



**The Review of the Trade Practices Act:  
issues concerning the substance of the  
law, and process and accountability**

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**Professor Allan Fels**

**Chairman**

**Australian Competition & Consumer Commission**

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## **1 Introduction**

Ladies and Gentlemen.

Thank you for giving me the opportunity to speak to you. I would like to share with you some thoughts about Australian competition and consumer protection law and the operation of the *Trade Practices Act 1974*.

Today, I want to discuss two particular topics of interest, both relevant to the review of the competition provisions of the Trade Practices Act.

First, I want to examine some improvements that, in the view of the Commission, can be made to the Trade Practices Act to bring it into line with best international practice.

In addition, I want to talk about transparency, public confidence and institutional performance. I want to lay bare for you the way the Commission administers the Trade Practices Act, and the way we answer for the operation of the Act to the Courts to Parliament and to the Australian people.

## **2 The Review of the Trade Practices Act**

The review of the Trade Practices Act provides an opportunity to review the Act and to bring its competition provisions into line with best international practice; and to review the processes of the Act (although individual cases will not be looked at).

## **3 Reforming the Trade Practices Act 1974**

To make the Act work better the Commission is seeking a number of changes most of which would bring it into line with international best practice.

## **Criminal sanctions**

The first change being sought by the Commission is the introduction of the possibility of there being criminal sanctions under the Trade Practices Act for hardcore collusion by big business.

Collusion is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

There has been a significant rise in international concern about collusion as reflected in recent resolutions by the OECD Council of Ministries concerning hard core collusion by big business, including apparent growing global collusion.

The Commission believes that the present system is not properly based. It is based on there being fines only and does not allow for criminal sanctions. This is inappropriate having regard to the nature and effects of collusion.

In addition, the system does not provide a sufficient deterrent in all cases. The fear of possible gaol sentences is a far more effective deterrent.

It also believes that hardcore collusion, that is secret price-fixing agreements, bid rigging and market sharing is ethically objectionable, a form of theft and little different from classes of corporate crime that already attract criminal sentences. The possibility of criminal sentences is therefore appropriate for this kind of behaviour.

We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. In my view, it is only a matter of time before we do this. I hope we do it as a result of this review.

As I have said, the Commission believes that the pecuniary penalties (or “fines” under the Trade Practices Act) are not a sufficient deterrent to “hard core” collusion by big business.

Prior to 1993 the pecuniary penalties applicable to breaches of the TPA were low. The maximum penalty per offence was \$250,000 for a corporation and \$50,000 for an individual. Moreover, in no case until then had the total penalty exceeded \$250,000.

In 1993, the penalty was increased to a maximum of \$10 million for a corporation for an offence and to \$500,000 for an individual.

Shortly afterwards in early 1995, penalties of around \$15 million were imposed on TNT, Ansett Freight Express and Mayne Nickless for conduct which occurred under the previous penalty regime (of \$250,000 maximum).

There were some individual penalties and for whatever reason the CEO of Mayne Nickless left the company six months after being personally subjected to pecuniary penalties for behaviour prior to his becoming CEO.

\$21 million fines were applied in 1995 under the new penalty regime to Boral CSR and Pioneer for price fixing for ready mixed concrete in South Eastern Queensland.

It could be argued that since 1993 penalties have risen sufficiently to deter hard core collusion.

It is now clear that the new fines, although having had a significant effect, are still not sufficient. There has been a considerable number of price-fixing cases since then:

- ❖ Australian executives were involved in the international vitamin price-fixing cartel well after 1993. Fines of around \$26 million were imposed by the Federal court on the companies and executives.

- ❖ There has been extensive price fixing in the power transformers industry. Fines of \$20 million have already been collected and the case has not concluded at this point. The behaviour persisted until 1999, after the period of high fines.

The Commission will be presenting a list of other cases where serious price fixing has occurred since 1993. The list includes cases where firms have been involved in second offences i.e where, for the second time, they have breached the law, despite a fine the first time.

Moreover, there is an unusual mismatch in this law. Usually laws with such high fines provide for jail sentences as an option. I myself cannot think of many areas of the law where the possible fines are so high and yet there is no possibility of goal as an alternative or additional penalty.

