a person into that or any other market; or

(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

4.2.2 In order that a breach of section 46 can be established, several elements are required. First, a corporation must possess a substantial degree of market power. Secondly, a corporation must *take advantage* of its substantial degree of market power. Mere possession of the market power is not sufficient to substantiate a breach. Thirdly, there is the requirement that a corporation must take advantage of this power for one of the proscribed purposes.

4.3 *Interpretation of the misuse of market power provisions*

Recent experience

4.3.1 The misuse of market power provisions of section 46 have been subject to varying judicial interpretation since they came into force.

4.3.2 Recent case law has recognised the lower threshold test of a *substantial degree of power* inserted by the 1986 amendments. In the case of *Mark Lyons Pty Ltd* v *Bursill Sportsgear Pty Ltd* (1987) ATPR 40-809, for example, a sole distributor of a brand of ski boots was held to have a substantial degree of power in the Australian ski boot market, even though the brand of ski boots in question only accounted for about one third of ski boot sales.

4.3.3 In contrast, it has been far more difficult to prove that a corporation has taken advantage of market power. Concerns have been raised about the narrow interpretation given to section 46 in cases such as *Warman International & Ors* v *Envirotech Australia Pty Ltd & Ors* (1986) ATPR 40-714 and *Williams & Anor* v *Papersave Pty Ltd* (1987) ATPR 40-818.

4.3.4 In the *Warman* case, Wilcox J. decided that proceedings which were instituted to enforce copyright could not be characterised as taking advantage of market power, as the applicant was taking advantage of its legal rights. It was held that to exercise an extraneous legal right in good faith was to take advantage of that right and not of market power, even though the effect may be to lessen, or even eliminate, competition.

4.3.5 In the *Papersave* case, Sheppard J. held that a company which had 60 per cent of the Sydney waste computer paper market and which attempted to acquire the lease of certain premises after discovering that a potential competitor was about to acquire the same lease, was not taking advantage of its market power, but of

information gained about the intentions of the applicant. Whilst Sheppard J. found that the respondent company had a substantial degree of power in the relevant market and did have the proscribed purposes set out in section 46 for its actions, he held that the applicant had not demonstrated that the respondent was taking advantage of its market power in order to achieve these purposes. The decision was upheld on appeal to the Full Federal Court.

4.3.6 These cases indicated possible limits to the operation of section 46. They are apparent authority for the notion that there is no contravention of section 46 if the conduct complained of can be categorised as taking advantage of a particular right, such as a legal or contractual right, or could have been performed regardless of market power. At issue is whether such conduct was intended to be or should be permitted under the Act. Also at issue is how to differentiate between legitimate business conduct and predatory behaviour. The non-specific nature of section 46 reflects the difficulty in defining precisely the nature of predatory purpose.

The *Queensland Wire Industries* case

4.3.7 The case of *Queensland Wire Industries Pty Ltd* v *The Broken Hill Proprietary Company Ltd & Anor* (1987) ATPR 40-810, constitutes an important development in the case law relevant to the effectiveness of section 46.

4.3.8 In this case, the plaintiff, Queensland Wire Industries Pty Ltd (QWI), instituted proceedings under section 46 of the Act against the Broken Hill Proprietary Company Limited (BHP) and a wholly-owned subsidiary of BHP. QWI alleged that BHP, the dominant Australian steel company, had misused its market power in that it had wrongfully withheld the wherewithal to make steel fence posts (the *Y-bar*) from QWI for the purpose of preserving BHP's monopoly in them.

4.3.9 Two significant points emerged from the decision. First, Pincus J. at first instance held that the case law showed the meaning of take advantage to be pejorative and not neutral, ie. that there is no taking advantage unless there is a misuse of power. His Honour found that, even though BHP had market dominance in the Y-bar required to manufacture star picket fencing, and refused to supply QWI with that Y-bar in order to prevent QWI from competing with BHP in the market for star picket fencing, BHP was not taking advantage of its market power within the meaning of section 46, as there was no reprehensible conduct involved. In the view of Pincus J., there was nothing predatory or unfair about BHP declining to sell a product it had not previously sold or about BHP wanting to sell only the completed fence posts rather than the material from which it makes them. His Honour stated:

> ... BHP has not in this case used its monopoly in a way which would ordinarily be regarded as reprehensible; in particular, its refusal to supply a competitor with Y-bar to enable the latter to compete more effectively would not, I think, be regarded in commerce as deserving criticism.[39]

4.3.10 Secondly, Pincus J. rejected the line of reasoning in cases such as *Warman*, ie. that there is no taking advantage of market power if the conduct could have taken place regardless of market power. Instead, His Honour found that a corporation has market power not only because it has a certain percentage of the market, but also because of its assets, technical knowledge, raw materials or capital. These assets include, in his view, contractual rights. Pincus J. stated:

> If one were to exclude from the concept of taking advantage of market power the use of rights which are available under the general law, there would not be much left of the section.[40]

4.3.11 QWI appealed to the Full Federal Court. In its appeal, QWI raised the essential facility doctrine, as applied in the United States of America. The doctrine imposes upon a firm controlling an essential facility - that is, a facility that cannot be reasonably duplicated and to which access is necessary if one wishes to compete - the obligation to make that facility available to competitors on non-discriminatory terms.

4.3.12 QWI submitted that whilst as a general rule a monopolist may deal or refuse to deal with whom it pleases, this is not so where it controls an essential facility. QWI argued that if a monopolist does control such a facility, it is under a duty to give access to that facility to competitors. QWI likened BHP's control of the Y-bar needed to make star picket fencing to control of an essential facility.

4.3.13 The appeal was dismissed on the ground that the findings of fact by Pincus J. indicated that there never had been a market for the product sought by QWI so as to attract the operation of section 46. Pincus J. had found that BHP was the sole domestic supplier of the Y-bar, it had refused to supply the Y-bar to QWI, and that BHP's policy was, in essence, that it did not distribute the Y-bar domestically, but used the material itself.

4.3.14 Whilst the Full Court referred to the finding of Pincus J., ie. that there needs to be a pejorative element in the conduct complained of before a taking advantage of market power can be established, it did not express any view on this point.

4.3.15 The Full Court, however, rejected the essential facility doctrine on the grounds that:

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[39] (1987) ATPR 40-810, p48,821.
[40] (1987) ATPR 40-810, p42,817.

- it is not readily accommodated to the terms of section 46;
- it evolved as a gloss upon the succinct terms of the United States Sherman Act;
- the Court had some difficulty, at least in cases where a monopoly of electric power, transport, communications or some other essential service is not involved, in seeing the limit of the concept of essential facility;
- in applying the doctrine, there would appear to be a need to consider the impact upon it of another doctrine, i.e. that of upholding conduct engaged in for a legitimate business purpose; and
- there was force in BHP's submission that the essential facility cases in the United States involved discriminatory refusals to deal rather than, as in the *Queensland Wire Industries* case, a vertically integrated monopolist which had refused to deal at all in an intermediate product and committed it solely to its own manufacturing operations.

4.3.16 QWI subsequently appealed to the High Court, which handed down its decision on 8 February 1989.

4.4 *Evidence prior to High Court decision in the Queensland Wire Industries case*

4.4.1 During the inquiry, a considerable amount of evidence relevant to section 46 of the Act was provided before the High Court decision was known. Given the extent of that evidence, a brief analysis is warranted before considering the decision and its implications for the future operation of section 46.

Retention of the existing test

4.4.2 Prior to the High Court decision in the *Queensland Wire Industries* case, retention of section 46 in its existing form was recommended in a significant number of submissions, including those from LCA, McComas, Coles Myer, BCA, CAI, the TPC and Attorney-General's.[41]

4.4.3 It was noted that the 1986 amendments to section 46 have given the section a much wider reach. It was argued that further experience of its effectiveness was required before any additional amendments should be considered. Coles Myer summed up these arguments when it submitted:

> the Committee should be wary before it seeks to adjust this section before the Courts have had an adequate period of time to enable its effect to be clarified. The changes wrought in 1986 were wideranging and extensive. They evoked concepts unfamiliar to both lawyers and businessmen alike and it is submitted

[41] Evidence ppS189, S260, S291, S515, S559, S727 and Exhibit 25 p136.

that it is undesirable for further changes to be proposed before the community has had an opportunity to understand and come to grips with the present provisions.[42]

4.4.4 In particular, it was emphasised that the outcome of the High Court decision in the *Queensland Wire Industries* case should be known before any amendments to section 46 are recommended. There was an expectation among those who advocated retention of the existing provisions that the High Court decision would provide clarification of the section. However, the TPC and LCA noted that, if the decision did not provide the clarification which was hoped for, amendments to section 46 may need to be considered.[43]

Proposals for reform

4.4.5 In contrast to those who supported the status quo, it was argued in a number of submissions that the narrow interpretation of section 46 adopted in cases such as *Warman* and *Papersave* indicated that there are problems with the drafting of the section. It was put to the Committee that section 46, as currently drafted, enables a corporation to engage in anti-competitive conduct which breaches the proscribed purposes provision of the section, as long as the conduct itself does not fall within the narrow interpretation of the concept of taking advantage of market power. It was also argued that the existing provisions in section 46 enable a corporation to take advantage of the very element which gives it its market power in order to eliminate competition without being in contravention of the section.

4.4.6 Academics from various Australian tertiary institutions considered that additional legislative direction was required in relation to section 46.[44] This view was supported by ACA, which argued that 'a strengthening, and vigorous enforcement, of section 46 is essential, given the high level of concentration of control in Australian industry'.[45]

4.4.7 A number of proposals for reform were suggested, including:

- replacing the phrase *take advantage* with the term *misuse* and providing a test for misuse which would consider effect on competitors and potential competitors, effect on consumers and whether there was good business justification for the conduct;[46]
- extending the meaning of *take advantage* either to include the use of contractual and property rights or to emphasise the pejorative element;
- incorporating an inclusory list of prohibitions along the lines of the Canadian Competition Act;[47] and

[42] Evidence pS291.
[43] Evidence pS727 and p846.
[44] Evidence ppS8, pS64.
[45] Evidence pS933.
[46] Evidence pS9.
[47] Evidence pS9.

- amending section 46 to prevent a corporation which has a substantial degree of power in a market from engaging in conduct which has the purpose of substantially lessening competition in that or any other market.[48]

4.4.8 The proposals generated considerable debate, especially at the workshop. Particular attention was directed to the suggestion of introducing a substantial lessening of competition test.

4.4.9 Also considered at the workshop were the potential difficulties raised by the Full Federal Court's definition of market in the *Queensland Wire Industries* case.

4.4.10 Each of the proposals drew criticism from the proponents of the existing section 46. It was argued that the proposals would not contribute to the achievement of any greater certainty or improvement in the law. There was particular concern that many of the proposals, especially the substantial lessening of competition test, could catch legitimate business conduct.

Proposals from the Trade Practices Commission

4.4.11 To encourage debate on the issue, the TPC provided a further submission detailing various options in relation to section 46. In that submission, though, the TPC stated that the proposals did not alter its original position in favour of retaining section 46 in its existing form.

4.4.12 In its further submission, the TPC suggested the following options:

- replace the existing section 46 of the Act - together with sections 47, 49 and 93 - with a provision which prohibits a corporation with a substantial degree of power in a market from engaging in conduct which has the purpose or has or is likely to have the effect of lessening competition in any market;
- extend the unconscionable conduct provisions in section 52A of the Act to commercial situations;
- prohibit a corporation with a substantial degree of power in a market from failing to allow reasonable access to any good/service/facility considered to be an essential facility; and
- prohibit a corporation from failing to allow reasonable access to spare parts, manuals, circuit diagrams or other items essential to the repair of goods supplied by the corporation.[49]

4.4.13 The Committee received a number of submissions directed specifically at the TPC proposals. Among those submissions there was limited support for the suggestions.

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[48] Evidence pS64.
[49] Evidence pS973-5.

4.4.14 ACA was in favour of the proposals and commented that the essential consideration is protection of competition. ACA supported the introduction of an essential facility provision in relation to section 46 and saw a particular need for the extension of the unconscionable conduct provisions so that they would apply to the supply of goods and services to all consumers and not just domestic consumers. ACA argued that the concentration of ownership in Australia has led to small business enterprises often being the victims of unconscionable behaviour by large enterprises, against which the Act affords little protection.[50]

4.4.15 Mr Corones (Queensland University of Technology) was in favour of amending section 46 but opposed the abolition of sections 47 and 49. He argued that, if section 46 was amended along the lines suggested, the courts should be given as much guidance as possible on how to measure the effect of market conduct on individual competitors and competition in a market. He also opposed the extension of section 52A, because of the uncertainty it would create for business, but supported the introduction of an essential facility provision. Corones considers, however, that to allay concerns about such a provision deterring investment, it might be appropriate to permit the owner of an essential facility a period of exclusive use of the facility, as occurs in relation to patent protection.[51]

4.4.16 In a clear majority of submissions on the TPC proposals, though, there was considerable opposition to the suggestions. The majority view is reflected by LCA, which stated:

> The proposals would inhibit normal competitive conduct, produce uncertainty and drafting and interpretation difficulties and do not appear to be adequately thought out.[52]

4.4.17 It was argued that no persuasive reasons have been put forward for repealing sections 47 and 49 of the Act. BCA considers that it would be a retrograde step to throw out those provisions, with the accumulated experience and understanding which goes with them.[53] McComas believes that to combine into one section the proscriptions of sections 46, 47 and 49 would be to weaken the exclusive dealing and price discrimination provisions of the Act for no commensurate gain in curbing misuse of market power.[54]

4.4.18 There was also considerable concern that an amendment to section 46 along the lines suggested by the TPC could have a substantial effect on competitive behaviour. BCA, Coles Myer, McComas, LCA and CAI all argued that the proposed amendment makes no attempt to distinguish between unacceptable anti-competitive conduct and acceptable pro-competitive conduct.[55] McComas noted:

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[50] Evidence pS1176.
[51] Evidence pS1084.
[52] Evidence pS1112.
[53] Evidence pS1059.
[54] Evidence pS1094.
[55] Evidence ppS1060, S1077, S1101, S1115 and S1123.

> In essence a section such as is suggested could well have such an effect that corporations possessing substantial market power would not be able to offer vigorous competition lest they be subject to an allegation of unlawful conduct...[56]

4.4.19 The extension of the unconscionable conduct provisions in section 52A of the Act to commercial situations was also strongly opposed in a majority of submissions. The arguments put forward against the proposal were that:

- it would introduce considerable uncertainty in relation to business transactions;
- the courts have shown themselves to be ready to apply the principles of fairness to declare contracts unenforceable because of their harsh and unconscionable characteristics, and there would thus seem to be no reason why legislation should be amended to cover something which is already capable of having practical effect;
- in the normal course, business undertakings should be left to settle their disputes by appropriate procedures and the TPC should not become involved in situations properly left to civil proceedings as between the parties; and
- it is confusing two different concepts to suggest that a prohibition of unconscionable conduct will automatically catch abuses of market power.

4.4.20 It was further noted that the proposal for extension of the unconscionable conduct provisions was included in the 1984 Green Paper but was abandoned after considerable opposition to it.

4.4.21 In addition, a significant number of organisations and individuals rejected the proposal to incorporate in the Act an essential facility provision similar to the United States doctrine. Arguments put forward against such a provision were that:

- there are difficulties in determining the scope of the term *essential facility*, as there could be various interpretations of what constitutes an essential facility and what constitutes reasonable access;
- there should be no arbitrary or pre-emptive interference with the basic right of a corporation to choose the persons with whom it should deal;
- the existing provisions in Part IV of the Act are adequate for dealing with cases of refusal to supply;
- there would be difficulties in implementing such a provision, for example on what terms should access to an essential facility be allowed;
- refusal to supply is justifiable in certain circumstances, for example, a monopolist should not be required to supply customers in uneconomic quantities or conditions;

[56] Evidence pS1101.

- the demand that a corporation controlling an essential facility give competitors access to it may involve additional costs which could be passed on to consumers;
- application of the provision to intellectual property rights, such as patents, could be considered an acquisition of property on unjust terms;
- the doctrine may constitute a penalty on successful competitors; and
- the enforcement of remedies against refusal to deal poses difficulties, particularly as the courts may be forced into the role of commercial arbitrator, setting standards for acceptable prices and other conditions of supply.

4.4.22 LCA pointed out that while the notion that access should not be denied to an essential facility has gained support in U.S. antitrust law at the judicial level, it has not been legislated for.[57] In a number of submissions, there was support for the view that in Australia the principle should be allowed to evolve naturally from the existing section 46 and should not be the subject of a specific legislative provision.

4.5 *High Court decision in the Queensland Wire Industries case*

4.5.1 In its decision in the *Queensland Wire Industries* case, the High Court held unanimously that BHP had a substantial degree of power in the market for steel and steel products and that, in refusing to supply Y-bar to QWI, BHP was taking advantage of its substantial market power for the purpose of preventing QWI's entry *into the star picket fence posts market in breach of paragraph 46(1)(b) of the Act.*

Market definition

4.5.2 The High Court provided clarification of the approach to be taken in defining the relevant market for the purposes of the Act. The High Court clearly established that:

- supply-side substitutability is an important determinant of market boundaries;
- potential and actual competition is a factor to be taken into account; and
- the fact that there is no commercial trade or traffic in a product does not preclude there being a market in that product.

4.5.3 Deane J. held:

> ...for the purposes of the Act, a market may exist for particular existing goods at a particular level if there exists a demand for (and the potential for competition between traders in) such goods at that level, notwithstanding that

[57] Evidence pS1118.

there is no supplier of, nor trade in, those goods at a given time - because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other.[58]

4.5.4 Dawson J. held:

It must be sufficient to constitute a market that there is a product for exchange, regardless of whether exchange or negotiation for exchange has actually taken place.[59]

4.5.5 Toohey J. held:

...the definition of the relevant market requires a consideration of *substitutability both on the demand and on the supply side.*[60]

Evaluating degree of market power

4.5.6 In overturning the Full Federal Court's decision, the High Court decided that no matter which market was defined, BHP possessed a substantial degree of power in it. Mason C.J. and Wilson J. held:

...the issue of whether there is a market for Y-bar was of little significance in determining the degree of BHP's power ... any market power BHP had with regard to Y-bar would be dependent on power in the market for steel and steel products.[61]

4.5.7 They found that:

Pincus J.'s holding that BHP was in a position to control and that it possessed a substantial degree of power in the market for steel and steel products is clearly supported by the evidence.[62]

4.5.8 In establishing that BHP had a substantial degree of market power, the High Court took into account the following elements:

- market share;
- barriers to entry; and
- vertical integration of the corporation.

[58] Exhibit 16 p19.
[59] Exhibit 16 p23.
[60] Exhibit 16 p37.
[61] Exhibit 16 p13.
[62] Exhibit 16 p13.

The take advantage provision

4.5.9 In deciding that BHP, by refusing to supply Y-bar to QWI, was taking advantage of its substantial market power, the High Court was unanimous in overturning the decision of Pincus J., in which he held that, in order to demonstrate a violation of section 46, it must be shown that a company has used its market power in some *reprehensible* way, rather than simply in a way which resulted in damage to a would-be competitor. Instead, the High Court adopted a neutral interpretation of the meaning of *take advantage*. It found that the element of misuse of market power with which section 46 is concerned is provided by the purpose provisions in the section. In the words of Mason C.J. and Wilson J.:

> ... we have difficulty in seeing why an additional, unexpressed and ill-defined standard should be implanted in the section. The phrase take advantage' in s.46(1) does not require a hostile intent inquiry - nowhere is such standard specified. And it is significant that s.46(1) already contains an anti-competitive purpose element. It stipulates that an infringement may be found only where the market power is taken advantage of for a purpose proscribed in par. (a), (b) or (c). It is these purpose provisions which define what uses of market power constitute misuses.[63]

4.5.10 Mason C.J. and Wilson J. held:

> The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.[64]

Object of section 46

4.5.11 In its decision, the High Court also commented on the object of section 46 of the Act. In the words of Mason C.J. and Wilson J.:

> ...the object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.[65]

Essential facility doctrine

4.5.12 The High Court made no comment on the application of an essential facility doctrine in Australia.

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[63] Exhibit 16 p11.
[64] Exhibit 16 p12.
[65] Exhibit 16 p12.

4.6 *Implications of the Queensland Wire Industries case*

Reaction to High Court decision

4.6.1 The High Court decision has been generally acknowledged as a landmark in the development of section 46 of the Act. Those who made submissions in reaction to the decision all recognised its importance for the future operation of the section.

Positive response to decision

4.6.2 In a majority of the submissions, it is considered that the High Court decision confirms the view that there is no present need for amendment to section 46. In the words of McComas:

> The judgement of the Court ... has demonstrated that the section has force and, in appropriate circumstances, will operate to achieve the purpose for which it was intended.[66]

4.6.3 The TPC, Corones and McComas emphasised that the *neutral* interpretation of *take advantage* adopted by the High Court (as opposed to the *pejorative* test adopted by Pincus J. at first instance) has removed a principal area of difficulty and uncertainty, which has led to the degree of inconsistency in the earlier judgements of the Federal Court in cases brought under the section.[67] The TPC in particular, believes that the decision will place a greater onus on firms which have a substantial degree of market power to be conscious of section 46 in the conduct of their activities. It also considers that the High Court has taken a practical approach to the issues of defining market, market power and use of market power.[68]

4.6.4 The TPC noted that some commentators have suggested that the decision imposes obligations on a firm with a substantial degree of market power to supply all-comers. The TPC considers this to be an extreme position which does not take into account the circumstances of the *Queensland Wire Industries* case. It argued that in more vertical arrangements than existed in the case, a manufacturer in BHP's position may well have commercially sound reasons for not supplying a competitor which are not related to preventing or hindering competition to itself or at other levels of the market. However, the TPC noted that, because the Court held that the purpose of section 46 is to protect *consumers* by protecting the competitive process, the greater the effect on competition of the conduct of a firm with a substantial degree of market power, the more closely the legitimate reasons for the conduct will have to be examined.[69]

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[66] Evidence pS1138.
[67] Evidence ppS1125, S1134 and S1138.
[68] Evidence pS1125-7.
[69] Evidence pS1126.

4.6.5 ACA also welcomed the High Court decision. ACA believes that the decision has achieved three important things for consumers:

- a sensible definition of the word market in section 46 to include a potential market;
- a long overdue clarification of the words *take advantage* with the rejection of notions of predatory purpose or improper conduct as being a prerequisite for this to occur; and
- a much needed clarification of the object of section 46 to be the protection of consumer interests, with the operation of the section predicated on the assumption that competition is a means to that end.[70]

4.6.6 ACA considers that, from a consumer perspective, the words currently contained in section 46 should be retained so as to avoid any future uncertainty if new words were to be substituted.[71]

Continuing concerns

4.6.7 Despite the generally positive reaction to the High Court decision, some uncertainty and concerns about the future operation of section 46 remain.

