THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

# MERGERS, MONOPOLIES & ACQUISITIONS

## ADEQUACY OF EXISTING LEGISLATIVE CONTROLS

REPORT BY THE
SENATE STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

DECEMBER 1991

The Parliament of the Commonwealth of Australia

# MERGERS, MONOPOLIES AND ACQUISITIONS

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Report by the
Senate Standing Committee on
Legal and Constitutional Affairs

December 1991

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# TERMS OF REFERENCE

On 16 May 1991 the Senate referred the following matters to the Committee for report on or before the first sitting day in October 1991.[1]

(a) the adequacy of the existing legislative controls in the *Trade Practices Act 1974* over mergers and acquisitions, with particular reference to:

  (i) the appropriate test that should apply; and

  (ii) whether compulsory pre-merger notification should be introduced and, if so, in what circumstances;

(b) whether, in situations of existing market dominance, the Trade Practices Commission should be able to examine conduct in addition to that already covered by s.46, and, if so, what action (including divestiture) might be taken as a result of such examination;

(c) the extension of section 52A (unconscionable conduct) to all commercial dealings;

(d) any other matters (including review mechanisms) considered by the Committee to be relevant to any or all of these matters.

---

1 *Subsequently the Senate resolved to extend the reporting date to 19 December 1991.*

# ABBREVIATIONS

| | |
|---|---|
| ACA | Australian Consumers Association |
| AFCO | Australian Federation of Consumer Organizations |
| APAD | Australian Petroleum Agents & Distributors |
| BCA | Business Council of Australia |
| Beddall Committee | 1990 House of Representatives Standing Committee on Industry Science and Technology Report on Small Business in Australia; Challenges, Problems and Opportunities |
| BIE | Bureau of Industry Economics |
| Blunt Committee | The 1979 Trade Practices Consultative Committee |
| CAI | Confederation of Australian Industry |
| CLC | Communications Law Centre |
| CMBA | Confectionary and Mixed Business of Australia and New Zealand |
| FAA | Franchisors Association of Australia |
| 1984 Green Paper | The 1984 Green Paper: The Trade Practices Act - Proposals for Change |
| Griffiths Report | Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs into 'Mergers Takeovers and Monopolies: Profiting from Competition' |
| ICA | Insurance Council of Australia |
| Law Council | Law Council of Australia |
| MTIA | Metal Trades Industry Association |
| NCAAC | National Consumer Affairs Advisory Council |
| New Zealand Act | The Commerce Act of New Zealand |
| OECD Report | 1984 OECD Report on Merger Policies and Recent Trends in Mergers |

| | |
|---|---|
| PSA | Prices Surveillance Authority |
| REIA | Real Estate Institute of Australia |
| Swanson Committee | The 1976 Trade Practices Review Committee |
| The Act | Trade Practices Act 1974 |
| Treasury | Department of the Treasury |
| TPC | Trade Practices Commission |
| TPT | Trade Practices Tribunal |
| VECCI | Victorian Employers Chamber of Commerce and Industry |
| Wright Report | 1991 Special Caucus Committee of Inquiry into Aspects of the Australian Petroleum Industry |

# RECOMMENDATIONS

Mergers and acquisitions: the appropriate test

*Recommendation 1* (see paragraph 3.131)

1 The Committee recommends that section 50 of the Trade Practices Act 1974, be amended to prohibit mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services.

*Recommendation 2* (see paragraph 3.132)

2 The Committee recommends that, to make clear the ambit of the new test, guidelines be incorporated in the Trade Practices Act 1974.

*Recommendation 3* (see paragraph 3.133)

3 The Committee recommends that the guidelines should contain criteria including:

- the level of concentration in the market;
- the likely level of foreign competition in the market;
- the availability of product substitutes;
- barriers to entry;
- whether one party to the merger is a failing firm;
- the likelihood that the proposed merger would remove a vigorous and effective competitor;
- the extent to which effective competition remains or would remain in the market;
- change and innovation in the market;
- the ability to significantly increase prices following a merger; and
- any other factors relevant to competition in a market.

*Recommendation 4* (see paragraph 3.134)

4 The Committee recommends that where a proposed merger fails to meet the test including the guidelines the Trade Practices Commission should nevertheless have the power to authorise it when it is for the benefit of the public.

Compulsory pre-merger notification

*Recommendation 5* (see paragraph 4.40)

5 The Committee recommends that it be obligatory for a notice to be given to the Trade Practices Commission where mergers or acquisitions of a substantial nature are proposed. What is a matter of a substantial nature should be defined in the Act. The matters of which notice is to be given should be limited so that undue burden is not cast on those who must comply.

*Recommendation 6* (see paragraph 4.41)

6 The Committee recommends that proposals for what the notice is to contain should be drawn up by the Attorney-General's Department and released for public comment. The proposal should be drawn up on the basis that those seeking a merger or an acquisition should not have to comply with requirements that are too wide, vague, onerous or vexatious.

Mandatory authorisation and sensitive industries

*Recommendation 7* (see paragraph 4.62)

7 The Committee recommends that section 50 should remain legislation aimed at protecting competition generally. Where there are other than economic issues involved in industry structure or ownership, they may well be dealt with in specific legislation. For example, at the moment, there are issues arising in the banking and media industries which could be dealt with in terms of discrete legislation

Pre-notification authorisation and the Trade Practices Tribunal

*Recommendation 8* (see paragraph 4.74)

8 The Committee recommends that parties proposing to merge should have the option of either approaching the Trade Practices Commission for authorisation, with a right of appeal to the Trade Practices Tribunal, or of approaching the Trade Practices Tribunal directly.

*Recommendation 9* (see paragraph 4.75)

9 The Committee recommends that strict time limits be imposed on the Trade Practices Commission and the Trade Practices Tribunal within which they are to determine authorisation applications or appeals. The Commission should continue to be required to determine an application within 45 days. Any appeal from a decision of the Commission to the Tribunal should be determined by the Tribunal within 45 days. Where the Tribunal is approached directly, it should be required to determine an application within 60 days.

*Recommendation 10* (see paragraph 4.76)

10 The Committee further recommends that adequate funding should be made available to the Commission and the Tribunal to enable this to be done.

Misuse of market power: s46

*Recommendation 11* (see paragraph 5.67)

11 The Committee recommends that section 46 be amended by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, when it has brought forward evidence which makes it as likely as not that one has occurred then one will be taken to have occurred unless the corporation in question shows otherwise.

*Recommendation 12* (see paragraph 5.74)

12 The Committee recommends that section 46 be amended to provide that where persons engage in conduct for the purpose of eliminating from or harming a class of persons in a market they shall be taken to be doing so in respect of a specific member of it.

*Recommendation 13* (see paragraph 5.80)

13 The Committee recommends that serious and persistent misuse of market power be dealt with by increased monetary penalties. It recommends that divestiture not be made available as a remedy.

Unconscionable conduct

*Recommendation 14* (see paragraph 6.56)

14 The Committee recommends that section 52A of the Trade Practices Act be repealed. It recommends that legislation be introduced giving the Trade Practices Commission the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another.

*Recommendation 15* (see paragraph 6.57)

15 The Committee further recommends that appropriate funds be made available to the Trade Practices Commission to enable this to be done.

Pecuniary penalties

*Recommendation 16* (see paragraph 7.22)

16 The Committee recommends that subsection 76(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties available to punish breaches of the provisions of Part IV of the Act.

*Recommendation 17* (see paragraph 7.23)

17 The Committee recommends that subsection 79(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties to punish breaches of the provisions of Part V of the Act.

Private right to injunctive relief

*Recommendation 18* (see paragraph 7.40)

18 The Committee recommends that the private right to injunctive relief in relation to mergers not be reintroduced into the Trade Practices Act 1974.

Enforceability of undertakings

*Recommendation 19* (see paragraph 7.48)

19 The Committee recommends that the Trade Practices Act be amended to provide remedies for breaches of undertakings made between the Trade Practices Commission and another person or persons.

Other remedies

*Recommendation 20* (see paragraph 7.59)

20 The Committee recommends that consideration be given by the Attorney-General to introducing a range of appropriate remedies for contraventions of Part IV of the Trade Practices Act 1974.

Implementation of Recommendations

*Recommendation 21*

21 The Committee recommends that the details of any proposed amendments to the Act should be developed by the Attorney-General's Department following consultation with all relevant parties and released by way of Exposure Draft Bill for public comment. Public comment should occur over a reasonable time of not less than three months.

# CHAPTER 1

# BACKGROUND TO INQUIRY

## Terms of reference

1.1 On 16 May 1991 on the motion of Senator Spindler, the Senate resolved to refer to the Standing Committee on Legal and Constitutional Affairs for report on or before the first sitting day in October 1991:

(a) the adequacy of the existing legislative controls in the *Trade Practices Act 1974* over mergers and acquisitions, with particular reference to:

  (i) the appropriate test that should apply; and

  (ii) whether compulsory pre-merger notification should be introduced and, if so, in what circumstances.

(b) whether, in situations of existing market dominance, the Trade Practices Commission should be able to examine conduct in addition to that already covered by s46, and, if so, what action (including divestiture) might be taken as a result of such examination.

(c) the extension of section 52A (unconscionable conduct) to all commercial dealings;

(d) any other matters (including review mechanisms) considered by the Committee to be relevant to any or all of these matters.[1]

1.2 On 11 September, 27 November and 11 December 1991 the Senate resolved that the time for presentation of the Committee's report be extended to 1, 12 and 19 December 1991 respectively.[2]

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1 *Journals of the Senate, No 89, 16 May 1991.*

2 *Journals of the Senate, No 114, 11 September 1991, No 131, 27 November 1991; No 139, 11 December 1991.*

## Advertising the inquiry

1.3 On 24 May 1991, the Committee advertised the inquiry in major national, state and territory newspapers seeking written submissions from interested persons by 28 June 1991. In addition, the Committee wrote to various individuals and organisations likely to be interested in the inquiry.

1.4 The level of community interest was reflected in the wide range of individuals and organisations that made submissions to the Committee and in the media publicity which the Committee received.[3] The Committee received 62 written submissions. The list of people and organisations who made submissions to the Committee is set out in Appendix I to this report.

## Public hearings

1.5 The Committee held public hearings in the following places on the dates indicated:

| | |
|---|---|
| Melbourne | 17 September 1991 |
| Canberra | 26 September 1991 |
| Canberra | 6 November 1991 |
| Canberra | 2 December 1991 |

1.6 Witnesses who appeared before the Committee at its public hearings are noted in Appendix II to this report.

1.7 The submissions authorised for publication and the transcripts of the evidence given are available from the Senate Committee Office and the Parliamentary Library.

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3 *See eg Financial Review 27 September, 23 October, 28 October 1991; The Age, 5 November 1991, Financial Review 2 December 1991.*

## Structure of the report

**1.8** The structure of the report reflects the terms of reference of the inquiry. It begins with a background to the inquiry and with a brief summary of recent reviews of Australian Trade Practices Legislation.

**1.9** Chapter 3 deals with mergers and acquisitions. The issue of the appropriate test that should apply in section 50 is discussed.

**1.10** Chapter 4 deals with the issue of whether compulsory pre merger notification should be introduced, and if so, in what circumstances. The issue of a mandatory authorisation requirement for 'sensitive' industries is also considered.

**1.11** In Chapter 5, the Committee considers whether in situations of existing market dominance, the Trade Practices Commission should be able to examine conduct in addition to that already covered by section 46 and, if so, what action (including divestiture) might be taken as a result of such circumstances.

**1.12** The report then deals in Chapter 6 with the possible extension of section 52A (unconscionable conduct) to all commercial dealings.

**1.13** Chapter 7 looks at related matters, and in particular remedies, including review mechanisms considered by the Committee to be relevant to any issues under inquiry.

1.14 Finally, the document sets out the dissenting reports of Senators Spindler and Schacht with respect to additional remedies for breaches of section 46, and in particular with the appropriateness of divestiture; and the dissenting report of Senator Kemp on the issue of the appropriate merger test in section 50 and the issue of the standard of proof in section 46.

# CHAPTER 2

# INTRODUCTION

## Trade Practices Act 1974

2.1 The Trade Practices Act 1974 (the Act) came into force on 1 October 1974. The Act relies on the power of the Commonwealth under the Constitution with reference to s51(1) (trade and commerce), s51(xx) (corporations), s51(xiii) (banking), s51(xiv) (insurance), s51(v) (post and telegraphs). In addition, ss51(xxix) (external powers) and s51(xxxix) (the incidental power) are important. The Act applies in relation to corporations supplying goods and services.

2.2 The Act was extensively amended in 1977 following the report of the 1976 Trade Practices Review Committee (Swanson Committee). In 1979 the Trade Practices Consultative Committee (Blunt Committee) also recommended various amendments to the Act. Further substantive amendments were made in 1986 following the publication of the 1984 Green Paper: The Trade Practices Act - Proposals for Change.

2.3 The Act adopts a proscriptive approach by prohibiting a range of restrictive trade practices. Part IV of the Act deals with practices which inhibit competition in the market place. Part V deals with consumer protection.

## The Griffiths Report

2.4 In 1989 the House of Representatives Standing Committee on Legal and Constitutional Affairs presented its report on 'Mergers, Takeovers and Monopolies: Profiting from Competition?' (the Griffiths Report). That Committee was required to look into issues similar to those of the present inquiry. In particular,

> the adequacy and extent of legislative controls over mergers, takeovers and monopolisation, with particular reference to:

- the extent of control of mergers, takeovers and monopolisation as necessary to safeguard the public interest;

- the adequacy of existing legislation;

- the role and effectiveness of the Trade Practices Commission in its implementation of sections 46 and 50 if the Trade Practices Act 1974.

2.5 The Griffiths Committee recommended, among other things:

- the retention of the current dominance test in s50[1]

- that pre-merger notification not be introduced in the Trade Practices Act[2]

- with qualifications, the private right to injunctive relief in relation to mergers be reintroduced[3]

- the procedure for authorisation of mergers be retained in its existing form[4]

---

1 *Griffiths Report, para 5.4.62. The Committee acknowledged, however, that its task in assessing the adequacy of the existing threshold test was hampered by a lack of empirical evidence.*

2 *Ibid, para 5.3.15.*

3 *Ibid, para 5.5.27. The Committee recommended that takeover targets and associated persons should be excluded from this right.*

4 *Ibid, para 6.3.8.*

- sub section 76(1) be amended to provide for a substantial increase in the existing maximum penalties in relation to breaches of the merger and misuse of market power provisions[5] and

- that a range of other remedies be introduced for contraventions of Part IV.

### The Government response

**2.6** In tabling the Government's response to the Griffiths Report, the Attorney-General, the Hon M Duffy MP said:

> 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 obviously would wish to have and study the report of the Senate Committee before making final decisions on the matters.[6]

**2.7** The Attorney-General then proceeded to indicate that:

> 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'.[7]

**2.8** In light of the above qualification, the Attorney-General stated that:

5 *Ibid, para 7.2.18.*

6 *Hansard, House of Representatives, 22 August 1991, pp 384-385.*

7 *Ibid, p 385.*

> the Government agrees with the Committee that the issue of market power provisions in section 46 should be retained in the present form ... like the Committee it is not convinced that there is sufficient justification for reverting to the 'substantial lessening of competition' test in merger cases ...[8]
>
> The Government also accepts the general thrust of the Committee's recommendations that:
>
> . a private right to injunctive relief against mergers should be introduced[9]
>
> . the procedure for authorisation of mergers should be retained in its existing form[10]
>
> ...
>
> . there should be a substantial increase in the existing maximum pecuniary penalties for sections 46 and 50 ...
>
> ...
>
> Recommendation 3 recommended against the introduction of pre-merger notification into the Act. The Government believes ... 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.[11]

**2.9** In view of the need to report promptly the Committee has focused on the matters specified in the terms of reference although related issues cannot and have not been ignored.

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8 *Ibid, p 385.*

9 *Ibid, p 385.*

10 *Ibid, p 385.*

11 *Ibid, p 385.*

**2.10** In its considerations the Committee has examined the submissions that were made, the evidence presented at its hearings, and the various reports referred to above.

# CHAPTER 3

## MERGERS AND ACQUISITIONS - THE APPROPRIATE TEST

### Mergers and competition

**3.1** The underlying principle of Part IV of the Trade Practices Act is the promotion and preservation of effective competition. The cogency and character of the Act as economic law has been described by Professor Maureen Brunt in the following words:

> We begin with a statute; it is to be interpreted and enforced by courts of law; necessarily we are in the hands of lawyers. Yet fundamentally the Trade Practices Act (together with its implementation, its interpretation and enforcement) is an instrument of economic policy; its subject-matter, anti-competitive conduct of business enterprises within markets, is economic; the very terms used in drafting the statute (e.g. "conduct likely to have the effect of substantially lessening competition in a market for goods or services") employ economic concepts; the statutory criterion for determining whether anti-competitive conduct is in the public interest calls for analysis of economic processes.[1]

**3.2** Undoubtedly the Act is one directed to economic matters. Against this background, the Committee recognises that an analysis of the effectiveness of the Act must be based on an understanding of economic issues and the current economic climate. At the same time it is legislation, and where there is a dispute about its meaning it must be interpreted by the Judiciary. Further, there are proceedings under it which must be brought in the Courts. Both economists and lawyers make the Act their province and bring different perspectives to the same issues, resulting at times in tensions, which on some occasions are creative, but on other occasions are counterproductive.

---

1 *Professor Maureen Brunt, The Monash Trade Practices Lectures (1975), cited in Annexures to TPC Supplementary Submission (6.11.91), p 5.*

**3.3** The regulation of mergers[2] is an integral component of competition law and policy. Mergers may have both beneficial and adverse effects. On the one hand, they may enable a well conducted firm to acquire one badly run. They may keep pressure on management so that it does not become complacent. They may offer the prospect of rewards such as increased market share. They may encourage the transfer of technologies between industries. They may assist in the redeployment of capital from inefficient to more productive uses. And they may provide a powerful force for increased operating efficiencies. However, the experience of the 1980s leads one to question whether these kinds of benefits have been achieved.

**3.4** On the other hand, mergers may result in the acquisition of monopoly or duopoly power, which may lead to an absence of vigorous competition, particularly price competition, and generally be against the public interest.

*The empirical evidence on mergers*

**3.5** Considerable research, particularly in the United States and the United Kingdom, has been undertaken into whether mergers, on average, produce efficiency gains. A submission from Treasury,[3] categorises this research as of two types: 'event studies' and 'accounting studies'. Event studies measure profitability from changes in the stock market value of shares at the time mergers are proposed. Accounting studies attempt to evaluate the productivity of mergers by using accounting data on the performance of acquiring firms following the merger.

**3.6** Treasury notes that the major Australian share-based study was undertaken by Bishop, Dodd and Officer in 1987 in respect of 1442 takeover bids between 1972 and 1985. This study concluded that takeovers, on average, lead to large increases in shareholders' wealth. The study found that:

---

2 *The word merger is used as a generic term for mergers, acquisitions and takeovers.*

3 *Submission, pp 17-18.*

- prior to takeover, targets were average performers;
- sharemarket values of the bidding and target firm substantially increased around the time of the announcement of takeover bids; and
- the above market returns to bidding firm shareholders fell in the longer term from their (high) level around takeover.[4]

3.7 The methodology of 'event studies' is challenged by the TPC. Professor Johns observes that there is no simple connection between share prices and enhanced profitability - the increase in prices may indicate that competition is not working, not that greater efficiency has been achieved.[5] It is also questioned by Ravenscraft who states that a net gain to shareholders does not necessarily translate into a net gain to society.[6]

3.8 In a supplementary submission, the TPC cites the views of Carlton and Perloff in 1990:

> In summary, considerable evidence from the stock market supports the view that merger activity improves efficiency and creates value. Shareholders of target firms are the primary beneficiaries of this increased value ... Additional research on profits subsequent to consolidation, not stock prices, is needed to confirm the efficiency gains. Without such research, some may argue that mergers and takeovers create illusory value that represents either the unjustified transfer of wealth from those dependent on the acquired firm (for example, employees) to its shareholders,

---

4 *Submission, p 17.*

5 *Evidence, p 182.*

6 *Ravenscraft, DJ, 'Australian Mergers and Takeovers: a Review of Recent Evidence, Economic Analysis and Policy, Vol 17, No 2, September 1987, p 233.*

or judgmental errors by the management of the acquiring firm.[7]

**3.9** 'Accounting studies', on the other hand, seek to assess the productivity of mergers by using accounting data on the 'post' merger performance of acquiring firms. Taken as a whole, these studies provide mixed results on claimed performance gains.[8] The Committee was informed that two major American accounting studies[9] concluded that 'the cash flow/sales performance of acquired units was slightly inferior to that of non-acquired units in the same line of business both before and after takeover and, on average, performance neither improved nor deteriorated significantly following takeover'.[10]

**3.10** A more recent US study,[11] however, has found that the post-merger operating cash flow of merged firms did improve relative to their industries' performance, and that this improvement came from 'increased asset productivity rather than higher operating margins' suggesting that the increases in cash-flow were not due to increased prices as a result of greater market power.[12]

---

7 *Carlton DW and Perloff JM, Modern Industrial Organisation, Scott Forseman/Little Brown Higher Education, 1990, p 171, cited in Trade Practices Commission, Notes on Economic Effects of Mergers (26.9.91), p 1.*

8 *Treasury submission, p 18; TPC submission (29.8.91), p 19; supplementary submission (5.11.91), pp 14-17, and Evidence, p 182 (Professor Johns).*

9 *By Ravenscraft and Scherer in 1987, and by Herman and Lowenstein in 1988 as cited in Treasury submission, p 18.*

10 *Treasury further notes that a study by Rhoades in 1987 of mergers in the US banking industry also revealed 'no evidence of an improvement in the acquired banks performance'.*

11 *By Healy, Palepu and Rubak in 1990, as cited in Treasury submission, p 18.*

12 *Ibid, p 18.*

3.11 Recent Australian accounting studies include that of McDougall and Round who looked at 88 mergers between 1970 and 1981,[13] and a study by the Bureau of Industry Economics in 1990 dealing with mergers between leading firms in three particular industries - pastry products, roofing tiles and automotive batteries.[14]

3.12 The McDougall and Round study found that:

- acquiring firms in horizontal takeovers were significantly more profitable than target firms, as well as experiencing lower levels of profit variability; and

- after acquisition, the profitability of the merged firms deteriorated compared to previous performance and that of the control groups.[15]

3.13 Treasury and the TPC suggest that the BIE study found that mergers produced 'moderate benefits chiefly in the form of economies in production, distribution and administration. Expected gains were not always fully realised, because the difficulties of merging appear to have been underestimated and the impact of the merger was overshadowed by other major changes in demand and supply conditions.'[16] The BIE study itself concludes:

> No precise measure of changes in the productive efficiency of the operations of the firms was possible because of the inadequacies of the data. The estimates that were made support the findings ... that there was a substantial lag between the merger and any apparent increases in productive efficiency and that other factors

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13 *McDougall FM and Round DK, The Effect of Mergers and Takeovers in Australia, Information Australia, Melbourne, 1986.*

14 *Bureau of Industry Economics, Mergers and Acquisitions, Research Report No 36, AGPS, Canberra, 1990.*

15 *Treasury submission, pp 18-19.*

16 *Ibid, p 19; TPC supplementary submission (5.11.91), p 16.*

> have had at least as great an impact on productive efficiency as the mergers. For example, the greatest increase in productive efficiency was in the automotive batteries industry but a major cause of this increase appears to have been competition from imported batteries.[17]

**3.14** The TPC observes that, in focusing on the manufacturing sector, the BIE study dealt with industries in which mergers were most likely to produce net benefits. The TPC expresses concern that in other sectors of the economy, and most importantly in the large non-traded goods sector, there is a greater likelihood of the costs of a merger exceeding the benefits.[18]

**3.15** In summary, the TPC considers that 'the empirical work carried out in the area shows there is no simple correlation between mergers and enhanced profitability'.[19]

**3.16** A somewhat different view of the BIE study was provided by Mr Beerworth,[20] who draws the following conclusions:

- The relationship between concentration and competition is unclear.

