MERGERS, TAKEOVERS AND MONOPOLIES: PROFITING FROM COMPETITION

GOVERNMENT RESPONSE

TO
THE REPORT BY

THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

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STATEMENT BY THE ATTORNEY-GENERAL,
THE HON. MICHAEL DUFFY MP

RESPONSE OF THE GOVERNMENT TO THE REPORT OF THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS ON MERGERS, TAKEOVERS AND MONOPOLIES: PROFITING FROM COMPETITION?

The Committee's inquiry into mergers, takeovers and monopolies was initiated in February 1988. The Committee was requested to examine and inquire into the adequacy of existing legislative controls over mergers, takeovers and monopolisation with particular reference to the extent of control of mergers, takeovers and monopolisation necessary to safeguard the public interest, the adequacy of existing legislation, and the role and effectiveness of the Trade Practices Commission (TPC) in its implementation of sections 46 and 50 of the Trade Practices Act.

This request followed a period of widespread discussion regarding the effectiveness of the Act to adequately safeguard the public interest at a time of increased merger activity involving corporations whose general activities significantly impacted upon large sections of the community.

The level of community interest was reflected in the wide range of individuals and organisations that made submissions to the Committee. The Committee held public hearings in various capital cities and, in addition, the Committee conducted a workshop in Canberra which provided a valuable opportunity for participants to exchange views on various options for reform of the Act which had been suggested to the Committee.

The conduct of the inquiry coincided with two important court cases concerning the interpretation of sections 46 and 50 of the Act. The High Court's judgment in the Queensland Wire Industries case is a landmark decision on the interpretation of the misuse of market power provision (section 46). The Australia Meat Holdings case constituted the first fully argued section 50 merger case since 1978.

The Government would like to express its appreciation to the Committee for the production of a very valuable report. Notably, the report brought together the views of a wide cross-section of the business, legal and academic communities and consumer organisations on the effectiveness of the merger and misuse of market power provisions of the Act and on proposals for their reform. The Committee should also be congratulated for its innovative approach in holding a workshop which enabled a greater and more effective input by participants into the inquiry.

Honourable members will be aware that the Senate has since referred to its Standing Committee on Legal and Constitutional Affairs for inquiry and report several trade practices issues which were also the subject of inquiry and report by the House of Representatives Committee. These relate to the adequacy of the existing merger test in section 50, and aspects of the misuse of market power provisions in section 46. The Government would obviously wish to have and study the report of the Senate Committee before making final decisions on these matters. The following response therefore represents the Government's views of the House of Representatives Committee recommendations, which will be examined again if necessary in light of any contrary recommendations of the Senate Committee.

The Government agrees with the Committee that the misuse of market power provisions in section 46 should be retained in their present form (recommendation 2). Like the Committee, it also is not convinced that there is sufficient justification for reverting to the 'substantial lessening of competition' test in merger cases (recommendation 4).

The Government also accepts the general thrust of the Committee's recommendations that:

- guidelines should be issued by the TPC on the operation of the misuse of market power provision (recommendation 2) - this has now been done;

- a private right to injunctive relief against mergers should be re-introduced (recommendation 5);

- there should be legislative recognition of the informal merger consultative process (recommendation 7);

- the procedure for authorisation of mergers should be retained in its existing form (recommendation 8);

- statutory remedies should be provided in respect of breaches of undertakings entered into with the TPC (recommendation 9);

- information concerning merger matters considered under the informal merger consultative process and the formal authorisation process should be publicly available, but subject to appropriate confidentiality requirements (recommendation 10);

- appropriate procedures should be developed to improve co-ordination between the TPC and other regulatory agencies involved with various aspects of mergers (recommendation 11);

- the TPC should maintain a pro-active approach to the merger and misuse of market power provisions (recommendation 12);

- cost recovery measures should be introduced in relation to costs incurred in the administration and enforcement of the merger provisions (recommendation 13);

- the role of the Federal Court in the resolution of matters under Part IV and related provisions of the Act should be retained (recommendation 15); and

- there should be a substantial increase in the existing maximum pecuniary penalties for sections 46 and 50 and an enhancement of the range of remedies available for Part IV contraventions (recommendation 16).

Further detailed consideration of some aspects of the above recommendations will be required. These include the suggested options relating to the procedures of the Federal Court in the resolution of matters under Part IV and related provisions of the Act (recommendation 15), and the level of penalties which should apply not only to sections 46 and 50 (recommendation 16) but also for infringements of other provisions of the Act.

Recommendation 3 recommended against the introduction of pre-merger notification into the Act. The Government believes, upon further reflection and consultation with the TPC, that a form of pre-merger notification which has sufficiently high thresholds, is sufficiently flexible and does not involve unduly onerous burdens, would be advantageous. This would ensure that the TPC received adequate notice of proposed mergers, thereby enabling it to give proper consideration to the transaction before it is consummated. A pre-notification scheme would also mesh well with the proposal to give statutory recognition to the informal consultation process and to provide for enforcement of undertakings given during it.

The Government believes that the objective of recommendation 6, which concerns the TPC's policy of giving emphasis to the authorisation process in mergers with potential for market dominance is already being achieved and that a section 29 direction as recommended by the Committee is, therefore, not warranted. The TPC is already aware of the Government's support in principle for its approach in this area and regular consultation between the TPC and the Government provides a satisfactory means for the Government to keep the TPC informed of its views in this area.

As regards recommendation 14 concerning the provision of adequate resources to enable the TPC to maintain its pro-active approach, the Government notes that the TPC was provided with significant increases in the 1989/90 budget. It has since been given additional funds for its new responsibilities in relation to waterfront reform, misuse of market power in a trans-Tasman market, and resulting from micro-economic reform. These additional funds have been built into its resource base for the future.

The Government is sympathetic to the considerations underlying the Committee's first recommendation - that the TPC in conjunction with the Australian Bureau of Statistics should establish a minimal set of line-of-business data for use by the TPC and private researchers. However, consideration of this recommendation has identified significant practical and resource difficulties for which satisfactory solutions would need to be found, if the recommendation is to be implemented.

I turn finally to the Committee's recommendation that the Attorney-General initiate a further review of the merger and misuse of market power provisions of the Act within 5 years. There is of course a further review now being conducted by the Senate Committee. Officers of the Attorney-General's Department have made a detailed submission to that Committee. That submission canvasses those issues examined by the House of Representatives Committee which fall within the terms of reference of the Senate Committee. It also canvasses a wider range of proposals for amendment of the Trade Practices Act. The officers' submission has the general endorsement of the Government but, as noted above, this position will be reconsidered in light of the report of the Senate Committee.

In conclusion, I again thank the members of the House of Representatives Standing Committee on Legal and Constitutional Affairs for their valuable work.