4.6.8 Mr Pengilley (Sly and Weigall, Solicitors) is highly critical of the High Court decision. In an article made available to the Committee, Pengilley considers that the decision will, in the long term, be regretted because it causes considerable uncertainties and opens competition policy to a new form of regulation - judicial regulation in the guise of competition law enforcement.[72]

4.6.9 In his analysis of the case, Pengilley argues that it is for individual entities in the market to determine whether a price is adequate to bring about an actual sale or purchase. He believes that it is not for the judiciary, under the guise of competition law, to say that a sale should take place when a price acceptable to both buyer and seller does not exist. Pengilley argues that it cannot be taking advantage of market power (whether one believes the words should be interpreted pejoratively or not) merely to decline to accept a price or refuse to offer a price.[73]

4.6.10 Pengilley considers that the problems in relation to the High Court decision should be recognised. He recommends that a provision be enacted stating that section 46 is not breached by reason only of non-supply. He also recommends that a further provision be enacted to the effect that no court orders shall deal with prices or quantities of goods to be supplied, unless there has been a prior history of trading or an established trading pattern. He states:

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[70] Evidence pS1175.
[71] Evidence pS1175.
[72] Exhibit 20 p32.
[73] Exhibit 20 p33.

> it will be a tragedy for Australian competition policy as a whole if steps are not taken to prevent judicial intrusion into market decisions in relation to prices and supply terms.[74]

4.6.11 In other submissions, doubts about the future implications of the High Court decision were raised.

4.6.12 BCA considers:

> ...some aspects of the decision appear to demonstrate a simplistic approach to competition and a lack of recognition of the process of investment and risk taking.[75]

4.6.13 BCA argued that the decision greatly increases the scope of conduct which may be seen to be anti-competitive. However, it is unsure about the extent to which the decision may affect the desire of business to be creative, competitive and cost-effective. BCA believes that the TPC should issue guidelines on the application of section 46 as soon as practicable.[76]

4.6.14 Ms Hurley (University of Sydney), while acknowledging that the High Court decision apparently resolves the debate which has surrounded the correct interpretation of the words *take advantage* of market power, points to three elements of the decision which are left open to speculation. First, Hurley argues that there is uncertainty about the circumstances in which a refusal to supply a potential competitor will contravene section 46. She believes that the observations of some of the judges indicate that a refusal to supply will only constitute a taking advantage of market power if the firm refusing supply is a sole supplier of the product. However, she argues that, if such a limitation does not apply, then a firm which has a substantial degree of market power, but is not the sole operator in the market, will contravene the section merely by exercising its right to choose the firms with which it wishes to deal. Hurley considers that such a result would be an enormous erosion of the trader's freedom to choose with whom it deals and would be a result which section 46 is not intended to achieve.[77]

4.6.15 Secondly, Hurley argues that the decision has the potential to render any conduct which drives a competitor from the market, or deters or prevents it from competing, to be in contravention of section 46. She considers that the neutral interpretation of *take advantage* may catch genuine competitive conduct, as well as anti-competitive conduct, which would not be consistent with the aim of the section.

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[74] Exhibit 20 p34.
[75] Evidence pS1145.
[76] Evidence pS1145.
[77] Exhibit 19 p4.

Hurley believes that reliance on the purpose provisions of section 46 to provide the anti-competitive element may be overlooking the fact that, depending on the circumstances, those purposes may all be legitimate competitive purposes or the results of legitimate competitive processes.[78]

4.6.16 Thirdly, Hurley considers that, where a refusal to supply does constitute a contravention of section 46, there is a problem for the Court in framing the appropriate order for relief of the aggrieved party. She questions whether the Court can frame an order requiring the dominant supplier to supply the product in certain quantities, for a stipulated price and for a stipulated time, or whether the Court can require the dominant supplier to maintain a certain level of output and to provide a proportion of that output to the potential customer.[79]

4.6.17 LCA also acknowledged that the High Court decision does not resolve all uncertainties arising within section 46, but did not elaborate on the extent of those uncertainties. It argued that the provision should be allowed to work through the system for a reasonable period of time so that an assessment can be made as to whether section 46 is effective or could be seen, in some circumstances, to be imposing an unacceptable constraint on vigorous competitive conduct.[80]

4.6.18 Corones noted that the High Court decision is silent on two matters: first, on the issue of the essential facility doctrine and secondly, on the question of how to formulate and enforce an appropriate remedy. In relation to the essential facility doctrine, Corones acknowledges that, if the term *take advantage* is construed in a neutral sense, sub-section 46(1) would catch a refusal to supply as long as one of the purposes of the corporation controlling the essential facility is to prevent the entry of a competitor into a market. On the question of applying a remedy, Corones believes that the fairest remedy is access on a non-discriminatory basis. He considers that one solution to the problem of formulating a remedy might be to involve the assistance of the TPC or the Trade Practices Tribunal once the Court has made a finding that there has been a contravention of sub-section 46(1).[81]

4.6.19 ACA, while advocating retention of the existing words contained in section 46, believes that the section remains inadequate because:

- the section is still too heavily dependent on subjective interpretations as to market power;
- there is no provision that relates anti-competitive behaviour to its effect on consumers;
- the new interpretation of section 46 still does not provide the same degree of protection that the United States essential facility doctrine provides; and

[78] Exhibit 19 p5.
[79] Exhibit 19 p5.
[80] Evidence pS1143.
[81] Evidence ppS1135-6.

- the section does not provide any protection to commercial consumers in the way that section 52A of the Act provides protection against unconscionable conduct to domestic consumers.[82]

4.6.20 Accordingly, ACA recommended that an additional provision be incorporated in section 46, which would prohibit a corporation with a substantial degree of power in a market from engaging in conduct that is likely to cause significant injury to consumers, having regard to price, quality and availability of products or services. ACA also believes that an essential facility provision should be introduced to section 46 and that section 52A should be extended to make the unconscionable conduct provisions apply to the supply of goods and services to all consumers, not just domestic consumers.[83]

4.6.21 The TPC, which in its initial reaction to the High Court decision also advocated retention of section 46 in its existing form, in a further submission indicated that some issues remain unresolved. First, it noted that the High Court did not comment on the Full Federal Court's rejection of the essential facility doctrine, and that the issue is thus unclear. Secondly, the TPC believes that another problem in the High Court judgement could be the high threshold for market power used by the Court, which could take section 46 back to a dominance or even control test.[84]

4.6.22 The TPC suggested that the two issues could be resolved by either:

- amending section 46 to read *a corporation that has a substantial degree of market power or controls an essential facility ...;* or
- making it clear in the second reading speech and explanatory memorandum of any future amendment that a firm controlling an essential facility has a higher obligation to supply, because of the more drastic effects of any refusal to supply.[85]

4.6.23 The TPC noted that the term *essential facility* will need definition and that American experience can be drawn on in this regard. It also noted that, to alleviate concerns about the possible effect on research and development, there may be a need to confine the term to firms controlling scarce resources or essential commodities, such as steel or fuel, or service facilities, such as communication networks and airports. The TPC believes that, by defining and clarifying the position of firms controlling essential facilities, the opportunity can be taken to reaffirm the intention behind the 1986 amendments to the Act, ie. that a *substantial degree of market power* is something less than dominance or control and that section 46 should apply to a wider number of firms, including those in oligopoly situations.[86]

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[82] Evidence pS1176.
[83] Evidence pS1176.
[84] Evidence pS1161.
[85] Evidence pS1162.
[86] Evidence pS1162.

4.6.24 As a final issue, the TPC suggested that the High Court decision does little to aid the small business complainant who is having trouble with a major shopping centre or oil company landlord or who cannot buy on terms comparable with major competitors. The TPC considers that the answer to this lies in extending section 52A of the Act to business transactions generally, as previously suggested by the TPC in its proposals for reform.[87]

Conclusions

4.6.25 Throughout the inquiry, there has been a considerable degree of uncertainty about the varying judicial interpretations of the misuse of market power provisions in section 46 of the Act, and the implications of those interpretations for the operation of the section. This uncertainty has been reflected not only in the various proposals for reform suggested to the Committee, through which greater clarification of the provisions has been sought, but also in the fact that some individuals and organisations have modified their approach to the need for reform during the course of the inquiry.

4.6.26 In this regard, the Committee welcomes the High Court decision in the *Queensland Wire Industries* case for the degree of clarification which it has provided in relation to the various elements of section 46 of the Act. The judgement resolves the difficulties relating to market definition arising from the Full Federal Court's decision in the case. The decision also resolves the debate about the interpretation of the take advantage provision. It is the view of the Committee that the neutral interpretation adopted by the High Court should make it easier for aggrieved parties to establish a breach of section 46.

4.6.27 The Committee is aware of concerns that the decision has not resolved all areas of uncertainty in relation to section 46. For example, there are concerns about the possibility of legitimate competitive behaviour being caught as a result of the neutral interpretation of take advantage, and concerns about the circumstances in which a refusal to supply will contravene the section.

4.6.28 The Committee notes that the TPC has given an undertaking to issue guidelines on the operation of section 46, having regard to the High Court decision in the *Queensland Wire Industries* case. These guidelines should address the concerns which have been identified at paragraphs 4.6.9 to 4.6.16 of the report.

4.6.29 However, insufficient evidence has been presented to support the need for a major redrafting of section 46. Indeed, the bulk of the evidence suggests that no change to the section is required, and that sufficient opportunity should be provided through the evolution of case law for the resolution of any potential difficulties in the section. Given that the High Court has now provided significant clarification of the existing wording of the section, the Committee is of the view that any major changes to the wording would at this time be a retrograde step which could lead to

[87] Evidence pS1162.

renewed uncertainty if new and untested provisions were substituted. In particular, the major proposals for reform suggested during the inquiry would not contribute to the achievement of any greater certainty in the law.

4.6.30 In addition, while it was suggested in some submissions that minor amendments to the Act may bring about improvements in the law, a compelling case has not been made out to warrant such amendments.

4.6.31 In relation to the suggestion that the unconscionable conduct provisions in section 52A be extended to commercial transactions, there is extensive opposition to the proposal. The Committee considers that if the TPC wishes to pursue the proposal, it needs to develop persuasive arguments to counter the concerns of the business community and legal profession in this regard.

4.6.32 As for the suggestion that an essential facility provision, similar to the United States doctrine, be incorporated in section 46, there is also considerable opposition to such a proposal. While the Committee acknowledges the principle that a firm controlling scarce resources or essential commodities or service facilities should be under a higher obligation to supply the facility in question, it is persuaded by the fact that such a doctrine was developed at a judicial level in the United States and was not specifically legislated for. The Committee has not been presented with persuasive arguments to suggest that, in Australia, the doctrine should not be left to develop through the courts, in accordance with the circumstances of a given case. Tnere are, in fact, concerns that legislative recognition of the doctrine may cast too wide a net and deter corporate incentive. Suggestions that it may be possible to confine the extent of the doctrine have not been worked out fully.

4.6.33 An effective provision to prevent misuse of market power is an essential, indeed fundamental, counterbalance to a policy which encourages growth by acquisition and rationalisation. As a result of the evidence before it, and particularly in light of the decision in the *Queensland Wire Industries* case, the Committee is not convinced that the existing provisions of section 46 of the Act are not capable of achieving the purposes for which they are intended.

4.6.34 This finding, however, is based on the presumption that the TPC will have both sufficient resources and the capacity to actively enforce the existing provisions.

Recommendation 2

The Committee recommends that section 46 of the *Trade Practices Act 1974* be retained in its existing form.

The Committee also recommends that the Trade Practices Commission issue guidelines on the operation of section 46 of the *Trade Practices Act 1974*, having regard to the High Court decision in the *Queensland Wire Industries* case. The

guidelines should address the concerns identified by the Committee in relation to possible areas of uncertainty, particularly where a refusal to supply may be found to be in contravention of section 46.

CHAPTER 5

SECTION 50 : MERGERS

5.1 *Development of the section*

The substantial lessening of competition test

5.1.1 Between 1974 and 1977, the Act prohibited acquisitions which resulted in a substantial lessening of competition in a market for goods or services. A voluntary clearance procedure operated whereby an acquirer could request the TPC to determine, in advance, whether the merger had the required anti-competitive effect before deciding whether to seek authorisation.

5.1.2 Due to the wide definition of market, the Act prohibited relatively small mergers in relatively small markets. This interfered unduly with mergers of little or no significance in a competition policy context and placed a large administrative burden on the TPC and unnecessary regulatory costs on business.

The Swanson Committee

5.1.3 The Swanson Committee stated:

> Our view is that merger law is needed but that its application should not be as sweeping as that of the present law. In particular the law should not apply to the smaller acquisitions; damage to competition is much more likely to occur where larger companies are involved.[88]

5.1.4 The Swanson Committee recommended the introduction of a monetary threshold test of $3 million, based on the turnover of the target company, to avoid the application of the merger provisions to smaller acquisitions.

The 1977 amendments

5.1.5 The 1977 amendments to the Act significantly narrowed the scope of the merger provisions by inserting a test which prohibited acquisitions which result in, or substantially strengthen, a position of *control or dominance* in a *substantial* market. The merger authorisation test was changed so that the TPC was not to authorise a merger unless it was satisfied that the proposed acquisition would result, or be likely to result, in such a benefit to the public that it should be allowed to take place. The clearance procedure was also removed from the Act, thereby reducing the administrative burden on the TPC.

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[88] Exhibit 22 p48.

The *Ansett/Avis* case

5.1.6 *Ansett Transport Industries (Operations) Pty Ltd & Ors* v *Trade Practices Commission* (1978) ATPR 40-071, constitutes the first fully argued merger case providing interpretation of the dominance test. In this case, the TPC sought an injunction to prevent Ansett acquiring the shares of Avis.

5.1.7 Northrop J. held that the relevant market was the Australian car rental market, extending to all car rental business within Australia.

5.1.8 Northrop J. held that the word *dominate* should be construed as something less than *control* and that it should be construed in its ordinary sense of having a commanding influence on. In determining the question of dominance, his Honour had regard to the car rental market in Australia, the structure of Avis and the nature of competition in that market. He considered five factors in his assessment of dominance:

- the firms operating in the market and the degree of market concentration, i.e. market share;
- the capacity of Avis to determine prices for its services without being consistently inhibited in its determination by other firms;
- the height of barriers to entry, i.e. the ease with which new firms may enter and secure a viable share of the market;
- the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion; and
- the character of corporate relationships and the extent of corporate integration.

5.1.9 Northrop J. stated that the profitability of a firm is of no real assistance in determining dominance. He noted that, in the Australian car rental market, comparisons based on financial return, car utilisation and profitability may be distorted. The ability of operators to enter the market and sustain their entry was held to be of more importance.

5.1.10 Avis was held to be by far the largest operator in the car rental market in Australia, in each State and in each capital city, having made a larger profit than the other national operators in the market. However, having regard to the factors outlined above, Northrop J. concluded that Avis did not have a commanding influence on the car rental market in Australia and, therefore, was not in a position to dominate that market.

5.1.11 Northrop J. then considered whether, as a result of the acquisition of all of the shares in the capital of Avis, the position of Avis would be enhanced so that Ansett Operations would be, or would be likely to be, in a position to dominate the

car rental market in Australia. Consideration of the same criteria led his Honour to the conclusion that Ansett would not be likely to be in a position to dominate the car rental market in Australia as a result of the acquisition.

5.1.12 The five criteria specified by Northrop J in this case have since been utilised by the TPC in its assessment of dominance.

The 1986 amendments

5.1.13 The 1984 Green Paper included a proposal for a return to the substantial lessening of competition test in conjunction with the existing limitation that the affected market constituted a substantial market.

5.1.14 Following public debate, it was decided to retain the dominance test. The Attorney-General, in his Second Reading Speech to the 1986 amendments, stated:

> The Government is firmly committed to the encouragement of efficient Australian industry and to increasing our competitiveness on world markets. It has been decided that the existing dominance' test in section 50 should remain essentially unchanged. The coverage of section 50 will not be extended beyond those mergers which result in undue concentration in a market. The competitive conduct of firms which increase their market power as a result of other mergers will be subject to scrutiny under section 46 as proposed to be amended.[89]

5.1.15 The amendments deleted the redundant control test (which was found in the *Ansett/Avis* case to be more onerous than the dominance test) and expressly extended the coverage of the merger provisions to joint venture acquisitions, acquisitions by natural persons and acquisitions occurring outside Australia which affect Australia. In addition, the Act was amended so that it would not prohibit acquisitions which merely transfer an existing position of market dominance without strengthening such dominance.

5.1.16 A new streamlined merger authorisation procedure was also introduced. Under this procedure, the TPC is deemed to have granted an authorisation should it fail to determine an application within 45 days of its receipt (subject to certain *clock-stopping* mechanisms).

5.1.17 The divestiture remedy was also strengthened so that the Court may, on the application of the Minister or the TPC, declare an acquisition void where there has been a contravention of section 50 of the Act and the vendor was involved in the contravention. Where the Court makes such a declaration, the relevant shares or assets are deemed never to have been disposed of by the vendor and the vendor is required to refund any amount paid for the shares or assets.

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[89] Parliamentary Debates, House of Representatives 19 March 1986, p1627.

Merger guidelines

5.1.18 In October 1986, the TPC issued guidelines to the merger provisions of the Act which set out the TPC's approach to the interpretation of the dominance test. In the guidelines, the TPC states:

> ...the Act is finely balanced, for whilst it allows the creation of oligopolies or even duopolies through merger, it forbids the achievement thereby of dominant market power in any one hand...
>
> The Commission has said that the merger provisions do not usually operate:
>
> - where (after a merger) there are two well-matched local competitors left in the market;
> - where despite the fact that there might be only one local major competitor left, there is a number of small independent competitors who are viable and whose underlying economic circumstances are such that they have the opportunity to develop further; or
> - where there is one local major producer left who faces effective competition from imports not heavily disadvantaged by tariff protection and representing a secure alternative source of supply in the longer term.[90]

The *Australia Meat Holdings* case

5.1.19 *TPC* v *Australia Meat Holdings Pty. Ltd. & Ors.* (1988) ATPR 40-876, constitutes the first fully argued merger case since the *Ansett/Avis* decision in 1978.

5.1.20 In January 1988, Australia Meat Holdings Pty. Ltd. (AMH) acquired the whole of the issued capital of Thomas Borthwick & Sons (Australia) Ltd (Borthwick), an English company. The TPC argued that, by its acquisition of Borthwick, AMH would be, or would be likely to be in a position to dominate the fat cattle market in northern Queensland or the separate fat cattle market in each of northern or central Queensland or would, or would be likely to be in a substantially strengthened position of dominance in that or those markets.

5.1.21 Wilcox J. accepted the following concept of market:

> A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand and supply side. The ideal definition of a market must take into account substitution possibilities in both consumption and production. The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the

[90] Exhibit 7 p3.

> products in different markets. The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or the supply side in response to a change in relative price.[91]

5.1.22 In determining whether AMH was in contravention of section 50 in relation to the relevant market, Wilcox J. made reference to the judgement of Northrop J. in the *Ansett/Avis* case. Northrop J. considered that dominance meant having a commanding influence on. Wilcox J. accepted the following construction of dominance:

> ... dominance, unlike control, is not primarily concerned with the formal relationship between entities but rather with their conduct towards each other within a particular market environment. If the size or strength of a particular entity is such that, in practice, other entities are unable or unwilling actively to compete with it in a particular market, that entity is dominant in that market.[92]

5.1.23 Wilcox J. stated that whilst the word *control* was omitted from sub-section 50(1) in 1986, in his view this did not affect the continued application of the construction of dominance used by Northrop J. He then cited the five criteria considered by Northrop J. in considering dominance, and made the following comments on these criteria:

> In formulating this list, Northrop J. did not purport to describe criteria of universal application. No doubt there will be cases in which other relevant considerations emerge and, in some cases, some of the matters mentioned by Northrop J. may be of little or no significance. Nonetheless, in many cases it will be useful to go to that list, at least in the first instance, in considering the issue of dominance in a market. I think that this is such a case and I propose to examine the evidence regarding these five matters.[93]

5.1.24 After considering the application of these criteria, Wilcox J. concluded that the acquisition of Borthwick by AMH would enable AMH to dominate the northern fat cattle market. AMH was not found to be in a dominant position before its acquisition of Borthwick. Whilst Borthwick's market share was small, it had a disproportionate influence on prices by pursuing an aggressive pricing policy, thereby depriving AMH of a commanding influence. Thus, a contravention of paragraph 50(1)(a), but not paragraph 50(1)(b), was established.

5.1.25 AMH lodged an appeal from the decision of Wilcox J. and the TPC lodged a cross-appeal. In deciding the appeal, the Federal Court found in favour of the TPC and ordered the disposal of two Queensland abattoirs.

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[91] (1988) ATPR 40-876 p49,480.
[92] (1988) ATPR 40-876 p49,496.
[93] (1988) ATPR 40-876 p49,497.

5.1.26 The *Australia Meat Holdings* case has been regarded as providing an endorsement of the approach adopted by Northrop J. in the *Ansett/Avis* case in relation to the meaning of dominance.

5.2 *Current provisions*

5.2.1 Since 1986, section 50 of the Act has prohibited mergers which would result in a corporation or a person being in a position to dominate a substantial market for goods or services or would substantially strengthen an existing dominant position.

5.2.2 Section 50A of the Act, inserted by the 1986 amendments, regulates acquisitions outside Australia whereby a person obtains a controlling interest in a corporation and, as a result, would be, or would be likely to be, in a position to dominate or to substantially strengthen an existing dominance of a substantial market for goods or services in Australia, or in an Australian State or Territory.

5.2.3 The TPC may grant an authorisation in respect of an otherwise prohibited merger if it is satisfied that the merger would result in such a benefit to the public that it should be allowed to take place.

5.3 *Pre-merger notification*

Background

5.3.1 The 1984 Green Paper contained a proposal for the introduction of a scheme of pre-merger notification. The proposal was put forward as a means of dealing with mergers which occurred without the TPC's knowledge and which were presented as an accomplished fact rather than as a proposal (*midnight mergers*). Enforcement or remedial action (for example, divestiture) in relation to such mergers may be difficult or ineffective. The 1984 Green Paper made reference to the Petersville/General Jones frozen food merger in 1984, where the TPC was seeking divestiture. The difficulties in seeking a divestiture remedy in this merger were described in an article on merger regulation as follows:

> In the Petersville Case, the transaction was entered into on Wednesday and by Saturday certain bean processing equipment had either been dismantled and removed to a new location or was in an advanced stage of dismantling and removal. Further, immediately upon the sale of the shares, a significant part of General Jones' staff was retrenched and others were transferred to the Elders Group. Within seven days of the sale, all General Jones' sales offices were closed and orders for General Jones' products were being directed to Edgell Sales Offices. Immediately upon the sale the accounting and financial reporting activities of General Jones were transferred to Edgell. On the first hearing date, the TPC sought orders to preserve and keep separate the assets, business undertakings and goodwill of General Jones but by this time

> Petersville was arguing that irreparable harm would be caused to innocent third parties if the bean processing plant was not re-installed in the Petersville Plant.[94]

5.3.2 Despite this, the introduction of pre-merger notification was decided against. Attorney-General's set out a number of conceptual and administrative problems which were identified as being associated with a mandatory pre-merger notification scheme. These included:

- applying the scheme to only those mergers or acquisitions with trade practices implications;
- the related problem of determining a clear and precise threshold which is neither arbitrary nor places an undue administrative burden on the TPC;
- in relation to takeovers of publicly listed companies, devising a scheme which does not conflict with the policy goals underpinning CASA; and
- providing a sufficient time period for the TPC to fully determine the competition implications of a proposed acquisition without unduly intruding into and delaying commercial decisions where time may be of the essence.[95]

5.3.3 In view of these problems, it was considered that a mandatory pre-merger notification scheme was not justified. It was concluded that the problem identified by the Petersville/General Jones merger was confined to acquisitions which can be completely consummated and executed before they are made public, involving both the acquisition of an unlisted company not subject to CASA and the acquisition of a company's assets rather than its shares. Given the relative paucity of *midnight mergers* and the lack of encouragement the Petersville settlement gave to parties contemplating such mergers, the Government was not firmly convinced of the need for pre-merger notification even in such cases.