- It is not at all clear that mergers make a great deal of difference to the structure of an industry in the long run or to the degree of competition faced within an industry because of other changes.

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17 *Bureau of Industry Economics, Mergers and Acquisitions, Research Report 36, AGPS, Canberra, 1990, pp 105-6.*

18 *TPC supplementary submission (5.11.91), p 17.*

19 *Evidence, p 182 (Professor Johns).*

20 *Submission, p 10.*

- The market power of merged firms has been, if anything, reduced principally as a result of changes in demand patterns, technology, barriers to entry and increasing import competition.

- The impact of mergers in the industries studied appear to have been relatively minor.

**3.17** The Attorney-General's Department views the BIE study as indicating that mergers do not produce all the benefits in efficiency for individual firms that were forecast by their proponents. However, the study does not find that mergers are without benefits. It finds that though competition was suppressed for a period it resurfaced.[21]

**3.18** The Australian Consumers Association acknowledges a measure of validity in the argument that mergers bring about economic efficiency. But relying on the pattern of beer prices following the mergers of the 1980s it states that 'the evidence of gains to consumers resulting from recent mergers and takeovers in Australia is very thin'.[22] ACA concludes:

> Where there are efficiency gains from a merger it may still not guarantee increased consumer welfare. They may be appropriated by shareholders. These gains have to be of sufficient magnitude to ensure net benefits to consumers that are stable in the long run. The long run benefit must significantly outweigh the long run detriments arising from the merger. Otherwise, any lessening of competition as a result of the merger should not be tolerated and the merger should not be allowed.[23]

21 *Evidence, p 189 (Mr Skehill).*

22 *ACA submission, p 15.*

23 *Ibid, p 17.*

**3.19** A similar proposal is advanced by Professor Mills. Noting that mergers are frequently justified on the ground of decreasing unit costs resulting from economies of scale, Professor Mills suggests that only mergers, where the claimed reduction in unit costs is 'significant' (above 10%) and attained within a designated period (for example, 2 years or less), should be permitted. Professor Mills also suggests that the merged entity should automatically be declared a 'regulated corporation' and subject to a price control scheme administered by the Prices Surveillance Authority (PSA) to ensure that cost savings are passed on to consumers in prices charged.[24]

*The theoretical analysis of mergers*

**3.20** The analytical work of Professor Michael Porter was frequently cited in evidence before the Committee. Treasury summarises Porter's analysis of what leads to international competitiveness in the following terms:

> Porter questions the view that domestic firms must be large relative to the size of the domestic industry to gain economies of scale in order to be internationally competitive. In his industry studies he found that creating a dominant domestic firm rarely results in an internationally competitive advantage. He concluded that the need for economies of scale is tempered by the importance for competitive advantage of the rate of innovation. Economies of scale, he argues, are best achieved by exporting, not by dominating the domestic market.[25]

**3.21** As a consequence, in his work The Competitive Advantage of Nations, Porter concludes:

> A strong antitrust policy - especially for horizontal mergers, alliances and collusive behaviour - is fundamental to

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24 *Submission, pp 2-3.*

25 *Submission, p 12.*

> innovation. While it is fashionable today to call for mergers and alliances in the name of globalization and the creation of national champions, these often undermine the creation of competitive advantage. Real national competitiveness requires governments to disallow mergers, acquisitions and alliances that involve industry leaders ... Companies should, however, be allowed to acquire small companies in related industries when the move promotes the transfer of skills that could ultimately create competitive advantage.[26]

3.22 And in Upgrading New Zealand's Competitive Advantage Porter states:

> It is often argued in New Zealand and elsewhere that domestic competition is undesirable, particularly in a 'small country'. The belief that competition leads to duplication of effort and prevents firms from gaining economies of scale misses the fact that competition tends to force firms to improve and upgrade. Concentration is not the best way to achieve scale in small countries, export is ...
>
> New Zealand lacks a tradition of strong competition policy ... The alleged 'economic efficiency' of market concentration has been used to justify a policy of 'non-intervention' towards concentrations of market power. This reflects a fundamentally static view of the world that does not take into account the gains in dynamic efficiency that result from vigorous rivalry.[27]

**3.23** Professor Porter has stressed that he is not an expert on the Australian economy.[28] His analysis is not based on an examination of it. In considering the relevance of his thesis for this country, Treasury makes the following observations:

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26 *Evidence, pp 290-91 (cited by Professor Fels).*

27 *Crocombe GT, Enright MF and Porter ME, Upgrading New Zealand's Competitive Advantage, Oxford, pp 133, 135.*

28 *Business Council of Australia, National Business Summit: Our Competitive Future, p 21.*

- Porter sometimes refers to the existence of 'vigorous competition' when there are as few as two dominant firms in the local market;

- Some 'success stories' (for example Sweden) are not explained by the thesis - Sweden has only one significant company in many international industries, however, unlike Australia, its proximity to other markets may lead to vigorous rivalry with competitors in those markets; and

- Porter's focus is on export-oriented industries, particularly manufactured goods and some services. Australian exports on the other hand, are dominated by resource-based commodities and there are substantial non-traded and import-competing sectors.[29]

3.24 The BCA submits that the TPC has misinterpreted Professor Porter's work,[30] and that his general thesis 'requires some adaptation in applying it to Australia.'[31] CAI considers there to be little justification for using it as the basis for abandoning existing industry policy.[32]

*Conclusions*

3.25 The Committee finds that the empirical evidence on the effects of mergers is conflicting and not conclusive. The economic evidence that mergers actually result in productive efficiencies remains equivocal. Nor is it clear that efficiencies, where they have occurred, have improved the international competitiveness of Australian firms, or resulted in demonstrable benefits to consumers

29 *Submission, p 26.*

30 *Evidence, p 290 (Mr Speed).*

31 *BCA supplementary submission (26.9.91), p 4.*

32 *CAI supplementary submission (27.9.91), p 3.*

3.26 The Committee notes the growing body of economic theory which suggests that international competitiveness is achieved not through mergers but through the encouragement of competition. The Committee also notes, in particular, the work of Professor Porter. This work has questioned the view that domestic firms must be large relative to the size of the domestic industry to gain economies of scale in order to be internationally competitive. While Porter's work does not deal directly with Australian conditions, it nevertheless is a work of considerable importance.

## Section 50

3.27 Mergers in Australia are regulated under section 50 of the Trade Practices Act. This section prohibits mergers or acquisitions which would result, or be likely to result, in a corporation being in a position to dominate a market for goods or services, or which would substantially strengthen the power of a corporation already in that position.

3.28 Market in section 50 means 'a substantial market for goods and services in Australia, in a State or in a Territory' and it may be dominated by a corporation either as a supplier or an acquirer of goods or services.[33] The acquisition of an already dominant corporation is not prohibited if, as a result of the acquisition, the acquirer is not (or is not likely to be) in a stronger position to dominate that market.[34]

3.29 The Act empowers the TPC to grant authorisation for a merger.[35] The effect of an authorisation is to exempt from the provisions of the Act mergers which would otherwise contravene it. However, authorisation may be granted only where the

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33 *Trade Practices Act 1974 (Cth) s50(3).*

34 *Trade Practices Act 1974 (Cth) s50(2C).*

35 *Trade Practices Act 1974 (Cth) s88(9).*

TPC is satisfied the proposed merger would result, or be likely to result, in such a benefit to the public that it should be allowed to take place.[36]

**Previous consideration of amendments**

**3.30** Between 1974 and 1977, section 50 prohibited mergers or acquisitions which resulted in a substantial lessening of competition in a market for goods and services.

**3.31** In 1977 the threshold was changed to prohibit mergers or acquisitions which resulted in (or substantially strengthened) a position of control or dominance in a substantial market. The rationale for these amendments was 'to achieve economies of scale and to improve international competitiveness,' and the intended effect was that 'the categories of merger to be subject to the Act should be quite limited'.[37]

**3.32** In 1986, following the decision in TPC v Ansett Transport Industries (Operations) Pty Ltd & Ors,[38] the 'control or dominance' test was replaced by the current 'dominance' test. In that case, Northrop J held that, as the word 'dominate meant something less than 'control', the latter word was effectively redundant. He also construed the word 'dominate' according to its ordinary meaning of 'having a commanding influence on'.

**3.33** The 1984 Green Paper The Trade Practices Act - Proposals for Change (1984 Green Paper) proposed a return to the 'substantial lessening of competition test, while retaining the proviso that the affected market constitute a substantial one This proposal was not adopted in the 1986 amendments. In his Second Reading

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36 *Trade Practices Act 1974 (Cth) s90(9).*

37 *Hansard, House of Representatives, 3 May 1977, p 1478.*

38 *(1978) ATPR 40-071 at p 17,717; (1978) 32 FLR at 325.*

Speech on the Trade Practices Revision Bill 1986, the Attorney-General restated the government's commitment to the encouragement of efficient Australian industry and to increasing its competitiveness on world markets. However, the coverage of section 50 was not extended beyond those mergers which resulted in undue concentration in a market.[39]

3.34 The Griffiths Committee considered a number of submissions urging a return to the substantial lessening of competition test. By majority, that Committee, while recognising the potential benefit associated with that test, (ie greater exposure of proposed mergers to public benefit scrutiny) said it was 'not convinced that there is sufficient justification, at this stage, to recommend the adoption of this test.'[40]

3.35 Two members of the Committee in a dissenting Report recommended a prohibition on mergers resulting in a substantial lessening of competition in a substantial market. The dissenting report stated that:

> 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.[41]

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39 *Hansard, House of Representatives, 19 March 1986, p 1627.*

40 *Mergers, Takeovers and Monopolies: Profiting from Competition? Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, May 1989, para 5.4.22.*

41 *Ibid, p 118.*

## Objectives of s50

**3.36** Underlying some of the submissions made on section 50 is a tension in the perceived objectives of merger regulation and in how best to achieve competitiveness in international markets.

**3.37** If the aim of merger policy is to enable firms to attain sufficient size to compete successfully overseas then it may be that the dominance test is to be preferred.[42] However, if the policy is the enhancement of competition, then, the substantial lessening of competition test is to be preferred.[43]

**3.38** Professor Fels says that the present test does not make sense. Competition policies, if a country is going to have them, should deal with all actions that substantially lessen competition:

> To limit the examination of mergers to just those that lead to dominance is to adopt the principle of overlooking mergers which can have substantially lessening effects on competition and therefore seriously adverse economic effects including higher prices.[44]
>
> The Australian legislation is different from that of quite a number of other countries in that it provides for authorisation ... the merger partners can go to the TPC and, on appeal, to the TPT for authorisation if the benefit from the merger exceeds the detriment to competition. So if they want to argue that there are economies of scale or economic efficiency benefits or that there is going to be a failing firm situation or other social factors, there is full

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42 *See, for example, Attorney-General's Department submission, p 10; Evidence, p 9 (Professor Baxt). However, it has been suggested that section 50 as it stands may actually prevent some mergers which, arguably, promote economic efficiency, instancing the facts in the Australia Meat Holdings case: see Professor P Clarke, 'Trade Practices Policy and the Role of the Trade Practices Commission (1989) 17 ABLR 291 at 297.*

43 *Evidence, p 313 (Professor Fels).*

44 *Ibid, p 313.*

> opportunity for them ... to get authorisation. We do not see the law getting in the way of rationalisation in the internationally traded goods and services sector at all.[45]

*Efficiency, scale and international competitiveness*

3.39 Economic efficiency is one of the arguments put to the Committee as relevant to a consideration of the appropriate merger threshold. Others focus on the need for business certainty, a lack of evidence of any demonstrable damage to competition under the existing test, the likelihood of excessive regulatory costs on business if the test is changed, the resource implications of a change for the TPC,[46] and the importance of closer economic relations with New Zealand.

3.40 The view that the objective of merger regulation should be the facilitation of industry efficiency and effective Australian participation in international markets is one put to the Committee by, among others, Mr Bobeff,[47] Mr McComas,[48] Dr Pengilley,[49] Pacific Dunlop Ltd,[50] the Business Council of Australia (BCA),[51] the Law Council of Australia (Law Council),[52] the Attorney-General's Department,[53] and Professor Baxt.[54]

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45 *Evidence, p 315.*

46 *Evidence, pp 323-4 (Dr Pengilley); p 326 (Mr Featherston).*

47 *Submission, p 2.*

48 *Submission, p 5.*

49 *Evidence, p 325.*

50 *Submission, p 2.*

51 *Submission, p 9.*

52 *Submission, p 10.*

53 *Submission, p 10.*

54 *Evidence, p 9.*

3.41 The BCA quoting from its submission to the Griffiths inquiry observes:

> The need for rationalisation and efficiency in industry and commerce is stronger than ever before. Section 50 ought not to impose any greater barrier to development and improvement than it does now.

3.42 However, Professor Clarke asserts that mergers have a detrimental effect. They reduce incentive, they lead to wealth transfers, they reduce international competitiveness and they facilitate the concentration of economic power. All these detriments would be avoided with a substantial lessening of competition test.[55]

3.43 Professor Clarke has observed:

> the central issue ... to be determined - is what the Government thinks section 50 ought to be about. If the policy behind Part IV of the Act, and if the policy behind the merger provision in particular, is to protect and enhance competition, then it is patently obvious that section 50 does not do that. It does not even purport to do that because it establishes a higher test before it is contravened.
>
> ...
>
> My complaint about section 50 is that it requires too high a level of public injury before it comes into operation ... if there is a substantial reduction in competition then public detriment will be suffered and ... consequently section 50 ought to try to prevent that detriment occurring by being activated once a merger substantially lessens competition. It should not need to wait until market dominance is reached.[56]

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55 *Evidence, p 88.*

56 *Evidence, p 87.*

**3.44** Professor Clarke believes that the dominance test has weakened Australian industry's capacity to compete internationally by reducing the need for it to compete domestically. He has stated:

> Because of our tariff barriers, we have created dominant local firms which are not properly exposed to competition because of import barriers. Our car industry is one example of that, telecommunications has tended in the past to be another, airlines have tended to be another. As a consequence, we have allowed these national champions, as Porter calls them, to be developed which have not been exposed to international competition. Certainly if we had no tariffs, if there were negligible barriers to these firms trading into Australia ... my fear is that we would then tend to see the elimination of Australian industry ... I suspect partly because we have allowed this dominance test to exist over the last 13 years and that is going to put us in a disadvantaged position now that the Government is lowering tariff barriers.[57]

**3.45** Professor Porter has questioned the view that domestic firms must be large relative to the size of the domestic industry to gain economies of scale in order to be internationally competitive. Professor Porter claims that his propositions apply equally to large countries and small.

**3.46** Professor Clarke agrees with Professor Porter's proposition and notes that 'the countries that are successful internationally are those which have vigorous domestic competition, and they are both big and small countries'.[58]

**3.47** The international competitiveness view is directly relevant to mergers in the traded goods and services sector of the economy. However, the TPC has raised concerns about merger activity in the non-traded goods and services sector, which has been 'shielded from competition in some respects by the comparative weakness

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57 *Evidence, p 90.*

58 *Evidence, p 94.*

of the merger test'.[59] A number of the problematic mergers considered by the TPC in recent years (including News Ltd/Herald and Weekly Times, Ansett/East West and Coles Myer discussed below) are said to have occurred in this sector, where 'the discipline of import competition is absent'.[60] The TPC states that mergers of such significance should be subject to public scrutiny, which is not possible under the present test.[61] The TPC believes that the future focus of competition policy will shift to this sector and has stated that an uncompetitive non-traded goods and services sector simply loads costs onto firms that are involved in international competition and holds back our international competitiveness.[62]

*Damage to competition?*

**3.48** Mr McComas,[63] Dr Pengilley,[64] Professor Baxt[65] and the Attorney-General's Department[66] hold that the existing dominance threshold has caused no demonstrable damage to competition in Australia. Mr McComas states that the subsequent behaviour of corporations formed by mergers which were approved under the existing threshold, but which may not have been approved under a lower threshold (highlighting Coles/Myer and News/Herald and Weekly Times) does not show a lack of competition. There is, he suggests, no evidence to indicate that any of the firms involved 'has behaved as one might expect a dominant firm to behave.'[67]

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59 *Evidence, p 315 (Professor Fels).*

60 *TPC supplementary submission (5.11.91), p 5.*

61 *Ibid, p 6.*

62 *Evidence, p 316 (Professor Fels).*

63 *Evidence, pp 218-9.*

64 *Evidence, pp 319-21.*

65 *Evidence, p 45.*

66 *Evidence, pp 45, 194 (Mr Skehill).*

67 *Evidence, p 218.*

3.49 The TPC has provided evidence to the inquiry concerning the anticompetitive consequences of a number of recent mergers. These include Coles/Myer, News Ltd/Herald and Weekly Times, Ansett/East West, ICI/British Paints, Tubemakers/McPhersons and Ampol/Solo.

3.50 The TPC observes that the Coles/Myer merger 'resulted in a substantial increase in concentration in the market for retailing, and caused the removal of a significant competitor from that market and possibly prevented entry, (in the shorter term), by another competitor.'[68]

3.51 This view is supported by the Confectionary and Mixed Business Association of Australia and New Zealand which states that the Coles/Myer merger has affected both small retailers and small suppliers. CMBA contends that the buying power of Coles/Myer may seem to deliver a public benefit in reduced prices, but acts against the greater public benefit which it identifies as:

> the retention of a viable small shop network which can help to ensure that market dominance by the larger retailers in the longer term does not produce permanently increased prices.[69]

3.52 In more general terms, Senator Boswell submits on behalf of business in rural industries, growers and primary industry organisations, independent grocery and hardware retailers and Australian manufacturers that mergers under the present test have resulted in anti-competitive consequences. Senator Boswell claims that retailing mergers have resulted in 76% of grocery sales now being controlled by three buying groups. These groups use their size to impose a range of non-negotiable extra costs such as subsidised advertising, corporate rebates, preferred supply discounts, special catalogue discounts and settlement discounts on manufacturers or

68 *Submission (29.8.91), p 10.*

69 *Submission, p 2.*

processors.[70] In effect, Senator Boswell submits, manufacturers are forced to increase wholesale prices to meet these demands for discounts and allowances[71] which in turn results in higher prices to the consumer.

**3.53** He concludes that prices are no longer driven by real competition 'because the competition has bought each other out'.[72]

**3.54** On the other hand, Coles Myer states that its current market share of total retail sales is 15.7%, that its share of the grocery/food market is only 22%, that vigorous competition has led to a decline in its market share, and that barriers to entry into retailing are 'non-existent'.[73]

**3.55** The Attorney-General's Department consider that there is effective competition in the various retail markets in which Coles/Myer operates, and that section 46 provides appropriate controls over any misuse of Coles/Myer's buying power.

**3.56** Notably, in their dissenting report to the Griffiths Committee, Mr Robert Tickner, MP and Mr Keith Wright MP questioned the reliance on s46 to prevent abuse of market power. They argued that the best way to protect against misuse of market power is to prevent its being created in the first place by preventing mergers which would substantially reduce competition.

**3.57** Following the acquisition by News Ltd of Herald and Weekly Times, the TPC claims that, in spite of securing the divestment by News Ltd of afternoon newspapers in Brisbane and Adelaide, 'the Commission was unable to restore to th

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70 *Submission, p 1; Evidence, p 397.*

71 *Addendum to submission, p 6; Evidence, p 397.*

72 *Evidence, p 415.*

73 *Submission, p 2.*

market the level of competition that the Herald and Weekly Times had provided as a major competitive force in the newspaper market. Competition in the newspaper market has been consequently substantially lessened as a result.'[74]

3.58 The Attorney-General's Department states that the Herald and Weekly Times merger is an unsuitable base on which to construct a principle of general application, both because of the special sensitivity of the print media, and because, on the facts, the TPC considered that the merger did breach the dominance threshold and acted accordingly.[75]

3.59 The TPC also notes that the acquisition by Ansett of East-West Airlines resulted in a reduction in competition, particularly price competition (prior to the entry into the market of Compass) and particularly on major eastern trunk routes.[76] The TPC suggests that a similar result would occur were Compass now to be acquired by one of the other airlines (or vice versa). The TPC quotes a PSA finding that 'the influence of increased competition is most apparent on the six routes where Compass operates'. On these routes, average revenue per passenger kilometre has fallen by 13.4%. On other routes it has fallen by only 1.3%.[77]

3.60 Dr Pengilley states that the Ansett/East West merger was not evidence of the failure of the dominance threshold as the TPC again found that the merger actually breached that threshold. However, rather than take proceedings in court, the TPC took 'alternative administrative remedies'[78] which restructured the merger. With regard to the failure of these administrative remedies, the TPC stated that:

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74 *Submission (29.8.91), p 11.*

75 *Evidence, p 349 (Mr Skehill).*

76 *Submission (29.8.91), p 12.*

77 *TPC supplementary submission (5.11.91), p 10.*

78 *Evidence, pp 320-22.*

> after more than 12 months of negotiations on the sale of Skywest the Commission felt that the possibility of a viable buyer emerging was remote and the likely result of insisting on the sale would be the shut down of Skywest's regular public transport operations. The Commission felt that given the likely outcome, it could no longer justify the heavy drain on resources which continuing involvement would impose ... Despite some criticism of the decision, the Commission decided not to insist on the divestiture of Skywest.[79]

**3.61** With respect to the acquisition by ICI (Dulux) of Berger and British Paints, the TPC states that 'in terms of dominance there was no breach of the Act but there was no doubt that it led to a substantial lessening of competition. Since the merger took place in early 1988, prices of architectural paint have gone up approximately 35% and prices of automotive paint have also risen substantially.'[80] Senator Boswell also raised these matters before Committee, and observed that, following the merger, paint retailers lost fairly significant discounts, were forced to buy in increased quantities and lost the advantage of having a number of suppliers serving the market.[81]

**3.62** In reply, the BCA contends that the paint market has continued to be strongly competitive since the merger, that ICI's market share has fallen, that Taubmans and Wattyl have become stronger competitors both through share gain and acquisition, that all suppliers are subject to the countervailing market power of large national paint purchasers, and that while the list price of a selected line of architectural paint may have increased by 35%, its estimate of the average selling price increase is less than 15%.[82]

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79 *TPC Annual Report 1988-89, p 17.*

80 *TPC submission (29.8.91), p 14.*

81 *Submission, p 4, Evidence, pp 399-400.*

82 *Supplementary submission (26.9.91), p 10.*

**3.63** The Attorney-General's Department draws attention to the fact that Berger and British Paints were unprofitable producers.[83] The TPC accepts this but notes the special value of these companies to Dulux as indicated in the higher price it was prepared to pay.[84]

**3.64** The PSA notes that though the ICI/British Paints merger should help ensure less industry fragmentation and greater efficiency in the long term, and that it had not yet considered it necessary to intervene to restrict prices,[85] nevertheless it calculates that increases in paint prices were 50% greater than the CPI in the three years to December 1990 and that it was investigating whether these price increases were justified by cost increases. Financial data from the companies concerned revealed that their profitability was significantly greater than the all industries average.[86]