5.3.4 However, having regard to cases such as the Petersville/General Jones merger, the divestiture remedy was strengthened by the insertion of sub-section 81(1A) into the Act in 1986. This sub-section provides that where a vendor is involved with the purchaser in a contravention of section 50, the Court may, on the application of the Minister or the TPC, declare the acquisition void. Where such a declaration is made, the shares or assets in question are deemed never to have been disposed of by the vendor, who is required to refund any amount paid for the shares or assets.

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[94] 'The Merger Provisions - A Reflection on Recent Experience', Alan H. Goldberg, QC and David Shavin (Monash Trade Practices Workshop, October 1984) p26.

[95] Evidence pS578.

Current attitudes

5.3.5 The introduction of a scheme of pre-merger notification was favoured by the National Consumer Affairs Advisory Council (NCAAC) and AFCO.[96] Mr Clarke (Monash University) also argued that the TPC should be advised of significant mergers and that sufficient time should be allowed for the TPC to consider proposed mergers before their consummation. Clarke suggested that the most simple threshold test would be based on the size of the parties in terms of sales or assets or both.[97]

5.3.6 In contrast, a number of submissions to the inquiry were opposed to the introduction of pre-merger notification.

5.3.7 LCA is of the view that there is no need for, and that there would be positive detriment in, the introduction of compulsory pre-merger notification. It argued that the TPC is not likely to be unaware of important mergers. Moreover, the introduction of pre-merger notification would positively impede the TPC's ability to monitor mergers, because of the need to utilise its resources in reviewing acquisitions, the majority of which would be unlikely to involve significant competition issues. Even if the TPC were likely to miss an important merger, LCA pointed to the existence of the penalty and divestiture provisions.[98]

5.3.8 LCA also referred to the fact that increasing formalisation introduces delays and costs, and to the difficulties involved in the framing of threshold tests. As an example, it cited the First Schedule of the New Zealand Commerce Act which, it claimed, appears to operate somewhat capriciously, as it is based on the assets of the participants, rather than the significance of the market affected.[99]

5.3.9 In addition, LCA argued that it is not clear that the introduction of a pre-merger notification procedure would satisfy those who have called for inquiries into mergers such as Bell/BHP, as any such inquiry would be limited to the question of whether the proposed merger breached the dominance threshold.[100]

5.3.10 Maintaining its opposition to the suggestion for pre-merger notification, Attorney-General's indicated that the objectives of a pre-merger notification scheme are already capable of being achieved. It stated:

> (The TPC) can take an injunction and has beefed up powers in relation to divestiture. One could argue that you can achieve the same result through those avenues rather than having ...pre-notification.[101]

[96] Evidence ppS129, S424.
[97] Evidence ppS70, S71.
[98] Evidence pp828-834.
[99] Evidence pS186.
[100] Evidence pS187.
[101] Evidence p1030.

5.3.11 The TPC counselled very strongly against any proposal for a formal pre-notification procedure similar to that operating in New Zealand. In particular, it referred to the *great paper war* which occurs in New Zealand. The TPC stated:

> There is little doubt ... that they are literally buried in paper ... and that the amount of time that they spend on dealing with mergers that are of no significance at all has really affected what I would call the proper administration of trade practices law over there.[102]

5.3.12 McComas also opposes pre-merger notification on the ground that it would result in an increased amount of work for the TPC with no commensurate cost benefit. He does not support the introduction of either a voluntary or a mandatory scheme.[103]

Conclusions

5.3.13 While the issue of pre-merger notification generated only limited discussion during the inquiry, there was considerable opposition to the suggestion that a pre-merger notification procedure be introduced in Australia.

5.3.14 The Committee is not convinced of the need for a scheme of pre-merger notification. There is little evidence to suggest that the TPC would be unaware of significant mergers before they are effected or that the problem of *midnight mergers* is widespread. The TPC has expressed confidence in its ability to take immediate action to prevent a merger from proceeding where such action is necessary. In turn, the Committee is confident that the 1986 amendments to the Act have provided the TPC with adequate powers of divestiture to unravel any mergers which may be effected before preventative action can be initiated by the TPC.

5.3.15 The introduction of mandatory pre-merger notification may involve a number of difficulties, including a substantially increased administrative burden for the TPC, the difficulty of determining an appropriate threshold test and the possibility of unduly delaying and interfering with the merger process. The Committee considers that it would not be prudent to introduce a scheme of pre-merger notification, which would have significant resource implications for the TPC and could impact on the effective administration of trade practices law in Australia. The objectives of such a scheme are already capable of being achieved through existing procedures. However, there would be significant benefits associated with the legislative recognition of the existing voluntary consultative procedure in relation to mergers. This issue is addressed further at paragraph 6.2.13

Recommendation 3

The Committee recommends that provision for pre-merger notification should not be introduced into the *Trade Practices Act 1974*.

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[102] Evidence p1128.
[103] Evidence pS255.

5.4 *The dominance test*

5.4.1 It is generally accepted that the dominance test in section 50 of the Act provides a high threshold which permits relatively high levels of industry concentration. It is claimed that the benefits of the dominance test include the facilitation of industry rationalisation, improved efficiencies and increased international competitiveness. However, a significant degree of public disquiet has been expressed concerning the levels of industry concentration which have been reached under the dominance test, without the necessity for any public benefit issues to be examined or demonstrated. Such concerns have been expressed particularly in relation to recent mergers in the import protected sectors of the economy (such as domestic airlines, retailing and newspapers) where it is claimed that the justifications of economic efficiencies, scale economies and increased international competitiveness associated with rising levels of concentration are less applicable.

5.4.2 The TPC has pointed to the fact that most of Australia's key manufacturing industries and service industries are oligopolistic, while many others are duopolies or monopolies.[104]

5.4.3 It is, therefore, timely to review the operation and effectiveness of the dominance test and to examine criticisms of the test and proposals for change.

Criticisms of the dominance test

5.4.4 Several criticisms of the dominance test were raised in submissions.

5.4.5 McComas, for example, is of the view that the very high degree of concentration permitted by the dominance threshold may be conducive to collusion between competitors. He stated that where a market is reduced to two competitors, one of the two might be expected to attain supremacy over the other. He also claimed that a highly concentrated market raises barriers to the entry of new competitors. Whilst McComas believes that the basic dominance threshold should be retained to allow Australian manufacturing industry to achieve efficiencies, he pointed out that because section 50 is not industry specific, it permits numerous takeovers which do not result in economic benefits.[105]

5.4.6 Corones believes that the dominance test can have adverse consequences for consumer welfare with no off-setting benefits. He is of the view that it confers on firms the opportunity to exploit consumers via higher prices.[106]

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[104] Evidence pS307.
[105] Evidence ppS250, S251.
[106] Evidence pS5.

5.4.7 Clarke pointed to concerns that oligopolistic or duopolistic market structures tend to reduce the level of competition because of the existence of express collusion or tacit co-ordination. He believes that the dominance test does not achieve the goal of the preservation and encouragement of competition. He considers that a harsher test should be applied to mergers for various reasons, particularly as there is a tendency for industry to concentrate, rather than de-concentrate, and because of the availability of the authorisation process.[107]

5.4.8 NCAAC indicated that there is very little support among its members for retention of the existing dominance test.[108]

5.4.9 ACA put forward the view that the present dominance test has failed. ACA believes that if a merger lessens competition it should be presumed to be harmful to consumers in the long term and should be resisted.[109]

A modified dominance test

5.4.10 McComas suggested that, if it is considered that the current provisions of section 50 require modification, there may be advantages in combining the dominance test with a concentration ratio and a market share threshold approach. Such a test would operate along the following lines:

- the present dominance prohibition would remain unchanged;
- where the number of competitors in a market is reduced as a result of the takeover below a certain number (say four) and the acquiring company aggregates a market share in excess of a certain percentage (say 33 percent), the takeover could not proceed unless authorised; and
- the TPC would be required to grant an authorisation unless it could identify a public detriment. In assessing public detriment the primary consideration would be the effect of increased concentration on the maintenance of effective competition.[110]

5.4.11 Attorney-General's put forward the view that there are real difficulties associated with this approach, as it involves a multiplicity of thresholds and tests and would, therefore, be unduly complex and increase uncertainties as to the scope of the prohibitions. Attorney-General's referred to the lack of up-to-date and relevant industry concentration statistics, the difficulties in fixing appropriate market share or industry concentration ratios, and the fact that an arbitrary concentration threshold which applied to all mergers may operate capriciously in certain cases.[111]

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[107] Evidence ppS68, S69.
[108] Evidence pS129.
[109] Evidence pp S1033-4.
[110] Evidence pS254.
[111] Evidence p1014.

5.4.12 LCA considers that the proposal has significant practical and legal problems and expressed the view that it is difficult to see how the proposal could work without a pre-merger notification requirement, which it does not support. However, LCA stated that, if these problems could be resolved, the proposal could assist in addressing some concerns about the operation of section 50 in some key areas.[112]

5.4.13 CAI believes that the application of a public benefit or detriment test to selected concentrated industries would run counter to the broad legislative framework of the Act.[113]

Conclusions

5.4.14 Whilst the modified dominance test proposed by McComas would appear to take into account several of the concerns which have been expressed in relation to the operation of the dominance test, the Committee is not satisfied that it represents a satisfactory and workable alternative scheme. In particular, the Committee is concerned that the proposed test would introduce complexities and, therefore, uncertainties into the scope of the prohibition, with the potential for enforcement delays. The Committee considers that it would be inappropriate to fix universal market share or industry concentration ratios and concludes that the introduction of such a scheme would be tantamount to requiring pre-merger notification.

The substantial lessening of competition test

5.4.15 As an alternative, Clarke suggested a return to the test of substantially lessening competition, but argued that the present requirement for a substantial market should be retained. He believes that this would not result in uncertainty as there is a 'plethora' of cases dealing with the substantial lessening of competition test under sections 45, 47 and 49 of the Act.[114]

5.4.16 The Consumers' Association of Victoria, NCAAC and AFCO are also in favour of a return to the substantial lessening of competition test.[115] AFCO submitted that the question of increased international competitiveness of industry is not relevant in a number of key cases, but that the dominance test has prevented the TPC from taking action in this regard. AFCO believes that the adoption of the substantial lessening of competition test would result in the assurance or optimisation of competition, rather than the current implied situation of merely ensuring that monopolisation does not occur.[116]

5.4.17 The TPC, however,submitted that a substantial lessening of competition test would cause particular problems, including an increased strain on the TPC's resources (with the number of matters being caught by the prohibition being two to

[112] Evidence pS938.
[113] Evidence pS558.
[114] Evidence pS69 and Exhibit 25 p23.
[115] Evidence pp S34, S128, S423.
[116] Evidence pp S425, S426.

four times higher than the numbers at present caught, and increased authorisation work). The TPC believes that the test is likely to inhibit desirable industry rationalisation and may create more uncertainty for business. A significant widening of the threshold may, it argued, result in pressure to return to formal clearances, which delay the merger process. The TPC also put forward the view that the test of substantial lessening of competition is not a certain instrument, as there is not a strong body of law associated with it.[117]

5.4.18 Similarly, McComas does not support a return to the pre-1977 test, whether or not the substantial market requirement is retained. He believes that it would inhibit the attainment of desirable efficiency and optimum resource allocation and would require an increase in the TPC's resources for no apparent cost benefit.[118]

5.4.19 LCA and BCA also oppose a return to the substantial lessening of competition test.[119] BCA believes that a competition test would unnecessarily inhibit a wide range of mergers and would stand in the way of much needed rationalisation and efficiency.

Conclusions

5.4.20 The Committee is of the view that any proposal to return to the pre-1977 test of substantial lessening of competition would, of necessity, need to be linked to the retention of the existing requirement in relation to a substantial market in order to avoid undue interference in merger activity.

5.4.21 However, a significant number of individuals and organisations argued that a return to this test would inhibit desirable industry restructuring and rationalisation. It is widely accepted that this test would involve a significant lowering of the threshold, thereby subjecting a wider range of mergers to TPC scrutiny. This proposal would, therefore, have significant resource implications for the TPC. It would also reduce the level of harmonisation of Australian and New Zealand merger law. In addition, a return to the pre-1977 test would involve increased uncertainty for business and may, therefore, impede decision-making processes. This proposal was put forward in the 1984 Green Paper, but was not adopted for similar reasons.

5.4.22 Accordingly, whilst recognising the potential benefit associated with the adoption of a substantial lessening of competition test, in terms of the greater exposure of proposed mergers to public benefit scrutiny, the Committee is not convinced that there is sufficient justification, at this stage, to recommend the adoption of this test.

[117] Exhibit 25 p13.
[118] Evidence pS956.
[119] Evidence pS937 and Exhibit 25 p37.

A modified substantial lessening of competition test

5.4.23 ACA submitted that section 50 should be amended by:

- redrafting sub-sections 50(1) and 50(1A) to provide that an acquisition be prohibited if it would result in, or would be likely to result in, a substantial lessening of competition in a market for goods or services or would have significant social or economic consequences;
- the addition of sub-section 50(1B) which would read:

  For the purposes of sub-sections 50(1) and 50(1A) substantial lessening of competition is taken to mean any acquisition which would give rise to a situation where -

  (i) six or less corporations are, or are likely to be, responsible for 50 percent or more of the turnover of goods or services within the market; or

  (ii) the concentration of ownership of the supply or acquisition of goods or services in a market exceeds an amount as might be determined as appropriate for that market by the TPC or by the Minister; and
- amending paragraph 50(3)(b) to bring it into line with the above.[120]

5.4.24 ACA subsequently modified its proposal as follows:

Redraft sub-sections 50(1) and 50(1A) so that acquisitions are prohibited if they -

- would result, or be likely to result, in a substantial lessening of competition in a market for goods or services; or
- would give rise to a situation where the turnover of over 50 percent of goods or services in a market is controlled by four or less corporations (or persons) or some other number as might be determined by the relevant Minister for a particular market; and
- in markets where the concentration specified in the dot point above is already exceeded, would give rise to greater concentration of control than already exists.

Amend the transfer of monopoly provisions of sub-section 50(2C) to provide that the acquisition can be stopped if, in the opinion of the TPC, it is contrary to the public interest.[121]

[120] Evidence pS204.
[121] Evidence pS1036.

5.4.25 Coles Myer raised several difficulties with ACA's proposal:

- it would result in uncertainty in the law;
- it makes no distinction between beneficial or adverse social or economic consequences;
- the development of a concentration ratio involves identification of the relevant market, leading to uncertainties;
- the concentration ratio approach would result in the diversion of attention to arguments of little relevance to the effect of an acquisition upon performance in any relevant market;
- the concentration ratio approach would be likely to proscribe many mergers; and
- the proposal for the exercise of discretionary power by the Minister or the TPC would constitute discretionary regulation at its worst, with no criteria being specified for the exercise of the discretion.[122]

5.4.26 The ACA proposal was also opposed by Attorney-General's, McComas, LCA and BCA.[123] Attorney-General's believes that this test has a number of significant difficulties associated with it, particularly its complexity and its provision for the intervention of the political decision-making process in the black letter law.[124]

Conclusions

5.4.27 The Committee is not convinced that the proposal put forward by ACA represents a practical alternative scheme of merger regulation. It is a vague and complex test and appears, by definition, to prohibit mergers of any significance. It could prohibit mergers which would have significant social or economic consequences, regardless of their desirability. It does not specify the person or body which would determine whether a merger would have such consequences.

5.4.28 Many of the significant industries in Australia could be caught by the set of circumstances which would constitute a substantial lessening of competition. In addition, the proposed provision, which would allow for decisions to be made by the TPC or the Minister in relation to the scope of the prohibition, would provide little or no guidance to those wishing to ascertain the prohibited level of concentration in particular markets.

5.4.29 The Committee, therefore, does not support the proposal.

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[122] Evidence pS1024.
[123] Exhibit 25 pp14, 37 and Evidence ppS938, S957.
[124] Exhibit 25 p14.

The section 46 threshold test

5.4.30 Corones considers that the section 50 threshold test should be brought into line with that contained in sub-section 46(1) of the Act. He suggested that section 50 should prohibit mergers that create or strengthen a position of substantial power in a market or facilitate its exercise.[125]

5.4.31 Coles Myer submitted that the adoption of this test would make the acquisition of a substantial degree of market power unlawful, whereas the mere possession of such power would not otherwise be unlawful. This, it was argued, would distort the market for the control of companies.[126]

5.4.32 McComas pointed out that the section 46 threshold is relatively low (as demonstrated by the case of *Mark Lyons* v *Bursill Sportsgear* (1987) ATPR 40-809). He argued that this test would tend to catch more mergers than would be consistent with the present policy of section 50.[127] Attorney-General's also believes that, in light of the *Mark Lyons* case, there is potential for the threshold associated with this test to be very low indeed.[128]

5.4.33 LCA believes that this proposal would introduce great uncertainty into the law.[129]

Conclusions

5.4.34 The Committee considers that this proposal would represent a very significant lowering of the section 50 threshold, which would have the potential to interfere unduly with the merger process. The Committee, therefore, does not support the proposal.

Proposals for a public interest test

5.4.35 In some submissions, it was suggested that a public interest test needs to be applied to the regulation of mergers.

5.4.36 ACA put forward the view that there is an overwhelming case for a public interest test to apply to mergers. It proposed that such a test should be incorporated in the authorisation provisions. ACA also proposed that there should be scope for broader public interest issues to be raised at the time of merger proposals.[130]

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125 Evidence pS5.
126 Evidence pS1023.
127 Evidence pS956.
128 Exhibit 25 p14.
129 Evidence pS937
130 Evidence ppS232, S233, S1033.

5.4.37 NCAAC indicated that, in the opinion of a number of its members, if the present dominance test was to be retained, a public interest rider should be added, although most regard this as a second best solution.[131]

5.4.38 DITAC suggested the application of a broad public interest test which transcends market power considerations and more directly appraises the potential for increased efficiency arising from a merger.[132]

5.4.39 AFCO believes that consideration should be given to the inclusion of a reserve power in the Act which would allow the Executive Council to prevent mergers which are contrary to the national interest. AFCO envisages that such power would only be used in industries of significant national importance.[133]

5.4.40 The Communications Law Centre and the Public Interest Advocacy Centre submitted that it is essential for a broad public interest test to be inserted in section 50 and that a statement of legislative policy be incorporated in the Act to include consumer protection and welfare as the principal objective of the Act. They also recommended the introduction of special public interest criteria, similar to the provisions of the United Kingdom Fair Trading Act, in relation to newspaper ownership.[134] In contrast, the Australian Press Council (APC) stated that it was important that there be no disincentive to investment in the newspaper industry by the creation of additional barriers under the Act which would apply only to newspapers or to the media generally.[135]

5.4.41 Attorney-General's submitted that the question of public benefit or public interest should only be considered once the basic competition threshold has been breached. It believes that any proposal to incorporate such considerations in a threshold test would encounter significant difficulties in establishing firm criteria to measure such an amorphous concept, in determining the appropriate threshold to prohibit mergers on such grounds, and in determining the appropriate body to examine such issues.[136]

5.4.42 CAI expressed strong opposition to the introduction of a public benefit or detriment test on the grounds that there is little evidence to suggest its necessity. It also claimed that the benefits, if any, would be outweighed by uncertainties to business and the associated public and private costs.[137]

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131 Evidence pS129.
132 Evidence pS144.
133 Evidence pS431.
134 Evidence pS848.
135 Evidence pS40.
136 Evidence pS631.
137 Evidence pS558.

5.4.43 Coles Myer also submitted that the insertion of a public interest test could have serious repercussions for commercial activity, including uncertainties for commercial decision-making. It believes that a wide public interest test incorporating social policies unrelated to the Act's objectives could result in the antithesis of these objectives being achieved.[138]

5.4.44 Similarly, McComas does not favour a public interest test. He believes that *public interest* is an amorphous, indefinable concept and that the public interest test as it applies in the United Kingdom is too uncertain.[139]

5.4.45 The TPC also commented on overseas experience in this regard. The Deputy Chairman of the TPC stated:

> I agree that both the United Kingdom and New Zealand have got a frontal perception that they have a ripsnorting merger control system and that they take account of public benefit and what not. I think you should judge it by the bottom line about what mergers those organisations or the TPC has looked at, what it has let go and what it has not let go. All the reports I have ever had about the United Kingdom matter, for example, is that it is a very second class effort. This effort here in which all of us are involved - the Parliament and the Commission - is an honest effort. It might be bad, but it is an honest effort. I am not so sure about some of the others. It is very easy to put something up front, but what is underneath and what it delivers is more important.[140]

Conclusions

5.4.46 The Committee is sympathetic to calls for a greater consideration of the public interest in merger regulation. However, it is of the view that it would be inappropriate to incorporate such considerations into the terms of the threshold test itself. There are a number of difficulties associated with such a proposal. Primary among these is the degree of uncertainty which would attach to the scope of the prohibition and the potential for such a test to prohibit further rationalisation of industry.

5.4.47 In determining the most appropriate threshold at which point a merger would breach the Act, ie. whether it should be *dominance* or some other test, the Committee has, of course, given consideration to the threshold which is in the public's best interest. In relation to specific mergers, though, public interest considerations should only be taken into account once that threshold has been breached.

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[138] Evidence pS289.
[139] Evidence p553.
[140] Evidence p146.

5.4.48 In the context of the report, the Committee has addressed public interest considerations in relation to a wide range of issues relevant to merger regulation. For example, the Committee has made recommendations in this report concerning the authorisation process and the need to ensure that the process for assessing net public benefit is exposed to public scrutiny, increased public disclosure of the informal merger consultative process and the re-introduction of private rights of action for merger injunctions.

5.4.49 The Communications Law Centre and the Public Interest Advocacy Centre, though, pointed to factors peculiar to the media as justifying a special case for defined restrictions on the level of ownership and control of the print media, principally to secure and maintain freedom of expression.

5.4.50 In conducting the inquiry, the Committee did not identify particular industries or markets for special attention, but rather, has taken a broad approach to public interest considerations in the Act. However, the Committee is conscious of, and sympathetic to, the heightened public expectations that appropriate levels of competition are maintained and, where possible, improved in the newspaper sector.

5.4.51 The Committee notes that the Parliament has seen fit to legislate in relation to radio and television ownership and has taken newspapers into account where broadcasting issues are concerned. There is, of course, no such legislation dealing only with newspaper ownership.

5.4.52 The Committee is aware that the TPC is undertaking an inquiry into certain issues concerning the degree of concentration of newspaper ownership in Australia. The Committee is of the view that the TPC inquiry, which currently has a narrow focus, should be broadened to enable a serious examination of the extent of the powers available to the Commonwealth in relation to the newspaper industry. That examination should consider what, if any, special provisions are appropriate in relation to newspapers.

Retention of the dominance test

5.4.53 Retention of the dominance test was supported in a significant number of submissions.

5.4.54 Attorney-General's favours retention of the dominance test. It pointed to the fact that the TPC has now clearly indicated that it is sensitive to public concerns that mergers in various areas of the economy have been consummated without *sufficient scrutiny on public benefit grounds. This change in approach by the* TPC includes a greater emphasis on the authorisation process and an increased preparedness to initiate court actions, together with an increased utilisation of the misuse of market power prohibition. Attorney-General's, therefore, suggested that it may be appropriate to allow time to assess the impact of this change. It is also of the

view that the *Australia Meat Holdings* case has added considerably to the jurisprudence on the dominance test.[141]

5.4.55 The TPC also considers that the dominance test should be retained. It believes that its new approach to dealing with the more difficult cases and the use of the adjudication process will allow desirable industry rationalisation whilst preventing single company dominance of substantial markets. The decision in the *Australia Meat Holdings* case confirmed the TPC's view that section 50 of the Act be left to operate unchanged.[142]

5.4.56 McComas, in supporting the retention of the existing dominance test, stated that there is no objective evidence to demonstrate that the threshold has resulted in any adverse reaction in the national economic sense. He considers that no change has been demonstrated as necessary.[143]

5.4.57 LCA also supports the retention of section 50 of the Act in its present form for a number of reasons, including the harmonisation of Australian and New Zealand takeover laws, and the fact that it is more easily applied by the courts and more readily understood by business. LCA points to the degree of certainty which now exists in relation to the dominance test following the *Ansett/Avis* and *Australia Meat Holdings* cases.[144]

5.4.58 BCA submitted that while section 50 tolerates high levels of industry concentration, this reflects a realisation of beneficial scale or other efficiencies. It strongly believes that no moves to strengthen the merger provisions of the Act should be made or are warranted. BCA states that the need for rationalisation and efficiency in industry and commerce is stronger than ever before, and that the *Australia Meat Holdings* case has demonstrated the full force of the existing prohibition. It believes that, at the very least, the scheme of amendments to both sections 46 and 50 in 1986 should be given a chance to show what can be done.[145]

5.4.59 CAI also favours retention of the existing legislative controls over mergers, stating that it would be premature to amend the legislation without allowing time for it to be fully tested. It believes that the legislation has led to greater efficiency, enhanced competitiveness and appropriate industry restructuring during a period of high growth in merger activity.[146]

5.4.60 Coles Myer submitted that the dominance test is effective and is achieving its stated aims. It urged that greater time be given for the test to work and for the TPC's modified approach to be tested. Coles Myer believes that, given the

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[141] Exhibit 25 p15.
[142] Evidence ppS311, S783, S1217.
[143] Evidence pS956.
[144] Evidence ppS185, S937.
[145] Evidence ppS514, S515.
[146] Evidence pS538.

comparatively small size of Australian markets and the levels of concentration which the requirements of efficiency dictate in many of these markets, the threshold test should not be too low.[147]

Conclusions

5.4.61 There is significant support for the retention of the dominance test and for the belief that the test facilitates and promotes desirable industry rationalisation and increased international competitiveness. The Commitee considers that the TPC's modified approach to merger regulation will go some way towards allaying concerns about the operation of the dominance test. In addition, the decision in the *Australia Meat Holdings* case has added to the degree of certainty in the scope of the prohibition.

5.4.62 There is, at this stage, insufficient justification to recommend any amendment to the dominance test. The Committee notes that there is a continuing need to improve efficiency in the economy and mergers and takeovers will be part of that process. The modified approach to merger regulation by the TPC, as outlined in its statement of *Objectives, Priorities and Work Program for 1988/89*, should be allowed sufficient time in which to demonstrate its effectiveness.

Recommendation 4

The Committee recommends that the existing provisions of section 50 of the *Trade Practices Act 1974* prohibiting acquisitions which result in or substantially strengthen a position of dominance in a substantial market be retained.

5.5 *Private injunctive relief in merger cases*

Background

5.5.1 The Act provides for a wide variety of remedies which are available to private litigants. However, sub-section 80(1A) of the Act provides that a person other than the Minister or the TPC is not entitled to apply for an injunction in respect of a contravention of the merger provisions of the Act.

5.5.2 Sub-section 80(1A) was inserted by the 1977 amendments to the Act. Introducing the 1977 amendments, the then Minister for Business and Consumer Affairs stated:

> Some changes have ... been made to Part VI of the Act - that is, remedies - in relation to remedies available following contravention of the merger provisions. The remedy of injunction is now to be available in these cases only upon the application of the Minister or the Trade Practices Commission. The availability of the injunctive remedy on the application of private persons and

[147] Exhibit 25 p37.

companies gave a powerful tool to opponents of the merger. It has been used as a device to defeat mergers, during the tactical battle between the parties, for reasons quite unrelated to competition.[148]

Current attitudes

5.5.3 LCA made a detailed submission supporting the re-introduction of private rights of action for merger injunctions. LCA advanced the following arguments in favour of the re-introduction of this right:

- consistency with the treatment of other provisions of Part IV (The divestiture remedy is not a substitute for injunctive relief as it may be granted only after the event. Certain practical difficulties may also be associated with the divestiture remedy, for example, where there is no alternative buyer);
- the legislation was intended to be largely self-enforcing (In moving to a prohibition type law it was sought to keep bureaucratic activity to a minimum. The possibility of private actions is a significant force in ensuring compliance);
- the TPC has limited resources (Merger cases can be expensive and time-consuming. Private actions may result in more court decisions, thereby increasing certainty in and awareness of the law. In addition, private litigants may have better information and more available resources than the TPC); and
- the remedy is available by other means (The case of *Brisbane Gas Co Ltd v Hartogen Energy Ltd & Anor* (1982) ATPR 40-304, demonstrates that a private litigant may achieve the same result by an indirect approach. It would be preferable for the orthodox approach to be available).[149]

5.5.4 LCA also referred to the arguments which may be put forward against the extension of standing in merger injunction cases and set out its reaction to those arguments. First, the remedy could be abused by those in control of target companies or others keen to prevent an acquisition occurring. LCA did not deny the potential for delay, disruption and the associated cost involved in litigation. However, it believes there are a number of factors which would militate against this prospect, namely, the requirement to give undertakings as to damages, liability for costs if unsuccessful and the fact that the Court will not entertain cases lacking in merit.

5.5.5 Secondly, the Court may too readily grant an injunction in a merger case which may prevent the merger ever proceeding. In response, LCA argued that a Court will generally be reluctant to grant an interim injunction that will have the

[148] Parliamentary Debates, House of Representatives 3 May 1977, p1478.
[149] Evidence pS867.

effect of final relief. It also indicated that judges are experienced in such matters, and the issues involved will not be any more difficult merely because the applicant is not the TPC.

5.5.6 Thirdly, the remedy may be used in an anti-competitive way. LCA, however, argued that the potential for abuse, in the sense of an entrenched management or shareholder seeking to prevent acquisition at all costs, is relevant only in the public takeover area and not in those cases which proceed by way of private treaty. In any case, in the contested takeover area a target company or other interested parties have available to them a range of options under companies and securities legislation for interfering by litigation in the takeover process.

5.5.7 Fourthly, if a plethora of marginal cases was pursued, the law might become inconsistent. LCA referred to section 6 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* to counter this argument.

5.5.8 Finally, the disruption caused by an injunction may be such that a desirable merger, offering benefits to the economy, may effectively be made too difficult. LCA believes that this argument also has some application to intervention by the TPC. Although the TPC intervenes in what it sees to be the public interest, it is no better equipped to predict the outcome of the proceedings than any other person.[150]

5.5.9 In other submissions, the extension of standing in merger injunction cases was also supported.

5.5.10 The Communications Law Centre and the Public Interest Advocacy Centre stated:

> Important public policy considerations weigh heavily in favour of liberalised standing rules in aid of enforcement of the public interest in areas of business and environmental regulation as well as public administration.[151]

5.5.11 McComas submitted that provided a private litigant is required to give an undertaking as to damages prior to being able to obtain interlocutory relief, little real harm would appear to be done by the proposal.[152] Corones also recommended the re-introduction of a private right of action for injunctions in relation to section 50 of the Act to ensure that private litigants have an input in enforcement decisions and to ensure that no single economic theory would be permitted to exclude alternative theories from consideration.[153] At the workshop, Attorney-General's expressed the view that private actions should probably be allowed, but drew attention to the significant difficulties associated with the proposal.[154]

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[150] Evidence pS870.
[151] Evidence pS846.
[152] Evidence pS958.
[153] Evidence pS1092.
[154] Exhibit 25 p96.

5.5.12 *The TPC, however, does not support the proposal. It endorsed the present* policy which, it believes, prevents the improper and potentially disruptive use of the injunctive process in merger matters. It considers that this right would be used by lawyers as a means for negotiation, and that prior to 1977 the threat of private actions was used quite often.[155] CAI also expressed concern regarding potential abuses of the extension of standing and questioned the need for the proposed change.[156]

Overseas experience

5.5.13 LCA pointed out that no private right of action for injunction exists in relation to mergers in the United Kingdom, New Zealand or Canada. However, in the United States, an injunction may be granted in an action brought by any person, firm, corporation or association against threatened loss or damage by violation of the antitrust laws. LCA submitted that it is easier for target companies and competitors to sue than it is for others. Damage has been interpreted by the courts as requiring the plaintiff to show the potential for damage to itself.[157]

5.5.14 The Hon. Judge Douglas H. Ginsburg of the United States Court of Appeals made the following comments in relation to private rights of action to prevent mergers:

> *Private civil litigation to enforce the antitrust laws where the government* would not sue (because the case lacks merit, not merely because of resource constraints) is necessarily inimical to the cause of competition ... while many countries have followed our lead in passing merger control laws, our antitrust regime remains unique in according a private right of action to prevent a merger; it is positively bizarre, however, that in limited circumstances even competitors, and not just consumers, may be able to pursue such an action.[158]

Alternative approaches

5.5.15 It has been suggested that there are already a number of alternative methods for a private litigant to frustrate a merger.

5.5.16 In the *Brisbane Gas,* case the applicant sought a declaration that the acquisition of certain shares contravened section 50 of the Act. The applicant also sought a divestiture order and an interlocutory injunction restraining the respondents from dealing with the shares. The respondents argued that such an injunction may only be granted on the application of the Attorney-General or the TPC.

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[155] Evidence p1644.
[156] Exhibit 25 p101.
[157] Evidence pS866.
[158] 'The Appropriate Role of the Antitrust Enforcement Agencies', Cardozo Law Review, Volume 9, number 4. March 1988 cited in Exhibit 25 p99.

5.5.17 Fitzgerald J. held that the injunction was merely incidental to the claim for substantive relief and did not seek to restrain conduct dealt with by the relevant provisions of section 80. His Honour held:

> I am satisfied that the Court also has power in a case such as the present to grant an interlocutory injunction which is reasonably related to the orderly procedure of the Court or the subject matter of the litigation, even though it is not in a form which falls within sec. 80 of the Act.[159]

5.5.18 It would appear, however, that little use has been made of the *Brisbane Gas* mechanism to delay or frustrate mergers.

5.5.19 Another alternative which is open to use by private litigants is the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). In *Visy Board Pty Ltd* v *Attorney-General of the Commonwealth and SCI Operations Pty Ltd* (1983) ATPR 40-433, the applicant unsuccessfully sought an order pursuant to the ADJR Act quashing or setting aside a decision by the Attorney-General not to institute proceedings in respect of a possible acquisition.

5.5.20 Defensive tactics may also be utilised under companies and securities legislation. NCSC made reference to its report, released in 1986, relating to defensive schemes and the duties of directors. The report concluded that:

- tactical and strategic measures which have defensive implications are common;
- it is very difficult to determine whether defensive motives predominate when directors decide to introduce these measures;
- although the majority of bids are not defended, there has been a marked increase in the propensity to defend in the 1980's;
- there has been little change in the incidence of most defensive tactics;
- in the majority of cases where defensive tactics are employed, the bidder increases the offer price; and
- defensive tactics tend to have a high rate of success in defeating bids initially, but subsequent agreed takeovers and hostile bids which are successful mean that, over time, defensive tactics generally do not succeed in preserving the position of directors (assuming that this was the intention).[160]

A limited extension of standing

5.5.21 LCA referred to the possibility of excluding target companies from the extension of standing. It believes such a restriction would be extremely difficult to implement and may be capable of circumvention. It also referred to an alternative

[159] (1982) ATPR 40-304 p40,304.
[160] Evidence pS160.

possibility of requiring that an applicant for an injunction show some direct interest, other than as a target, in the outcome of the merger. Again, it believes that such a provision would present difficulties in drafting and that such a provision may be unreasonably restrictive in the range of applicants which would be able to bring proceedings.[161]

5.5.22 At the workshop, Attorney-General's put the view that it may be possible to draft a provision to exclude target companies and their associates from the right to seek injunctive relief in merger cases. It presented an alternative scheme, whereby the availability of such actions could be limited to suppliers or acquirers of goods or services, either to and from the target company or to and from the acquirer, as these are the persons who would be affected in a competitive sense should the merger proceed.[162]

Conclusions

5.5.23 The Committee supports the suggestion that private litigants be granted standing to institute injunction proceedings in merger cases.

5.5.24 The re-introduction of this right should bring significant additional resources to the enforcement of the merger provisions of the Act. This is particularly important in view of the TPC's claims regarding its lack of resources. The re-introduction of this right should also facilitate the testing of section 50 by ensuring that resources other than those of the TPC can be directed towards enforcement of the existing provisions. In addition, it would be consistent with the scheme of the Act which grants a wide range of remedies to private litigants in relation to contraventions of Part IV.

5.5.25 The Committee is, nevertheless, conscious of the possible disadvantages of the proposal. Chief among these is the potential for abuse of the right to standing by its use as a tactical weapon to delay or defeat takeovers. Whilst requirements as to undertakings for damages and potential liability for costs may provide some disincentive in relation to possible abuse of the right, this may not constitute a significant factor in large mergers involving significant players in the market. The Committee is also mindful of the fact that the test applied in the granting of an interim injunction is relatively low.

5.5.26 Accordingly, the Committee favours the imposition of some restriction on the range of private litigants who may apply for injunctive relief in merger cases. Rather than require an applicant to demonstrate a special interest in the outcome of a merger, which may unreasonably exclude certain potential litigants, the Committee favours the exclusion of takeover targets and their associates from the right to seek

[161] Evidence pS874.
[162] Exhibit 25 p99.

injunctive relief. Such an exclusion would not prevent takeover targets and their associates from approaching the TPC or the Minister with a request that injunctive relief be sought.

5.5.27 LCA has drawn attention to the difficulties of drafting an effective provision to achieve this exclusion. However, the Attorney-General's considers that it may be possible to draft a provision that is not too complex and that at least discourages target companies or their related companies from seeking the remedy.

Recommendation 5

The Committee recommends that the private right to injunctive relief in relation to mergers be re-introduced to the *Trade Practices Act 1974*, but that takeover targets and associated persons should be excluded from this right.

CHAPTER 6

ROLE AND EFFECTIVENESS OF THE TRADE PRACTICES COMMISSION

6.1 *Background*

The role of the Trade Practices Commission

6.1.1 A major function of the TPC is the administration of the merger and misuse of market power provisions of the Act. Since 1974, the TPC has adapted its administrative approach at various times to take account of changes to the circumstances under which it has been required to operate, including amendments to the Act in 1977 and 1986.

6.1.2 Following the introduction of the Act in 1974, the TPC was faced with a large volume of clearance and authorisation applications from parties which sought protection for existing practices and agreements threatened by the new law. Between 1974 and 1977, 523 clearance applications and 118 authorisation applications were lodged.[163]

6.1.3 The workload of the TPC diminished considerably in relation to merger control following the 1977 amendments to the Act, due mainly to the higher threshold test, the requirement that a merger must have the prohibited effect in a *substantial* market and the abolition of the clearance procedure. Between 1977 and 1981 only 10 authorisation cases were decided by the TPC.[164]

6.1.4 In place of the clearance procedure, there developed a practice of informal consultation between the TPC and proponents of a merger which may have risked breaching section 50. Through this process of consultation, the TPC could indicate whether, in its view, the proposal would be likely to breach section 50, and whether it would be likely to result in the TPC approaching the court for an injunction. This process also enabled the proponents of a merger to formulate a modified proposal which was acceptable to the TPC.

6.1.5 In January 1978, the TPC instituted proceedings in the Federal Court in the *Ansett/Avis* case. Following the *Ansett/Avis* decision the TPC found few matters it considered could be challenged. Since then, the *Australia Meat Holdings* case has been the only other fully argued section 50 case.

6.1.6 Court action by the TPC against misuse of market power (or monopolisation as it was known until the 1986 amendments to the Act) has also been rare. Between 1974 and 1987, the TPC initiated only one action. This was

[163] Evidence pS304.
[164] Evidence pS304.

against C.S.B.P. and Farmers Ltd (*TPC* v *C.S.B.P. & Farmers Ltd* (1980) ATPR 40-191) and was unsuccessful. It should be noted, however, that the TPC sought leave to intervene in the High Court appeal in the *Queensland Wire Industries* case and, more recently, decided to take CSR Ltd to the Federal Court alleging misuse of market power under section 46 of the Act.

6.1.7 Between 1982 and 1988, there was a steady increase in merger activity, with industries becoming more concentrated and the beginning of an era of large conglomerate mergers. An increasing number of mergers came within reach of section 50. The TPC adopted an active role in monitoring mergers.

6.1.8 The TPC continued to encourage discussions with proponents of mergers which had possible section 50 consequences. The informal consultation process was used more frequently by companies proposing major mergers. Both the TPC and industry saw benefits in the consultation and compromise process which 'entailed the use of limited resources by the Commission but had the effect of stopping some mergers altogether, altering others to remove the likelihood of breach and allowing most to proceed unhindered'.[165]

6.1.9 In October 1986, following amendments to the Act, the TPC issued guidelines to clarify its administration of section 50 of the Act. In those guidelines the TPC indicated that:

- it will, as a general rule, investigate a merger where a merged entity will have a market share of 45 percent or more and will be the largest competitor in the market, or will be the largest competitor in the market and have a market share exceeding that of its largest competitor by 15 percent or more;
- it will encourage those proposing mergers or acquisitions to discuss their proposals with the TPC before they are implemented;
- it will entertain submissions from the proponents whereby the impact of the merger might be lessened in competition terms;
- it will continue to entertain proposals for voluntary divestiture, without usually requiring the divestiture to be made the subject of a binding contract prior to the merger proceeding;
- it will require undertakings for divestiture to be in a solemn form, in some cases to be given to the court to satisfy it that the merger should be allowed to proceed; and
- it will encourage proponents of a merger to seek authorisation if there is a prima facie case of dominance in a market but if demonstrated efficiencies, such as industry rationalisation or international competitiveness, can be seen to emerge.[166]

[165] Evidence pS306.
[166] Exhibit 7 pp11, 12.

Criticism of the Trade Practices Commission

6.1.10 In recent years, considerable criticism has been directed at the TPC, especially over its role in merger regulation. Public concern has been expressed particularly in relation to the TPC's role in three controversial merger cases:

- Coles/Myer;
- News Limited/Herald and Weekly Times; and
- Ansett/East West.

6.1.11 The common threads in these three cases, as noted by the TPC, appears to have been that the mergers:

- resulted in a high level of industry concentration;
- occurred at the final functional level of the market where their impact on consumers is immediate and visible; and
- occurred in politically sensitive sectors of the economy.[167]

6.1.12 Following these cases, public comment was made that the TPC's process of decision-making and of reaching agreement on divestiture of assets has not been sufficiently open to public scrutiny. As noted in the introduction to the report, such criticism, coupled with public concern about levels of concentration in Australian industry and the subsequent potential for market dominance and misuse of market power, acted as a catalyst for the Committee's inquiry.

6.2 *Informal consultations on mergers*

6.2.1 In submissions, contrasting views were expressed about the process of informal consultation adopted by the TPC following the abolition of the clearance procedure. The various advantages and disadvantages of the informal procedure were debated at length.

Advantages

6.2.2 BCA and Coles Myer consider that informal consultation is a commonsense approach to merger regulation as it avoids adversarial proceedings and allows the TPC to respect commercial confidentiality of information provided by companies.[168]

6.2.3 McComas also favours informal consultations and considers that the effectiveness of the TPC in its administration of the Act will be lessened if this approach is not continued. McComas argued that it is just as essential for business

[167] Evidence pS307.
[168] Exhibit 25 p220 and Evidence p301.

people and their advisers to be able to discuss matters in confidence with the TPC as it is for the TPC to gather evidence from its market enquiries and maintain confidentiality in respect thereof.[169]

6.2.4 Attorney-General's considers that a co-operative rather than confrontationist relationship between the TPC and business is desirable. It noted that consultation may result in a speedier, more efficient and cost-effective resolution of a matter. It emphasised that there are substantial costs and delays associated with enforcement of merger policy through the courts. Attorney-General's argued:

> Where consultation results in action that avoids these costs whilst still achieving policy objectives, consultation must be regarded as a strategy consistent with prudent administration of the merger provisions.[170]

Disadvantages

6.2.5 Concerns were expressed, however, that mergers which are dealt with by this procedure and which have a significant effect on the competitive environment are not subject to full and vigorous scrutiny. Consumer organisations, in particular, argued that there is a lack of opportunity in the consultative process for interested parties to raise matters of concern with the TPC relevant to a proposed merger. ACA submitted that interested parties often do not know about the negotiations until an agreement has been reached.[171]

6.2.6 Further disadvantages of the consultative process, as noted by Attorney-General's, are that the procedure:

- may lead to uncertainty regarding the TPC's merger enforcement policy;
- may discourage businesses from using the authorisation procedure and as such may be viewed as a mechanism which discourages a full examination of proposed mergers on public benefit grounds;
- has resulted in a lack of publicly available authority regarding the interpretation of section 50 of the Act, which compounds the difficulty in assessing criticism of the existing provisions and any proposals for amendment; and
- may be based upon incomplete information, as interested persons may be unaware of the procedure.[172]

[169] Evidence pS960.
[170] Evidence pS607.
[171] Exhibit 25 p222.
[172] Evidence ppS608, S609.