**3.65** With regard to the acquisition by Tubemakers of McPherson's steel distribution business, the TPC observes that the effect of the purchase has been to limit the business available to Tubemakers' competitors, and that 'there is considerable evidence to indicate that Tubemakers has been engaged in a creeping acquisition of a number of distributors over the past decade with progressive anticompetitive consequences, but that it is difficult to apply the dominance test to small increments in market share.'[87]

**3.66** In reply, Tubemakers states that its own manufactured products account for only 23% of the sales of its merchandising business and that, during the period it is alleged to have 'engaged in creeping acquisition', its principal domestic

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83 *Evidence, p 350 (Mr Skehill).*

84 *Submission (29.8.91), p 14.*

85 *Submission, p 8.*

86 *Price Probe, December 1990, p 11.*

87 *Submission (29.8.91), p 16.*

manufacturing competitor, Palmer Tube Mills, has grown to a producer of more than 100,000 tonnes per annum.[88]

**3.67** The TPC states that mergers in the fibreboard container industry have resulted in substantial price increases to consumers,[89] that mergers in the bread baking industry have 'limited any sustained price competition'[90] and that increased concentration through mergers in industries such as tyres (Dunlop/Goodyear) and tea (Unilever/Bushells) has 'undermined' the competitiveness of those markets.[91]

**3.68** Senator Boswell states that mergers in the wine industry, culminating in the takeover of Penfolds Wines by SA Brewing, have caused prices to consumers to rise substantially, and the resulting market concentration has markedly lessened the bargaining power of growers.[92] The TPC considers that the full effect of mergers in the wine industry has not yet been seen.[93]

**3.69** In the North Queensland meat processing industry, in spite of the divestiture order imposed in the Australia Meat Holdings litigation, the Committee was informed that existing concentrated ownership has meant that no meaningful competition exists in the Northern and Central Queensland cattle yards and that employment prospects and local provincial town economies have been adversely affected.[94]

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*88 Submission, p 2.*

*89 TPC submission (29.8.91), p 15.*

*90 Ibid, p 13.*

*91 Ibid.*

*92 Addendum to submission, p 1.*

*93 Submission (29.8.91), p 15.*

*94 Senator Boswell, addendum to submission, p 4.*

3.70 The TPC suggests that an agreement for the acquisition of Solo by Ampol reached in October 1989 brought to an end a period of heavy discounting and marked fluctuations in petrol prices.[95] When the takeover was completed in April 1990 the TPC states that 'Ampol immediately raised Solo's prices compared to the rest of the market. Solo was the price leader in the main metropolitan markets of Australia and the effect of Ampol's decision was to lift the general level of prices and also to remove a key dynamic factor contributing to competition in the market'.[96]

3.71 Even allowing for the effect of other factors on prices, the TPC considers that this takeover 'has been associated with a transformation in pricing behaviour ... [and] since every one cent on the price of petrol and distillate is equivalent to around $300m per annum it can be seen that even small looking takeovers can be associated with profound and far reaching effects on what consumers and business users pay'.[97]

3.72 The TPC also believes that the potential effect of the dominance threshold on competition should be considered. As noted above, the TPC states that the current merger threshold would enable an effective and vigorous competitor to be eliminated without a contravention of the Act.[98] Arguably, the dominance threshold would not prevent the acquisition of Compass Airlines by Australian Airlines or Ansett (or vice versa), and it would not prevent the acquisition of Power Brewing by either Carlton and United Brewing or National Brewing. The TPC states that while such acquisitions would have important competition implications, it is questionable whether they would be caught by the dominance test.[99]

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95 *Supplementary submission (6.11.91), Annexure 6-1.*

96 *Supplementary submission (5.11.91), p 10.*

97 *Ibid, p 11.*

98 *Ibid, p 9.*

99 *Submission (29.8.91), p 13.*

3.73 This view is supported by Treasury which states that 'it appears that the dominance test could potentially permit future mergers with substantial anti-competitive impacts not fully offset - or offset at all - by public benefits.[100]

*Certainty*

3.74 Professor Baxt,[101] Mr Tonking,[102] LCA,[103] VECCI,[104] CAI[105] and BCA[106] each said that altering the dominance threshold would create a measure of business uncertainty. The dominance test, it is said, is both well-tried and has been judicially interpreted, and 'it would be a shame to lose that certainty without any compensating benefit in either policy or practical terms'.[107] The test has the benefit of practical guidelines laid down in the Ansett Avis case[108] - no similar criteria have ever been set out in relation to substantial lessening of competition test[109] - and it has, it is said, resulted in a moderate degree of intervention which has been both adequate and which has enabled the business community to establish a degree of confidence in the TPC.[110]

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100 *Submission, p 54.*

101 *Evidence, p 34.*

102 *Submission, p 9.*

103 *Submission, p 10.*

104 *Submission, p 2.*

105 *Evidence, p 265 (Mr Martin).*

106 *Evidence, p 271 (Mr Speed).*

107 *LCA submission, p 10. See also Mr Tonking submission, p 5.*

108 *Ansett Transport Industries (Operations) Pty Ltd v Trade Practices Commission (1978) ATPR 40-071.*

109 *Mr Tonking submission, p 8.*

110 *VECCI submission, p 2.*

**3.75** Treasury notes that changing the test might send confused signals to business.[111] Dr Pengilley, observing that the TPC supported the dominance test in 1988, states that it is unsatisfactory for the TPC's attitude to change with changes in its personnel.[112]

**3.76** It was also suggested that, as the threshold applicable in New Zealand is dominance, the harmonisation of laws between the two countries would be complicated by any changes to section 50.[113]

**3.77** It was suggested to the Committee by the BCA that business will not know what substantial lessening of competition really means.[114] However, as this form of words is commonly used throughout the Act, it is arguable that these words would provide no more uncertainty in section 50 than elsewhere.

**3.78** Mr McComas in his evidence observed:

> I do not know about more uncertainty. It [a substantial lessening of competition test] would certainly lead to a great deal more need for the business community to come and get a tick from the regulator or find out how the regulator is going to behave.[115]

**3.79** The Committee notes that in Canada, which adopts a substantial lessening of competition test, to help in applying the test, the Canadian Competition Act contains statutory guidelines as follows:

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*111 Evidence, p 328 (Mr Shogren).*

*112 Evidence, pp 319-20.*

*113 LCA submission, p 10.*

*114 Evidence, p 271 (Mr Speed).*

*115 Evidence, p 237.*

In determining ... whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially, the Tribunal may have regard to the following factors:

(a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger:

(b) whether the business, or a part of the business of a party to the merger or proposed merger has failed or is likely to fail:

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available:

(d) any barriers to entry into a market including

(i) tariff and non-tariff barriers to international trade

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry.

and any effect of the merger or proposed merger on such barriers:

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger:

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor:

(g) the nature and extent of change and innovation in a relevant market: and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

**3.80** Treasury takes the view that it is a matter of judgment in any particular case whether the benefits of a merger outweigh the costs, but:

> the examples so far available do not appear to amount to unequivocal evidence that the dominance test has had significant adverse consequences for the economy (emphasis added). But that is not to say that there may not be scope to improve the test.
>
> In particular, it appears that in industries not exposed to import competition and the threat of entry of new competitors there may be, potentially at least, inadequacies with the current dominance test. The potential anti-competitive effects, which may be difficult and costly to detect and act against under current arrangements, may better be avoided by preventing mergers than by applying other sections of the TPA (and other legislation).
>
> This suggests that some tightening of the dominance test may be desirable, for example, in the form of an appropriately interpreted substantial lessening of competition test.[116]

**3.81** Treasury observes that any significant change in the legislation could be accompanied by uncertainty. However, Treasury observes:

> If the test were to be tightened so as to better target - and in particular if a substantial lessening of competition test were to be reintroduced - it would be crucial to ensure that factors additional to the number of existing domestic competitors such as: the extent of import competition; the availability of substitutes; barriers to entry; be taken into account in applying the test. The ability profitably to increase prices as a result of the merger may also be relevant. For example, guidelines could be included in legislation or in an Explanatory Memorandum

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116 *Submission, p 53.*

accompanying a Bill to change the Trade Practices Act.[117]

**3.82** The Committee also notes the TPC submission that should the test be altered, certain factors should be incorporated into the Act or referred to in the Explanatory Memorandum or second reading speech to provide guidance to the Commission, the courts, and as a consequence, reduce any uncertainty that changing the test might bring.[118]

**3.83** Thus when considering whether or not a merger would be likely to substantially lessen competition, guidelines similar to those applying in Canada should be considered, but with some changes for Australian conditions.

**3.84** The TPC has also undertaken to issue detailed merger guidelines covering all aspects of its merger administration including:

- what the Commission sees as meant by substantial lessening of competition;
- the Commission's view of the various factors adapted from Canada as outlined above when it comes to substantial lessening of competition;
- the Commission's view of markets;
- the authorisation procedures;
- what the Commission sees as being public benefit issues and the information needed to sustain such a claim;
- information requirements generally.[119]

117 *Ibid, p 53.*

118 *Supplementary submission (25.11.91), p 1.*

119 *Ibid, pp 2-3.*

*Regulatory and compliance costs*

**3.85** It has been suggested that merger control often involves the imposition of regulatory and compliance costs.

**3.86** The substantial lessening of competition test was used in section 50 from 1974-1977. The Griffiths Committee noted that, owing to the wide definition of market, a problem experienced with the test was the large number of mergers caught, with consequent high compliance costs and administration costs. Treasury believes this problem could be reduced if section 50 continued to be limited in its application to substantial markets, as proposed by the TPC and in contrast to the 1977 test. The number of mergers which would be caught under a 'substantial lessening of competition' test would still depend on the interpretation of those words.[120]

**3.87** In considering the additional cost the TPC notes that it is important to distinguish between the costs attributable to the introduction of a system of pre-notification and those attributable to a change in the merger test. The TPC believes that it would be prudent to assume that a somewhat greater number of proposed mergers would be investigated or challenged if a substantial lessening of competition were introduced. The Commission has submitted to the Committee that it expects the total number of mergers would probably increase from approximately 150 to around 200 and of that number it only expects some 25 to 30 to require detailed consideration.[121]

**3.88** With respect to compliance costs for business, the TPC has submitted that the compliance costs directly resulting from a change in the merger test are likely to be small. However, to the extent that some firms seek to challenge the Commission's decision under a changed merger test, those firms could expect to see

120 *Submission, p 51.*

121 *TPC supplementary submission (5.11.91), p 21.*

higher legal and administrative costs. To that extent, some additional compliance costs to industry as a whole are possible as a result of the revision of the merger test.[122]

**Raising the threshold**

**3.89** Section 50 operates by reference to substantial markets for goods or services in Australia, in a State or in a Territory.[123] This definition has enabled the court to define a market such as the North Queensland fat cattle market.[124] Submissions from CRA Ltd and Mr Bobeff have invited the Committee to consider a minor relaxation in the definition of the term market.

**3.90** Mr Bobeff proposes that the appropriate threshold should be 'substantial market dominance in Australia as a whole', which would be achieved by deleting the words 'or in a State or Territory' from section 50(3)(a).[125] Applying this threshold, a merger resulting in dominance of the Northern Territory soft drink market (or, presumably, the North Queensland fat cattle market) would **not** be prohibited. The abuse of any resulting monopoly power would be prevented by the threat of import competition, and the activities of the PSA.[126]

**3.91** CRA Ltd contends that the Act should explicitly recognise that, in certain significant industries, the relevant market is the international market and not the Australian market. It suggests that section 50 be amended 'so that in applying the 'dominance' test the TPC is not constrained by relating this to the Australian market where it would be appropriate to assess dominance in terms of international markets

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122 *Ibid, p 22.*

123 *Trade Practices Act 1974 (Cth) s50(3)(a).*

124 *TPC v Australia Meat Holdings Pty Ltd (1988) ATPR 40-876; (1989) ATPR 40-932.*

125 *Submission, p 2; Evidence, p 41.*

126 *Mr Bobeff submission, p 3; Evidence, p 47.*

for those industries or companies that sell their commodities primarily in these markets.'[127]

### Lowering the threshold

**3.92** Many of the arguments for lowering the merger threshold to 'substantial lessening of competition' have been canvassed above. These include suggestions that the 'dominance' test fails to facilitate the development of industry efficiency or scale economies, that it retards the development of true international competitiveness, and that it has resulted in damage to domestic competition.

**3.93** Other arguments focus on the need for consistency between the various sections of the Act, the desirability of the public scrutiny of contentious mergers, and the adverse effect of the 'dominance' threshold on consumers.

*Consistency*

**3.94** The need for consistency throughout the Act is articulated by the TPC in the following terms:

> It seems inconsistent to the Commission that while most other conduct caught by Part IV of the Act (restrictive trade practices) is subject to a competition test, s 50 is subject to a less rigorous test. For example, if two firms agree to engage in conduct that substantially lessens competition this would contravene the Act. Yet, they can merge and unless this results in dominance or increased dominance, the acquisition would not be caught by the Act even if there is a serious diminution of competition.[128]

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127 *Submission, p 4.*

128 *Submission (29.8.91), p 2.*

**3.95** Professor Fels, on behalf of the TPC, suggests that if the Act imposes strong restrictions on behaviour and weak restrictions on mergers, people will merge in order to gain the objectives that they are barred from achieving by other conduct.[129]

**3.96** A return to a substantial lessening of competition test for mergers would, it is said, reintroduce a degree of compatibility within the Act, would bring Australia more into line with the approach taken in major Western economies, and would leave the availability of authorisation on public benefit grounds unaffected.[130]

**3.97** On the other hand, it has been submitted that section 50 is a provision intentionally concerned with structure and not with conduct which is dealt with elsewhere in Part IV,[131] that the dominance threshold is widespread overseas, and that authorisation is a time-consuming and costly process.

*International merger tests*

**3.98** In its review of foreign merger tests, the Attorney-General's Department states that a 'substantial lessening of competition' test applies in the United States, Canada and Japan. A 'dominance' test applies in the European Community (under Article 86 of the Treaty of Rome) and in Germany, France, Spain, Switzerland and New Zealand.[132]

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129 *Evidence, p 300. See also, for example, NCAAC submission, p 2.*

130 *TPC submission (29.8.91), p 3. See also submission from the Right Honourable Mr Malcolm Fraser; and Evidence, p 87 (Professor Clarke).*

131 *See, for example, VECCI submission p 2; Attorney-General's Department, Analysis of and Comments on Submission by the Trade Practices Commission (17.9.91), p 1; Evidence, p 265 (Mr Martin).*

132 *Attorney-General's Department, Notes on Foreign Merger Tests (26.9.91).*

3.99 However, under the German Act Against Restraints of Competition, a rebuttable presumption exists that an enterprise dominates a market where its share is at least one third. And under the Spanish Anti-trust Act, mergers may be challenged when a share of at least 25% of a national product or service market or a substantial portion thereof is acquired or increased, or when the parties to the transaction have a combined turnover in Spain of at least 20 billion pesetas in the last preceding accounting year.[133]

3.100 Section 69 of the United Kingdom Fair Trading Act provides that mergers may be referred to the Monopolies and Mergers Commission for report as to whether the proposed merger operates or may be expected to operate 'against the public interest'. A primary factor considered is the likely effect on competition.[134]

3.101 The New Zealand Commerce Act broadly accords with the existing dominance test in section 50 of the Trade Practices Act.

3.102 Although both thresholds are in use in overseas countries, care must be taken in interpreting them in Australia. There is danger in assuming an equivalence in meaning where a similar form of words is used in different jurisdictions. Professor Johns, on behalf of the TPC, contends that 'it is quite clear in this country that, rightly or wrongly, we now have a standard of dominance test which is high by the standards of Germany or the European Community'.[135] On the other hand, Mr Skehill, on behalf of the Attorney-General's Department, has observed that 'the substantial lessening of competition test that applies in America, when you have regard to the environment in which it is applied, looks very much like our dominance test when you take into account the guidelines'.[136]

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133 *Attorney-General's Department, Notes on Foreign Merger Tests (26.9.91), pp 6, 8.*

134 *Ibid, p 10.*

135 *Evidence, p 191.*

136 *Evidence, p 191.*

*Public scrutiny*

3.103 The TPC asserts as a basic principle of competition policy that 'if a merger is going to lead to a substantial lessening of competition, it should be looked at'.[137] It submits that under a substantial lessening of competition test, and if authorisation were sought, it would at least 'have the opportunity of balancing the public benefit resulting from such an acquisition against the detriment constituted by the lessening of competition.'[138] This is of considerable importance given that mergers, once consummated, cannot easily be untangled.

3.104 However, a number of submissions[139] point out that the authorisation test is an onerous one to fulfil. Public benefit is undefined; what is anti-competitiveness is often a matter of perception by the regulator; and it is difficult to gather reliable data such as the projected achievement of efficiencies to put to the TPC and to satisfy that body to the degree necessary. Authorisation has been described as a very resource-intensive process both for those seeking authorisation and for the TPC.[140]

*Consumers*

3.105 AFCO, NCAAC, and ACA all favour a return to the 'substantial lessening of competition' threshold, [141] and all believe that a public interest test should apply to mergers. AFCO suggests that in determining where the public interest lies, the Act should 'direct the TPC and the Court to consider consumer interest.' Companies proposing mergers or takeovers which result in a lessening of competition should be

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137 *Evidence, p 193. (Professor Fels)*

138 *Supplementary submission (5.11.91), p 11.*

139 *Evidence, pp 224-226 (Mr McComas); pp 325, 337 (Mr Featherston), p 335 (Dr Pengilley).*

140 *Evidence, p 227 (Mr Skehill).*

141 *NCAAC submission, p 2; AFCO submission, p 2; ACA submission, p 3.*

required to provide an independent 'consumer impact statement' showing that the public interest outweighs detriment.[142]

**3.106** ACA proposes that s 50(1) and (1A) should prohibit an acquisition 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.'[143] It further proposes that a new subsection 50(1B) be inserted to provide that 'substantial lessening of competition' in this context means any acquisition whereby 6 or less corporations are, or are likely to be, responsible for 50% or more of the turnover of goods or services within a market, or where 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.

**3.107** AFCO proposes that 'takeovers or mergers resulting in a substantial lessening of competition should not be permitted unless public hearings establish that the anti-competitive effect of the merger or takeover will be outweighed by the public benefit,' with the onus on the merging parties to demonstrate in court proceedings that no substantial lessening of competition, or no net public detriment in authorisation proceedings will result.[144]

**3.108** The lower threshold is also supported by Senator Boswell who states that, based on evidence of small businesses in manufacturing and primary industry, 'the recent experience of mergers has firstly not benefited consumers, which is a

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142 *Submission, p 4.*

143 *Submission para 1.14. The public interest is relevant under the UK Fair Trading Act. The interests of consumers are explicitly accorded recognition under the Spanish Anti-Trust Act.*

144 *Submission, p 2. Placing the onus of proof on the merger proponents rather than on the TPC is also supported by ACA.*

stated purpose of Trade Practices legislation, nor led to greater efficiencies in Australian manufacturing and primary industry'.[145]

Conclusions

**3.109** The philosophy underlying Part IV of the Trade Practices Act is the protection and enhancement of competition. Implicit in Part IV is the assumption that acts or occurrences which substantially lessen competition contravene the Act, unless authorised by the Trade Practices Commission on public benefit grounds.

**3.110** While most other conduct caught by Part IV of the Act is subject to a competition test, section 50 is subject to a less rigorous test. The existence of a dominance test in the area of merger regulation is difficult to reconcile with the essential thrust of the Act which is directed to preventing anticompetitive conduct.

**3.111** The dominance test was specifically introduced to facilitate the development of economies of scale in Australian industry, and to further its international competitiveness.

**3.112** However, the economic evidence, both analytical and theoretical, concerning the effects of mergers, presented during the course of this inquiry, has not led to absolute certainty. The economic evidence that mergers actually yield productive efficiencies remains equivocal. Nor is it clear that such efficiencies as have occurred have in fact improved the international competitiveness of Australian firms, or resulted in demonstrable benefits to consumers.

**3.113** A growing body of economic theory now suggests that international competitiveness, both in large and small nations, is achieved not by encouraging industry leaders to merge, but by encouraging them to compete. The work of

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*145 Submission (28.11.91), p 5.*

Professor Michael Porter was frequently cited before the Committee. His studies of the development of national competitive advantage have questioned the view that domestic firms must be large relative to the size of the domestic industry to gain economies of scale in order to be internationally competitive. While Porter's work does not deal directly with Australian industries it nevertheless is a work of considerable importance by an internationally recognised authority in this area.

**3.114** The Committee also notes that a significant and growing number of Australian industries in the non-traded goods and services sector are not subject to international competition nor concerned with international competitiveness.

**3.115** Significantly, the dominance test where applicable internationally is often accompanied by a presumption of dominance at market shares of around 25% or 33%.

**3.116** The Committee considers that the essential thrust of the Trade Practices Act should be to prohibit acts which substantially injure competition, except where public benefit can be demonstrated. This principle is embraced elsewhere in Part IV of the Act, and should also be incorporated in the merger regulation provisions.

**3.117** A unique aspect of the Australian trade practices regime is the availability of authorisation where acts otherwise in breach of the legislation are shown to have a net public benefit. The Committee views authorisation as a necessary and appropriate mechanism for consideration of countervailing efficiency arguments such as the development of economies of scale and international competitiveness.

**3.118** The Committee acknowledges business concerns that the law governing mergers should be certain and predictable. The dominance threshold has been in operation since 1977, and has accumulated a body of interpretative law. However, the alternative threshold of 'substantial lessening of competition' has operated throughout

Part IV of the Act since 1974, and has similarly accumulated a body of interpretative law.

**3.119** The Committee notes and adopts the observations made in the 1984 OECD Report on Merger Policies and Recent Trends in Mergers to the effect that 'member countries should make as transparent as possible the criteria they apply [to mergers] ... Such criteria could include for instance the determination of the relevant market in merger analysis, the level of concentration in the market, barriers to entry and factors relating to the firm's conduct and performance'.[146]

**3.120** The Committee is of the view that any uncertainty that changes to the test might bring could be reduced significantly by the incorporation into the Act of statutory guidelines, possibly along the lines of the Canadian model, to assist in applying the test.

**3.121** Change should not be introduced lightly. Amendments to the Trade Practices Act may well bring about uncertainty which should not be readily risked. On the other hand, if reform is needed, it should be made unless the harm caused by it outweighs the good obtained. The Committee considers that change is needed to s.50 of the TPA and that the benefit likely to flow from it will clearly outweigh any detriment that may arise.

**3.122** People and organisations whose opinions deserve to be accorded great respect differ in what they recommend as the appropriate test under section 50 of the Act. Those most qualified to advise the community how best it might deal with trade practices have given conflicting opinions to the committee. This is unfortunate as were there greater unity amongst them the committee's task would have been much easier.

146 *Page 65.*

**3.123** The Committee does not accept that because an authority wants more power it should have it. On the other hand, where a body like the TPC says it lacks the authority to carry out its function in a way most beneficial to the community, considerable weight must be given to its statement. This is particularly so where there is much support given to it by people learned in the relevant area. As pointed out in the previous paragraph, there are strong opinions to the contrary. The fact remains the TPC stands with strong allies when it advocates change to section 50.

**3.124** There is a poor bank of available studies based on empirical research into the Australian economy. There is no work of which the Committee has been made aware which would compel it to come to a particular conclusion. However, there is material which provides it with significant help. The Competitive Advantage of Nations by Professor Michael Porter has been quoted already. Generally it was treated with considerable respect by those who made submissions to the Committee. The thrust of Professor Porter's work supports a change in section 50.