Modified approach

6.2.7 In May 1988, the TPC released its statement of *Objectives, Priorities and Work Program for 1988-89*. In that statement, the TPC responded to concerns about its emphasis on informal consultations by stating:

> Based on its recent experience, the Commission will be giving greater emphasis to the authorisation process in mergers with the potential for market dominance. This will ensure that the process for assessing any net public benefit is exposed to public scrutiny and that any divestiture or other undertakings are built into the authorisation decision.[173]

6.2.8 The TPC indicated that voluntary divestiture outside the authorisation process will be acceptable only where it represents a minor part of the overall acquisition, for example one product area within a multiproduct company. The TPC also warned that legal proceedings will be seriously considered if companies choose to go ahead with an acquisition, without divestiture or authorisation, in face of the TPC's view on dominance.[174]

6.2.9 In response, BCA and CAI noted that the TPC's modified approach would address much of the public disquiet about recent merger activity. CAI believes that recent overseas experience, particularly in the United States, has demonstrated the useful role that administrative guidelines can play in fine-tuning any inadequacies in the law.[175] Similarly, BCA acknowledged that a more open approach may lead to a greater public knowledge of, if not involvement in, more difficult and controversial matters. However, BCA warned that the more severe application of the merger provisions, in accordance with the modified approach, should be monitored to ensure that they are not inconsistent with the Government's goal of industry rationalisation and restructuring.[176]

6.2.10 ACA and AFCO also welcomed the modified approach as it accords with their belief that a greater number of mergers should be subjected to the formal procedures for authorisation than has been the case in recent times. Nevertheless, they stressed that this approach should not depend on the discretion of the incumbent officers of the TPC.[177]

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[173] Exhibit 8 p5.
[174] Exhibit 8 p5.
[175] Evidence pS560.
[176] Evidence ppS505, S516.
[177] Exhibit 25 p222 and Evidence pS421.

Conclusions

6.2.11 The Committee welcomes the modified approach to merger regulation by the TPC, as announced in its statement of *Objectives, Priorities and Work Program for 1988-89*. The Committee agrees that greater public scrutiny of mergers with the potential for market dominance will allay some of the recent concerns about the role and effectiveness of the TPC.

6.2.12 However, there remain concerns among consumer organisations that the emphasis on greater public scrutiny in the TPC's modified approach continues to be at the discretion of the incumbent officers of the TPC. The Committee considers that there should be a consistent and standardised approach to the public scrutiny of public benefit issues in merger regulation.

Recommendation 6

The Committee recommends that the Attorney-General give a direction, pursuant to paragraph 29(1)(b) of the *Trade Practices Act 1974*, that the Trade Practices Commission continue its policy of giving emphasis to the authorisation process in mergers with the potential for market dominance, to ensure that the process of assessing net public benefit is exposed to public scrutiny.

Legislative recognition of the consultative process for mergers

6.2.13 It is apparent, though, that the TPC's modified approach to merger control may not address concerns expressed regarding mergers which will continue to be dealt with by way of informal consultation and which are not amendable to the authorisation process. This would include mergers where the proponents of the merger, in seeking the approval of the TPC, are willing to comply with any divestiture requirements to avoid a position of dominance in a market, but are unable to utilise the authorisation process because public benefit considerations cannot be demonstrated.

6.2.14 To overcome potential difficulties in this regard, it was suggested that legislative recognition of the informal consultative process for mergers would enhance the effectiveness of the procedure. Attorney-General's considers that the existing process of informal conslutation is, in effect, an informal partial *clearance* process.[178] It indicated that a number of advantages could be attained if the process was given statutory recognition. Attorney-General's believes that:

- if undertakings on divestiture or the enforcement of such undertakings are to be facilitated, the only realistic way to achieve this is by having the undertakings given under some sort of statutory process rather than under an extra statutory process (this issue is discussed in further detail in section 6.4 of the report); and

[178] Evidence pS659.

- statutory recognition of the informal consultative process would facilitate statutory protection for material provided confidentially to the TPC in such circumstances.[179]

6.2.15 It was also suggested that providing legislative recognition for the informal consultative process would facilitate the implementation of effective cost recovery measures by the TPC (this issue is discussed at paragraphs 6.8.5 to 6.8.10).

6.2.16 *A further advantage of the proposal is that it would enable the Act to* specify certain minimal public disclosure requirements in relation to the process.

6.2.17 In a number of submissions, though, it was argued that there should not be any greater level of formality than the minimum. BCA does not believe that further regulation is required and expressed concerns about the increased costs, delays and uncertainty for business which more formal procedures would entail.[180] LCA also warned about the costs which could be involved with a more formal process. Nevertheless, it considered that a re-examination of the issue is timely, particularly if a process can be evolved which would allay public concern that the present provision is not working adequately.[181]

Conclusions

6.2.18 The Committee considers that legislative recognition of the existing informal consultative process for mergers would provide significant advantages in terms of public accountability considerations, the effectiveness of undertakings entered into as part of the process and the effectiveness of cost recovery measures. While there are concerns about formalising the consultative process, the Committee emphasises that legislative recognition of the process should essentially comprise legislative backing for extra statutory activities already carried out by the TPC, and that any formalisation of the process should be of a minimal nature.

6.2.19 There are substantial benefits associated with the existing informal consultative process and the Committee, therefore, would not advocate a return to the pre-1977 formal clearance procedure. The Committee considers, though, that the advantages which would accrue from statutory recognition of the process would complement the benefits which already exist in relation to that process.

6.2.20 The only difficulty which the Committee envisages in such an approach is that, should the Government adopt the Committee's recommendation that the private right to injunctive relief be re-introduced (paragraph 5.5.27), the incentive for merger proponents to consult with the TPC and enter undertakings in consideration of the TPC not instituting enforcement action will be reduced. Accordingly, the Committee is of the view that, as part of the legislatively recognised

[179] Exhibit 25 p229.
[180] Exhibit 25 p220.
[181] Evidence pS187.

consultative process for mergers, the TPC should be empowered to grant immunity from enforcement action, including action by private litigants. This, of course, would be subject to the condition that the TPC also be empowered to review any immunity decision if it can be shown that the decision was made on the basis of false or misleading information.

Recommendation 7

The Committee recommends that the *Trade Practices Act 1974* be amended so as to provide legislative recognition of the informal consultative process currently utilised by the Trade Practices Commission in relation to mergers.

The Committee also recommends that, should the Government adopt the Committee's recommendation on reintroduction of the private right to injunctive relief in merger cases, the Trade Practices Commission be empowered, as part of the legislatively recognised merger consultative process, to grant immunity from merger enforcement action, including action by private litigants, subject to the condition that the Trade Practices Commission also be empowered to review the decision to grant immunity if it can be shown that the decision was made on the basis of false or misleading information.

6.3 *Merger authorisations*

6.3.1 The existing procedure for the authorisation of mergers also drew some criticism in submissions, although the concerns were not as extensive as those expressed in relation to the informal consultative process.

Consumer participation

6.3.2 Consumer organisations such as ACA and AFCO generally support the process of authorisation on the grounds that it is a non-adversarial procedure. However, ACA and AFCO consider that a broader range of organisations needs to be involved in the process, in order that the full range of public interest concerns are considered.[182]

6.3.3 AFCO suggested that authorisations should be conditional upon the demonstration of substantial and ongoing public benefits which would substantially outweigh public detriments.[183] Similarly, ACA recommended that the TPC should not grant an authorisation unless it is satisfied that the proposed acquisition would result or be likely to result in a substantial and lasting net consumer benefit and would not be contrary to the public interest.[184]

[182] Exhibit 25 p222 and Evidence pS428.
[183] Evidence pS427
[184] Evidence pS235.

6.3.4 In addition, ACA suggested that applications for authorisation should be accompanied by a *consumer impact statement* which would address the social and economic implications of the acquisition and would be available to the public. ACA considers that the *consumer impact statement* would have a similar function to an environmental impact statement.[185]

6.3.5 In contrast, LCA noted that it has no difficulty with the existing process of authorisation. From its experience, it argued that a wide range of interested parties is consulted by the TPC and the opportunity is given for those parties to respond to the propositions of the proponents of a merger. It noted that all the material is placed on a public register, subject to confidentiality.[186]

6.3.6 LCA cited the recent Fletcher Challenge authorisation as evidence of the effectiveness of the existing process. It noted that a public hearing was held, even though there is no provision in the Act for authorisation hearings. It also noted that the applicant for authorisation issued very extensive material, with statements from those who favoured the acquisition as well as from those who opposed it. In light of such evidence, LCA could not see why there would be need for a consumer impact statement which would operate according to a strict formula.[187]

Conclusions

6.3.7 The Committee considers that the existing process of merger authorisation allows for sufficient public scrutiny of mergers with the potential for market dominance. It is of the view that there is adequate opportunity for interested parties to become involved in the process, particularly as the TPC approaches a broad range of organisations and individuals to obtain comments.

6.3.8 The Committee does not favour the introduction of a consumer impact statement as it does not consider that any additional information would be made available which the TPC could not already obtain. The Committee also notes that it is often difficult to project the extent of a merger's impact on consumers. There is considerable uncertainty about the remedies which would be available to the TPC if those projections were found to be incorrect.

Recommendation 8

The Committee recommends that the procedure for authorisation of mergers be retained in its existing form.

[185] Evidence pS235.
[186] Exhibit 25 p224.
[187] Exhibit 25 pp224, 225.

Two-tier approach

6.3.9 Under the existing authorisation provisions an interested party can appeal to the TPT against an authorisation determination by the TPC.

6.3.10 BCA expressed concern about the two-tier approach, suggesting that it creates a double jeopardy for business of application to the TPC and appeal to the TPT. BCA considers that the power of determining authorisations should remain with the TPC, but recommended that appeal to the TPT should be removed. BCA argued that the TPC has a better working knowledge of the industries and issues under review and should have the final say, subject to limited appeal to the Court.[188]

6.3.11 Attorney-General's also raised the issue of a two-tier approach. It did not come to any firm conclusions on the subject but instead listed a number of alternatives to the two-tier system which could be considered, including:

- removal of the power to grant authorisations from the TPC and vesting that power exclusively in the TPT;
- limiting the grounds of review by the TPT; and
- streamlining TPT proceedings.[189]

Conclusions

6.3.12 The issues relating to the two-tier authorisation approach generated limited comment during the inquiry. While some options were presented, these did not produce any significant debate.

6.3.13 However, given the modified approach of the TPC to merger regulation, which places greater emphasis on the authorisation procedure, it is apparent to the Committee that the matter deserves further consideration.

6.4 *Undertakings on merger matters*

Background

6.4.1 The existing provisions of the Act which empower the Minister or TPC to approach the Court for an injunction to restrain a merger have enabled the TPC to entertain voluntary divestiture proposals from proponents of a takeover which would potentially breach the dominance provisions of section 50 of the Act. In recent years, various undertakings have been formulated, both in the context of the authorisation procedure and the informal consultative process, on the understanding that the TPC would not intervene in the merger under consideration.

[188] Evidence pS516.
[189] Evidence ppS615, S699, S700.

6.4.2 Such undertakings have contained provisions relating to:

- the divestiture of certain assets if the merger is successful;
- the appointment of a trustee for the sale of those assets should the person giving the undertaking fail or be unable to comply with it; and
- consent orders for divestiture by the Federal Court under section 81 of the Act to support the trustee powers of sale.

6.4.3 Some concern has been expressed, though, about difficulties faced by the TPC in enforcing undertakings once a merger has been implemented. The TPC is empowered, by virtue of sub-section 91(4) of the Act, to revoke an authorisation if a condition of the authorisation was granted on the basis of false or misleading evidence or information. However, to enforce undertakings which involve divestiture of assets after a merger has been implemented, the only recourse under the Act for the TPC would be to institute enforcement action pursuant to section 50. Such enforcement action may be prejudiced by the delay in its initiation.

6.4.4 The difficulty in enforcing undertakings was illustrated in the decision by the TPC not to insist on the divestiture of the Western Australian operations of Skywest by TNT/News Ltd as part of the Ansett takeover of East West Airlines. In that case, the TPC agreed to the acquisition of East West Airlines by TNT/News Ltd (the owners of Ansett) subject to four principles. One of those principles was that the whole passenger carriage business of Skywest Airlines in Western Australia would be divested. However, when no *viable* buyer could be found for Skywest after 12 months of negotiations, the TPC decided not to insist on the sale. In making its decision, the TPC was swayed by the fact that it would have had to seek a court order for divestiture. The TPC noted that court proceedings may have involved closure of Skywest which, the TPC argued, was not in the public interest. The TPC also admitted that it could not justify the drain on resources which its continued involvement in the case would have entailed.[190]

Statutory remedy

6.4.5 In his submission, McComas, while noting that the TPC's policy of entering into undertakings has been successful in the main, argued that the voluntary divestiture procedures could be strengthened by an amendment to the Act whereby failure to perform an undertaking within the agreed period of time would entitle the TPC to an order from the Court for divestiture of the agreed assets and, if necessary, for the vesting of such assets in the TPC for sale. McComas is of the view that to require conditions entered into as part of the authorisation process to have the force of statutory undertakings would give such conditions greater force in the event of their not being met, and would avoid the difficulties of restoring the status quo after the subject matter of the authorisation has been implemented. McComas

[190] Exhibit 14 p1.

also believes that a provision for statutory undertakings should be more widely applicable, in order to assist the enforceability of undertakings given in connection with takeover or merger proposals outside the authorisation process.[191]

6.4.6 At the workshop, the TPC referred to several problems which may be associated with voluntary post-merger divestiture. These include the run down of assets, failure to inform the regulatory agency of relevant facts and delaying tactics. The TPC is very much in favour of having some power to enforce undertakings.[192]

6.4.7 Attorney-General's drew attention to the difficulty of providing for statutory remedies in relation to undertakings entered into as a result of informal discussions which are conducted without any statutory backing. It believes that there is much merit in McComas's suggestion, but that it requires some sort of statutory backing by way of a voluntary clearance procedure. Under such a procedure clearances could be granted subject to divestiture conditions. Should those conditions not be complied with, then an application could be made to the Court for an order with no necessity to establish a breach of section 50.[193]

6.4.8 LCA put forward the view that, if it is possible to address the problems referred to by Attorney-General's, there would be merit in having statutory provisions to reinforce the effectiveness of undertakings given to the TPC. However, LCA also stated that it was not sure that such a step was absolutely necessary, due to the fact that it should not be beyond the TPC to enter binding deeds or agreements to secure undertakings from the acquiring party in consideration of the TPC agreeing not to take action under section 50.[194]

6.4.9 BCA similarly raised the issue of whether the TPC already has the power to secure undertakings by binding agreements or by initiating formal proceedings and the entering of a consent order.[195]

Conclusions

6.4.10 The Committee considers that there would be significant benefits in amending the Act to provide statutory remedies, such as those suggested by McComas, in relation to breaches of undertakings given to the TPC. The Committee is of the view that recent experience, such as the Skywest case, indicates the need for greater force to apply to such undertakings.

6.4.11 The Committee considers that statutory remedies should be applicable to breaches of undertakings relating to divestiture or other conduct entered into as a condition of both the authorisation process and the consultative process for mergers. In this regard, it is noted that the Committee's earlier recommendation relating to

[191] Evidence ppS257, S957, S958.
[192] Exhibit 25 pp87, 88.
[193] Exhibit 25 p89.
[194] Exhibit 25 pp90, 91.
[195] Exhibit 25 p91.

legislative recognition of the consultative process for mergers (paragraph 6.2.20) should allay concerns about providing a statutory remedy for breaches of undertakings given as part of consultative procedure which has no statutory backing.

6.4.12 While statutory remedies will give greater force to undertakings in the extent of a breach, it will still be necessary to ensure that the obligations under such undertakings are strictly drafted to ensure their desired effect.

Recommendation 9

The Committee recommends that the *Trade Practices Act 1974* be amended so as to provide remedies in respect of breaches of undertakings entered into both in connection with the merger authorisation process and the recommended legislatively recognised merger consultative process.

6.5 *Disclosure of information on mergers*

6.5.1 A further area of concern in relation to merger regulation is the amount of information which is made publicly available about agreements entered into by the TPC with regard to proposed mergers.

Background

6.5.2 In accordance with section 89 of the Act, the TPC maintains a public register in relation to authorisations. Authorisation applications, submissions received by the TPC on those applications, notes taken at any pre-determination conference and all decisions on authorisations are placed on the register, which is open for public inspection and copying. The TPC may, however, exclude information on the grounds of confidentiality. Particulars of an authorisation decision are also published in the Australian Government Gazette.

6.5.3 In relation to the informal consultative process, there is no statutory requirement for disclosure of information as the process itself has no statutory backing. However, in cases which have attracted publicity or which have been considered significant, the TPC has generally issued a media release to inform the public of the proposal and the TPC's attitude to it.

Adequacy of information

6.5.4 LCA noted that there has been criticism about the lack of published information in relation to the informal consultative process for mergers, not so much during but at the end of the process. LCA argued that the criticism of the TPC in relation to recent merger cases approved under the informal consultative

process may not have been any more muted, but should have been better informed had there been more information publicly available in relation to the mergers than was the case.[196]

6.5.5 LCA considers that the brief press release from the TPC, informing the public about merger proposals considered under the consultative process, and the slightly expanded summary in the next annual report, leaves interested observers, critics and those who wish to analyse the operation of the Act in this area bereft of the facts on which to evaluate whether or not the TPC's decision in a particular matter has been appropriate.[197] LCA supports the suggestion that it would be possible to publish more detailed information along with the reasons for a decision by the TPC in relation to the consultative process. However, LCA warned that there would be a need to ensure that matters which are still commercially sensitive would not be published.[198]

6.5.6 ACA and AFCO also were critical of the lack of information made publicly available about agreements entered into as part of the consultative process for mergers.[199] AFCO considers that consumers are at a disadvantage in terms of obtaining information about the effects of a merger where the decision to approve or, at least, not oppose the merger is restricted to an internal administrative decision of the TPC.[200]

6.5.7 In response to such criticism, the TPC indicated at the workshop that it is considering the extension of the public register concept to encompass a public register of all merger matters considered by the TPC, including mergers considered under the consultative process. The TPC noted that information to be included in such a register would be the matter under consideration, the decision and the reason for the decision.[201]

Conclusions

6.5.8 The Committee is concerned about claims that adequate information is not made publicly available to enable sufficient public scrutiny of the TPC's decision-making processes in relation to merger matters considered outside of the authorisation procedure. The absence of publicly available information has undoubtedly contributed to the level of criticism generated in recent years as a result of controversial mergers. It has also created some difficulties in relation to assessing the effectiveness of the TPC in the performance of its functions with regard to merger control.

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196 Evidence pS183.
197 Evidence pS183.
198 Evidence pS826.
199 Exhibit 25 p222 and Evidence pS430.
200 Exhibit 25 p84.
201 Exhibit 25 p227.

6.5.9 The Committee supports the proposal for an extension of the public register to encompass all merger matters, including those matters considered under the consultative process. In this regard, it is noted that the Committee's earlier recommendation in relation to legislative recognition of the consultative process for mergers (paragraph 6.2.20) will enable the proposal to become a statutory requirement.

6.5.10 The Committee considers that extension of the public register concept will enable a more informed assessment of the TPC's role and effectiveness in merger regulation. It may also provide the opportunity for interested parties to become aware of proposed mergers and submit relevant information to the TPC for its consideration.

6.5.11 The proposal, however, will need to be subject to appropriate confidentiality provisions. Once again, the Committee's recommendation on legislative recognition of the consultative process for mergers will enable statutory protection to be provided for material made available confidentially to the TPC in such circumstances.

Recommendation 10

The Committee recommends that the Trade Practices Commission extend the use of its public register for merger authorisations to cover all merger matters considered by the Trade Practices Commission, including merger matters considered under the consultative process, subject to appropriate confidentiality provisions.

The Committee also recommends that all merger matters considered by the Trade Practices Commission be placed on the public register within twelve months, unless the Trade Practices Commission declares that the matters should be excluded from the register for reasons of confidentiality or other sensitivity. In such cases, the matters should be placed on the public register once they cease to be confidential or sensitive.

6.6 *Liaison with other regulatory agencies*

Background

6.6.1 A number of regulatory agencies are involved in the examination of various aspects of mergers. These include the TPC, the NCSC, the Foreign Investment Review Board (FIRB) and the Australian Broadcasting Tribunal (ABT).

6.6.2 In several submissions, various options were canvassed regarding the rationalisation of merger regulation in terms of both the range of regulatory agencies which should be involved and the extent of liaison which should exist between them.

The regulatory framework

6.6.3 The TPC submitted that the various public interest and competition tests applicable to mergers should be administered by one authority and that it has the necessary expertise to carry out this function. The TPC considers that such rationalisation is necessary for the following reasons:

- the differing public interest and ownership restriction requirements imposed by other legislation can overlap with section 50 of the Act;
- co-ordination of inquiries and decisions is difficult;
- costs and uncertainties for the parties to a merger are increased; and
- the TPC may be required to consider mergers which have already been considered by other regulatory bodies.[202]

6.6.4 The TPC argued that there are too many bodies which examine competition issues in relation to mergers. It claimed that the role of the ABT in relation to the television and radio media restricted the TPC's dealing with the News Ltd and Herald and Weekly Times merger. The TPC also referred to complaints concerning inconsistencies in the approach of the TPC and the FIRB. The TPC stated that the competition and trade practices area should be administered by one body and the securities industry should be administered by a separate body. It also acknowledged that the ABT and, perhaps, other organisations would look at the technical aspects, but that this issue would need to be examined in greater detail.[203]

6.6.5 LCA considers that where industry-specific laws are warranted they should not remove the relevant industries from the general law on takeovers. LCA argued that, in relation to foreign takeovers, the Treasurer should be required to accept the TPC's views as to competition.[204] Attorney-General's also submitted that the merger test should have universal application to all industries so that, while there may be industry-specific legislation, the Act should be the only legislation dealing with competition issues.[205]

6.6.6 McComas suggested that consideration might be given to the appropriateness of requiring bodies such as the ABT to consult with the TPC on competition issues relevant to licence applications or renewals, and to take note of the TPC's views in reaching its decisions. McComas also submitted that if his proposed public detriment test were adopted, the FIRB could be disbanded, leaving the TPC as the only relevant authority to assess public detriment in relation to mergers.[206]

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[202] Evidence pS313.
[203] Evidence pp130, 131.
[204] Evidence pS188.
[205] Evidence pS658.
[206] Evidence ppS258, S259.

6.6.7 APC submitted that, rather than there being specific rules in the Broadcasting and Television Act which limit cross-media ownership, the question should be left to the application of the Trade Practices Act.[207]

6.6.8 AFCO considers that there should be better co-ordination of regulatory mechanisms to assist policy objectives.[208]

6.6.9 Treasury argued that concerns specific to particular industries (for example, the media) are best dealt with by special provisions, rather than through the general regulation of mergers. It indicated that this is already the case in regard to foreign takeovers. Commenting on the foreign takeovers legislation, Treasury noted that the legislation is motivated by the special characteristics of foreign ownership and control, which have a significant political dimension. Treasury argued that it would be very difficult to envisage transferring responsibility for assessment of foreign investment considerations outside the normal executive government process.[209]

6.6.10 The ABT made a detailed submission setting out its arguments why the regulation of the ownership and control of the commercial broadcasting industry should continue to be the function of the ABT, rather than the TPC or a similar body. The ABT indicated that it was incorrect to assume that there is a degree of cooperation between the TPC and the ABT in terms of sharing information. It stated that material that is dealt with in camera and which is commercially sensitive is not shared, even on a confidential basis, and that there is no informal sharing of information with other relevant regulatory bodies.[210]

6.6.11 In contrast, the NCSC gave evidence that there is a 'mafia' between the relevant regulatory bodies (including the FIRB, the ABT and the TPC) whereby each of the organisations is dependent on the others for access to information. The NCSC indicated that there are effective mechanisms for the transfer of information.[211]

6.6.12 Mills submitted that, in the case of public utilities and similar complex service industries, trade practices policy should be implemented through industry-specific bodies. Mills' justifications for this view include the complexities of utilities or service industries, the requirement for much industry-specific knowledge and the view that to place all industry with one trade practices body would result in an agency which would be too large in terms of good management and staff morale.[212]

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[207] Evidence pS40.
[208] Evidence pS424.
[209] Evidence p1270.
[210] Evidence p601.
[211] Evidence p458.
[212] Evidence pS242.