**3.125** Different submissions treat certain mergers that have taken place in varying ways. However there is a substantial body of material before the Committee expressing concern about mergers and acquisitions such as that of The Herald and Weekly Times by News Limited, that of Berger and British Paints by ICI (Dulux), that of McPherson's Steel by Tubemakers, and the joining together of Coles and Myer. However, there is a significant number of responsible people and organisations with as much disquiet about mergers and acquisitions that have taken place. It seems appropriate to the Committee that ones of a similar nature should be closely examined in the future.

**3.126** The thrust of the submissions the Committee received from small business and from farmers was generally in the one direction. They argued for a change in section 50.

3.127 Material put before the Committee giving a consumer's perspective on section 50 sought a change in it.

3.128 The Griffiths Report which was tabled in May 1989 was one of high standard. The majority recommended that no change be made to section 50 of the Trade Practices Act. The Senate Standing Committee on Legal and Constitutional Affairs has great respect for the Griffiths Report. However, it must decide the issues before it on the material available to it. Further, since the tabling of the Griffiths Report there has been a considerable shift towards increasing competition in the marketplace as a means of giving Australia a better economic outlook. An amendment to section 50 in the terms suggested by the Committee is seen as a means towards that end.

3.129 Those countries having most in common with Australia have legislation similar to the Trade Practices Act. A goodly proportion of them operate under the 'lessening of competition' test. Australia would be bringing itself into line with them were it to adopt that test.

3.130 Section 50 deals with the structure of corporations. The rest of Part IV of the Trade Practices Act deals with conduct. The sections dealing with conduct impose more rigorous limitations on it than does section 50 on structures. There would be more consistency in the Act were structure and conduct dealt with generally in the same way.

3.131 **The Committee recommends that section 50 of the Trade Practices Act 1974, be amended to prohibit mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services.**

3.132 **The Committee recommends that, to make clear the ambit of the new test, guidelines be incorporated in the Trade Practices Act 1974.**

3.133 The Committee recommends that the guidelines should contain criteria including:

- the level of concentration in the market;
- the likely level of foreign competition in the market;
- the availability of product substitutes;
- barriers to entry;
- whether one party to the merger is a failing firm;
- the likelihood that the proposed merger would remove a vigorous and effective competitor;
- the extent to which effective competition remains or would remain in the market;
- change and innovation in the market;
- the ability to significantly increase prices following a merger; and
- any other factors relevant to competition in a market.

3.134 The Committee recommends that where a proposed merger fails to meet the test including the guidelines the Trade Practices Commission should nevertheless have the power to authorise it when it is for the benefit of the public.

# CHAPTER 4

# COMPULSORY PRE-MERGER NOTIFICATION

## Notification and clearance procedures

4.1 The Trade Practices Act has never required that the parties to a merger or acquisition notify the TPC in advance of their intention to merge. The parties may seek merger authorisation from the TPC on showing net public benefit,[1] but are not obliged to.

4.2 Prior to 1977, the Act contained a clearance procedure, which provided for voluntary notification of an intended merger to the TPC. After notification, the TPC could grant a clearance if it believed that the merger would not substantially lessen competition. The TPC was then bound by this decision. Mergers above the competition threshold could be authorised on public benefit grounds.

4.3 The clearance procedure was removed in 1977 following the change to the dominance test.[2] Currently a non-statutory, informal, voluntary notification system operates. The TPC states that, under this system, it is often approached on a confidential basis for instant decisions. This pressure has greatly limited its scope for obtaining necessary market information.[3]

## Previous consideration of amendments

4.4 Compulsory pre-merger notification was considered in the 1984 Green Paper, but not adopted in the 1986 amendments. It was again considered by the

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1 *Trade Practices Act 1974 (Cth) s88(9).*

2 *Hansard, House of Representatives, 3 May 1977; p 1478.*

3 *Submission (29.8.91), p 27.*

Griffiths Committee, which (with the support of the TPC) recommended that the informal scheme be retained but receive legislative recognition.[4]

**Overseas experience**

4.5 Compulsory pre-merger notification procedures operate in the United States, Canada and the European Community. A voluntary scheme operates in the United Kingdom.

4.6 In January 1991, New Zealand moved from a compulsory to a voluntary scheme.[5] This was originally opposed by the New Zealand Commerce Commission, but its subsequent experience of the scheme's operation has now, apparently, caused the Commerce Commission to alter its view.[6]

4.7 The United States scheme operates under the Hart-Scott Rodino Act. This makes pre-merger notification mandatory subject to a threshold. Notification is required where a firm with an annual turnover of at least US$100m proposes to acquire a firm with an annual turnover of at least US$10m, and the acquisition is of the value of US$15m.[7]

4.8 Mr McComas submits that the United States scheme 'has proved to be very burdensome upon the administration for no apparent cost benefits'.[8]

4.9 However, the Attorney-General's Department observes that it is regarded as successful by both regulators and those affected by it, that 'the resource

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4 *Griffiths Report para 6.2.19.*

5 *TPC submission (29.8.91), p 27.*

6 *LCA submission, p 13.*

7 *Evidence, p 48 (Mr Skehill).*

8 *Submission, p 7.*

requirements for the regulator of such a regime are slight, that the resources previously directed to keeping a watching brief on proposed transactions can be better directed to the assessment of notified transactions, and that the paper burden and delay to consummation can be minimised'.[9]

**4.10** The US Federal Trade Commission in January 1991 is quoted as saying that:

> The premerger notification program has been a success. Compliance with the Act's notification requirements has been excellent. As a result, since the inception of the program, the two enforcement agencies generally have been able to challenge anticompetitive transactions before they are completed. These premerger enforcement actions have been less costly and more effective. In addition, although the agencies retain the power to challenge mergers after they are consummated and will do so under appropriate circumstances, the fact that they rarely do so has led many members of the private bar to view the premerger notification review process as a helpful procedure in giving antitrust advice to their clients.[10]

**4.11** Dr Pengilley notes that these are comments from an administrative body and should be taken on that basis.[11] He refers to the rules for the operation of the scheme as formulated in '101 triple-column pages of the federal register' and maintains that the scheme is not as happily accepted in the United States as the Federal Trade Commission would have people believe.[12]

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9 *Submission (9.8.91), pp 16-17.*

10 *Ibid, p 17.*

11 *Evidence, p 386.*

12 *Evidence, p 387.*

### Benefits of compulsory notification

4.12 A compulsory pre-merger notification scheme would give the TPC adequate time to deal with those mergers against which it should proceed, thereby enabling optimal use of its resources; it would ensure that 'midnight mergers' do not occur; would reduce the likelihood of costly litigation; and it would support the principle that it is preferable to prevent the completion of a merger rather than attempt to later unwind it through the use of forced divestiture.[13]

4.13 This latter consideration was seen as particularly relevant by the OECD which, in its 1984 Report on Merger Policies and Recent Trends in Mergers, suggested that:

> Member countries which have not already done so should consider adopting mandatory prior notification of proposed mergers to ensure that significant mergers do not escape control as well as to obtain detailed information on the proposed transactions. In this context, mergers involving small acquiring and acquired enterprises could be exempted from pre-merger notification, so as to alleviate the reporting burden on them as well as to simplify control. However, acquisitions of relatively small enterprises by large firms could be brought within the control system to ensure that such acquisitions are not anti-competitive.

4.14 Professor Clarke considers it 'axiomatic' that the TPC should be informed of any proposed merger which may have the effect of substantially lessening competition in a significant market, and should be given time to consider its response. He contends that 'to leave the Commission in the position of having to discover such mergers for itself pays scant regard to its role as guardian of the public interest in this area.'[14] These views are shared by Professor Baxt.[15]

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13 *Attorney-General's Department submission (9.8.91), p 16.*

14 *Evidence, p 66.*

15 *Evidence, p 15.*

4.15 The TPC advocates the introduction of a scheme limited to:

- horizontal mergers where both parties to the merger operate in the same market; and

- mergers where either the combined assets or sales of both parties exceed $150 million and where the transaction value is in excess of $25 million.[16]

4.16 This scheme would specifically exempt certain mergers otherwise caught by the guidelines which would have a negligible impact on competition, such as corporate reconstructions, real estate acquisitions and sales by mortgagees in possession.

4.17 Benefits of the scheme are identified as: quickness in decision-making;[17] certainty as to the Commission's attitude to the merger; providing an opportunity for negotiation concerning partial divestments; and the availability of advice as to whether authorisation should be sought. Provided that 'due process' is guaranteed, MTIA does not object to the TPC scheme.[18]

4.18 Currently the TPC considers between 120 and 150 mergers annually. It estimates that, if a competition test were introduced in section 50, then its pre-merger notification guidelines would involve consideration of between 150 and 200 mergers annually, probably in greater detail.[19]

4.19 The TPC proposes a continuation of the present informal scheme for mergers outside the nominated categories where there might nevertheless be a

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16 *Submission (29.8.91), p 28.*

17 *It is envisaged that an answer could be given within 5 to 15 days.*

18 *Supplementary submission (11.9.91), p 3.*

19 *Submission (29.8.91), p 29.*

potential breach of section 50.[20] A decision to take no action against a merger would not prevent third parties (with standing) from taking their own private action at a later stage.[21]

4.20 AFCO also supports the introduction of a pre-merger notification scheme.[22] The NCAAC considers that a 'pre-merger clearance procedure' should be introduced.[23] As part of the procedure the NCAAC suggests that a 'Consumer Impact Statement' addressing all possible social and economic effects on consumers of a proposed merger or takeover should be produced for public comment. A proposal for the introduction of a 'consumer impact statement' in the context of applications for authorisation was rejected by the Griffiths Committee. That Committee felt that such a statement would make no additional information available to the TPC found and that it was always difficult to project the extent of a merger's impact on consumers.[24]

**Retention of the present scheme**

4.21 The Victorian Employers' Chamber of Commerce and Industry[25] summarises the key arguments in opposition to compulsory pre-merger notification as:

- increased resource demands placed on the TPC
- increased delays and compliance costs for business
- interference and adverse impact on the merger process itself

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20 *TPC submission, p 28.*

21 *Ibid, p 29.*

22 *Submission, p 12.*

23 *Submission, p 4.*

24 *Griffiths Report, para 6.3.8.*

25 *Submission, p 3.*

depressed business activity as a consequence of increased regulation and the TPC is, in any event, already aware of imminent significant mergers.

**4.22** The Law Council suggests that the costs to public administration of a compulsory scheme will be high.[26] The threshold of such a system would have to be 'conservative' to ensure that questionable acquisitions are always caught. By definition this would entail more notifications than are necessary, thus placing an additional and unnecessary burden on administrative costs.[27]

**4.23** LCA states that, under the voluntary scheme now in place in New Zealand, the Commerce Commission has been freed from much of the unnecessary paperwork which accompanied the previous compulsory scheme (notifications have fallen from 205 in the first half of 1990 to 32 in the first half of 1991) and the Commission is now able to concentrate on matters of substance.'[28] This view is supported by the BCA and Dr Pengilley.[29]

**4.24** LCA also states that the compliance costs for business will be considerable, both in terms of the time to be allowed for the processing of notifications and in the effort and expense in providing the information required. It adds that, once a system is institutionalised, its requirements may change as economic or political circumstances change, and that what may be tolerable in one year may become onerous the next. LCA concludes that whatever the cost in an individual case, costs

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26 *Submission (16.9.91), p 13.*

27 *LCA supplementary submission (31.10.91), p 3; Evidence, p 385 (Mr Featherston).*

28 *Submission (16.9.91), p 13.*

29 *BCA submission, p 11, Evidence, p 386 (Dr Pengilley).*

in aggregate will be considerable.[30] These views are confirmed by Dr Pengilley,[31] and CAI.[32]

4.25 However, the TPC disputes the analogy with New Zealand, observing that the scheme abandoned there was more in the nature of a clearance system.[33] Documentation in a form similar to that required by the Foreign Investment Review Board is all that would be contemplated under a scheme in Australia. And Professor Clarke adds that informing the TPC would not require the merging companies to supply information additional to that which they would already have compiled for other purposes.[34]

4.26 Under the existing informal scheme, the TPC states that it is frequently taken by surprise, with matters filed on public holidays or over Christmas. The necessity for an immediate response can shape the course (and raise the cost) of later litigation.[35] The long-running litigation involving Arnotts was referred to as an instance where the TPC was forced into stating its case in an inappropriate manner that could have been clarified had information been available from a simple pre-notification.[36]

4.27 Mr McComas considers that, whilst the TPC may on occasion receive short notice, its submission suggests that it does not necessarily require a great deal of notice, and its industry knowledge would enable it to move quickly when required. He suggests that the Federal Court will grant an interlocutory injunction freezing a

30 *Supplementary submission (31.10.91), p 3.*

31 *Evidence, pp 386-7.*

32 *Submission, p 3, Evidence, p 246 (Mr Gardini).*

33 *Evidence, p 388 (Mr Asher).*

34 *Evidence, p 67.*

35 *Evidence, p 389 (Mr Asher).*

36 *Evidence, p 389 (Mr Asher).*

merger if prima facie reason is shown, and this threat of litigation makes the present informal scheme workable.[37]

4.28 The Law Council also states that in its experience there is no pressing need for a compulsory procedure and it dismisses this as a suggestion to build up the network of regulations surrounding the Act.[38] Currently, parties either take their own advice and bear the risk in relation to a possible contravention of section 50, or they approach the TPC on an informal basis for 'reassurance' as to likelihood of a breach of the section. Alternatively, they may seek authorisation.[39] LCA suggests that the remedy of divestiture is available should an acquisition occur before the TPC is able to challenge it.

4.29 Mr Bobeff suggests that pre-merger notification should apply only to mergers exceeding a defined threshold in industries identified as 'sensitive'.[40]

4.30 The BCA expresses a preference 'for a prohibition-type law rather than a registration plus examination-type law (as in the UK)'.[41] This would enable business to arrange its mergers in accordance with the law without the need to incur substantial compliance costs, and yet would not prohibit informal discussions with the TPC prior to undertaking a merger.[42]

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37 *Evidence, p 239.*

38 *Evidence, p 385 (Mr Featherston).*

39 *LCA submission (16.9.91), p 13.*

40 *Submission, p 4.*

41 *Submission (22.8.91), p 11.*

42 *Ibid.*

4.31 The BCA identifies other disadvantages of compulsory pre-merger notification as delay in obtaining an assessment from the TPC (which may result in the successful defence of a takeover) and the potential for loss of confidentiality.[43]

4.32 BCA considers the existing system, where parties approach the Commission only where they feel an issue to be reasonably apparent (and where authorisation is not available for completed mergers), to be working satisfactorily and not requiring replacement by a 'formal and bureaucratic notification system'.[44]

4.33 CAI considers that, if the aim of pre-merger notification is to force companies to negotiate with the TPC about matters including divestiture, then this contradicts the essential focus of the legislation which it sees as requiring compliance.[45] CAI has also challenged the TPC to name the mergers where it has not received sufficient notice, and to identify the detriment caused by any failure to notify.[46] It suggests that there is little in such a scheme to advantage business.[47]

**A proposed scheme**

4.34 The Attorney-General's Department believes it possible to develop proposals for a pre-merger notification scheme which 'would place minimum impediments in the way of business and micro-economic reform and still satisfy the

43 *In its submission, the TPC proposes that pre-merger notifications would be confidential. If the Commission considered it necessary to make market enquiries it would seek a waiver of confidentiality. If confidentiality were not waived, then the Commission could provide only a qualified response.*

44 *Submission (22.8.91), p 12.*

45 *Evidence, p 246 (Mr Gardini).*

46 *Ibid.*

47 *Evidence, p 249 (Mr Gardini).*

policy imperatives of the TPA'.[48] The Department has proposed a scheme based on the following guidelines:[49]

- a form of pre-merger notification, with relatively high thresholds;

- the merger to be 'frozen' for a short period; (eg maximum period of 28 days with no minimum period)

- the TPC to have power to shorten this period if satisfied the merger falls below the competition threshold, or if the acquirer gives undertakings sufficient to justify the merger proceeding and authorisation investigations being finalised thereafter;[50]

- such undertakings to be enforceable by the TPC in the Federal Court;

- the TPC to have power to grant authorisation post-consummation where pre-merger notification has been given;

- where pre-merger notification is not required or not given, authorisation post-consummation to remain unavailable as at present;

- failure to notify a merger or acquisition at or above the threshold to constitute an offence;

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48 *Submission (9.8.91), p 17.*

49 *Ibid, pp 18, 19.*

50 *Such undertakings might include on-selling parts of the merged group, the presence of which would breach section 50 in an otherwise unobjectionable transaction, or retaining the independent operation of merging companies pending the grant of authorisation or the exhaustion of review rights following a refusal of authorisation.*

- consummation without required notification, or within the freezing period without the consent of the TPC, or beyond the freezing period without the required authorisation to be challengeable by the TPC as at present; and

- consummation below the notification threshold without authorisation to be challengeable as at present.

4.35 These proposals allow for notification to be kept confidential and not recorded on the TPC's public register; and for the details to be provided to the TPC to be kept to a minimum. In addition the notification form would be prescribed by Regulation rather than issued by the TPC.[51] It might therefore be disallowed by either house of Parliament.

4.36 Though of the view that pre-notification is not practically necessary, Mr McComas considers the principles put forward by the Attorney-General's Department to have considerable merit.[52]

4.37 These principles are also broadly supported by CRA Ltd,[53] which, however, does not believe that notification should be made mandatory. CRA proposes as an alternative approach that:

> - the acquiring company have the option of either notifying the TPC on a confidential basis, following which the procedure outlined by the Attorney-General's Department would apply; or
>
> - the acquiring company choosing not to notify the TPC, and inviting the risk of subsequent TPC intervention.

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51 *Attorney-General's Department submission (9.8.91), p 19.*

52 *Evidence, p 240.*

53 *Submission, p 5.*

Conclusions

4.38 The Committee notes that Australia has operated an informal system of pre-merger notification for some years. While this system is a useful one, the Committee accepts that the TPC does not receive sufficient notice of impending mergers and at times encounters difficulty in giving them detailed and prompt consideration.

4.39 There are a number of countries similar to Australia which require pre-merger notification. The OECD has suggested to its members that they should follow suit.

4.40 **The Committee recommends that it be obligatory for a notice to be given to the Trade Practices Commission where mergers or acquisitions of a substantial nature are proposed. What is a matter of substantial nature should be defined in the Act. The matters of which notice is to be given should be limited so that undue burden is not cast on those who must comply.**

4.41 **The Committee recommends that proposals for what the notice is to contain should be drawn up by the Attorney-General's Department and released for public comment. The proposal should be drawn up on the basis that those seeking a merger or an acquisition should not have to comply with requirements that are too wide, vague, onerous or vexatious.**

4.42 The Committee considers that the resource implications for the TPC of an appropriate threshold test being established would be minimal. While such a scheme does not accord with the regime adopted in New Zealand, the Committee considers that the benefits of its introduction outweigh the possible complications of harmonisation of business laws.

**Compulsory notification and 'sensitive' industries**

4.43 The Attorney-General's Department's proposed scheme for compulsory pre-merger notification has the broad endorsement of Professor Baxt.[54]

4.44 Professor Baxt is doubtful that the scheme would be appropriate to deal with 'sensitive industries'.

4.45 The proposal that the Act be amended to require that any merger in a designated 'sensitive' industry be prohibited unless authorised by the TPC has not been previously considered by the Government or by a Parliamentary Committee.

4.46 There are obvious problems inherent in categorising industries as 'sensitive'. For example, Mr McComas suggests that 'a sensitive industry means that someone for the time being is concerned about the sensitivity of that industry rather than there are good objective reasons for it'.[55]

4.47 Recognising these problems, Professor Baxt observes that new procedures are needed to deal with mergers in sensitive areas - such as the deregulated industries and the media. What is needed, he suggests, is for mergers, unless they are so small as to be insignificant, to be assessed by the Trade Practices Commission and not be allowed to proceed if the Commission can show that the merger will result in a net public detriment. The Commission's evaluations would be through a mechanism similar to the existing authorisation process.[56]

4.48 Professor Baxt believes that such an approach would not impose significant burdens on the business community for such mergers would arise only on

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54 *Submission, p 5.*

55 *Evidence, p 234.*

56 *The Independent Monthly, 20 August 1991, p 21.*

rare occasions. These might include large mergers in the deregulated industries, and in areas in which community interest has been generated, such as petroleum, food and media.[57] Other industries could be added if the Government felt an area was sufficiently sensitive to warrant such classification.

**4.49** From a competition policy perspective, Treasury identifies sensitive industries as those 'characterised by a lack of import competition and barriers to entry'.[58] It suggests that the current sensitivity of mergers in the airline industry[59] may partly reflect the fact that competitive forces are constrained by restrictions on the carriage of domestic passengers by foreign airlines, and the fact that ticketing services and terminal access may act as barriers to entry.

**4.50** Identifying sensitive industries, Treasury suggests, may provide an avenue for vested interests to limit mergers, and thus capital market disciplines, to their own ends. The introduction of an authorisation requirement for sensitive industries 'is likely to create business uncertainty and may delay or impede desirable mergers in those industries. This could, in turn, create distortions in the allocation of resource between industries generally and those targeted as being sensitive'.[60]

**4.51** Treasury concludes that, in the deregulated industries, section 46 should be used to ensure the absence of predatory conduct designed to eliminate potential or actual competitors. It also suggests that the TPC 'would lose its trade and commerce focus if it were asked to consider a range of social, cultural and political issues for mergers in certain sectors'.[61]

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57 *Submission, pp 6-7; A Revival for Trade Practices Law and Competition Policy, Hansard, Senate, 15 October 1991, p 2017.*

58 *Submission, p 57.*

59 *See for example Professor Baxt, submission, p 6.*

60 *Submission, p 56.*

61 *Ibid, p 57.*

**4.52** The TPC believes that the question of sensitive industries would best be dealt with through its proposals with regard to the general merger test, and the adoption of this test in other industry-specific legislation.

**4.53** The TPC, however, proposes that the Government should be able to refer to it for consideration and report any mergers which in the Government's view are socially, economically or politically sensitive.[62] Such a reference would in no way limit the Government's power to make a decision on these mergers on competition or other grounds. Sensitive areas might be nominated in the regulations under the Act, with provision for industries to be added or deleted over time.

**4.54** In addition, the TPC proposes that authorisation be required for mergers where the purchase price of the target exceeds $500 million. Requiring authorisation would provide an opportunity for public scrutiny and input and ensure that such mergers are not detrimental to the community.[63]

**4.55** This latter proposal is strongly opposed by Treasury as 'an arbitrary and unjustified extension of economic regulation'.[64] It is also rejected by the Attorney-General's Department which states that transaction size is irrelevant to competitive or structural effect. Attorney-General's continues:

> It is resource wasteful for both the Commission and the business community to subject large transactions to the costly process of requiring investigation to find positive public benefit when there is no effect on competition or position of dominance.[65]

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62 *Submission (29.8.91), p 25.*

63 *Ibid, p 24.*

64 *Submission, p 57.*

65 *Attorney-General's Department, Analysis of and Comments on Submission by TPC (17.9.91), p 4.*

**4.56** With regard to 'sensitive' industries, the Attorney-General's Department proposes that their needs be settled on a case-by-case basis, as a result of which a role may be conferred on the TPC, or an industry-specific body established.[66] The Department states that it:

> would not favour any mechanism which left it to the Attorney-General, the TPC or the courts to decide what industries should be regarded as 'sensitive' from time to time. We believe such a regime would be too uncertain for the business community and that the designation of an industry as 'sensitive' and therefore subject to some heightened regulation should remain a matter for the Parliament.[67]

**4.57** Similarly, the Law Council submits that in the case of sensitive industries

> if authorisation is not a sufficient mechanism to deal with those areas, then they should be treated quite independently of the Act. They should be the subject of special legislation which would then be proposed, debated and examined on the basis of that industry as a special case.[68]

**4.58** On the other hand, the Communications Law Centre has urged the amendment of the Act to recognise the special nature of some industries. The Centre has stated:

> a new part of the Trade Practices Act and supporting administrative structure should be established to deal solely with the print media. ... Separate treatment of the

66 *Submission (9.8.91), p 13.*

67 *Ibid, p 14.*

68 *Evidence, p 110 (Mr Featherston).*

print media would be consistent with the approach taken in broadcasting.[69]

4.59 The Committee notes that the UK Fair Trading Act 1973 makes special provision for newspaper mergers.

Conclusions

4.60 The Committee accepts that certain industries may at various times attract a measure of community sensitivity. These currently include the media and the deregulated industries such as aviation, telecommunications, water and power generation. They may, in the future, include industries using biotechnology. The Committee notes that some sensitive industries such as insurance and banks are currently governed by specific legislation.