Conclusions

6.6.13 The Committee views with concern claims by the TPC that requirements imposed by other legislation may overlap with section 50 of the Act and impede the TPC's administration of those provisions. However, insufficient evidence has been presented to enable any firm recommendations regarding the form of any alternative regulatory regime to be made.

6.6.14 It appears that there may be scope for improving co-ordination between the relevant regulatory bodies. This may avoid some of the difficulties alluded to by the TPC.

Recommendation 11

The Committee recommends that the Attorney-General develop appropriate procedures to improve co-ordination between the Trade Practices Commission and other regulatory agencies which deal with various aspects of mergers.

6.7 *A pro-active role for the Trade Practices Commission*

6.7.1 In recent times, the TPC has adopted a more pro-active approach to the regulation of the merger and misuse of market power provisions of the Act. This is evidenced by:

- the TPC's modified approach to merger control;
- the institution of proceedings in relation to section 46 of the Act;
- public pronouncements by the TPC on its policy, objectives and priorities in relation to mergers and misuse of market power.

6.7.2 The Committee is eager to see the pro-active approach by the TPC continue. It endorses comments by ACA that the TPC, as the main consumer protection agency in Australia, should 'vigorously enforce the provisions of the Trade Practices Act to ensure that consumers' rights are not infringed'.[213]

6.7.3 While the Committee acknowledges the benefits which can be attained from a policy of industry rationalisation and restructuring, it is also aware of the potential dangers arising from increased levels of industry concentration. In this regard, the Committee considers that the TPC, as the regulatory agency responsible for the administration of competition policy in Australia, should not simply provide symbolic reassurance to the community, but should actively monitor and pursue all matters which impact on competition in Australia.

[213] Evidence pS229.

6.7.4 The Committee recognises that a more pro-active role will have a significant impact on the resources of the TPC. This issue is addressed in section 6.8 of the report.

Recommendation 12

The Committee recommends that the Trade Practices Commission maintain a pro-active approach to the regulation of the merger and misuse of market power provisions of the *Trade Practices Act 1974*.

6.8 *Resources of the Trade Practices Commission*

Resource constraints

6.8.1 In its Annual Report for 1987-88, the TPC stated:

> The declining value of its administrative resources in recent years has severely hampered the Commission's efforts to achieve more cost-effective ways of promoting and securing the competition and fair trading which are essential to the success of Australia's drive for a more dynamic, flexible and efficient economy ... Put bluntly, in terms of resources the Commission is hurting.[214]

6.8.2 In that report, the TPC noted that the real value of the administrative resources, mainly staff resources, provided to it declined by 6.6 percent between 1980-81 and 1987-88, a period in which the real value of Commonwealth Budget sector outlays increased by 23.6 percent. It also noted that the reduction in its resources has coincided with a significant expansion and diversification of its responsibilities, largely as the direct or indirect result of government policies.[215]

6.8.3 In evidence at public hearings, the TPC indicated that additional resources are required, particularly in light of its modified approach to merger control. The TPC stated that while its more pro-active approach is basically driven by policy considerations, resource constraints may eventually force it to allow less important matters to go by the wayside. To illustrate difficulties in this regard, the TPC indicated that during its handling of the recent *Australia Meat Holdings* case relevant to section 50 of the Act, it was forced to defer normal consumer complaints and other work in its Sydney office for a period of one month.[216]

6.8.4 A further area of concern for the TPC, as noted in its 1987-88 Annual Report, is that in the near future its legal vote will be treated as part of overall running costs. The TPC believes this could be disastrous in the likely event of a major case with very high legal costs.[217] Relevant to this issue is the recent decision by the TPC not to insist on the divestiture of Skywest as part of the Ansett takeover

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[214] Exhibit 24 p54.
[215] Exhibit 24 p6.
[216] Evidence pp124, 126.
[217] Exhibit 24 p55.

of East West Airlines. In making its decision, the TPC argued that it could no longer justify the heavy drain on resources which continuing involvement, particularly if that included court proceedings, would have imposed.[218]

Cost recovery

6.8.5 One solution to the problem of resources for the TPC is the implementation of cost recovery measures. While cost recovery was raised as an issue, it generated limited debate.

6.8.6 The TPC indicated that it would welcome a proposal for some cost recovery in relation to areas such as authorisations or the provision of informal advice on merger matters. It referred to charges made in areas such as Corporate Affairs, Patents and Customs for such things as applications and searches as a precedent for charges in the trade practices area.

6.8.7 The TPC also referred to fees charged by the New Zealand Commerce Commission for authorisation applications. These fees, which comprise $550 (including $50 tax) are paid directly to the Commerce Commission for its running costs. In comparison, income earned by Australian agencies such as the TPC is generally directed to consolidated revenue, unless special arrangements are made with the Department of Finance. In addition, the TPC made reference to the United Kingdom proposal for a sliding scale of charges in relation to voluntary pre-notification, based on the value of the transactions. Such fees would commence at 7500 UK pounds. The TPC understands that it is now proposed to extend this concept to both formal and informal approaches on mergers.[219]

6.8.8 At the workshop, CAI stated that it was confident that business would be sympathetic to the imposition of filing fees for authorisation applications, provided that the TPC gives full details of the income derived and that such fees are not used as a mechanism for the government to abdicate its financial responsibilities to the TPC. However, the CAI does not believe that business would support the payment of fees in relation to the provision of informal advice on merger matters as it may impede such approaches and may also involve an element of double counting where an authorisation application is subsequently made. CAI believes that if such a proposal is implemented, fees should be paid directly to the TPC rather than to consolidated revenue.[220]

[218] Exhibit 14 p1.
[219] Exhibit 25 p235.
[220] Exhibit 25 p236.

Conclusions

6.8.9 The Committee considers that it would be desirable to implement cost recovery measures in relation to merger authorisations.

6.8.10 However, the Committee notes that even with the greater emphasis on merger authorisations recently announced by the TPC, a significant amount of the TPC's time and resources will continue to be devoted to the provision of advice to business on proposed mergers. Therefore, it is evident that if any effective cost recovery measures are to be implemented, they should encompass the provision of such advice. As such advice is currently provided by the TPC on an informal basis, the Committee considers that its recommendation for legislative recognition of the consultative process (paragraph 6.2.20) will facilitate the implementation of cost recovery measures.

Recommendation 13

The Committee recommends that cost recovery measures be introduced in relation to costs incurred in the administration and enforcement of the merger provisions of the Trade Practices Act 1974.

Resource independence

6.8.11 Cost recovery, however, remains only one solution to the resource constraints applicable to the TPC. The TPC has indicated that cost recovery measures will only generate a modest financial gain for the TPC.[221]

6.8.12 In emphasising the need for additional resources, the TPC argued that it is important for the TPC to be seen as an independent organisation and be given the necessary resources to conduct its research independent of government. The TPC stated:

> The time has come, if government is serious about a Trade Practices Commission and its role in helping to formulate views and policies in relation to competition law, for the Commission to be given the resources and responsibility to deal with these areas.[222]

Conclusions

6.8.13 The Committee is concerned at claims by the TPC that its efforts to promote competition have been severely hampered by the declining value of its resources. While the Committee has endorsed a more pro-active role for the TPC in controlling mergers and misuse of market power, and regards this as essential in an

[221] The Australian Financial Review, 30 September 1988 p3.
[222] Evidence p127.

environment in which there is increased potential for such misuse, such a role can only be adopted and maintained if sufficient resources are made available to the TPC.

6.8.14 In this regard, the Committee endorses the view of the TPC that:

> If Australia as a nation is to reap all the benefits of a competitive, dynamic and efficient economy it must be prepared to make the essential investment in effective administration of competition law.[223]

6.8.15 The Committee is concerned that if resource constraints feature as a fundamental part of the TPC's decision-making processes in relation to whether it should pursue breaches of the Act or other matters of concern with regard to the administration of competition policy, there is a strong possibility that the TPC may eventually represent little more than symbolic reassurance for the community. Unless the TPC is able to actively pursue breaches of the merger and misuse of market power provisions of the Act through the processes available to it, the deterrence value currently applicable to the powers of the TPC may well be diminished.

6.8.16 Accordingly, the Committee considers that if sufficient resources are not made available to the TPC, in order that it can pursue a pro-active role in the administration of Australian competition policy, then consideration may need to be given to strengthening the merger and misuse of market power provisions of the Act.

Recommendation 14

Pursuant to Recommendation 12, the Committee recommends that the Trade Practices Commission be provided with sufficient resources to enable a pro-active approach to be maintained.

[223] Exhibit 24 p6.

CHAPTER 7

OTHER ISSUES

7.1 *Appropriate forum*

Perceived deficiencies in the court system

7.1.1 A number of submissions referred to alleged deficiencies of the court system for dealing with merger and misuse of market power matters under the Act. These alleged deficiencies may be summarised as follows:

- judges lack the necessary economic expertise to determine complex economic issues such as market definition;
- resolution of matters is impeded by the application of formal rules of evidence and procedure;
- court proceedings are costly and time consuming; and
- Federal Court registries and hearing venues are restricted to capital cities, thereby resulting in inaccessibility.

Establishment of a specialist tribunal

7.1.2 NCAAC favours the establishment of a new tribunal to determine merger issues, which would include consumer representation.[224]

Expansion of the role of the Trade Practices Tribunal

7.1.3 Support for an expansion of the role of the TPT was expressed in a number of submissions.

7.1.4 McComas is in favour of enlarging the role of the TPT where the adjudicating body comprises a judge, an economist and a businessman. He considers this to be an appropriate mixture of disciplines and experience. He also believes that, in general terms, decisions of the TPT have been accorded a considerable degree of respect. McComas does not support the formation of any new independent tribunal and does not believe that consumer representation is necessary on any review tribunal any more so than other special interest groups.

7.1.5 In relation to the TPT, though, McComas drew attention to the need to ensure that the TPT does not exercise judicial power. He suggested that any final orders should be made by the Court after consideration of recommendations from

[224] Evidence pS129.

the TPT. McComas also believes that consideration would need to be given to the streamlining of the TPT's procedures. He indicated that TPT proceedings still tend to be adversarial in nature and recommended that this should be lessened.[225]

7.1.6 LCA, whilst drawing attention to constitutional constraints, considers that, in principle, there would be benefits associated with entrusting the TPT with the determination of all matters of market and competition analysis in Part IV of the Act. LCA believes that, as presently constituted, the TPT has been an extremely effective body and has demonstrated an ability to produce certainty in this area.[226]

7.1.7 The TPC submitted that the TPT's ability to reflect appropriate expertise and experience would constitute a major advantage over the courts. A quicker resolution of matters might also be expected, although this may be nullified by appeals to the Federal Court in interlocutory matters and post-decision appeals on points of law. Another advantage of a tribunal is its greater ability to determine its own procedures and relax the rules of evidence.

7.1.8 However, the TPC also pointed out that the use of a tribunal is unlikely to significantly reduce costs, the most significant of which are the parties' own discretionary costs. Indeed, the TPC believes that proceedings may be even more costly due to the exercise of interlocutory and appeal rights in a second forum and the tendency to increase hearing times with a greater flexibility in relation to the admissibility of evidence.[227]

7.1.9 AFCO referred to the possibility of Federal Court judges sitting, in effect, as the TPT in respect of certain questions.[228]

Retention of existing forum

7.1.10 The TPC believes that the Federal Court is the most appropriate forum for actions initiated by the Attorney-General or the TPC, particularly where pecuniary penalties are sought and for private actions where competition issues are involved.[229]

7.1.11 AFCO expressed the view that the Federal Court should retain the primary function of determining matters under the Act. It rejected claims of inaccessibility in relation to the Federal Court.[230]

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[225] Evidence pS963.
[226] Evidence pS940.
[227] Evidence pS987.
[228] Exhibit 25 p201.
[229] Evidence pS983.
[230] Exhibit 25 pp200, 201.

7.1.12 LCA, while indicating that it favoured an increased role for the TPT, generally supported the retention of the Federal Court as the appropriate forum in this area. LCA referred to the fact that where legislation exposes persons to penalties, they should be entitled to legal rights which can really only be afforded by a properly constituted court.[231]

7.1.13 BCA prefers to retain the courts as the appropriate forum for the resolution of Part IV matters. It believes that regardless of whatever intermediary tribunals are used, the issues will end up in the courts, whether through review under the (ADJR) Act or other means.[232]

7.1.14 A number of suggestions, however, were put forward as a means of enhancing the Federal Court's role in this area.

Relaxation of the rules of evidence

7.1.15 *Corones suggested that, if the courts retain jurisdiction in relation to* sections 46 and 50 of the Act, it may be necessary to establish a specialist court with informal procedures unconstrained by formal rules of evidence.[233]

7.1.16 McComas believes that in relation to competition matters left in the hands of the Court, consideration should be given to modification of the hearsay rule.[234]

7.1.17 LCA made reference to the New Zealand Commerce Act, which provides that, except in relation to criminal proceedings and proceedings for a penalty, the court may receive in evidence any statement, document or information which would not otherwise be admissible and which may, in its opinion, assist it to deal effectively with the matter.[235]

The use of assessors

7.1.18 The TPC is of the view that the use of *assessors* (economic experts or members of the TPT) would significantly enhance the Federal Court's ability to *consider complex economic issues. The TPC referred to the use of assessors in the* New Zealand court structure. It noted that, in the context of a recent decision (the Truetone case), the Court of Appeal accepted the lower court's finding on matters relating to the market because of the availability to the court of a lay assessor and the way in which that court evaluated the market. The TPC regards this case as a very encouraging indicator of the way in which such a provision may operate in Australia.[236]

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231 Exhibit 25 p202.
232 *Exhibit 25 pp206, 207.*
233 Evidence pS3.
234 Evidence pS963.
235 Exhibit 25 p203.
236 Exhibit 25 p205.

7.1.19 AFCO also referred to this proposal and expressed the view that assessors could probably be appointed in the same way as the commercial division of the New South Wales Supreme Court appoints assessors or arbitrators. AFCO indicated that this could be done within the judicial power of the Commonwealth.[237]

7.1.20 BCA believes that the use of assessors in the Federal Court may be something that could be usefully pursued.[238]

7.1.21 Attorney-General's considers that the proposal for appointment of assessors has merit but also involves certain difficulties, including issues relating to the presentation of economic evidence. For example, there is the issue of whether parties should be able to cross-examine the assessor.[239]

A separate division of the Federal Court

7.1.22 A further option for improving the Federal Court's ability in relation to competition matters, as noted by the TPC, is the creation of a specialist Competition Division of the Federal Court.[240] This option was also referred to by AFCO as a means of focussing attention on the specialist nature of decisions under Part IV of the Act.[241]

7.1.23 BCA, however, considers that the creation of a Competition Division of the Federal Court, confined to trade practices cases, would be self-defeating, in that judges may become too specialised.[242]

Educational programs

7.1.24 The TPC believes that if members of the judiciary and the bar were encouraged to participate in a continuing education program addressing economic and commercial issues, the Federal Court's ability to consider complex economic issues would be enhanced.[243]

7.1.25 AFCO also referred to the possibility of creating economic educational activities for judges.[244]

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[237] Exhibit 25 p201.
[238] Exhibit 25 p207.
[239] Exhibit 25 p209.
[240] Evidence pS985.
[241] Exhibit 25 p200.
[242] Exhibit 25 p207.
[243] Evidence pS983.
[244] Exhibit 25 p200.

Conclusions

7.1.26 The Committee considers that the Federal Court's role in the resolution of matters under Part IV and related provisions of the Act should be retained, but that there are a number of possible avenues for enhancing the effectiveness of the Court in this area.

7.1.27 Little benefit would appear to attach to the proposal for the establishment of a new tribunal, particularly since the TPT has established a reputation as a very effective body.

7.1.28 However, there would seem to be significant benefits associated with enlarging the role of the TPT, which is currently empowered to review merger authorisation decisions and make declarations under section 50A of the Act (which deals with acquisitions outside Australia), but has no role in relation to section 46 of the Act.

7.1.29 Section 103 of the Act gives discretion to the TPT to determine its own procedures (subject to the Act and the regulations) and provides that proceedings shall be conducted with as little formality and technicality, and with as much expedition as the requirements of the Act and a proper consideration of the matters before the TPT permit. In addition, the TPT is not bound by the rules of evidence. However, as pointed out by McComas, there would appear to be scope for the streamlining of the TPT's procedures. This could be achieved, for example, by making the procedures less adversarial in nature.

7.1.30 Sub-section 31(2) of the Act specifies qualifications for appointment as a member of the TPT (other than a presidential member) as having a knowledge of, or experience in, industry, commerce, economics, law or public administration.

7.1.31 The Committee is of the view that consideration should be given to more fully utilising the TPT's expertise and resources by enabling the Federal Court to refer economic issues to the TPT. Significant questions would need to be resolved concerning, for example, the issues of the difficulties in defining the questions to be referred, the responsibility for defining those questions, the status of the TPT report and associated constitutional difficulties, and whether the TPT report would be capable of appeal.

7.1.32 Another option which warrants further consideration is the proposal for a relaxation of the rules of evidence, which could be achieved, for example, by a *provision in similar terms to paragraph 103(1)(c) of the Act, applicable to the* determination of economic issues by the Court.

7.1.33 A further option is the use of assessors by the Federal Court. Again, this option would involve the resolution of a number of complex issues, including the determination of the functions of the assessor, whether the assessor's advice would be made public and subject to cross examination, and the number of assessors who should assist the Court.

7.1.34 The Committee is not convinced that the creation of a specialist Competition Division of the Federal Court would significantly enhance the role of the Court in this area. The Committee notes that the Court's effectiveness may be enhanced should the judiciary consider it appropriate for economic educational programs to be made available to its members.

Recommendation 15

The Committee recommends that the role of the Federal Court of Australia in the resolution of matters under Part IV and related provisions of the *Trade Practices Act 1974* be retained, but that the Attorney-General adopt procedures to enhance the effectiveness of the Court in this area. Options may include:

- **enabling the Court to refer economic issues to the Trade Practices Tribunal with an associated streamlining of the Tribunal's procedures;**
- **relaxation of the rules of evidence in relation to economic issues considered by the Court; and**
- **the use of assessors by the Court.**

7.2 *Remedies*

Current Provisions

7.2.1 In considering the effectiveness of the existing merger and misuse of market power provisions of the Act, the Committee was aware of the need to examine, as an associated issue, the extent to which the existing remedies for breaches of the provisions contribute to the prevention of such breaches.

7.2.2 The existing remedies available for contraventions of sections 46 and 50 of the Act are set out in Part VI of the Act. They comprise:

- pecuniary penalties in respect of which the Minister or the TPC may institute proceedings (maximum $50,000 for a person who is not a body corporate and $250,000 in the case of a body corporate);
- injunctions (only the Minister or TPC may apply for an injunction relating to contravention of the merger provisions);
- divestiture in relation to contravention of the merger provisions;
- damages; and

- other orders - the Court is given a discretion to make such orders as it thinks appropriate where, in a proceeding instituted under Part IV of the Act, it finds that a party has suffered, or is likely to suffer, loss or damage by the conduct of a person in contravention of Part IV of the Act. An inclusory list of orders is specified in sub-section 87(2) of the Act.

Criticisms

7.2.3 A number of concerns were expressed regarding the adequacy and effectiveness of the level and range of remedies available in respect of breaches of Part IV of the Act, but particularly in relation to breaches of section 46 of the Act. Several proposals for amending the remedy provisions of the Act were suggested.

7.2.4 In an article on pecuniary penalties provided to the Committee, Hurley states:

> Sole reliance upon a monetary penalty, the amount of which is at the discretion of the Court, may not be the most effective or efficient form of enforcement for legislative provisions such as Part IV of the Trade Practices Act.[245]

7.2.5 Hurley notes the following criticisms about sole reliance upon the pecuniary penalty as provided for in section 76 of the Act:

- it is not always the most appropriate form of penalty;
- the individual perpetrators of the contravention in the corporation to a large extent may escape punishment;
- to date the penalties imposed have been far from the maximum provided for;
- the penalties bear no relationship to the gain made by the corporation as a result of the contravention;
- section 76 is not specific about the matters to be taken into account, with the result that there appears to be little consistency between the level of penalties imposed in analogous cases and little consistency between the matters considered relevant by the Court in imposing penalties; and
- it may encourage a firm to engage in a cost-benefit analysis ie. whether the expected benefit from engaging in restrictive trade practices is greater than the expected cost if detected and penalised.[246]

7.2.6 Hurley suggests that it is time that a wider view of appropriate penalties for antitrust offences is taken. Accordingly, she recommends that the following should be considered:

[245] Exhibit 10 p3.
[246] Exhibit 10 p12.

- removal of a discretion to impose a pecuniary penalty up to a stipulated maximum;
- instead, a pecuniary penalty which is mandatory and proportionate to the profits of the corporation;
- provision for disqualification from office of the directors or executives involved in blatant contraventions of the Act;
- provision for disgorging of profits made as a result of contraventions of the Act;
- a requirement to file with the TPC details of the corporation's program for avoiding contraventions of the Act;
- greater use of injunctions or perhaps preventive orders;
- use of publicity in conjunction with any of the above; and
- a wide power to make other orders similar to the equitable orders possible under American antitrust legislation.[247]

7.2.7 Hurley further suggests that it may be appropriate to give the Court power to make an order as it thinks fit in the relevant circumstances. She states:

> The advantage of such a course is that it allows the Court greater flexibility in fitting the sanction to the circumstances of the breach, and would provide greater deterrence advantages so that hopefully compliance with the provisions of the Act would be greatly enforced.[248]

7.2.8 The TPC shares the above concerns about the adequacy of the existing remedies for breaches of sections 46 and 50 of the Act and the inconsistency in some of the fines already imposed. The TPC considers that the remedies which are available must constitute a realistic commercial deterrent in today's marketplace. It believes that the penalties for contraventions of the Act must be significant enough to deter not only the defendant but, more importantly, other companies and their officers from contemplating similar conduct.[249] The TPC observed that:

> ... in many instances the Australian courts do not seem to view trade practices law breaches as being all that serious. Some of the cases in fact show a sympathy with the respondent who has been caught in a 'difficult' situation, and in none of the cases have penalties come anywhere near the maximum permitted under the Act.[250]

7.2.9 The TPC pointed to the decision in the *Australia Meat Holdings* case, where the Court fell short of ordering the disposal of a key abattoir.[251]

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[247] Exhibit 10 p13.
[248] *Exhibit 10 p13.*
[249] Exhibit 25 p211.
[250] Evidence pS1068.
[251] Exhibit 25 p212.

7.2.10 The TPC is of the view that penalties or remedies should be considered as a package and not simply as pecuniary penalties. It sees merit in the suggestions put forward by Hurley. The TPC believes that the Court should be given a wide discretion in imposing remedies, but with some guidance, as is found in section 79A of the Act relating to Part V offences. It noted that there are a number of matters which should be considered, including the level of penalties, particularly whether there should be a minimum level of penalty, fines as a per centage of profits, re-couping all profits made and divestiture in relation to section 46 matters. The TPC also believes that there could be special provisions which give the Court the discretion to act against directors and executives, including jail in blatant cases and for repeated offenders. However, it warns that, because trade practices contraventions are not criminal offences under Australian law, actions against directors or executives could have ramifications beyond the trade practices jurisdiction.[252]

7.2.11 As a further issue, the TPC recommended that consideration be given to extending the application of section 87 of the Act, which empowers the TPC to institute representative actions for compensation in relation to Part V offences, so that it would also apply to contraventions of Part IV of the Act.[253]

7.2.12 On the issue of divestiture, DITAC suggested that the ceiling on a penalty for a breach of section 46 of the Act should be raised so that the deterrent is equivalent to the threat of divestiture in relation to section 50 of the Act.[254] However, several doubts were raised about the appropriateness of divestiture as a remedy for contraventions of section 46. BCA argued that divestiture would be too severe a penalty to impose upon a company for what may well be the conduct of a particular manager acting not within the scope of his employment.[255] Both McComas and Clarke consider that difficulties could be encountered in identifying the part of the business which should be divested.[256] Clarke pointed out that in a section 46 case there would not be an acquisition to which one could apply divestiture, as there would be in a section 50 case. He, therefore, suggested that divestiture in relation to section 46 matters could be seen as compulsory acquisition of property already owned by a guilty firm and could raise constitutional difficulties.[257]

Conclusions

7.2.13 The remedies for contraventions of sections 46 and 50 of the Act must be realistic to ensure that they provide an effective deterrent to any corporation or individual contemplating a breach of the merger or misuse of market power

[252] Evidence pS1069.
[253] Evidence pS983.
[254] Evidence pS147.
[255] Exhibit 25 p217.
[256] Evidence pS960 and Exhibit 25 p218.
[257] Exhibit 25 p218.

provisions of the Act. In this regard, the Committee agrees with the view that the existing level and range of remedies is inadequate to ensure the effective achievement of that objective.

7.2.14 Pecuniary penalties may not be the most appropriate remedy in every case where there is a contravention of either section 46 or section 50 of the Act. Reliance solely on pecuniary penalties, especially at their existing level, may provide a corporation with the opportunity to weigh up the benefits of a contravention of the Act against the costs of the pecuniary penalty which may be imposed if the contravention is detected and prosecuted.

7.2.15 Accordingly, the Committee not only considers that the existing pecuniary penalties need to be strengthened, but also that a number of additional remedies should be introduced. A substantial increase in the existing maximum penalty for contraventions of sections 46 and 50 of the Act would be an appropriate signal to indicate that the penalties which are imposed need to be an effective deterrent to any breach of the Act.

7.2.16 In particular, the Committee considers that the Courts should be provided with a wider discretion in relation to the range and level of remedies which may be imposed. A greater flexibility in this regard would enable the Courts to impose sanctions which would more appropriately suit the nature and circumstances of the contravention which has occurred.

7.2.17 However, in considering other remedies, the Committee does not favour the extension of divestiture to section 46 matters. As section 46 cases do not involve acquisitions, divestiture as a remedy for contraventions of section 46 would most likely involve an arbitrary decision about which part of the offending corporation should be divested. Such a decision may result in a corporation having to divest a part of its operations which may have had little to do with the circumstances of the contravention in question.

7.2.18 Finally, the Committee sees merit in the suggestion that the TPC should be able to institute representative actions for compensation in relation to Part IV offences. The suggestion should be considered in tandem with the introduction of other possible remedies for Part IV offences.

Recommendation 16

The Committee recommends that sub-section 76(1) of the *Trade Practices Act 1974* be amended to provide for a substantial increase in the existing maximum pecuniary penalty in relation to breaches of the merger and misuse of market power provisions of the Act.

The Committee also recommends that a range of other appropriate remedies be introduced for contraventions of Part IV of the *Trade Practices Act 1974* and that the Courts be provided with broader discretionary powers in relation to the range and level of penalties which may be imposed for Part IV contraventions.

CHAPTER 8

ADVANCE TO GO!

8.1 *Conclusions*

8.1.1 As noted in the introduction to the report, and as discussed in the preceding chapters, there were a number of significant developments during the inquiry in relation to the merger and misuse of market power provisions of the Act. These include:

- the announcement of a modified approach to merger regulation by the TPC;
- the High Court decision in the *Queensland Wire Industries* case; and
- the favourable decision for the TPC in the *Australia Meat Holdings* case.

8.1.2 The Committee reiterates that in the absence of these developments more substantial changes than have been recommended in the report would have been required.

8.1.3 Nevertheless, due to the recent nature of the developments, there remains some uncertainty about the implications for the future of Australian competition policy.

8.1.4 Uncertainty has been a feature of the debate which has encompassed Australian trade practices law since it was first enacted. While various committees of review have considered the operation and effectiveness of the Act, there have always remained some elements of doubt and concern.

8.1.5 This Committee has sought to address the uncertainty and concerns which have arisen in recent times. In this task it has been hampered by the limited empirical evidence currently available in the trade practices field.

8.1.6 The Committee recognises that both the merger and misuse of market power provisions of the Act are still in the developmental stage. It also acknowledges that the Act is required to operate in a dynamic and changing environment. Accordingly, the Committee considers that a further review of the merger and misuse of market power provisions of the Act will be necessary once sufficient time has elapsed for the implications of the recent developments in those provisions to be tested.

Recommendation 17

The Committee recommends that the Attorney-General initiate a further review of the merger and misuse of market power provisions of the *Trade Practices Act 1974* within 5 years.

Alan Griffiths, MP
Chairman
May 1989

ADDENDUM A

Expression of concern by Duncan Kerr, MP

In my opinion there is a need to express particular caution in accepting that the Section 50 dominance' test should be retained.

The 'dominance' test provides a high threshold which permits high levels of industry concentration. It permits mergers to proceed where, for example, the end result would be concentration to the degree that:

- there are only two 'well matched' competitors left; or
- there is only one major producer remaining, provided there remains a number of small independent 'competitors'; or
- there is only one major producer remaining (and no local independent competitors) provided imports represent an effective competition.

Evidence given to the Committee by the TPC highlights that, as a result, most of Australia's key manufacturing industries were oligopolistic, duopolistic or monopolistic.

I have, on balance, joined with the majority in assenting to the view that the overriding imperative, notwithstanding this undisputed evidence, is to provide a policy setting which permits the facilitation of industry rationalisation and increased international competitiveness.

I believe, however, that there is a pressing need for more empirical research both to assess whether the policy is meeting this objective and to examine the negative impact of increased concentration on competitiveness.

In this regard, I am particularly mindful of the findings of the Prices Inquiry Board 'Report to the Tasmanian Government on Retail Prices in Tasmania in Relation to Other Australian States'.

The Prices Inquiry Board's extensive report is a detailed and illuminating case study plainly demonstrating the cost to the consumer of limited competition in a market dominated by a duopoly. The Report concluded that the retail prices of many food items sold to shoppers in Tasmania, when compared to the retail prices of the same or similar goods in other parts of Australia were 'excessive and unreasonable'. Turning to the question of industry concentration, the Board found (at p.397):

> The level of concentration of ownership and or control in both the wholesale and retail food and grocery industry in Tasmania can be described as very high.

Woolworths (Victoria) Ltd. trading as Purity and Roelf Vos Supermarkets have an estimated market share of wholesale grocery sales in Tasmania of between 53.5% and 59.5% and a share of the Tasmanian retail grocery market of approximately 45%.

Coles-Myer Ltd. trading as New World Supermarkets has an estimated share of the wholesale and retail market of 28%.

The Board concludes that the very high level of concentration of ownership in Tasmania coupled with the vertical integration (from retailing into wholesaling) of the two major chains is deleterious to price competition and contributes to higher retail prices for food and groceries in this State than exist elsewhere in Australia. It will be recalled that 30% to 35% of the overall 8% difference between Tasmania's average retail prices and those of Australia as a whole cannot be explained by reference to the additional costs of operating in Tasmania.

All possible encouragement should be given to the permanent establishment within the State of a third major and wholly independent grocery wholesaler and a third major retail chain (preferably a discount chain). Without either or possibly both the level of competition at a retail level is unlikely ever to be such as to generate the best possible prices for Tasmanians.'

This is an important finding and should be contrasted with Coles/Myer's assertions to the Committee that it regarded the Tasmanian market as being highly competitive.

I believe that findings of this kind give credence to the concerns of groups such as the Australian Consumers Association.

My support for the retention of the dominance test is therefore merely the choice of what appears, *in the absence of adequate empirical evidence,* to be the lesser of two evils.

The Committee has drawn attention to the need for the ABS to establish adequate industry concentration statistics.

Having done so, it will be important for the Government to monitor the success of the Section 50 test which is designed to foster international competitiveness and to balance any gains in that direction against costs to Australian consumers of the kind highlighted by the Prices Inquiry Board.

ADDENDUM B

Expression of concern by Mr Peter Cleeland, MP

I agree with the concerns expressed by Mr Duncan Kerr, MP that there is a need to express particular caution in accepting that the section 50 'dominance' test should be retained.

Section 50 has not prevented the creation of a group of corporations called Agribusiness. Such corporations impact heavily on family farms. Over the years these corporations have explored and exploited most possible commercial avenues in the financing, production, manufacture and marketing of the country's food and agricultural produce. As can be expected, they form neither a homogeneous nor an easily researched group. They have the reach of an octopus, the camouflage of a chameleon and the amoeba's ability to adapt.[1]

Corporations such as Adelaide Steamships Australia, Allied Mills Australia, Elders IXL Australia and Inghams Enterprises Australia, among others, are vertically integrated and control the output of food through wholesale markets at all points from the farm gate. The end result is that farmers have a diminishing number of markets in which to sell their produce, and competition accordingly diminishes.

Paragraph 3.2.2 of the report discusses the theory of 'perfect competition' which is tacitly assumed in many areas. In this perfect world there are many buyers and sellers, perfect knowledge, educated consumers, no product differentation and no interference with prices by government. The fact that no one market possessing these ideal characteristics has ever existed, nor is likely to exist in the future, has not deterred economists from basing the entire structure of micro-economic theory and thus policy recommendations relating to business efficiency on it. The report recognises the imperfections of the market place.

In a market economy, such as that of Australia, structural balance is secured by the ordinary operation of supply and demand in the market, acting through prices and profits. The prices of goods in relative short supply tend to rise, and this signals, through higher profits, the need to produce more of them. The reverse occurs when goods are over supplied. The market mechanism can, for the most part, be relied on to produce an effective, if not always perfect, structural balance. But, imperfections in the mobility of resources or in the knowledge about market conditions retard the smooth operation of this mechanism. In the same way, restraints on the free entry of competitors and particular industries, restrictive market practices and the exploitation of monopoly power interfere with the free working of the price mechanism and act as a brake on economic efficiency and economic growth. The

[1]Sarah Sergent 'The Food Makers', Penguin.

vertically integrated structure of agribusiness can operate as a brake on ordinary market mechanisms and severely limit the choice available to individual farmers in both cost of inputs and price on sale of products.

It is the proper role of government to produce an economic environment which most closely replicates that of 'perfect competition'. It would, however, be idle to pretend that individual firms will not have major regard to their own interest. It is for this reason that I believe that government should produce a setting in which the search for efficiency and expansion itself becomes a natural objective of the business policies of private firms. It is for this reason that I believe more attention needs to be given to the growth of agribusiness in Australia and its economic effect on competition within the farm sector.

It is pleasing to note that the Trade Practices Commission is moving in this direction but such changes do not remove the need for more empirical research both to assess whether Section 50 is meeting the objectives of competition and to examine the negative impact on increased concentration in agribusiness on competitiveness.

Like Mr Duncan Kerr, MP, I have, on balance, gone with the majority in assenting to the view that the overriding imperative, notwithstanding this undisputed evidence, is to provide a policy setting which permits the facilitation of industry rationalisation and increased international competitiveness. It is essential, however, that the government continue to provide sufficient resources to the Trade Practices Commission to enable empirical data to be produced which will enable more effective monitoring of agribusiness in Australia.

Dissenting Report by Mr Robert Tickner, MP and Mr Keith Wright, MP

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DISSENTING REPORT BY MR ROBERT TICKNER, MP AND MR KEITH WRIGHT, MP

Introduction

This dissenting report concentrates on section 50 of the *Trade Practices Act 1974* (the "TPA").

Part IV of the TPA is intended to prevent "restrictive" trade practices. Section 50 is a key provision in that Part and prohibits mergers that would result in a corporation dominating a substantial market for goods and services. Where a corporation already *dominates a substantial market, a merger is prohibited if it would substantially* strengthen the power of the corporation to control or dominate that substantial market.

The prohibition in section 50 can be circumvented through obtaining authorisation for a merger under section 88(9) of the Act. The Trade Practices Commission (the "TPC") can only grant such an authorisation if the proposed merger would result in a "benefit to the public" (section 90(9)).

Generally speaking, there are four types of submissions put to the Committee on section 50:

(1) maintain the status quo;

(2) retain the dominance test but introduce a second threshold for situations where dominance might not result but where the competitors in the market may be reduced below an acceptable level;

(3) revert to the pre-1977 "substantially lessen competition" test;

(4) include a "public interest" test to be applied to all mergers.

In reaching our own conclusions based on the evidence, due regard was had to the legal regimes of comparable industrialised countries and strong expressions of public concern about the impact of takeovers generally, and in particular in relation to specific sectors of the economy.

History of Merger Regulation

The original TPA prohibited mergers which resulted in a "substantial lessening of competition in a market". A voluntary clearance and an authorisation procedure also existed.

The major problem with this test is alleged to have been that it was too wide. It "prohibited relatively small mergers in relatively small markets" (Attorney-General's Department's submissions, No. 29, p.11). Thus it was said to impose too great an administrative burden on the TPC.

In 1977 the TPA was amended to prohibit acquisitions which result in, or substantially strengthen, dominance in a substantial market. The clearance procedure was abolished but the authorisation provisions remained.

In February 1984 the Government issued a Green Paper entitled "The Trade Practices Act: Proposals for Change". It suggested that because the aim of merger regulation in the TPA was to promote competitive conduct, "(t)he appropriate test for mergers should be one based on the likely competitive effect of the merger in the market, rather than solely on market structure" (p.11). The "dominance" test was criticised because "the reliance of the section on the "control or dominate" test, to the exclusion of any explicit reference to the effect of a merger on competition, means that mergers which may substantially lessen competition and which may have no redeeming public benefit can nevertheless proceed unimpeded by the section if neither the merging nor the merged corporations are or would be in a position to control or dominate a market" (Ibid.).

The Green Paper also advocated retention of the "public benefit" authorisation procedure and suggested consideration of a compulsory pre-notification system. The latter suggestion was intended to prevent "midnight mergers" which were negotiated and effected without the TPC's knowledge and which therefore made remedial action a problem.

In addition, the re-introduction of a voluntary pre-clearance mechanism was recommended. A clearance procedure would enable the TPC to examine whether a proposed merger would come within the prohibition while the authorisation procedure would allow the TPC to authorise, on public benefit grounds, a merger that would result in the prohibited dominance of a market.

In 1986 further amendments were made to the TPA, including several which affected section 50. For example, the term "control" was removed from subsection (1) but the "dominance" test was retained. The section was extended to cover acquisitions by persons and a new section 50A was introduced to apply the prohibition on mergers to acquisitions outside Australia that affect a substantial market in Australia.

The authorisation procedure was streamlined in that if an application was not determined by the TPC within 45 days, the proposal was deemed to have been authorised (section 90(11)). The divestiture remedy was also strengthened (section 81(1A)).

The Operation of Section 50

A principal problem with the existing "dominance" test is its tendency to allow the abuse of market power. Quite simply, it has allowed a high degree of concentration to develop in many Australian markets.

A provision that facilitates the reduction of competition is contrary to the spirit of the TPA. "(M)erger provisions are necessary to prevent the possibility of achieving, by merger, anti-competitive results prohibited elsewhere in the same law" (1976 Trade Practices Review Committee, the "Swanson Committee", cited in the Attorney-General's Department Submission at p.5).

The existing "dominance" test does not guarantee the preservation of competitive conduct. The "test relates to the structure of a market, not the conduct in that market." (Green Paper, Op. Cit., p.11). Instead it concentrates on economic efficiency in financial terms. Indeed the high degree of concentration that has occurred in recent years and the resulting public concern is the prime impetus for reference of the issue to this Committee.

The Attorney-General, in his Second Reading Speech to the 1986 Bill, stated Government policy:

> "The Government is firmly committed to the encouragement of efficient Australian industry and to increasing our competitiveness on world markets...The coverage of section 50 will not be extended beyond those mergers which result in undue concentration in a market...The Commission has...made it clear that it regards desirable industry restructuring as a public benefit and has been prepared to authorise mergers for that purpose."

The emphasis on efficiency considerations was recognised in the submission made to this Committee by the Attorney-General's Department:

> "The starting point is to recognise that the present dominance test is a high threshold. Whilst it has fostered the Government's policy of industry rationalisation and efficiency, it has also facilitated the entrenchment of very high levels of concentration in many sectors of Australian industry. The present test permits mergers at least up to the point of duopoly without the need for any public benefit to be demonstrated." (Submission No.29, p.94).

The TPC has implemented Government policy. The Editor of the Australian Trade Practices Reporter states that "(t)he benefit of scale economies or other efficiencies brought about through rationalisation has been a consistently important public benefit recognised by the TPC." (p.7,356).

In approving Fletcher Challenge Ltd's proposal to increase to 50 per cent its holding in Australian Newsprint Mills Holdings Ltd and Australian Newsprint Mills Investments Pty Ltd the TPC found, according to its Annual Report (1987-88) that:

> "several benefits...offset the partnership's dominant market position including benefits to ANM in the scale of operations, technology, product quality, financial backing and access to capital, and management and marketing expertise." (p.16).

Similarly, in approving the merger of Ardmona Fruit Products Co-operative Ltd, Letona Co-operative Ltd and SPC Ltd the TPC said:

> "The Commission considered the merger would considerably reduce competition and result in market dominance but accepted that the canners were facing a number of difficulties in world and domestic markets. It saw the merger as an opportunity for the reconstruction and rationalisation of a range of activities in the industry...". (Annual Report, p.17).

The TPC, in its merger guidelines, indicates that it prefers to control abuse of market power through section 46:

> "whilst (the TPA) allows the creation of oligopolies or even duopolies through merger, it forbids the achievement thereby of dominant market power in any one hand. It tolerates the concentration of market power into few hands and seeks to control the behaviour of corporations which possess a substantial degree of market power by prohibiting (through section 46) misuse thereof." (p.3).

In our view this is the wrong approach. It is a reactive rather than a preventive approach. The better way to protect from misuse of market power is to prevent it being created in the first place. Mergers should not be allowed to occur if they substantially reduce competition and they should only be authorised if the public benefit of the merger demonstrably outweighs competition considerations.

Indeed, the Economic Planning Advisory Council ("EPAC") in its Council Paper No. 38 (April 1989) pays significant attention to the effects of high concentration on competition in Australia. EPAC concludes that "(c)oncentration levels in Australia are high by international standards" (p.10) and notes that "(t)he extent of efficiency gains through takeovers and mergers has been queried in several overseas studies, which have found that the performance of the merged companies, measured by movements in share prices and/or profitability, has often been poor." (p.14). EPAC quotes the Australian Financial Review as saying:

> "It is a rare industry in Australia that has more than three participants. Some of these oligopolies are intensely competitive, but as a rule they are not, by their nature." (AFR, 22/2/89). (p.10).

The problem with relying on section 46 to prevent market abuse in concentrated industries is that the fact of concentration may facilitate forms of market abuse that are hidden, and which are more difficult to prevent under section 46.

EPAC comments:

> "In principle, however, high levels of concentration make the exercise of market power feasible, without requiring the visible trappings of explicit collusion or regulation which might be necessary to exploit market power when markets are less concentrated. Tacit collusion can in many instances substitute for arrangements which are illegal under the Trade Practices Act." (p.14).

This is not to say that the promotion of efficiency is not a desirable goal. But the creation of high market concentration provides fertile ground for the development of anti-competitive conduct.

The Australian Consumers' Association (the "ACA") argues that a policy of industry efficiency and competitiveness is a short term one.

> "In the longer term a duopolistic or oligopolistic commercial and industry society might not be beneficial to the public, for the more entrenched such a situation becomes, the less likely it is that there will be sufficient competitive discipline in the market to ensure the maintenance of that degree of efficiency which is desirable...there is a degree of public disquiet at the degree of concentration which is taking place within industry generally and within some particular industries, and perhaps it is time to consider whether the position should be re-evaluated." (Submission No.15, p.6).

The ACA argues that the efficiency argument should not outweigh the principle of promotion of competition within the Australian market unless genuine economies of scale would result, there is import competition, the economies would be passed on through lower prices and better product quality and there are no significant consumer disadvantages such as reduction in product choice or quality. (Ibid., p.15). In the ACA's view, these considerations are ignored in the application of the "dominance" test.

In addition, the Australian Consumers' Association alleges that the TPC does not monitor the result of takeovers nor compile general information on the effect of takeovers on industry ownership (Submission No.15, p.27).

In addition to concerns that increased concentration promotes or allows future abuse of market power, DR Chapman and CW Junor (Submission No. 9) cite American research to the effect that there is "a positive relationship between increased concentration and increased price, especially in markets for consumer goods" (p.5) and the Australian Consumers' Association argue that increased concentration has a detrimental effect on corporate management performance (Submission No.15, p.19)

Thus the general thrust of the existing provision lies in favour of promoting economies of scale. The public interest in enhanced competition and in preventing corporations from being placed in a position from which they may abuse their market power seems to take second ranking.

Overseas Merger Regulation

Australia's limited intervention in merger activity is out of line with many comparable countries. Most other countries regulate mergers with the primary aim of protecting competition and preventing abuse of market power. A merger is not required to result in market dominance before regulatory authorities can intervene.

For example, in the United Kingdom the Director General of Fair Trading is required to be informed about mergers and to determine whether they qualify for investigation by the Monopolies and Mergers Commission. They will qualify if they create or enhance a 25 per cent market share or if the value of the assets taken over exceeds 30 million pounds. The Commission is required to determine whether the merger operates, or may be expected to operate, against the public interest. Factors to be taken into account include the maintenance and promotion of competition, the interests of consumers in respect of price, quality and variety and the facilitation of new entry (section 84(1) *Fair Trading Act 1973).*

In a White Paper dated January 1988 the Department of Trade and Industry (see Attorney-General's Department Submission p.60) said:

> "Government should intervene only where the interests of the decision makers in the market are likely to run counter to the public interest. The classic example of this is where a merger threatens to give the newly-formed enterprise a position of market power which it will be able to exploit at the expense of its customers...In practice, in assessing the public interest, it is likely that the main consideration for the MMC will continue to be the likely effect of the merger on competition...In most cases, competition is likely to be the most effective means of promoting efficiency. There may sometimes be cases in which a merger appears both to threaten competition and to offer the prospect of efficiency gains. In such cases, arguments about the gains to efficiency (and thus to international competitiveness) which may flow from a merger will be considered. But the paramount consideration is to maintain competitive market conditions."