4.61 There are industries made sensitive by their bearing on the social and cultural life of the community. Social and cultural issues are outside the ambit of the Trade Practices Act and should be dealt with separately. The Trade Practices Act should continue to be concerned with fair competition in the market place and the protection of consumers.

4.62 **The Committee recommends that section 50 should remain legislation aimed at protecting competition generally. Where there are other than economic issues involved in industry structure or ownership, they may well be dealt with in specific legislation. For example, at the moment, there are issues arising in the banking and media industries which could be dealt with in terms of discrete legislation.**

4.63 The Committee considers that a requirement that parties to 'large' mergers obtain mandatory authorisation for the merger from the Trade Practices Commission to be unnecessarily intrusive. The Committee accepts that there is no

69 *Submission, p 8.*

reason to expect absolute size to be necessarily associated with likely anticompetitive conduct. The other provisions of the Act and the recommendations contained in this Report render such a proposal unnecessary.

**Pre-notification, authorisation and the Trade Practices Tribunal**

**4.64** The Trade Practices Commission proposes that, where it advises the parties that it intends to oppose a notified merger, the parties should have the option of taking the matter directly to the Trade Practices Tribunal for authorisation.[70] This would avoid the need for two hearings on the same matter. A similar procedure is currently provided under the Act for mergers outside Australia.[71]

**4.65** The TPC also proposes that, in view of the need to consider merger matters expeditiously, the merger authorisation and review process should also be streamlined. The Act imposes no time limits on any application for review before the Trade Practices Tribunal. The Act provides for appeals to the Tribunal from merger authorisation decisions of the Commission, but makes no provision as to the time within which an appeal should be decided.

**4.66** The Act permits the TPC a maximum of 45 days to consider an authorisation application. The TPC proposes that appeals to the Tribunal should also be decided within 45 days.[72]

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70 *Submission, p 30.*

71 *Trade Practices Act 1974 (Cth) s50A.*

72 *Submission, p 32.*

**4.67** Where a party to a notified merger seeks authorisation directly from the Tribunal,[73] the TPC proposes that the Tribunal have a maximum of 90 days to consider the application.[74]

**4.68** Giving merging parties the option of seeking authorisation directly from the Tribunal is supported by Professor Baxt. Professor Baxt states that in his experience the TPC found it difficult to persuade parties to seek authorisation:

> because of their concerns that, even if the Commission were to be favourably disposed to the application, third parties may seek to delay the relevant transactions going ahead by seeking to review the Commission's decision thus destroying any incentives that the parties may have otherwise had to seek authorisation.[75]

**4.69** Professor Baxt considers that the Tribunal should be able to determine authorisation applications at first instance within 60 days.

**4.70** Giving jurisdiction to the Tribunal is opposed by the Law Council which says that:

> Although that suggestion has an initial attractiveness, the relative flexibility of the Commission's procedures and its greater ability to attract parties to make submissions to it, probably suggest that applications for authorisation should still be made, in the first instance, to the Commission and only if there is an application for review, should they go before the Trade Practices Tribunal.[76]

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73 *As proposed in para 4.64 above.*

74 *Submission, p 32.*

75 *Submission, p 7.*

76 *Submission, p 14.*

4.71 The proposal is also opposed by the Attorney-General's Department which states that it is far more important that the Tribunal reach the correct decision rather than a decision within time, and that 'one either has a primary decision maker and a merits review mechanism, or one has a primary decision maker with review only on questions of law.[77]

Conclusions

4.72 The Committee considers that there is merit in merger matters, where time is often of the essence, in imposing limits on regulatory authorities.

4.73 The Committee also considers that it would introduce a greater incentive for parties to use the authorisation process if the parties to a merger had the option of directly approaching the Trade Practices Tribunal for merger authorisation.

**4.74 The Committee recommends that parties proposing to merge should have the option of either approaching the Trade Practices Commission for authorisation, with a right of appeal to the Trade Practices Tribunal, or of approaching the Trade Practices Tribunal directly.**

**4.75 The Committee recommends that strict time limits be imposed on the Trade Practices Commission and the Trade Practices Tribunal within which they are to determine authorisation applications or appeals. The Commission should continue to be required to determine an application within 45 days. Any appeal from a decision of the Commission to the Tribunal should be determined by the Tribunal within 45 days. Where the Tribunal is approached directly, it should be required to determine an application within 60 days.**

77 *Attorney-General's Department, Analysis of and Comments on Submission by the Trade Practices Commission (17.9.91), p 6.*

4.76 **The Committee recommends that adequate funding should be made available to the Commission and the Tribunal to enable this to be done.**

# CHAPTER 5

## MISUSE OF MARKET POWER: S46

### The existing provision

5.1 Section 46 of the Act prohibits a corporation having a substantial degree of market power from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor,
- preventing entry into a market, or
- deterring or preventing a person from engaging in competitive conduct.

### The previous provision

5.2 When introduced in 1974, section 46 dealt with conduct characterised as 'monopolization'. Prior to 1977, the section prohibited corporations in a position to substantially control a market from taking advantage of their market power to, in general terms, damage competitors, prevent entry into markets or deter or prevent competitive behaviour. The section was amended in 1977 to specifically incorporate a purpose test when evaluating the conduct in issue. This amendment adopted a recommendation of the Swanson Committee.

5.3 Further amendments in 1986[1] lowered the threshold and changed the character of the provision from 'monopolization' to 'misuse of market power'. The requirement 'substantially to control a market' was said by the Attorney-General to be 'of quite limited effectiveness ... principally because the section applies only to

1 *Adopting a recommendation made in the 1979 Blunt Report and canvassed in the 1984 Green Paper.*

monopolists or those with overwhelming market dominance.'[2] It was therefore replaced by a requirement that the corporation have a 'substantial degree of market power.'[3] Proof of purpose was to be made easier by the insertion of subsection 46(7), enabling the court to infer purpose from conduct or from other relevant circumstances, and the substitution of a new subsection 84(1), enabling the attribution of purpose where offences were committed by bodies corporate.

**5.4** In 1989, the Griffiths Committee reviewed the operation of section 46 and recommended that it be retained in its existing form.[4]

### Objectives of the section

**5.5** The apparently contradictory nature of the section has often been commented upon. For example, Professor Baxt has drawn attention to the 'as yet unresolved problem of whether the section is a section aimed at ensuring that competition and the competitive process is at the heart of the protection provided for by the legislation, or whether, as the words of ss 46(1)(a) and (b) (in particular) indicate, individual competitors might also be the beneficiaries of the amendments to the law'.[5]

**5.6** In introducing the amended provision in 1986, the Attorney-General stated that it was 'most important to ensure that small businesses are given a measure of protection from the predatory actions of powerful competitors'.[6]

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2 *Hansard, House of Representatives, 19 March 1986, p 1626.*

3 *For discussion of the operation of this threshold compare Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd (1987) ATPR 40-809: a 33% share of the ski-boot market constituted a substantial degree of power, and D & R Byrnes (Nominees Pty Ltd v Central Queensland Meat Export Co Pty Ltd (1990) ATPR 41-028: a 7% market share did not give the respondent a substantial degree of market power.*

4 *Griffiths Report, para 4.6.34.*

5 *Submission, p 11.*

6 *Hansard, House of Representatives, 19 March 1986, p 1626.*

**5.7** However, in a frequently quoted passage, Mason CJ and Wilson J in their joint judgment in the Queensland Wire Case said:

> the object of section 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. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort ... and these injuries are an inevitable consequence of the competition s 46 is designed to foster.[7]

**5.8** In a gloss on this passage, Wilcox J observed that the section:

> seeks to protect traders against damage from their competitors. Yet it is one of a series of provisions designed to foster, not limit, trading competition; and it is axiomatic that effective competitive activity by one market participant inflicts damage upon other participants. The more competitive the market, the more the principles underlying Part IV are applied, the greater the damage likely to be sustained by less efficient participants.[8]

**5.9** AFCO suggests that the section is generally seen as a provision 'to guarantee competition, rather than as a means of pursuing powerful corporations who deal harshly and unfairly with smaller competitors.'[9]

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7 *Per Mason CJ and Wilson J in Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989) 63 ALJR 181 at 186. In the same case, Deane J (at p 187) stated that "the essential notions with which s 46 is concerned and the objective which the section is designed to achieve are economic and not moral ones ... The objective is the protection and advancement of a competitive environment and competitive conduct ..."*

8 *Eastern Express Pty Ltd v General Newspapers Pty Ltd (1991) ATPR 41-128.*

9 *Submission, p 11.*

**5.10** Yet Professor Clarke observes that, despite having a link with competition, the section 'cannot be regarded as being primarily concerned with its preservation or enhancement, because the section can be contravened by conduct which has no effect on competition. Notwithstanding the fact that the kinds of conduct prohibited are likely to have an adverse effect on competition, the primary purpose of s46 appears to be the protection of individuals and firms, usually small ones, against the predatory conduct of large firms, rather than of competition as such.[10]

**5.11** These different perceptions of its objectives underlie many of the proposals for reform of the section.

**Retention of the existing provision**

**5.12** A number of submissions oppose any change to the provision,[11] on the basis that in the absence of evidence of need, section 46 in itself is adequate for the purpose for which it was passed and no further provision is required.[12]

**5.13** Under its terms of reference, the Committee has considered three specific proposals for reform of section 46: the incorporation of an 'effects' test, the addition of further conduct to that currently prohibited, and the extension of the range of remedies, and in particular the inclusion of a remedy of divestiture.

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10 *Clarke PH, 'Trade Practices Policy and the Role of the Trade Practices Commission', (1989) 17 ABLR 291 at 296-7.*

11 *See, for example, submissions from Mr McComas, Victorian Employers' Chamber of Commerce & Industry, CAI and the Insurance Council of Australia Ltd.*

12 *Mr McComas, submission, p 9.*

## An 'effects' test

5.14 Both the TPC and Professor Baxt point to the difficulty of proving purpose under section 46.[13] Professor Baxt says that 'the difficulty of showing purpose (as distinct from the lesser test of showing effect on competition) means that unless there is very clear evidence of a predatory purpose, or unless someone is prepared to act as a 'deep throat', it will be very difficult to prove the case'.[14]

5.15 Recognition of this problem is also evident in the Attorney-General's Second Reading speech in 1986, and in a number of recent legal cases. For example, in TPC v Carlton & United Breweries Ltd,[15] Northrop J stated:

> A contravention [of section 46] may take many forms and in many cases a wink or a nod may be more effective than the written or expressed word. Proof of those aspects may be difficult to obtain.

5.16 In Eastern Express Pty Ltd v General Newspapers Pty Ltd,[16] Wilcox J, with specific reference to breaches of section 46 by predatory pricing stated:

> ... the outward decision to engage in predatory pricing is a lowering of prices, an action which, on its face, is pro-competitive. The factor which turns mere price-cutting into predatory pricing is the purpose for which it is undertaken. That will often be difficult to prove.

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13 *TPC submission, p 33; Professor Baxt submission, p 10.*

14 *The Independent Monthly, August 1991, p 21.*

15 *(1990) ATPR 41-037 at p 51,549.*

16 *(1991) ATPR 41-128 at p 52,895.*

**5.17** And in Berlaz Pty Ltd v Fine Leather Care Products Ltd,[17] Wilcox J drew a careful distinction between purpose and consequence. While the termination of a distributorship agreement may have had the consequence of getting rid of or damaging a competitor, his Honour could find no evidence that this was the defendant's purpose.

*In favour of an 'effects' test*

**5.18** One option that has been suggested to overcome these difficulties is the amendment of section 46 to prohibit conduct which has or is likely to have an **effect** on competition. It is said such an approach is consistent with the one taken in sections 45, 47, 49 and 50 of the Act. Professor Baxt states:

> Most of the provisions of the statute (other than those provisions that deal with mergers and the per se offences) speak of practices, arrangements, understandings etc which have the purpose or effect or likely effect of substantially lessening competition in a relevant market. Why is not such an approach adopted in the area of misuse of market power? The business community may well want consistency of approach unless there are very strong grounds for having a special test or exemption from such an approach.[18]

**5.19** Prohibiting misuse of market power by reference to its **effect** rather than its **purpose** was rejected by the Swanson Committee in 1976 and in the Blunt Report in 1979. It was suggested in the 1984 Green Paper but not adopted in the 1986 amendments. However, as noted above, amendments were made to s84(1) and s46(7) to facilitate proof of purpose by expressly permitting its inference from particular conduct and other relevant circumstances. In 1989, the Griffiths Committee

17 *(1991) ATPR 41-118.*

18 *Submission, p 13.*

considered the introduction of an effects test, but concluded that insufficient evidence had been presented to support the need for a major redrafting of section 46.

**5.20** Professor Baxt is generally in favour of the introduction of an effects test, but perhaps confined to 'deregulated industries'. In A Revival for Trade Practices Law and Competition Policy, Professor Baxt says:

> Another change that might be considered to s46 so as to in effect bring it on par with the other provisions of the statute (other than the mergers provision) is to prevent the misuse of market power where the purpose or effect of the misuse is to create detriment to the competitive environment - ie to lead to a substantial lessening of competition. If an effects test was introduced (as has been suggested by the Trade Practices Commission especially in relation to the deregulated industries) other parts of the section would have to be changed, in my view, to make sure that it is the competitive process rather than competitors that will have to be shown to have been damaged to obtain the necessary relief. If we do not change the impact of the relevant conduct this may amount to swinging the pendulum too far the other way.[19]

**5.21** The TPC believes that, even given the decision of the High Court in the Queensland Wire Case, establishment of 'purpose' within the meaning of section 46 will continue to require a high burden of proof.

**5.22** The TPC proposes the insertion of a new provision which would, 'subject to the conduct having the **purpose or effect** of substantially lessening competition, prevent a corporation with a substantial degree of market power from engaging in certain defined conduct'.[20] The new section would be directed at competition rather than competitors (which accords with Professor Baxt's views), and would provide for

19 *Hansard, Senate, 15 October 1991, p 2019.*

20 *Submission (29.8.91), p 33.*

the conduct concerned to be authorised. The existing section 46, targeted at competitors, would remain as is.

**5.23** This new section is seen as particularly relevant to ensuring access to 'essential facilities' during the initial phase of deregulation of the 'natural monopolies',[21] and is endorsed by Professor Baxt.[22]

**5.24** The section could also cover conduct that substantially lessens competition but is not directed at a specific person such as:

- pre-emption of access by competitors to scarce facilities or resources;
- buying up of products to prevent the erosion of existing price levels;
- adoption of product specifications incompatible with products produced by any other person and designed to prevent entry into or eliminate competition from a market;
- impeding or preventing entry into or expansion in a market by:
  - (i) squeezing, by a vertically integrated supplier, of the margin available to unintegrated competitors; or
  - (ii) acquisition by a supplier of customers who would otherwise be competitors of a supplier;
- selective introduction of fighting brands;

21 *For example the utilities, telecommunications, postal services and railways*

22 *Baxt submission, p 13.*

- raising rival's cost; and
- strategic creation of entry barriers.[23]

**5.25** In response, Treasury states that these new categories of conduct would, if truly anti-competitive, more likely than not be caught by the existing provision. Treasury concludes that the inadequacy of section 46 has not been demonstrated, and adds that some of the features of the TPC's proposal would be potentially damaging to competition. For example, the proposed prohibition on product specifications might hinder the adoption of new technology, and attempts to regulate 'margin-squeezing' by vertically integrated suppliers 'could remove the incentive efficiently to vertically integrate and/or to pass such benefits on to consumers.'[24]

**5.26** Acknowledging that the TPC's approach is conditioned by difficulty in the proof of purpose, Treasury suggests that 'a more direct approach would be to turn section 46 into an effects rather than purpose related provision.'[25]

*Against an 'effects' test*

**5.27** The introduction of an 'effects' test is opposed by, among others, the Attorney-General's Department, the Business Council of Australia, the Confederation of Australian Industry, the Law Council, CRA Ltd, Dr Pengilley and Mr McComas.

**5.28** The Attorney-General's Department, CRA Ltd and BCA[26] endorse the view of the Griffiths Committee that no case has been made out for amendment of the

23 *TPC submission (29.8.91), p 34.*

24 *Submission, p 60.*

25 *Ibid, p 61.*

26 *Attorney-General's Department submission, p 26; BCA supplementary submission (26.9.91), p 12; CRA Ltd submission, p 6.*

section, and cite with approval the statements of Mason CJ and Wilson J in Queensland Wire as to the ruthlessness of competition. BCA states that 'an effects test is likely to have unintended anti-competitive results, in that companies will be concerned that they might breach such a provision and may well become somewhat conservative in their competitive behaviour.'[27]

**5.29** The Attorney-General's Department does not support an 'effects' test in section 46 either by way of general application or by reference to the deregulated industries. It recognises the difficulties inherent in the proof of purpose but is of the view that these may be directly addressed by a rebuttable presumption of intent in defined circumstances.[28]

**5.30** The view of the Law Council is that 'purpose is an essential element of the contravention', and that, in most cases, its proof is not difficult.[29] Further:

> The critical element of section 46 should be that it operates so as to permit pro-competitive conduct, even where aggressive and having an effect on individual competitors who are perhaps marginal to the competitive process, but so as not to permit conduct which exploits a dominant position in a way which is positively harmful to the competitive process. To introduce an objective (effects) test into section 46 would destroy this distinction and, in the process, act as a strong disincentive to healthy competitive conduct.[30]

**5.31** The Law Council observes that adoption of an effects test would also complicate the harmonisation of Australian and New Zealand business law.

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27 *Supplementary submission (26.9.91), p 12.*

28 *Submission, p 26.*

29 *Evidence, p 142 (Mr Featherston).*

30 *LCA, attachment to submission, p 4.*

## Other conduct

5.32 The Attorney-General's Department accepts the 'theoretical concept' that section 46 might be amended to extend to other conduct, currently beyond its reach, but notes that no specific proposals defining such conduct have been made.[31]

5.33 However, the Department does propose one amendment. The current provision refers to conduct designed to eliminate or otherwise harm 'a competitor' or 'a person'. Conceivably, the Department argues, action might be taken with the purpose of eliminating competitors generally, rather than with a purpose directed at a particular rival. The Department suggests an amendment to provide that conduct engaged in for the purpose of eliminating or harming a class shall be taken to have been engaged in for the purpose of affecting each member of that class.[32]

5.34 Mr McComas, who approves of this proposed amendment, noted that it would enable the TPC to examine conduct aimed at frustrating competition rather than simply injury to competitors.[33]

5.35 As noted above, the TPC identifies a range of conduct indicating misuse of market power that might be covered by its proposed additional provision.[34] In essence, the response of Treasury is that this conduct is presently covered by the existing categories.[35]

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31 *Submission, p 27.*

32 *Ibid, p 27. This particular amendment is viewed by CRA Ltd as unnecessary: submission, p 7.*

33 *Evidence, p 233.*

34 *See paras 5.22 and 5.24 above.*

35 *See para 5.25 above.*

*Excessive pricing*

5.36 The TPC also notes that section 46 does not control excessive pricing per se, and suggests that the Act may need to be amended to cover this.[36]

5.37 The PSA, however, does not believe that such an amendment would be appropriate as long as it retains its separate existence. Were the mooted merger between the PSA and the TPC to be consummated, the PSA suggests a power to control prices should not be included in section 46, but rather incorporated as a separate provision in the Act to be administered by a tribunal. Adoption of this approach would also accord with the objective of achieving greater harmonisation between the business legislation Australia and New Zealand.[37]

5.38 Dr Pengilley considers that controls over excessive pricing is 'quite wrong'. He questions how one determines what an excessive price is.[38]

*Injury to consumers*

5.39 AFCO believes that section 46 should also prohibit a corporation with a substantial degree of market power from engaging in conduct 'that is likely to cause significant injury to consumers, having regard to price quality and availability of products or services'. AFCO's greatest concern is that the section should define and clarify the position of firms controlling essential facilities or monopolies of supply. It also believes that the section should apply to a wider number of firms, especially those in oligopoly situations. It does not specify a means.[39]

36 *Submission (29.8.91), p 24.*

37 *Submission, p 10*

38 *Evidence, p 363.*

39 *Submission, p 12.*

## Remedies

### *Divestiture*

**5.40** The Act currently enables the Court to order divestiture only where a merger or acquisition has been undertaken in breach of s50 of the Act.[40]

**5.41** A proposal to permit the TPC to seek, and the court to order, divestiture of the assets of a firm in a situation of 'intractable and continuous breach of s46' was considered by the Griffiths Committee. That Committee concluded:

> 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.[41]

**5.42** Divestiture as a remedy for misuse of market power has the explicit support of the former Chairman of the TPC, Professor Baxt. He considers one of the major and enduring weaknesses of Australian anti-trust law to be that, in an economy which has much evidence of high concentration, unless you have a remedy of divestiture, you will not be able to get to the heart of the problem.[42] Elsewhere, Baxt has commented:

> It may not be possible to stop a large corporation misusing its market power to prevent a competitive environment developing. In such circumstances, adequate discipline may only be exercised by breaking up the company (by virtue of a divestiture power) or by the court

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40 *Trade Practices Act 1974, section 81.*

41 *Griffiths Report, para 7.2.17.*

42 *Evidence, p 37.*

> ordering the rewriting of contracts which may have given that company a significant power base.
>
> These remedies would be used only if a misuse of market power seriously harmed competition. Such a remedy, while rarely used, exists in the United States and Canada and is a very significant discipline on larger players.[43]

5.43 Professor Baxt proposes that the power be exercised not by the TPC but by the courts. He is of the view that, although the power would be rarely used, the ability to obtain such an order in the appropriate circumstances would represent a breakthrough in the development of a mature competition law. These sentiments are echoed in submissions from AFCO[44] and the NCAAC.[45]

5.44 The Communications Law Centre (CLC), while not ruling out the appropriateness of divestiture in some cases (instancing News Ltd), recognises the difficulties inherent in such an action, especially if not ordered promptly. As companies are fused, the potential obstacles to orderly divestiture which do not penalise parties other than the defendant become considerable.[46]

5.45 The Attorney-General's Department notes that although divestiture as a remedy for misuse of market power exists under US, UK, Canadian and EC law, it has been ordered only in the US, in a limited number of situations, including the recent break-up of AT&T.[47] New Zealand makes no provision for divestiture in these situations.