In the United States mergers are prohibited where the effect may be to substantially lessen competition, or to create a monopoly (section 7, *Clayton Act*). Notification of proposed mergers that would exceed certain thresholds is compulsory.

A prime consideration in the United States is the effect of a merger on market power, but efficiency considerations are also important.

In Canada a merger will be prohibited if it "prevents or lessens, or is likely to prevent or lessen, competition substantially" (section 64, *Competition Act 1986)*. This section replaced a provision that prohibited mergers that were detrimental to the public interest. There is a compulsory pre-merger notification program for large mergers.

In determining whether a merger would lessen competition substantially, the Canadian Competition Tribunal is required to have regard to such factors as the availability of substitute products, entry barriers and the level of competition remaining after the merger.

The New Zealand *Commerce Act* requires notification of certain mergers and allows for action to be taken in respect of any merger found to be contrary to the public interest. In considering the public interest issue, the Commerce Commission is required to have regard to, among other things, the promotion of consumer interests, the development of industry and commerce, the better utilisation of resources and the entry of new competitors.

In some countries where a "dominance" test applies, the emphasis in application is on the preservation of competition. This is in direct contrast with the stated policy in respect of the Australian section 50.

For example, the European Community, although not prohibiting mergers per se, prohibits the abuse of a dominant position within the common market or in a substantial part of it (Article 86, *Treaty of Rome)*. According to the "Comparative Summary Paper on the Merger Laws of Certain Countries" supplied to the Committee by the Attorney-General's Department, "the maintenance of effective competition in all sectors throughout the community remains the (European) Commission's principal enforcement objective." (p.18).

Generally, the vast majority of world merger regulatory legislation focuses on competition considerations. The higher threshold, the "dominance" test, is relatively uncommon. Most countries adopt a less free market approach than Australia and seek to preserve the advantages of a competitive environment. This shows an understanding of the fact that market dominance is not an essential precondition to abuse of market power. A corporation can be in a position to engage in anti-competitive conduct without dominating a market. The fundamental problem with the existing section 50 is that it fails to recognise this.

Recommendations

We recommend that:

(1) section 50 be amended to revert to the pre-1977 "substantially lessening of competition" test;

(2) the qualification "substantial market" be retained in the prohibition;

(3) a pre-notification system be introduced;

(4) creation of a Ministerial discretion to institute a Government inquiry.

Advantages of the "Competition" Test

Our recommendations do not ignore the fact that higher concentration in a market can be advantageous, both in economic and in consumer benefit terms. The effect of reducing the threshold of section 50 from "dominance" to "substantially lessening competition" simply means that other considerations, in particular those arising from the promotion of competition, are also embodied in the legislation.

It is said that the "dominance" test is sufficiently wide to take account of "behavioural elements" (Attorney-General's Submission, p.36). The TPC in its Merger Guidelines, also says the section is "very much concerned with behavioural features" (pp8-9). But this is not obvious from the wording of the section or from the application of the test to date which shows a clear emphasis on industry efficiency factors. Even if the existing test is interpreted to include behavioural considerations, in my view the importance of such considerations should be specifically incorporated into the test. This is the effect of reducing the threshold from "dominance", a structural test, to "competition", a test of conduct.

The Attorney-General's Department notes that the competition test would have the greatest impact in import protected sectors and that these are "the areas in which mergers have been the subject of greatest controversy (e.g. Coles/Myer, News Ltd/Herald and Weekly Times, and Ansett/East West)." (p.55). The test would obviously have less impact in sectors where import competition exists.

The Attorney-General's Department have submitted that the most fundamental criticism of the substantial lessening of competition test was the wide definition of "market" which led to "an unintended application of the merger provisions to a large number of mergers with a minimal national significance" (p.54).

The Department suggested that a return to the competition test would require the retention of the rider that the market affected be a "substantial" market. This is exactly what we propose. Such an amendment would allow for examination of significant mergers but would "avoid undue interference in merger activity" (Ibid.).

Public Interest/Benefit Test

We do not recommend the introduction of a general public interest test to be applied by the TPC at this time. But we believe that the position should be kept under constant review.

The existing authorisation procedure contains an inbuilt public benefit component. The TPC, in considering whether to authorise a merger that would otherwise contravene section 50, is required to decide on public benefit grounds (section 90(9)).

"Public benefit", in this context, has been defined widely:

> "anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. If this conception is adopted, it is clear that it could be possible to argue in some cases that a benefit to members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable." (Re *QCMA and Defiance Holdings Ltd* (1976) ATPR 40-012 at p.17,242) cited in Attorney-General's Department Submission, pp.63-4).

Public benefits said to have been recognised by the TPC in considering authorisation applications include steps to protect the environment, such as industry arrangements to limit pollution and the provision of better information to consumers and business alike to enable them to make informed choices in their dealings. (ATPR Vol. I, p.7,401 citing TPC document "Objectives, priorities and work program for 1988-89").

Although the TPA at present makes no provision for a general inquiry into the public benefit of mergers, the compulsory merger pre-notification procedure, which we recommend be added to the TPA, means that the public benefit considerations relevant to a prohibited merger must be considered in every case by the TPC. The TPC will be aware of all proposed mergers and, if the TPC considers them to infringe section 50, the authorisation procedure will have to be instituted. Otherwise the merger will be at risk of divestiture and other orders available to the TPC in the event of a breach of section 50.

Instigation of Inquiries at Government Discretion

In particular cases where takeovers involve sensitive national or public interest considerations which warrant a public inquiry we propose that the *Trade Practices Act* be amended to enable such inquiries to be instituted by the Government at Government discretion.

We note that despite the free market rhetoric of Mrs Thatcher's Government that the British Government accepted the recommendations of the UK Monopolies and Mergers Commission to block the bid by the Australian company Elders IXL for Scottish and Newcastle Breweries.

The view that Governments and Ministers of the Crown have no role whatsoever to play in intervening in takeovers to protect the public interest is one which we can not accept. Our view is that such a power should be used only in exceptional circumstances to ensure that the public interest concerns including those of workers, consumers, shareholders and Government industry policy, are effectively addressed.

We simply can not subscribe to the view that current Australian laws as they stand are adequate to protect the public interest and believe that governments have a political and moral responsibility to intervene in the public interest in the special circumstances we envisage.

Pre-merger Notification System

If the TPC is not made aware of a merger that may contravene section 50 before it happens, the only action it can take is divestiture. But divestiture, as was recognised in the Green paper, "can be disruptive, particularly for employees involved, and can be ineffective" (p.13).

Thus the introduction of a pre-notification system is warranted.

Upon pre-notification, the TPC would be able to advise parties as to whether the proposed merger is likely to contravene section 50. If contravention is likely to occur, negotiations could be commenced with a view to preventing contravention. If no compromise was possible, an authorisation application would be necessary to prevent the risk of TPC action under the TPA.

In many ways, a system of pre-notification would be no different to the existing informal consultative approach adopted by the TPC. Statutory recognition of pre-notification would simply formalise the present procedure. As with consultation, pre-notification would avoid costly court proceedings and would enhance commercial efficiency.

The Green Paper's recommendation for the introduction of a pre-merger notification system was not implemented. One of the reasons, according to the Attorney-General's Department, was the problem "of determining a clear and precise threshold which is neither arbitrary nor places an undue administrative burden on the TPC" (Submission No.29, p.13).

But the TPC already has to decide whether a proposed merger is likely to contravene section 50 and therefore whether it should interfere. In so deciding it has to consider the meaning of section 50 and how it should be applied in practice; it has to rely on the threshold set out in the legislation. It the TPC was not already determining these questions, its informal consultative process would not be working.

Conclusion

In our view section 50 should be amended to prohibit mergers which result in a substantial lessening of competition in a substantial market. In addition, merger pre-notification system should be introduced.

This dissenting report also recommends that a Ministerial discretion be created to be used in exceptional circumstances to protect the public or national interest.

These recommendations promote the principal aim of the Act which may be generally described as to preserve competition and to promote economic efficiency. The present test conflicts with this overall legislative policy aim. The retention of the qualification contained in the phrase "substantial market", in large measure, defeats the argument that the pre-1977 test imposed too onerous a burden on the TPC. Further, compulsory pre-notification avoids the problem of divestiture being the only order open to the TPC and the retention of the authorisation "public benefit" test means public benefit considerations will still be given effective voice.

These recommendations also reflect public concern at the high level of concentration the existing merger provisions have allowed to develop, for example in the areas of newspaper ownership, domestic airline operations, brewing and retailing.

While this dissenting report concentrates on section 50 of the *Trade Practices Act* and related matters we do not adopt the process of reasoning and the conclusion adopted by the committee in relation to the discussion of economic issues in Chapter 4.

We strongly agree, however, that the existing evidence on the economic benefits or costs of takeovers is inconclusive. We find it extremely disappointing that successive governments have not acted more effectively in this area and therefore strongly endorse recommendation number one which, if implemented, will result in the compilation of detailed data to assist in the formulation of future policy.

We believe that until such data and research is available then governments should tread cautiously in allowing what may well turn out to be excessive industry concentration in the guise of promoting industry efficiency. It is highly unlikely that any future government will be able to unscramble the egg.

Part IV of the *Trade Practices Act* is legislation based on the principle of enhancement of competition for the benefit of the public and industry.

High concentration of industry is in our view against the long term interests of both consumers, small business and the nation generally.

APPENDIX A

SUBMISSIONS

Submission No.		Date
1	Mr S. Corones Queensland Institute of Technology, Brisbane, Qld	31.3.88
2	Ms J. Trutwein Monash University Melbourne, Vic	10.4.88
3	Mr F.G. Landers Pymble, NSW	12.4.88
4	Consumers' Association of Victoria Mt Waverley, Vic	23.4.88
5	Australian Federation of Air Pilots Melbourne, Vic	14.4.88
6	*Australian Press Council* Sydney, NSW	2.5.88
7	Australian Chamber of Commerce Canberra, ACT	3.5.88
8	Mr P.H. Clarke Monash University Melbourne, Vic	5.5.88
9	Messrs. D.R. Chapman & C.W. Junor, University of NSW Sydney, NSW	6.5.88
10	National Consumer Affairs Advisory Council Canberra, ACT	5.5.88

11	Department of Industry, Technology and Commerce Canberra, ACT	11.5.88
12	National Companies and Securities Commission Melbourne, Vic	21.4.88
13	Australian Stock Exchange Limited Melbourne, Vic	29.4.88
14	Law Council of Australia Canberra, ACT	10.5.88
15	Australian Consumers' Association Marrickville, NSW	16.5.88
16	Commercial Law Section, Law Institute of Victoria Melbourne, Vic	12.5.88
17	Professor G. Mills, University of Sydney Sydney, NSW	17.5.88
18	Mr G. Hoban Albury, NSW	12.3.88
19	Mr W.R. McComas Sydney, NSW	19.5.88
20	Mr R. Turner Mount Waverley, Vic	28.5.88
21	Coles Myer Ltd Tooronga, Vic	3.6.88
22	Trade Practices Commission Belconnen, ACT	7.6.88
23	Australian Federation of Consumer Organisations Manuka, ACT	6.6.88
24	Department of the Treasury Canberra, ACT	10.6.88
25	Mr J.M. Selimi Narre Warren, Vic	Received 16.6.88

26	Australian Broadcasting Tribunal North Sydney, NSW	15.7.88
27	Business Council of Australia Melbourne, Vic	20.7.88
28	Confederation of Australian Industry Canberra, ACT	26.7.88
29	Attorney-General's Department Canberra, ACT	July 88
30	Trade Practices Commission - misuse of market power	1.8.88
31	Trade Practices Commission - supplementary submission	4.8.88
32	Australian Stock Exchange Limited - supplementary submission	24.8.88
33	Mr S.W. Coates Grays Point, NSW	29.8.88
34	Trade Practices Commission - supplementary submission	16.9.88
35	The Communications Law Centre and The Public Interest Advocacy Centre Kensington, NSW	22.9.88
36	S.B.P. - State Council Incorporated Sydney, NSW	20.9.88
37	Shopping Centre Tenants Association of Australia Brisbane, Qld	26.9.88
38	Law Council of Australia - supplementary submission	27.9.88
39	The Metal Building Products Manufacturers Association Sydney, NSW	Sept 88
40	Department of the Treasury - supplementary submission	30.9.88

41	Australian Consumers' Association - supplementary submission	Received 10.10.88
42	Law Council of Australia - supplementary submission (workshop)	11.10.88
43	Messrs. D.R. Chapman and C.W. Junor - supplementary submission (workshop)	14.10.88
44	Mr W.R. McComas - supplementary submission (workshop)	11.10.88
45	Mr P.H. Clarke - supplementary submission	17.10.88
46	Trade Practices Commission - supplementary submission on misuse of market power	20.10.88
47	Australian Bureau of Statistics Belconnen, ACT	20.10.88
48	Coles Myer Ltd - supplementary submission	27.7.88
49	Coles Myer Ltd - supplementary submission (workshop)	Received 24.10.88
50	Australian Consumers' Association - supplementary submission (workshop)	Received 24.10.88
51	Australian Consumers' Association - supplementary submission on section 50 of the Trade Practices Act	21.10.88
52	National Companies and Securities Commission - supplementary submission	8.12.88
53	Business Council of Australia - supplementary submission	7.12.88
54	Council of Small Business Organisations of Australia Ltd Parkes, ACT	13.12.88

55	Trade Practices Commission - supplementary submission	23.12.88
56	Trade Practices Commission - supplementary submission	5.1.89
57	Australian Retailers' Association Sydney, NSW	12.1.89
58	Coles Myer Ltd - supplementary submission	16.1.89
59	Mr S. Corones - supplementary submission	26.1.89
60	Mr W.R. McComas - supplementary submission	2.2.89
61	Law Council of Australia - supplementary submission	6.2.89
62	Confederation of Australian Industry - supplementary submission	6.2.89
63	Trade Practices Commission - supplementary submission on the *Queensland Wire Industries* case	21.2.89
64	Australian Federation of Consumer Organisations - supplementary submission on the *Queensland Wire Industries* case	23.2.89
65	Mr S. Corones - supplementary submission on the *Queensland Wire Industries* case	23.2.89
66	Mr W.R. McComas - supplementary submission on the *Queensland Wire Industries* case	22.2.89
67	Law Council of Australia - supplementary submission on the *Queensland Wire Industries* case	24.2.89

68	Business Council of Australia - supplementary submission on the *Queensland Wire Industries* case	24.2.89
69	Department of the Treasury - supplementary submission	2.3.89
70	Business Council of Australia - supplementary submission	3.3.89
71	Attorney-General's Department - supplementary submission on the *Queensland Wire Industries* case	7.3.89
72	Trade Practices Commission - supplementary submission	10.3.89
73	Australian Consumers' Association - supplementary submission on the *Queensland Wire Industries* case	22.3.89
74	Trade Practices & Intellectual Property Committee of the Law Institute of Victoria Melbourne, Vic	26.4.89
75	Law Council of Australia - supplementary submission	27.7.88
76	Trade Practices Commission - supplementary submission (workshop)	Oct 88

APPENDIX B

EXHIBITS

Exhibit No.	
1	'Control for purposes of the Takeover Code', S. Corcoran
2	'Recent Developments in the Australian Law of Monopolization', P.H. Clarke
3	'Defensive Schemes and the Duties of Directors', National Companies and Securities Commission
4	*The effects of mergers and takeovers in Australia,* Australian Institute of Management, Victoria, and National Companies and Securities Commission
5	*Australian Takeovers: The Evidence 1972-1985,* S. Bishop, P. Dodd, R.R. Officer
6	Treasury Economic Paper Number 12, *Some Economic Implications of Takeovers*
7	*Guidelines for the Merger Provisions of the Trade Practices Act 1974,* Trade Practices Commission
8	*Objectives, priorities and work program for 1988-89,* Trade Practices Commission
9	'Section 76 of the Trade Practices Act: the problems asociated with the use of pecuniary penalties under Part IV and some suggestions for reform, A. Hurley
10	'Section 76 Trade Practices Act - Are Pecuniary Penalties Alone An Effective Sanction?', A.C. Hurley, in The Commercial Law Association of Australia Ltd. Bulletin - Volume 18 No.3
11	Trade Practices Commission Determination - Fletcher Challenge Limited

12 Federal Court decision, *Australia Meat Holdings* case

13 Federal Court appeal decision, *Australia Meat Holdings* case

14 Trade Practices Commission, Media Release, 'TPC final decision on Skywest'

15 Background material provided by Bureau of Industry Economics

16 High Court decision in the *Queensland Wire Industries* case

17 'Comparative Summary Paper on the Merger Laws of Certain Countries', Attorney-General's Department

18 'Conglomerate Mergers - A Comparative Trade Practice Analysis', C. Hodgekiss

19 Casenote on the *Queensland Wire Industries* case, A. Hurley

20 'Denial of supply and misuse of market power in Australia: What follows from the High Court decision in Queensland Wire?', W. Pengilley

21 Economic Planning Advisory Council Paper No.38, *Promoting Competition in Australia,*

22 Report of the Trade Practices Act Review Committee (August 1976)

23 'Refusal to deal - misuse of market power', C. Hodgekiss

24 Trade Practices Commission Annual Report 1987-88

25 Workshop on mergers takeovers and monopolies - transcript of proceedings

APPENDIX C

WITNESSES

CANBERRA: 15 JUNE 1988

- *Australian Chamber of Commerce*
  - Mr Robert Brent Davis, Chief Economist
  - Mr Stephen John Rimmer, Economist

- *Department of Industry, Technology and Commerce*
  - Dr Christopher Douglas Easter, Acting Assistant Secretary, Business Environment Branch
  - Mr Philip Patrick Smith, Director, Business Practices, Business Environment Branch

- *Trade Practices Commission*
  - Professor Robert Baxt, Chairman
  - Mr William Coad, Deputy Chairman
  - Mr Hank Spier, First Assistant Commissioner

MELBOURNE: 27 JULY 1988

- *Business Council of Australia*
  - Mr Morrish Alexander Besley, Chairman, Business Law Committee
  - Mr Rodney Turner Halstead, Member, Business Law Committee
  - Mr Ronald Stuart McCulloch, Member, Business Law Committee
  - Mr Richard Arthur St John, Member, Business Law Committee
  - Dr Neville Robert Norman, Consultant and Member, Trade Practices Subcommittee of the Business Law Committee
  - Mr Douglas Gilbert Williamson, QC, Member, Trade Practices Subcommittee of the Business Law Committee

- Mr Philip Hubert Clarke, Director, Centre for Commercial Law and Applied Legal Research, Faculty of Law, Monash University

- *Coles Myer Ltd*
  - Mr Keith Lindsay Irvine, Company Secretary
  - Mr Peter Edward Morgan, Managing Director, Discount Stores Group

- *National Consumer Affairs Advisory Council*
  - Mr Ronald Arthur Reedman, Acting Chairman

- Mr Richard Andrew Landa Gross, Member
- Mr Daryl Ian Maddern, Member

MELBOURNE: 28 JULY 1988

- *Australian Stock Exchange (Melbourne) Ltd*
  - Mr James Grimaldi Perry, Vice-Chairman
  - Mr Michael John Heffernan, Chief Economist-Lawyer

- *National Companies and Securities Commission*
  - Mr Henry Bosch, Chairman
  - Mr Raymond John Schoer, Executive Director

SYDNEY: 2 AUGUST 1988

- *Australian Broadcasting Tribunal*
  - Miss Dierdre Frances O'Connor, Chairman
  - Mr James Bernard Adamson, Policy Coordinator
  - Mr Michael Kevin Minehan, Principal Executive Officer, Legal Section

- *Australian Press Council*
  - Professor David Edward Flint, Chairman

- *Australian Consumers' Association*
  - Ms Philippa Judith Smith, Manager, Policy and Public Affairs
  - Mr Frank Ernest Sartor, Consultant

- Mr William Robert McComas, Cottage Point, NSW

SYDNEY: 3 AUGUST 1988

- Mr David Ross Chapman, Senior Lecturer, Department of Economics, University of New South Wales

- Mr Charles William Junor, Senior Lecturer, Department of Economics, University of New South Wales

- *Law Council of Australia*
  - Mr Henry Trevor Bennett, Secretary-General
  - Mr Alan Lawrence Limbury, Chairman, Business Law Section
  - Mr Alwyn Ian Tonking, Chairman, Trade Practices Committee, Business Law Section

CANBERRA: 9 AUGUST 1988

- *Attorney-General's Department*
  - Mr Peter Gordon Levy, Acting Deputy Secretary
  - Mr Anthony Charles Wing, Acting Senior Assistant Secretary, Competition Policy Branch
  - Ms Claire Maree Dalla-Costa, Senior Legal Officer

CANBERRA: 10 AUGUST 1988

- *Australian Federation of Consumer Organizations*
  - Mr Robin Michael Gwynne Brown, Director
  - Mr Adam James Smith, Research Officer

- *Confederation of Australian Industry*
  - Mr Robert Charles Gardini, Secretary and General Counsel
  - Mr Daryl Stephen George, Chief Executive

- *Department of the Treasury*
  - Mr Neil Francis Hyden, First Assistant Secretary, Structural Policy Division
  - Mr Wayne Mayo, Assistant Secretary, Infrastructure and Resource Allocation Branch, Structural Policy Division
  - Mr Colin Frederick Allum, Chief Finance Officer, Infrastructure and Resource Allocation Branch, Structural Policy Division
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- *Trade Practices Commission*
  - Professor Robert Baxt, Chairman
  - Mr William Coad, Deputy Chairman
  - Mr Allan James Asher, Commissioner
  - Mr Hank Spier, First Assistant Commissioner

BRISBANE: 5 OCTOBER 1988

- Mr Stephen George Corones, Solicitor, Supreme Court of Queensland and Senior Lecturer in Law, Queensland Institute of Technology

- *Shopping Centre Tenants Association of Australia*
  - Mr John Walter Bradford, National Director

APPENDIX D

WORKSHOP PARTICIPANTS

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- *Australian Federation of Consumer Organisations*
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- *Bureau of Industry Economics*
  - Mr S.W. Drabsch

- *Business Council of Australia*
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- *Metal Building Products Manufacturers' Association*
  - Mr E. Sharkey, Secretary

- Professor G. Mills, Department of Economics, University of Sydney

- *National Consumer Affairs Advisory Council*
  - Mr B. Wisener, Secretary
  - Ms L. Spier, National Consumer Affairs Advisory Council Secretariat

- *Trade Practices Commission*
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  - Mr B. Coad, Deputy Chairman
  - Mr A. Asher, Commissioner
  - Mr H. Spier, First Assistant Commissioner
  - Mr J. O'Neill, Senior Assistant Commissioner
  - Ms E. Barton, Supervising Project Officer