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43 *The Independent Monthly, August 1991, p 21.*

44 *Submission, p 10: courts may be unwilling to use such a punishment because of its potentially far-reaching consequences.*

45 *Submission, p 5.*

46 *Submission, p 11.*

47 *Submission (9.8.91), p 29.*

**5.46** Divestiture as a remedy in the circumstances covered by section 46 is opposed by VECCI[48] and CAI, which totally rejects 'the oppressive and disruptive nature of this suggestion.'[49]

**5.47** Mr McComas, CRA Ltd and BCA, each view the proposal as unnecessary given that there has been no indication in the cases that have arisen to justify such an order, nor that the range of remedies presently available is inadequate.[50]

**5.48** The BCA views divestiture as an inappropriate remedy for provisions such as section 46 which are directed to conduct rather than structure:

> Misconduct can always be restrained for the future by injunction of the court (and a business which breaches an injunction will find itself liable to be dealt with for contempt of court). Divestiture would be an unwarranted and arbitrary punishment. The fact that, by reason of the inherent complexity of a provision such as section 46, the lawfulness of particular conduct will often be debatable only adds to the objection. The threat of divestiture over a business for conduct of this kind would introduce great uncertainty and would be a disincentive to investment.[51]

**5.49** Divestiture is also seen as inappropriate by Dr Pengilley in the circumstances of a refusal to supply such as applied in Queensland Wire. If divestiture were ordered simply because prices had been declared 'unreasonable' this would

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48 *Submission, p 4.*

49 *Submission, p 4.*

50 *McComas submission, p 9; BCA submission, p 12; CRA Ltd submission, p 7.*

51 *BCA submission, p 13.*

involve the Courts in evaluations for which they were singularly unsuited[52] and which might result in the creation of an unviable company.[53]

**5.50** Dr Pengilley considers that section 46 should be redrafted in terms of its American equivalent, and should specify conduct considered to be a misuse of market power with reasonable certainty.[54]

**5.51** Where there is a refusal to supply, as occurred in Queensland Wire, Professor Corones considers that a structural remedy such as divestiture would appear to be inappropriate: injunctions, damages and appropriate ancillary orders are seen as being adequate.[55]

**5.52** A similar attitude is expressed by Treasury, which agrees that judicial intrusion into price-setting is undesirable, but argues that this does not justify a remedy such as divestiture:

> For breaches of section 46 not related to access to facilities, for example predatory pricing, divestiture would be difficult to apply, as there is no acquisition of separable plant to order divestiture of. Difficulties would arise in identifying which part of a business should be divested. In this case divestiture is likely to involve an arbitrary decision about which part of the corporation is to be divested and may involve divestiture of part of the business which had little to do with the actual breach of the Act.[56]

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52 *Submission, pp 1-2.*

53 *See also Attorney-General's Department submission, p 30: where growth has occurred through accretion it may not be possible to separate components.*

54 *Evidence, p 363.*

55 *Submission, p 16.*

56 *Submission, pp 61-62.*

5.53 The view of the Attorney-General's Department is that no compelling case has been made for the inclusion of divestiture as a remedy for breach of section 46, and that intractable breaches of that section should be addressed by increases in monetary penalties. The Department considers divestiture to be a 'very blunt and frequently ineffective remedy'.[57]

Other remedies

5.54 The TPC proposes that the courts have the power to make wide discretionary orders to rectify market power abuse, including the power to 'impose market place solutions'.[58] These include an order for the divestiture of a significant shareholding in a competitor where that holding has enabled anti-competitive pressure to be placed on the competitor, or (in a situation where, for example, Australian Airlines or Ansett refused to supply Compass Airlines with space on its airport lease) an order for the provision of space or an order for a reduction in the duration of the leases held by Australian and Ansett. Other remedies noted include:

- an order for the mandatory provision of essential facilities on competitive (or even favourable) terms in the deregulated industries
- compensation orders
- severance of unjust gain
- award of damages.[59]

5.55 A number of these remedies are specifically endorsed by Professor Baxt.[60]

57 *Submission (9.8.91), p 29.*

58 *Submission, p 35.*

59 *Ibid, p 36.*

60 *Evidence p 38.*

Remedies for refusal to supply

**5.56** Most of the reported cases on section 46 have involved refusal to supply. It has been suggested that there are problems with giving the court power to order supply in these situations.

**5.57** The Full Federal Court in the Pont Data case noted the reluctance of the US Courts to re-write contractual provisions as to price, but thought that the wide discretionary remedies under s 87 'may mean that this reluctance should not necessarily translate to the Australian situation ... Nevertheless the Court must be slow to impose upon the parties a regime which could not represent a bargain they would have struck between them.'[61] However, Professor Baxt doubts that under s 87 the courts are empowered to re-write contracts in the manner he views as potentially necessary.[62]

**5.58** Dr Pengilley is of the view that the solution to the problem of fixing the terms of supply and price is to legislate for certainty in the area. If control of the prices charged by those having a substantial degree of market power is desired, then, he suggests, this is a task for bodies such as the PSA, not for judicial regulators.[63]

**5.59** Professor Corones also considers that reference to the PSA or the TPC (rather than to the courts) would provide a less unsatisfactory basis for arriving at a supply price in cases of refusal to supply. These organisations are better qualified than the courts to set and monitor prices on an 'as if competition' basis.[64] Corones argues

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61 *Dr Pengilley submission, p 8.*

62 *Evidence, p 38.*

63 *Dr Pengilley submission, p 10.*

64 *Corones notes that other legislation (for example, the Telecommunications Act 1991 s 154 and the Copyright Act 1968 Pt VI) makes similar provision where parties are unable to agree a price for certain services.*

that the possibility of referral to them would act as a strong disincentive to misuse of market power.

**5.60** In its submission the PSA makes a similar observation. Prefacing its comments with the statement that 'in general, it seems very unlikely that the courts will have sufficient expertise and resources to determine reasonable prices' (illustrated by the decision in Queensland Wire), it suggests that if the TPC and the PSA were to be merged it would be appropriate to either:

- not include a power to control prices in section 46 but rather to incorporate this power as a separate provision of the Act and continue with the administrative tribunal approach (which is also the New Zealand approach); or

- substantially modify section 46 to allow for consideration of cases by an administrative tribunal such as the Trade Practices Tribunal [possibly joined with the existing PSA] rather than enforcement by the courts (which is an approach akin to the UK Mergers and Monopolies Commission).

**5.61** The PSA notes that taking advantage of a dominant position to impose prices or other terms of dealing that could not otherwise be imposed was one of the three instances of 'monopolisation' examinable by the Trade Practices Tribunal under the Trade Practices Act 1965, if the Commissioner of Trade Practices considered this conduct to be against the public interest.[65]

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65 *Submission, p 10.*

## Conclusions

**5.62** The proof of purposive conduct under section 46 clearly poses considerable difficulties for the TPC and private litigants. These difficulties were addressed in 1986 with the addition of ss46(7) and 84(1) enabling purpose to be inferred from conduct and other relevant circumstances, and facilitating the proof of conduct where engaged in by a corporation. However, the Committee accepts that establishment of a purpose will continue to present difficulties of proof for litigants relying on section 46.

**5.63** Proposals to change the section by adopting an effects test would encourage greater use of the section by litigants, and have the virtue of consistency with the Act's other restrictive trade practices provisions.

**5.64** However, the Committee accepts that in a provision directed explicitly at **misuse** of market power it is appropriate that a distinction between purpose and consequence be retained. The Committee accepts that purpose is an essential element of the contravention. To prohibit the taking advantage of market power where this has **or is likely to have** the effect of, for example, preventing a person from engaging in competitive conduct would unduly widen the operation of the prohibition. It would force corporations to evaluate the potential effect of their every action on their competitors and potential competitors.

**5.65** The Committee accepts that the process of effective competition involves engaging in conduct the potential effect of which is to produce the very ends proscribed in section 46,[66] and considers that prohibiting such conduct by reference to its effect may challenge the competitive process itself.

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66 *See Queensland Wire Industries v BHP (1989) 63 ALJR 181 at 186.*

**5.66** If the difficulty with section 46 is proof of purpose, the Committee considers that this would best be dealt with by requiring a corporation, once the TPC has established that it is as likely as not that an offence has occurred, to bring forward evidence showing that it did not have a proscribed purpose.

**5.67** **The Committee recommends that section 46 be amended by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, when it has brought forward evidence which makes it as likely as not that one has occurred then one will be taken to have occurred unless the corporation in question shows otherwise.**

**5.68** During the Inquiry it was suggested that the section might also be amended to include other forms of conduct within the prohibition so as to deal with excessive pricing, with misuse of market power affecting consumers, and with the various forms of conduct detailed by the Trade Practices Commission in their proposed additional section 46A.

**5.69** On the basis of the material before it, the Committee considers that excessive pricing is better dealt with under the Prices Surveillance Act.

**5.70** The Committee considers that misuse of market power affecting consumers is adequately dealt with under the existing consumer protection provisions of the Trade Practices Act.

**5.71** The Committee notes that the proposed new section by the TPC was originally raised before the Griffiths Committee in 1989.[67] Before that Committee the TPC argued that it was a means of replacing a number of other provisions of the Act (specifically sections 46, 47, 49 and 93) rather than complementing them. The Committee has been provided with insufficient evidence to fully evaluate this proposal

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67 *Griffiths report para 4.4.12.*

and considers that it would be better dealt with as part of a more general review of the Act.

5.72 The Committee considers that the conduct specified in the TPC's additional section would, if it were actually anti-competitive, be caught by the existing section 46. Many of the forms of conduct specified are also somewhat vague and uncertain.

5.73 However, the Committee considers that some doubts exist as to the applicability of section 46 to conduct affecting not merely competitors of a corporation with substantial power in a market, but the competitive process.

5.74 **The Committee recommends that section 46 be amended to provide that where persons engaged in conduct for the purpose of eliminating from or harming a class of persons in a market they shall be taken to be doing so in respect of a specific member of it.**

5.75 Divestiture of assets is a remedy currently available for breach of the merger provisions of the Act, but not for repetitive and serious abuses of market power.

5.76 Divestiture as a remedy for market power abuse is available under US, UK, Canadian and EC law, but has been used infrequently, if at all. It is not a remedy available in these circumstances in New Zealand.

5.77 Divestiture is essentially a structural remedy. Misuse of market power is essentially a matter of conduct. When divestiture is applied to an established corporation, it may result in the break up of the corporation without predictable results. The resulting parts of the corporation may be made less productive, less efficient, perhaps unprofitable, perhaps even non-viable.

5.78 Were divestiture available for misuse of market power, and were a judge disposed to order it in a particular case, there may be limited evidence available to enable him or her to do so in the most appropriate manner. A court may be an awkward instrument to affect a satisfactory divestiture. Given the Constitution it is difficult to see what other body could order it. In any event, it well may be that no other body would do as well as a court.

5.79 It is one thing to order divestiture of a merger or acquisition recently affected. It is another to order it for a corporation functioning as an established unit. The risk of destruction of a company in the first instance is much less than in the second.

5.80 **The Committee recommends that serious and persistent misuse of market power be dealt with by increased monetary penalties. It recommends that divestiture not be made available as a remedy.**

# CHAPTER 6

# UNCONSCIONABLE CONDUCT IN COMMERCIAL TRANSACTIONS SECTION 52A

## Section 52A

**6.1** Section 52A(1) of the Trade Practices Act prohibits a corporation, in trade or commerce, from engaging in unconscionable conduct in connection with the supply of goods or services to a consumer. Section 52A(2) sets out five matters to which the court may have regard in determining unconscionable conduct, although it is not confined to them.[1]

**6.2** The section is restricted to consumer transactions. Goods or services must be those of a kind 'ordinarily acquired for personal, domestic or household use or consumption'.[2] The supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce is specifically excluded.[3]

**6.3** In introducing section 52A in 1986, the then Attorney-General stated that it was directed 'at conduct which, while it may not be misleading or deceptive, is nevertheless clearly unfair or unreasonable ... The new provisions will supplement existing provisions of Part V and strengthen the protection afforded to consumers against unscrupulous trading practices.'[4]

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1 *Including the relative strength of the parties' bargaining positions, whether compliance was required with conditions not reasonably necessary for the protection of one party's legitimate interests, whether undue influence or unfair tactics were engaged in, and the cost of equivalent goods or services.*

2 *Trade Practices Act 1974 s 52A(5).*

3 *Trade Practices Act 1974 s 52A(6).*

4 *Hansard, House of Representatives, 19 March 1986, p 1627.*

## Unconscionable conduct

**6.4** The concept of 'unconscionable conduct' has its origins in equity.[5] Equity will grant relief whenever 'a party makes unconscionable use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage.'[6] The equitable principle does not apply simply by virtue of an inequality of bargaining power.[7]

**6.5** Circumstances which may give rise to a special disadvantage are generally of an inherent and personal nature, and have included poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where such are necessary, lack of time in which to consider, and the emotional pressures surrounding marital breakdown or another's death. However, the courts have stressed that these are no more than particular instances of the general principle.[8]

**6.6** Over time, equitable principles have been adopted in various statutory forms to control harsh and unconscionable conduct.[9]

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5 *See, generally Samuel v Newbold [1906] AC 161 and Zoneff v Elcom Credit Union Ltd (1990) ATPR 41-009.*

6 *Commercial Bank of Australia v Amadio (1983) 57 ALJR 358 at 363 per Mason J.*

7 *Ibid.*

8 *See, generally, Australian Commentary on Halsbury's Laws of England, Ch 65 para C344*

9 *Initially in legislation covering activities such as moneylending and consumer credit (for example, the Money-Lenders Act 1941 (NSW), the Hire Purchase Act 1960 (NSW) and the Credit Act 1984 (NSW)). Subsequently in legislation covering particular industries (for example, the Builders Licensing Act 1986 (SA) and the Petroleum Retail Marketing Franchise Act 1980 (Cth)) and legislation of general application, such as the Industrial Arbitration Act 1940 (NSW) s 88F, and the Contracts Review Act 1980 (NSW).*

## Unconscionable conduct and commercial dealings

**6.7** As noted above, the circumstances of equitable unconscionability tend to focus on disabilities of a personal nature, and the courts have been reluctant to extend the principle to businesses, which are deemed capable of protecting themselves but may fail to do so in a particular instance. The courts have generally been unsympathetic to claims based on the principle which have been argued by major businesses. For example, in Qantas Airways Ltd v Dillingham Corporation Rogers J stated:

> The emphasis on the wealth and standing of the defendants and their ready access to the best of advice is to displace the operation of concepts of unconscionable conduct which underlie decisions such as Commercial Bank of Australia v Amadio ... For a successful and wealthy international conglomerate to appeal to the safeguards the law provides for the elderly, the illiterate and the financially oppressed is to move into a totally inappropriate field of discourse.[10]

**6.8** In Austotel Pty Ltd v Franklins Selfserve Pty Ltd, Kirby P, prefacing his comments with the observation that, in particular commercial circumstances, protection from unconscionable conduct will be entirely appropriate, continued:

> But courts should, in my view, be wary lest they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges. Such consciences as the cases show, will typically be refined and sharpened by circumstances arising in quite different relationships where it is more apt to talk of conscience and to provide relief against offence to it.[11]

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10 *[1987] ACLD 35-460.*

11 *(1989) 16 NSWLR 582 at 586.*

**Unconscionable conduct and the Trade Practices Act - previous consideration**

**6.9** The possible introduction of a general statutory prohibition on unconscionable conduct in the Act was first considered in 1976, when the Swanson Committee[12] recommended that the Act be amended to prohibit, as a civil remedy, 'unconscionable conduct or practices in trade or commerce.' It was suggested that such an amendment would enable the Act to better deal with the problem of the general disparity of bargaining power between sellers and buyers. This recommendation was not embraced in the 1977 amendments to the Act.

**6.10** In 1979, the Blunt Committee stated that it saw a law prohibiting 'unfair' business conduct as going further than, and not being compatible with, the provisions of Part IV of the Act. This was because those provisions regulate conduct according to its competitive effect and not, as a law based on 'fairness' would, on its morality. The Committee also saw such a law as having a very wide impact beyond the present limits of Parts IV and V.[13]

**6.11** The issue was again considered in the 1984 Green Paper, which recommended a prohibition on unconscionable conduct in relation to contracts. As a consequence of numerous submissions, principally from business organisations, expressing fears that such a provision would introduce considerable uncertainty into business dealings, the present section 52A, limited to consumer transactions, was inserted.

**6.12** In 1989, the Griffiths Committee considered a proposed extension of section 52A to commercial transactions and recommended that if the TPC wished to

12 *Swanson Committee Report p 67*

13 *Blunt Committee Report para 9.46.*

pursue the proposal further, it needed to develop 'persuasive arguments to counter the extensive opposition within the business community and legal profession.'[14]

**6.13** In 1990, the House of Representatives Standing Committee on Industry, Science and Technology ('the Beddall Committee') presented its report Small Business in Australia: Challenges, Problems and Opportunities. That report recommended that section 52A should be extended to cover small business transactions including retail/commercial tenancy agreements, where a small business is disadvantaged in the same way as a consumer in its dealings with other parties.[15]

**6.14** In 1991, the Special Caucus Committee of Inquiry into Aspects of the Australian Petroleum Industry ('the Wright Report') recommended the extension of section 52A to provide protection to small business in relation to unconscionable conduct by suppliers.

**6.15** In July 1991, the TPC provided a detailed report on unconscionable conduct to the Attorney-General and the Minister for Small Business and Customs.[16] This report notes that approximately one third of complaints raising questions of unconscionable conduct came from small business. Particular problem areas are identified as commercial tenancy arrangements,[17] small business loans and loan guarantees, franchising, buying power activities by large retailers in dealings with small manufacturers and suppliers and by government bodies not covered by the Act, rural producers and the petroleum[18] and building industries.

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14 *Griffiths Report para 4.6.31.*

15 *Beddall Committee report recommendation 20.*

16 *Unconscionable Conduct and the Trade Practices Act: Possible extension to cover commercial transactions, July 1991.*

17 *See also Feros Riley & Associates submission pp 1-3.*

18 *See also submissions from Patricia Wyatt and Independent Fuel Supplies.*

**6.16** The Report concludes that, on balance, there are net economic benefits to be gained from the regulation of unconscionable conduct in commercial transactions where:

- there is inequality of bargaining power;
- the weaker party to a transaction suffers from an inability to protect its interests because of a special disability, a special relationship, or a lack of a practicable alternative; and
- the stronger party is sufficiently aware of the inability and uses its superior bargaining power to take advantage of the weaker party.[19]

**Retention of the existing provision**

*Unnecessary duplication*

**6.17** As noted above, unconscionable conduct is a matter long dealt with by the law of equity. A number of submissions have suggested that replicating or 'codifying' existing equitable principles in the Act is unnecessary and undesirable. In its July 1991 Report, the TPC observes that 'maintaining the status quo under equity would appear to be a reasonable option' - the Australian courts having shown a capacity to intervene in appropriate commercial circumstances, and a willingness to expand existing doctrines and develop new doctrines when necessary.[20] MTIA states that:

> The alleged benefit of codifying in the Act what would be principles substantially similar to existing equity rules are justified mainly on one ground; namely to make more certain the present 'somewhat piecemeal and

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19 *Unconscionable conduct and the Trade Practices Act, July 1991, p 35.*

20 *Unconscionable Conduct and the Trade Practices Act p 27.*

> unpredictable' but nevertheless adequate process of equity ... This is a quite inadequate answer ...[21]

**6.18** This view is endorsed by the Law Council of Australia which states:

> The Law Council is not persuaded that any justification has been demonstrated for an extension of section 52A. The existing s52A does not add much, if anything, to the common law and equitable doctrines of unconscionability. ... Also, section 52A has not been used very often since it was introduced into the Act in 1986, although that situation would be likely to change if it were to be made available to corporations in respect of commercial dealings.[22]

*Uncertainty*

**6.19** Another objection raised to extending unconscionable conduct to commercial dealings is that it will introduce uncertainty into those dealings. Such a claim was the main reason for the rejection of the proposal in the 1984 Green Paper, and was apparently decisive before the Griffiths Committee.

**6.20** REIA states that companies must be reasonably confident that the contracts they enter into to provide goods and services to other commercial entities will be 'secure' and not subject to the rules which regulate their dealings with consumers.[23]

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*21 Submission (19.8.91), p 3*

*22 Submission, p 35.*

*23 Submission, p 3.*

**6.21** This view is endorsed by, among others, VECCI,[24] the Law Council[25] and Michael Ahrens and Penelope Ward.[26] The MTIA expresses its concern about the uncertainty that would result should the courts come to regard such a provision 'as a legislative charter for judicial intervention whenever ethics dictate.'[27]

*Confusing businesses and consumers*

**6.22** Another argument is that the Act draws a firm distinction between commercial and consumer transactions, and that there is danger in attempting to control dealings between business entities in that part of the Act dealing with consumer protection.[28]

**6.23** REIA states that the principles governing the regulation of business in its relations with consumers should be quite separate from those governing relations between businesses, as even small firms necessarily possess a level of commercial sophistication not possessed by consumers.[29]

**6.24** On behalf of consumers, AFCO and ACA argue that a simple extension of section 52A would have a detrimental effect on its use by consumers.[30] The factors to be considered by the courts in determining whether conduct is unconscionable will vary depending upon whether it is directed against a consumer or a business. The absence of a settled body of law dealing with section 52A as it affects consumer

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24 *Submission, p 5.*

25 *Submission, p 36.*

26 *Submission p 4.*

27 *Submission, p 2.*

28 *REIA submission, p 3; BCA/CAI joint submission p 15; AFCO submission, p 11.*

29 *REIA submission, p 3. Similar sentiments are expressed by AFCO at p 10 of its submission.*

30 *Submission, pp 6-8. See also NCAAC submission, p 5.*

transactions, together with the courts' traditional reluctance to intervene in contractual relations generally, leads AFCO to conclude that an expanded section would be restrictively interpreted by the Courts.[31]

**6.25** AFCO concludes by suggesting redress for small business in Pt IV of the Act. ACA proposes a separate section for small business.

*Insufficient economic analysis*

**6.26** Some submissions maintain that no adequate economic analysis has been provided of the financial impact of an extended provision on business and the wider community.[32]

**6.27** In its July 1991 Report, the TPC predicates its economic analysis on a narrow interpretation of unconscionable conduct. Where such conduct is limited to instances of 'involuntariness' in a transaction, the TPC believes that relatively few complaints would be sustained and the benefits are likely to be small.

**6.28** Two varieties of costs are identified: distortionary costs created by the restrictions on competition that are inherent in most forms of regulation, and the pecuniary costs attendant on developing, administering, enforcing and complying with the regulation. The TPC notes that precise measurement of economic costs and benefits of regulation is difficult, if not impossible and observes that it:

> does not have the means to quantify these costs precisely, nor indeed the benefits. Although compliance costs are likely to increase on an on-going basis, an initial view is that the costs arising from regulation narrowly construed should largely be of a one-off nature.

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31 *AFCO submission, p 11. See also Evidence, p 56 (Professor Baxt).*

32 *BCA/CAI joint submission, p 1; MTIA submission, p 2, Franchisors Association of Australasia submission, p 5.*

> The Commission considers that, on balance, the economic benefits are likely to outweigh the costs to be derived from regulating unconscionable conduct in commercial transactions ...[33]

**6.29** The Law Council believes that an extended provision would increase the risk and the legal cost of doing business, and compound economic inefficiencies in carrying on business (for example, through being forced to compromise rights to avoid legal costs and delay).[34]

**6.30** The MTIA believes that the corresponding costs to business could be more significant than acknowledged by the TPC, whether in terms of contractual uncertainty, or in terms of the legal and transaction costs that would follow a long series of test cases, or attempts to use litigation for delaying or avoiding contractual obligations.[35] A similar view is put by the CAI.[36]

**6.31** Ahrens and Ward observe that all direct and indirect costs of administering and advising in relation to any new law will ultimately be transferred to the consumer.[37] They note as a further intangible cost of regulation, the deterrent effect of an extended provision on future contractual arrangements.[38]

**6.32** Ms Wyatt, in reply, draws attention to the time currently spent by 'big business' engaging in unconscionable conduct, and 'small business' in foiling it, in

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33 *Unconscionable Conduct and the Trade Practices Act, July 1991, p 25.*

34 *Submission, p 34.*

35 *Submission, p 2.*

36 *Evidence, p 256 (Mr Gardini).*

37 *Also acknowledged by the TPC at p 24 of Unconscionable conduct and the Trade Practices Act.*

38 *Ahrens and Ward submission, p 2. Also acknowledged by the TPC at p 24 of Unconscionable Conduct and the Trade Practices Act, July 1991.*

support of her view that a section 52A with general application would actually result in a reduction in costs and an improvement in service to the consumer.[39]

*Increase in litigation*

**6.33** A related consideration is the likelihood that an extended statutory provision would be used extensively in commercial disputes, with the potential to increase costs and delay and frustrate the enforcement of legal rights.[40] The Law Council observes that an extended section 52A would be pleaded and could not be easily dealt with summarily. Unconscionability is essentially a question of fact. If pleaded as a defence in enforcement proceedings it would probably necessitate either a full trial of the matter (adding to the costs of litigation) or, perhaps more likely, be settled by the plaintiff having to compromise its legal rights.[41] This view is shared by the MTIA.[42]

*Ineffectiveness*

**6.34** It has also been put to the Committee that an extension of statutory unconscionable conduct would provide an ineffective remedy, particularly for small business.[43] Noting that complaints of unconscionability to the TPC were concentrated in a relatively small number of specific industries, the FAA, BCA, CAI, VECCI and REIA all recommend that self-regulatory codes of industry conduct, education programs and industry-specific legislation (whether Federal or State-based) would provide a more

39 *Submission, p 4.*

40 *LCA submission, p 34; MTIA supplementary submission (11.9.91), p 2.*

41 *Submission p 34, Evidence p 144 (Mr Featherston).*

42 *Submission, p 2*

43 *Evidence p 255 (Mr Martin); BCA/CAI joint submission, p 1.*

appropriate and cost-effective solution.[44] The Committee understands that this is also the view of the Franchising Task Force of the Minister for Small Business.

6.35 Ahrens and Ward believe that the existing equitable principles dealing with unconscionable conduct, together with the traditional remedies for fraud, misrepresentation, duress, undue influence and mistake, estoppel, and section 52 of the Act, in combination, would provide an avenue for relief in most, if not all serious, cases where unconscionability arises.[45]

6.36 The CAI also notes that in overseas countries the practice is to deal with unconscionability in legislation based on contract law rather than competition law, [46] and by extending statutory unconscionability, the Australian Act and the New Zealand legislation would differ markedly.[47]

**Extension of the provision**

6.37 Extending the statutory prohibition against unconscionable conduct to commercial dealings was supported in a number of submissions.

6.38 Viewing the existing provision as arbitrary and illogical, Professor Clarke[48] observes that, although the section does not cover commercial dealings, it may nevertheless be used by businesses when they acquire 'consumer'

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44 *Franchisors Association of Australasia, submission p 4; BCA/CAI joint submission, p 8; VECCI submission, p 5; REIA submission, pp 4-6. From the point of view of dealings between insurance companies and their insureds, the Insurance Council of Australia draws attention to the specific provisions of the Insurance Contracts Act 1984 in support of its belief that further extension of section 52A would be inappropriate: submission, p 1.*

45 *Submission, p 2; Franchisors Association of Australasia, submission p 5.*

46 *Evidence, p 255 (Mr Gardini).*

47 *BCA/CAI joint submission p 13.*

48 *Evidence pp 68, 81.*

goods and services. Clarke notes that a business could probably rely on section 52A when purchasing an executive car, but not a forklift.[49] An individual could probably rely on it when guaranteeing a loan for the purchase of a home, but not in connection with a business.[50]

6.39 Were section 52A to have general application, then Professor Clarke suggests that it would become as ubiquitous a remedy as section 52 has become, and uncertainty in the law would be reduced. It would also provide the courts with a more satisfactory range of remedies for unconscionable conduct than simply avoiding the transaction, which is the basic remedy in equity.[51]

6.40 As noted above, the TPC considers that there are net economic benefits in regulating unconscionable conduct in commercial transactions. The TPC does not advocate extending the application of section 52A, but rather the creation of a new Part of the Trade Practices Act with appropriate remedies. The advantages[52] of this approach are said to be:

- ensuring that the various broad doctrines aimed at unconscionable conduct remain within economically justifiable areas, increasing certainty and predictability in the law;[53]

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49 *Submission, p 6. The illogicality is further suggested by the decision in George T Collings (Aust) Pty Ltd v HF Stevenson (Aust Pty Ltd) (1991) ATPR 41-104, where the existing section was applied to standard form agency agreement for the sale of commercial real estate.*

50 *Evidence pp 69, 85. See also Attachment E to Unconscionable Conduct and the Trade Practices Act, p 5.*

51 *Evidence pp 69, 85. The inadequacy of existing remedies is also supported by the Motor Trades Association of Australia submission, p 2.*

52 *Unconscionable Conduct and the Trade Practices Act, July 1991, pp 30-31.*

53 *See also Evidence p 61 (Professor Baxt).*

- the development of greater business awareness of unconscionable conduct through the public profile and compliance programs of the TPC, and through TPC representative actions and litigation; and

- recognition that the objectives underlying Parts IV and V of the Act are fundamentally different from those underlying the control of unconscionable conduct, with implications for the appropriateness of remedies.

**6.41** Implementation of the TPC Report on Unconscionable Conduct is endorsed by Professor Baxt[54] and Mr Peter Bobeff.[55]

**6.42** The Attorney-General's Department sees no argument of principle against a prohibition on 'unconscionable conduct' in commercial as well as consumer transactions, and accordingly favours a prohibition on such conduct in trade and commerce generally (subject to the constitutional limitations on the reach of the Trade Practices Act).[56] Any attempt to limit the extension to small business is considered artificial and arbitrary.[57]

**6.43** Such an extension would be achieved by drafting a new section along the lines of s52A(1), leaving the existing section unaffected in its application to consumers.

**6.44** During the Committee's hearing in Canberra on 6 November 1991, the Attorney-General's Department submitted that the Act could be amended to give the

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54 *Submission, p 18.*

55 *Evidence, p 57.*

56 *Submission, p 37.*

57 *Ibid, p 36.*

TPC standing to institute representative actions for unconscionable conduct.[58] This proposal is supported by the Law Council.

Conclusions

6.45 The Committee acknowledges that it would be consistent with the position at common law to introduce a statutory prohibition on 'unconscionable conduct' in commercial as well as consumer transactions.

6.46 The Committee also notes the claims that there could be benefits in introducing such a prohibition. These benefits are said to include:

- increased business awareness of unconscionable conduct, both through the public profile, education and compliance programs of the TPC, and through TPC representative actions and litigation;
- the likelihood that TPC involvement might lead to the negotiation of disputes before they were litigated;
- the conferring of jurisdiction on the Federal Court; and
- additional statutory remedies becoming available.

6.47 The Committee notes that legal and financial assistance may be approved through legal aid agencies generally, or under s170 of the Act where it would involve hardship to a person to refuse an application, and where in all the circumstances, it is reasonable to approve assistance. The Committee notes, however, that in practice legal aid is not usually available for commercial disputes unless there

58 *Evidence, pp 383-4. See also supplementary submission (2.12.91), p 1.*

are special circumstances involved. Generally speaking, the position is the same under s170.

**6.48** The Committee accepts that any attempt to confine a statutory prohibition against unconscionable commercial conduct to small business would be arbitrary, artificial and productive of uncertainty. There is the question of what is a small and what is a large business. Again many of the problems faced by small business are simply inherent in the competitive process, and there is no competition policy principle which dictates or supports the preferential treatment of small business over large business.

**6.49** The Committee's terms of reference require it to consider the extension of section 52A to commercial dealings. Were section 52A so extended, then the criteria listed in subsection 52A(2) would become applicable to all dealings. While these criteria are directly relevant to consumer dealings they are not automatically applicable to all dealings.

**6.50** The Committee notes that, since its introduction, s52A has been rarely used as a remedy and that it does not enhance the protection afforded by the common law. The Committee acknowledges that relying on the common law alone would appear to be a reasonable option, particularly as the courts in Australia have shown a willingness to expand the existing doctrines and to develop new equitable doctrines where justified.

**6.51** The Committee accepts that there could be advantages in conferring standing on the TPC to institute representative actions on behalf of parties who are the victims of unconscionable conduct as that is recognised by the common law.

**6.52** Submissions made to the committee say that section 52A is a statutory expression of the common law. However it adopts only part of the law namely that

which applies to unconscionable conduct towards consumers, and not to that towards persons engaging in trade and commerce.

6.53 Common law is an institution which develops to meet the needs of the community as they arise. Though section 52A may be amended by Parliament it may not have the ability to develop in the way the common law has. This is particularly important when circumstances in which unconscionable conduct may occur can vary.

6.54 The Committee considers it would be of greater benefit to those who suffer from the unconscionable conduct of others if their remedy were left to the common law but that the TPC be given the power to bring actions on their behalf and bear the burden of any costs.

6.55 This would allow the TPC to assist a significantly wider range of persons at common law which may well be more expansive than s52A and more appropriate for persons suffering from the unconscionable conduct of others, and would give them relief as to costs.

6.56 **The Committee recommends that section 52A of the Trade Practices Act be repealed. It recommends that legislation be introduced giving the Trade Practices Commission the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another.**

6.57 **The Committee further recommends that appropriate funds be made available to the Trade Practices Commission to enable this to be done.**

6.58 In making the recommendation in this form, many of the disadvantages raised at that hearings should be avoided. The continuing development of equitable principles will remain unaffected. There will be no corresponding erosion in business certainty. In addition, any development of voluntary industry codes of conduct will remain unaffected.

**6.59** The Committee wishes to emphasise that the repeal of s52A, although removing a statutory right, will not reduce consumer rights and protection as the existing remedies under equitable doctrines would remain.

**6.60** In making this recommendation, the Committee does not suggest that it will provide a panacea for the problems of small (or, indeed, of any) business. The existing section 52A has clearly not provided one for all the problems consumers experience. But in both instances, the benefits are considered to be of substance and of assistance.

# CHAPTER 7

## RELATED MATTERS: REMEDIES

7.1 Under its terms of reference, the Committee must inquire into other matters (including review mechanisms) it considers to be relevant to any or all of its terms of reference.

7.2 A number of submissions canvass significant matters such as the consistency or otherwise with which the Act treats goods and services, extension of the Act to government bodies presently exempted under the shield of the crown or specific legislation, simplification of the provisions of the Act, the adequacy or otherwise of legal aid funding for trade practices matters, and the role of the Trade Practices Tribunal or of assessors to assist in the resolution of economic questions arising in trade practices litigation.

7.3 As a consequence of the limited time available for its inquiry, the Committee elected to pursue an inquiry focused on its terms of reference. Nevertheless, the Committee considers that a more wideranging and thorough review of the Trade Practices Act 1974 may be warranted, particularly in the light of any subsequent re-assessment of the effects of recent amendments.

7.4 However, a number of matters directly related to the Committee's terms of reference were raised and are considered below.

### Pecuniary penalties

7.5 Section 46 of the Act provides for the imposition of a pecuniary penalty for a breach of Part IV. The maximum pecuniary penalty that may be imposed for a breach of the restrictive trade practices provisions of the Act is currently $250,000 for

a body corporate, and $50,000 for other persons.[1] These penalties have not been increased since the introduction of the Act in 1974.

7.6 In Trade Practices Commission v CSR Ltd Mr Justice French stated:

> The principal, and I think, probably the only, object of the penalties imposed by section 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.[2]

7.7 The inadequacy of these penalties is now generally recognised, and has been the subject of some judicial comment. In Trade Practices Commission v Sony Australia Pty Ltd, Mr Justice Pincus observed:

> When one finds deliberate breaches of the price maintenance provisions of the Trade Practices Act committed by a subsidiary of one of the greatest manufacturers of electronic consumer goods, after years of attempts to enforce compliance with these provisions, one can only suspect that the penalties have not been taken very seriously. Their deterrent effect has been insufficient ...[3]

7.8 And in the CSR Case, Mr Justice French noted:

> ... having regard to the size and strength of some of the corporations to which [section 46] is addressed, it may be concluded that the present day value of the maximum penalty no longer reflects the seriousness with which

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1 *Trade Practices Act 1974 (Cth) s 76(1).*

2 *(1991) ATPR 41-076 at p 52, 152.*

3 *(1990) ATPR 41-053 at p 51, 691.*

> Parliament intended contraventions of Pt IV to be treated when the Act was passed in 1974.[4]

7.9 The Griffiths Committee recommended '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'.[5] In his Government Response to the Griffiths Report the Attorney-General expressed his support for an increase in the existing pecuniary penalties for sections 46 and 50.[6]

7.10 Increases in monetary penalties have been generally endorsed in evidence before the Committee.[7] For example, the Law Council of Australia[8] and Treasury express similar doubts as the courts as to the deterrent effect of the present penalties. Treasury is of the view that, to the extent that the current maximum penalties are significantly lower than the potential benefits of actions in breach of the Act, there is an incentive for companies to undertake such actions.[9]

7.11 The Attorney-General's Department has submitted that an adjustment to take account of inflation is clearly warranted. Moreover, it suggests that 'as the Trade Practices Act is no longer novel and the standards of commercial conduct which it prescribes have now become an accepted part of business morality, it is appropriate to increase the level of penalties on a substantive basis to reflect the increased disapproval which the community now attaches to breach of those standards.'[10]

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4 *(1991) ATPR 41-076 at p 52,154.*

5 *Griffiths Report, para 7.2.15.*

6 *Hansard, House of Representatives, 22 August 1991, p 385.*

7 *See Attorney-General's Department submission, p 33; BCA supplementary submission (26.9.91), p 13. Evidence, p 122 (Mr Kelly); p 239 (Mr McComas).*

8 *Submission, p 17.*

9 *Treasury submission, p 62.*

10 *Submission (9.8.91), pp 23, 38-39.*

7.12 The Department proposes that new penalties be fixed for breaches of Part IV having regard to penalty levels in comparable countries,[11] and to penalty levels for other offences against Australian commercial regulatory laws. The Department suggests as appropriate maximum levels:

- for bodies corporate: $10m
- for other persons $500,000

7.13 Mr McComas endorses the view that the existing penalty levels do not demonstrate the seriousness of contraventions of Part IV. He proposes maximum penalties comparable to those in New Zealand of NZ$5m for bodies corporate, and NZ$500,000 for individuals.[12]

7.14 The Law Council has calculated the cumulative increase in the CPI since 1974 at 400%. On this basis a four-fold increase in existing penalties would, it submits, be appropriate - to $1m for bodies corporate and to $200,000 for natural persons. The Law Council questions whether 'increased community concern' or any other factor justifies the balance of the proposed forty-fold increase for bodies corporate and the proposed ten-fold increase for other persons.[13]

7.15 The BCA, while conceding the need for review, opposes the quantum of increases proposed by the Attorney-General's Department. It contends that few Australian companies can afford the proposed new penalties, and no sufficient evidence to justify it has been provided. It also believes that, for medium and small businesses:

> such penalties would virtually prevent them from defending actions brought by the Commission and run the risk that

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11 *In the United States the maximum penalty is $10m.*

12 *Submission, p 10.*

13 *Supplementary submission (31.10.91), pp 7-8.*

> such enterprises would enter into settlements with the Commission which would be harsh and oppressive.[14]

7.16 BCA recommends that the issue of penalties should be the subject of a Discussion Paper prepared by the Attorney-General's Department.[15]

7.17 CRA Ltd accepts the justification for an inflation-adjustment to the penalty level for sections 46 and 50, but concludes that 'no evidence exists to show that the objectives of these sections are being frustrated because of the lack of more substantial penalties.[16] CRA suggests that the purpose of penalties should be taken into account, and states that controls over anti-competitive behaviour and conduct should be by means other than the imposition of fines.[17]

7.18 Professor Baxt, while generally supporting an increase in penalty levels, considers the development of a policy on penalties to be of more importance. Questioning what the penalty regime seeks to achieve, he suggests that alternatives such as a disgorgement of profits should not be dismissed without further consideration.[18]

7.19 Professor Baxt also suggests that the question of penalties and the issue of remedies in the area of economic law (eg trade practices law, corporations law and related laws) should be considered afresh by a working party which would link these matters to the operation of the rules of sentencing. This, Professor Baxt observes, is

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14 *BCA supplementary submission (26.9.91), p 13.*

15 *Ibid, p 14.*

16 *Submission, p 7.*

17 *Ibid.*

18 *A Revival for Trade Practices Law and Competition Policy, Hansard, Senate, 15 October 1991, p 2020.*

the approach being adopted in the United States, and treats these types of offences with the proper gravity.[19]

## Conclusions

7.20 Section 76 of the Trade Practices Act applies common pecuniary penalties to contraventions of all provisions of Part IV. The Committee considers that changes to penalty levels should not be confined to ss 46 and 50, but should similarly apply to all contraventions of Part IV (including ss 45D and 45E).

7.21 The Committee considers that penalties for breaches of Part IV of the Trade Practices Act should be commensurate with penalties for anti-competitive conduct applicable internationally.

7.22 **The Committee recommends that subsection 76(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties available to punish breaches of the provisions of Part IV of the Act.**

7.23 **The Committee recommends that subsection 79(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties to punish breaches of the provisions of Part V of the Act.**

## Private right to injunctive relief

7.24 The Act specifically provides that persons other than the Minister or the TPC cannot apply for an injunction to restrain proposed, attempted or actual contraventions of the merger provisions of the Act.[20] Others may be able to seek an

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19 *Submission, p 19.*

20 *<u>Trade Practices Act 1974 (Cth)</u> s80(1A).*

interlocutory injunction in circumstances which give them a basis for doing so under the common law in any event.[21]

**7.25** Prior to 1977 the Act included a right to private injunctive relief. In removing this right in 1977, the Minister for Business and Consumer Affairs stated that:

> The availability of the injunctive remedy on the application of private persons and 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.[22]

**7.26** In 1989, the Griffiths Committee recommended that the private right to injunctive relief in relation to mergers be re-introduced, but that takeover targets and associated persons should be denied access to this right.[23] This view is endorsed by Professor Baxt.[24]

**7.27** However, it has been pointed out that this restriction would not preclude resort to the remedy by 'white knights' falling outside the definition of associates, nor rival bidders or existing competitors keen to avoid increased competition from the merging parties. In addition, an 'associates' test would undoubtedly provide a fertile opportunity for legal argument, and itself constitute a method to delay the consummation of mergers.[25]

**7.28** The Law Council submits that the public interest in preventing a merger which may contravene section 50 should not be represented only by the TPC or the

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21 *Brisbane Gas Co Ltd v Hartogen Energy Ltd (1982) 60 FLR 343.*

22 *Hansard, House of Representatives, 3 May 1977, p 1478.*

23 *Griffiths Report, para 5.5.27.*

24 *Submission, p 9.*

25 *Attorney-General's Department submission, p 21.*

Minister.[26] It suggests that the TPC has limited resources, that its decisions may be based on imperfect information, and that other parties may have additional information or other interests in seeking to challenge a particular merger. Additionally, a private right of action is consistent with the procedures available in relation to the other provisions of Part IV, and including such a right furthers the intention that the Act be 'more self-enforcing and less authority enforcing'.[27]

**7.29** This view is endorsed by Professor Clarke, who considers that both the Australian and US experience indicate that the private enforcement of the legislation has been beneficial. He envisages that the availability of this remedy might have led to the Australia Meat Holdings case being litigated privately.[28]

**7.30** Noting the reasons given for the removal of the private right of action in 1977, the Law Council suggests that the period during which it was available 'is not testimony to abuse or excess'.[29] The Attorney-General's Department considers that the current limited availability of interlocutory injunctions (under Brisbane Gas) also indicates no 'improper' use.[30] However, Dr Pengilley, who was a member of the TPC between 1974 and 1977, strongly disagrees with the claim that the remedy caused no problems.[31] His impressions confirm those expressed in 1977 by the Minister for Business and Consumer Affairs.[32]

**7.31** The TPC, while aware of concerns expressed that the right may have been misused in the past, states that it does not have evidence of this. It raises no

26 *Law Council submission, p 15.*

27 *Evidence p 122 (Mr Kelly); Law Council submission, p 16.*

28 *Evidence, p 105.*

29 *Submission, p 16.*

30 *Submission (9.8.91), p 21.*

31 *Evidence p 387.*

32 *See para 7.25 above.*

concerns about the unrestricted re-introduction of the right, suggesting that undertakings as to damages should provide sufficient safeguards against its misuse.[33]

**7.32** The Attorney-General's Department also inclines to the view that the right should be reinstated, subject to two qualifications. The court should not entertain an application unless satisfied that it is bona fide and non-vexatious, and appropriate undertakings as to costs and damages have been given. The Department's expectation is that the right will be used infrequently, and the undertakings to be required will limit the capacity for takeover targets to frustrate the process.[34] The expectation of Dr Pengilley and of CRA Ltd is strongly to the contrary.[35]

**7.33** The Attorney-General's position is broadly endorsed by Professor Baxt, who notes that under it 'the courts will be able to discipline frivolous actions and should be given specific powers to deal with this issue.'[36]

**7.34** CRA Ltd, which is opposed to its reintroduction, states that the TPC (particularly if it should gain the benefit of the introduction of a mandatory pre-merger notification procedure) is in the best position to protect the interest of the general community. CRA states:

> there are very strong concerns that allowing third parties to seek injunctions to block proposed mergers or acquisitions, whether friendly or hostile, can and will inevitably lead to extensive litigation by those whose primary aim is unrelated to concerns to over preserving or promoting competition.[37]

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33 *Submission (19.8.91), p 40.*

34 *Submission (9.8.91), p 21; Evidence pp 123-4 and 238-9 (Mr Skehill).*

35 *Evidence p 388 (Dr Pengilley); CRA Ltd submission p 6.*

36 *Submission (16.9.91), p 2.*

37 *Submission, p 6.*

7.35 Professor Baxt notes that the reintroduction of a private right of action may create considerable problems for consent arrangements reached between the TPC and the parties involved in a merger.[38]

Conclusions

7.36 The merger provisions are the only provisions in Part IV of the Trade Practices Act in relation to which third parties are precluded from seeking injunctions under the Act.

7.37 The Committee notes the views of those advocating reintroduction of this right such as the Attorney-General's Department and Professor Clarke to the effect that the requirement for undertakings as to costs and damages, and the power of the courts to prevent abuses of process should prevent any such abuse occurring.

7.38 The Committee nevertheless remains concerned that the re-introduction of a private right to seek injunctive relief in relation to the merger provisions of the Act may be open to abuse.

7.39 No evidence has been provided to establish a case for reintroduction of this right. The Committee is of the view that such a remedy gives a powerful tool to opponents of a merger for uses quite unrelated to competition. The Committee believes that the TPC is in the best position to protect the interests of the community at large against mergers. The scrutiny process that will need to be undergone by companies proposing to merge will ensure that the TPC would need to be satisfied that the public benefits outweigh any anti-competitive effects.

7.40 **The Committee recommends that the private right to injunctive relief in relation to mergers not be re-introduced into the Trade Practices Act 1974.**

38 *Submission, p 5.*

## Enforceability of undertakings

7.41 The Griffiths Committee recommended that the Act be amended to provide remedies for breaches of undertakings entered into in connection with the merger authorisation process and the merger consultation process.

7.42 This view is endorsed by the Attorney-General's Department, which proposes that the Act should specifically enable the enforcement of conditions attached to the grant of authorisation.[39]

7.43 Moreover, the Department considers that undertakings given to the TPC during informal consultations about proposed mergers even where no authorisation is sought, and in respect of which no proceedings have been taken prior to their consummation on the basis of those undertakings, should be made enforceable under statute.

7.44 The TPC believes that the issue of remedies for breaches of undertakings given should be addressed 'urgently and not just in relation to undertakings linked to mergers, but across the board.'[40] The need for urgency is confirmed by Professor Baxt.[41]

## Conclusions

7.45 The Committee notes the difficulties in relation to the enforcement of undertakings as to divestiture in the Ansett-East West merger.

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39 *Submission (9.8.91), pp 23-24.*

40 *Submission (29.8.91), p 26.*

41 *Submission, p 5.*

7.46 The Committee considers that undertakings may grow in variety and significance under the proposed scheme of compulsory pre-merger notification.

7.47 The Committee accepts the claims of the TPC and Professor Baxt that this matter requires urgent attention and that the enforceability of undertakings should not be restricted only to those occurring during the merger authorisation or merger consultative processes.

7.48 **The Committee recommends that the Trade Practices Act be amended to provide remedies for breaches of undertakings made between the Trade Practices Commission and another person or persons.**

Other remedies

7.49 Remedies currently available for breaches of Part IV of the Act include:[42]

- injunctions, which may be sought by any person (however, only the Minister or the TPC may seek an injunction to restrain breaches of the merger provisions);
- divestiture, which may be sought by the Minister, the TPC or any private litigant for breach of the merger provisions;
- actions for damages, which may be brought by any person who suffers loss or damage;
- such other orders as the court thinks appropriate to compensate a party for loss or damage, or to prevent or reduce the loss or damage.

42 *See Trade Practices Act 1974 (Cth) ss 80, 81, 82, 87.*

7.50 The Griffiths Committee recommended that 'a range of other appropriate remedies be introduced for contraventions of Part IV of the Act 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'.[43]

7.51 With regard to section 46 of the Act, the TPC proposes that the courts have power to make 'wide discretionary orders to rectify market power abuse, including the power to impose market place solutions'.[44] The TPC further suggests that 'broad remedies should be available for all breaches of Part IV' not just for sections 46 and 46A.[45]

7.52 Other remedies that have been identified include orders for divestiture of assets or shareholdings; redrafting of the terms of contracts or lease agreements; orders for the mandatory provision of essential facilities (on competitive or even favourable terms); compensation orders; orders for severance of unjust gain and measure of damages. Such discretionary remedies are said to be of particular importance if the anticipated competitive benefits of deregulation are to be realised.

7.53 In addition to proposing an expansion of remedies available for misuse of market power, Professor Baxt advocates that the TPC have access to 'cease and desist' orders (of greater relevance in consumer protection matters).[46] However, the Attorney-General's Department perceives particular constitutional problems with this proposal.[47]

7.54 The Attorney-General's Department supports three additional remedies:

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43 *Griffiths Report, para 7.2.18.*

44 *Submission (29.8.91), p 35.*

45 *Ibid, p 36.*

46 *Submission (16.9.91), p 4.*

47 *Submission (9.8.91), p 46.*

- representative actions for breaches of Part IV of the Act, in which the TPC might seek, on behalf of those who have or are likely to have suffered loss or damage, any order available to those persons;

- a general discretionary power in the Federal Court to enter consent orders agreed between the TPC and private parties (without a requirement that the TPC prove a breach of the Act as a condition precedent to registration); and

- an express power in the Federal Court to declare void contracts consequential to and dependent for their making on a breach of Part IV.[48]

7.55 The TPC is currently able to institute representative actions only on behalf of those suffering damage as a result of breaches of the consumer protection provisions of the Act. Attorney-General's considers the absence of a power in respect of Part IV breaches to be unjustified.[49]

7.56 Making the terms of undertakings, given in relation to mergers, court orders by consent is seen by the Department as one means of rendering them enforceable. However, other undertakings (for example, an undertaking to spend money in training sales staff to reduce the likelihood of further breaches of the Act) should, it is suggested, be similarly enforceable.

7.57 The power to declare void contracts in breach of the Act, or collateral arrangements relating to such contracts presently exists under the Act.[50] Certain contracts may not breach the Act, and certain arrangements may not be strictly

48 *Submission (9.8.91), p 43.*

49 *Ibid.*

50 *Trade Practices Act 1974 (Cth), s 87(2)(a)*

collateral to such contracts. The Department considers that the Court should have a specific discretionary power to declare such contracts void.[51]

## Conclusions

7.58 The Committee considers that the issue of broad and flexible remedies for breaches of Part IV of the Trade Practices Act deserves further detailed consideration.

**7.59 The Committee recommends that consideration be given by the Attorney-General to introducing a range of appropriate remedies for contraventions of Part IV of the Trade Practices Act 1974.**

Barney Cooney
Chairman

The Senate
Canberra

December 1991

51 *Attorney-General's Department submission, p 45.*

## DISSENTING REPORT
## BY SENATOR SID SPINDLER AND SENATOR CHRIS SCHACHT

### Section 46 - Remedies

This dissenting report deals with the need for additional remedies for breaches of section 46 of the Trade Practices Act 1974, and in particular with the need for a remedy of divestiture, in the case of serious and persistent misuse of market power.

Section 46 deals with misuse of market power. It prohibits corporations with a substantial degree of market power from taking advantage of that power for certain purposes. These purposes are eliminating or substantially damaging competitors, preventing new entrants into a market, or deterring or preventing others from engaging in competitive conduct.

Both Professor Baxt and the Trade Practices Commission have submitted that there is an inadequate range of remedies available to the courts when dealing with cases of misuse of market power.[1]

The existing remedies include monetary penalties (to a maximum of $250,000 for corporations and $50,000 for others), injunctions, damages and other orders in the nature of compensation under section 87(1). While the Trade Practices Act contains a remedy of divestiture, it is only available in merger cases.[2]

The Attorney-General's Department believes that intractable breaches of section 46 should be addressed through increased monetary penalties.[3] While clearly penalties should be increased, situations may arise where the benefits of misuse of market

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1 *Professor Baxt submission p 13; Evidence p 366 (Asher).*

2 *Trade Practices Act 1974 (Cth) s 81.*

3 *Attorney-General's Department submission p 30.*

power may be so great that they would outweigh the 'cost' of paying a fine, no matter how repetitively it was imposed.

Commissioner Asher, on behalf of the Trade Practices Commission, suggests that the problem with the existing remedies is that "almost none of them actually addresses the problems that you want to attack".[4]

And Professor Baxt states that, in an economy (such as the Australian economy) with plenty of evidence of high concentration, "unless you have a remedy, like the Americans, the Canadians and the Europeans have which enables their courts to say 'You have to divest certain parts of your operations', then you are not going to be able to get to the heart of the problem in these situations".[5]

These comments echo those of Professors Areeda and Turner in their classic American work Antitrust Law. Areeda and Turner state that, to the extent that society repudiates misuse of market power, it should attack the **existence** of the power rather than simply its **exercise.**

Also in the US context, in 1979 the National Commission for Review of Antitrust Laws and Procedures recommended that

> [w]henever a violation of the antitrust laws involving market power has been shown, courts should order relief that will effectively **eliminate** that power (emphasis added).

The Commission for Review concluded that a structural remedy (such as divestiture) should be preferred in situations of misuse of market power.[6]

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4 *Evidence p 366-7.*

5 *Evidence p 37.*

6 *Quoted in Attorney-General's submission p 29.*

This answers one of the major objections to divestiture in these circumstances - that it is conceptually wrong to impose a structural remedy where it is conduct that is being prohibited.[7]

We believe that divestiture should be available as a remedy in cases of misuse of market power for a number of reasons. It has been suggested that no situations have so far arisen in Australia where divestiture would have been warranted. Whether or not this is so, we consider that, given the high levels of industry concentration in Australia, it is likely that such a situation could arise in the future, and the Trade Practices Act should provide remedies capable of dealing with such situations as they arise and not after.

We should stress that we do not see divestiture as a remedy that would be commonly used. The Committee has been told that it is a rarely and reluctantly used remedy in those jurisdictions where it is available.[8] But the **fact** that it is available and can be used by courts in appropriate circumstances, and has not been withdrawn despite 'agitation' by interest groups, remains a telling factor in evaluating its appropriateness.

While we consider that divestiture will be rarely used, we do not propose that it be a remedy in name only. It has been enforced in the United States to break up AT&T,[9] and Standard Oil,[10] and to prevent concentration in the ownership of cinemas.[11] Divestiture also exists under the Commonwealth's Broadcasting Act, where the Australian Broadcasting Tribunal has the power to direct that persons holding prohibited media interests cease to hold those interests.

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7 *See, for example, Evidence p 364 (Dr Pengilley).*

8 *Professor Baxt submission p 14; Evidence p 38.*

9 *Attorney-General's Department submission p 29.*

10 *Professor Baxt submission p 14.*

11 *Professor Baxt submission p 14.*

We believe that a similar power should be given to the court in cases of misuse of market power under the Trade Practices Act, and accept the view of the Australian Federation of Consumer Organisations that the ultimate threat of a divestiture order will be a significant discipline on the actions of corporations with substantial market power.[12]

We would adopt Professor Baxt's comments that divestiture, to be effective, must take a variety of forms[13] - for example, requiring a company to divest itself of a significant shareholding in a related corporation,[14] or to give up part of its distribution network.[15]

We would also adopt the view of the Trade Practices Commission that the courts should have the power to make wide discretionary orders in cases of market power abuse.[16]

As noted by Commissioner Asher:

> the remedies should be changed so that they fit the problem so that they are able to fix it. If that means that a division of a company that is repeatedly breaking the law and abusing its power should be sold off, why not? If it can be fixed by giving damages, why not? But the courts

12 *AFCO submission p 13.*

13 *Professor Baxt submission p 15.*

14 *The TPC suggests that such an order might have been appropriate in Trade Practices Commission v Carlton & United Breweries Ltd (1990) ATPR 41-037, where it would have limited CUB's ability to continue to exert market power over SA Brewing: see TPC submission p 35.*

15 *Professor Baxt submission p 15. See also Wyatt submission, p iii.*

16 *Trade Practices Commission submission p 35.*

> should have that wider jurisdiction to match to the problem
> a solution that will make it work.[17]

For example, should either Australian Airlines or Ansett Australia refuse to supply Compass with adequate airport leasing space, and if such a refusal amounted to misuse of market power, then the court should be able to order the 'divestment' of a portion of the existing lease space to Compass, or even order a reduction in the term of the leases held by Australian or Ansett.[18]

As economic change continues over the next decade, it is not difficult to imagine innumerable other situations in which the availability of divestiture and additional discretionary remedies will be required to ensure that established market power cannot be continually misused. Such remedies are not uncommon in international trade practices law.

**We therefore recommend that, in cases of serious and persistent misuse of market power, the courts should have the power to order divestiture of the assets or component parts of the offending corporation.**

**We further recommend that the courts should have the power to make wide discretionary orders in cases where breach of the misuse of market power provision has been shown.**

17 *Evidence p 367.*

18 *Trade Practices Commission submission p 35; Evidence p 38 (Professor Baxt).*

# DISSENTING REPORT BY SENATOR ROD KEMP

I have differed from the conclusions and recommendations of my colleagues with respect to the appropriate merger threshold under section 50 of the Trade Practices Act 1974, and the changes to the standard of proof under section 46 of that Act.

## Section 50 - the appropriate threshold

Having considered the economic evidence on the effect of mergers presented during the course of this inquiry, I accept, as does the majority, that it has proved inconclusive.

In practical terms, I consider that there is insufficient evidence to indicate that any demonstrable harm has result from the application of the dominance threshold.

For example, the concern expressed by the Trade Practices Commission at the effect of the threshold was not shared by either of its previous two Chairmen or a previous Commissioner.

Concerns expressed by the Commission with regard to price increases following mergers in the paint industry, the fibreboard container industry and the wine industry were not fully supported by the Prices Surveillance Authority.

No conclusive evidence of public detriment was presented to the inquiry as a consequence of the contentious mergers of the mid 1980s such as Coles/Myer and News/Herald and Weekly Times.

I acknowledge business concerns that the law governing mergers should be certain and predictable. While the existing test has been in operation since 1977, it is still accumulating a body of interpretative law, and that law does not indicate a need for change. Indeed, in my view, a new threshold would simply entail another decade of uncertainty while the ambit of the new threshold is determined by the courts.

The importance of interpretation cannot be understated. For example, the Committee was told that 'the substantial lessening of competition test that applies in America, when you have regard to the environment in which it is applied, looks very much like our dominance test."[1]

Some merger guidelines have been proposed in the majority report. While acknowledging that such guidelines have merit, they have not been tested, and the manner in which they would be interpreted is uncertain. The evidence before the inquiry does not convince me that any distinct recommendations may be made as to how these guidelines should be interpreted. Also, I am not persuaded that these guidelines sufficiently clarify what business would be required to comply with under the changed merger threshold.

I consider that the onus is on those seeking to change the law to demonstrate the need for it. I am not convinced that such a need has been demonstrated on the evidence presented to the inquiry.

**Accordingly, I recommend that the existing provisions of section 50 of the Trade Practices Act 1974 which prohibit mergers or acquisitions which result in or, are likely to result in, a corporation being in a position to dominate a market for goods and services or which would substantially strengthen the power of a corporation to dominate that market be retained.**

**Section 46 - Standard of proof**

The majority report recommends that section 46 of the Trade Practices Act be amended to provide that, where the Trade Practices Commission adduces evidence indicating that it is as likely as not that a breach of the section has occurred, then a

1 *Evidence p 191 (Mr Skehill).*

breach will be taken to have occurred unless the defendant adduces evidence to show otherwise.

Proceedings for contraventions of Part IV of the Trade Practices Act (which includes section 46) are civil, and not criminal, in nature.[2] Therefore, the standard of proof is the balance of probabilities, after giving due consideration to the seriousness of the matters in question.[3] Those alleging a misuse of market power must show that it is **more likely than not** that it has occurred.

I have considerable doubt as to the workability and practical effect of a change in the standard to **as likely as not**. It may mean that evidence that is not sufficient to convince a court that an offence has occurred will nevertheless impose a duty on a defendant to prove their innocence.

While I accept that there are difficulties in the proof of purpose where misuse of market power is alleged, I consider that these difficulties are inevitable wherever purpose or intent must be proved. The court is expressly able to infer purpose from conduct.[4] I do not consider that the cases show that the difficulties involved in proof of purpose are insuperable.

**I recommend that section 46 of the Trade Practices Act 1974 should be retained in its present form.**

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2 *See Trade Practices Act 1974 (Cth) s 77.*

3 *See generally TPC v Ansett Transport Industries (Operations) Pty Ltd (1978) ATPR 40-071 at p 17,720; TPC v Nicholas Enterprises Pty Ltd (1979) ATPR 40-126 at pp 18,353-4; The Heating Centre Pty Ltd v TPC (1986) 9 FCR 153 at 160.*

4 *Trade Practices Act 1974 (Cth) s 46(7).*

## APPENDIX I

## INDIVIDUALS AND ORGANISATIONS WHO MADE WRITTEN SUBMISSIONS TO THE COMMITTEE

| Submission no | Submitter | Date received |
|---|---|---|
| 1 | Dr Warren Pengilley, Sly & Weigall, Sydney NSW | 13.6.91 |
| 2 | Professor Gordon Mills, University of Sydney, Sydney, NSW | 13.6.91 |
| 3 | Mr Peter Bobeff, Corrs Chambers Westgarth, Melbourne, Vic | 21.6.91 |
| 4 | Real Estate Institute of Australia, Curtin, ACT | 24.6.91 |
| 5 | Trade Practices Commission, Belconnen, ACT | 2.7.91 |
| 6 | Mr W R McComas, Clayton Utz, Sydney, NSW | 4.7.91 |
| 7 | Ms P B Wyatt, Cairns, Qld | 9.7.91 |
| 8 | Australian Federation of Consumer Organizations, Braddon, ACT | 15.7.91 |
| 9 | Victorian Employers' Chamber of Commerce and Industry, Hawthorn, Vic | 16.7.91 |
| 10 | Michael Ahrens and Penelope Ward, Baker & McKenzie, Sydney, NSW | 31.7.91 |
| 11 | National Consumer Affairs Advisory Council, Canberra, ACT | 7.8.91 |
| 12 | Communications Law Centre, Sydney, NSW | 7.8.91 |
| 13 | Attorney-General's Department, Barton, ACT | 9.8.91 |
| 14 | Business Council of Australia & Confederation of Australian Industry, Melbourne, Vic | 14.8.91 |
| 15 | Metal Trades Industry Association, Canberra, ACT | 19.8.91 |

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| 16 | Confederation of Australian Industry, Melbourne, Vic | 21.8.91 |
| 17 | Business Council of Australia, Melbourne, Vic | 22.8.91 |
| 18 | Trade Practices Commission - supplementary submission | 29.8.91 |
| 19 | Metal Trades Industry Association - supplementary submission | 11.9.91 |
| 20 | A I Tonking, Allen Allen & Hemsley, Sydney, NSW | 12.9.91 |
| 21 | Professor R Baxt, Arthur Robinson & Hedderwicks, Melbourne, Vic | 16.9.91 |
| 22 | Law Council of Australia, Canberra, ACT | 16.9.91 |
| 23 | Professor P Clarke, Deakin University, Melbourne, Vic | 17.9.91 |
| 24 | Attorney-General's Department - supplementary submission | 17.9.91 |
| 25 | Coles/Myer Ltd, Tooronga, Vic | 16.9.91 |
| 26 | Independent Fuel Supplies, Archerfield, Qld | 16.9.91 |
| 27 | Tubemakers of Australia, Sydney, NSW | 18.9.91 |
| 28 | S G Corones, Queensland University of Technology, Brisbane, Qld | 18.9.91 |
| 29 | Prices Surveillance Authority, Melbourne, Vic | 23.9.91 |
| 30 | Feros Riley & Associates, Chatswood, NSW | 25.9.91 |
| 31 | Attorney-General's Department - supplementary submission | 26.9.91 |
| 32 | Attorney-General's Department - supplementary submission | 26.9.91 |
| 33 | Trade Practices Commission - supplementary submission | 26.9.91 |

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|---|---|---|
| 34 | Franchisors Association of Australia, Wilberforce, NSW | 26.9.91 |
| 35 | Business Council of Australia - supplementary submission | 26.9.91 |
| 36 | Attorney-General's Department - supplementary submission | 26.9.91 |
| 37 | Attorney-General's Department - supplementary submission | 26.9.91 |
| 38 | Confederation of Australian Industry - supplementary submission | 27.9.91 |
| 39 | CRA Limited, Melbourne, Vic | 3.10.91 |
| 40 | Insurance Council of Australia, Melbourne, Vic | 4.10.91 |
| 41 | Business Council of Australia - supplementary submission | 9.10.91 |
| 42 | Pacific Dunlop, Melbourne, Vic | 15.10.91 |
| 43 | Motor Trades Association of Australia, Barton, ACT | 18.10.91 |
| 44 | Australian Consumers' Association, Marrickville, NSW | 22.10.91 |
| 45 | CRA Limited - supplementary submission | 25.10.91 |
| 46 | Department of the Treasury, Canberra, ACT | 31.10.91 |
| 47 | Law Council of Australia - supplementary submission | 31.10.91 |
| 48 | Trade Practices Commission - supplementary submission | 5.11.91 |
| 49 | Trade Practices Commission - supplementary submission | 6.11.91 |
| 50 | Australian Petroleum Agents & Distributors, Melbourne, Vic | 8.11.91 |

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|---|---|---|
| 51 | Dr Warren Pengilley, Sly & Weigall, Sydney, NSW | 12.11.91 |
| 52 | William J Beerworth, Solicitory, Sydney NSW | 15.11.91 |
| 53 | The Right Honourable Malcolm Fraser AC CH, Melbourne, Vic | 20.11.91 |
| 54 | Trade Practices Commission - supplementary submission | 25.11.91 |
| 55 | Mr W R McComas, Clayton Utz, Sydney, NSW - supplementary submission | 15.11.91 |
| 56 | Senator Ron Boswell, Leader of the National Party in the Senate, Canberra, ACT | 28.11.91 |
| 57 | The Confectionary and Mixed Business Association of Australia and New Zealand, Surrey Hills, Vic | 28.11.91 |
| 58 | Senator Ron Boswell, Leader of the National Party in the Senate - supplementary submission | 2.12.91 |
| 59 | Attorney-General's Department - supplementary submission | 3.12.91 |
| 60 | Mr B Campbell, Chairman, Livestock and Meat Authority of Queensland, Brisbane, Qld | 5.12.91 |
| 61 | Trade Practices Commission - supplementary submission | 6.12.91 |
| 62 | Australian Dairy Farmers' Federation, Malvern, Vic | 10.12.91 |

# APPENDIX II

## WITNESSES WHO APPEARED AT PUBLIC HEARINGS

*Melbourne: 17 September 1991*

Professor Robert Baxt, Partner, Arthur Robinson & Hedderwicks, Melbourne

Mr Peter Bobeff, Partner, Corrs Chambers Westgarth, Melbourne

Professor Phillip Clarke, Deakin University, Melbourne

Law Council of Australia

. Mr Roger Graeme Featherston, Chairman, Trade Practices Committee
. Mr Richard Arthur St John, Deputy Chairman, Trade Practices Committee
. Mr Anthony Peter Kelly, Member, Trade Practices Committee

Commonwealth Attorney-General's Department

. Mr Stephen Skehill, Deputy Secretary
. Mr James Randall Dick, Senior Assistant Secretary, Competition Policy Branch
. Mr Anthony Charles Wing, Principal Legal Officer, Competition Policy Branch

*Canberra: 26 September 1991*

Trade Practices Commission

. Professor Alan Fels, Chairman,
. Professor Brian Leslie Johns, Deputy Chairman
. Mr Alan Asher, Commissioner
. Mr Hank Spier, First Assistant Commissioner
. Mr John O'Neil, Senior Assistant Commissioner
. Mr Timothy Holland, Project Officer

Commonwealth Attorney-General's Department

. Mr Stephen Skehill, Deputy Secretary
. Mr James Randall Dick, Senior Assistant Secretary, Competition Policy Branch

Franchisors Association of Australia

. Mr Alan Atchison, Chairman
. Mr Michael Ahrens, Solicitor, Baker and McKenzie, Sydney

Mr W R McComas, Partner, Clayton Utz, Solicitors, Sydney

Confederation of Australian Industry

. Mr Robert Charles Gardini, Regulatory Consultant, Canberra
. Mr John Martin, Director, Canberra

Business Council of Australia

. Mr Clive Randolph Speed, Assistant Director, Canberra

*Canberra: 6 November 1991*

Trade Practices Commission

. Professor Alan Fels, Chairman
. Professor Brian Leslie Johns, Deputy Chairman
. Mr Alan Asher, Commissioner
. Mr John O'Neill, Senior Assistant Commissioner
. Mr Howard Hollow, Project Officer

Commonwealth Attorney-General's Department

. Mr Stephen Skehill, Deputy Secretary

Department of the Treasury

. Mr Richard Murray, Assistant Secretary, Infrastructure and Resource Allocation
. Mr Rodney Shogren, First Assistant Secretary, Structural Policy Division
. Mr David Imber, Director, Communications & Public Enterprise Policy Section

Dr Warren Pengilley, Partner, Sly and Weigall, Lawyers

Law Council of Australia

. Mr Roger Featherston, Chairman, Trade Practices Committee

*Canberra: 2 December 1991*

Senator Ron Boswell, Leader of the National Party in the Senate