I do not believe that the possibility of criminal sanctions should be of concern to the vast majority of businesses and business leaders in Australia from any kind of personal point of view. I believe that secret, unlawful collusion of a major kind is not the practice of the vast majority of Australian business. When it occurs, however, it is very harmful, and business is usually the first victim of collusion. In most price-fixing cases we deal with the customer is another business, not household consumers.

Most businesses regard price fixing as abhorrent.

Some businesses will argue that they are not opposed in principle to such a law, but they are concerned at the lack of safeguards.

In fact I believe it is essential that such provisions be accompanied by safeguards.

The forms of behaviour to which it would apply would be defined. For example, criminal sanctions would only apply to defined acts of collusion such as price fixing, market sharing and bid rigging agreements between big businesses. They would not apply to the rest of Part IV.

Second, the law would not apply to small business or unions or professions. The cut off between big and small business would be defined.

Thirdly, proof beyond reasonable doubt would be required. At present the standard for Part IV of the Act is balance of probability.

Fourthly, the Director of Public Prosecutions, rather than the Commission, would conduct the case.

Fifthly, the matter would be dealt with by a judge and jury, as the Constitution requires. For an indictable offence, that is an offence involving a gaol sentence of one year or more, a jury of twelve is required and, according, to High Court decisions, its verdict must be unanimous.

Sixthly, in the case of a guilty decision, a judge would then decide at his or her discretion whether or not someone should be fined or jailed.

In this situation it is obvious that the Commission would be unlikely to invoke the use of the law on very many occasions. It would only be where there is strong proof of blatant behaviour damaging to the community that it would be likely to take action.

You might ask after all this: Why bother? The answer is that in some blatant cases goal sentences are appropriate and that, in addition, the deterrent value is still likely to be very considerable.

## **Section 46**

Section 46 of the Trade Practices Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor
- preventing the entry of a person into any market

- deterring or preventing a person from engaging in competitive conduct in any market.

The purpose of s.46 is to prevent firms with substantial market power from engaging in illegitimate anti-competitive conduct. Situations in which it may arise include: predatory behaviour; refusal to supply in an anti-competitive manner; the illegitimate leveraging of market power in one market to damage competition in another market; and some vertical practices.

This provision which is similar to laws in North America, and Europe is intended to steer a balance between preventing illegitimate anti-competitive conduct and not deterring genuine pro-competitive conduct. The need for such laws has been generally accepted since the time of John D. Rockefeller and the case for them can be found in most economics and business text books.

### **Effects test**

The second change deals with the introduction of an effects test in s46.

Let me explain at the outset how I personally came to be interested in the issue of an effects test.

For some years I lived in the USA, then in the UK, and visited parts of Europe and returned to them often.

They all have an effects test. The USA monopolisation law is about the effect of monopolisation. The EU abuse of dominance law concerns the effect of abusive behaviour.

Australia is different, as is New Zealand that copied our law in this respect.

“Effects” has long been and still is the normal test in other countries and the fact that it is, is not the subject of controversy. The reason is that competition law is seen to be about protecting the process of competition in the modern economy. It is about economics, about the economic effects of certain behaviour, about the harm to the economy from anticompetitive conduct. The general approach to competition law around the world is that it is concerned with outcomes rather than just the purposes of behaviour.

There is an ongoing debate in all countries about the balance to be struck in the law between protecting and deterring competition but the debate is not concerned with whether there should be an effects test.

In 1977, following big business lobbying, the Act was watered down. The dominance test was introduced for mergers and only revised in 1993. A purpose test was introduced at that time also as a further concession.

The Trade Practices Act is an economic statute expressed through the use of legal instruments. The concern of economic policy is with the effect of behaviour. I believe that if a firm with substantial market power goes too far in terms of illegitimate anti competitive behaviour and thereby takes advantage of that power, causing anti-competitive effects in a market, causing damage to competition then such behaviour should be prohibited.

To put this another way, if a dominant firm seriously damages the competition process with illegitimate behaviour of the kind set out in the Act, then the fact is that, under the present law, it is not unlawful, no matter how great the harm to competition, unless its purpose can be shown.

It is difficult to see why the section of the Act should be limited to conduct that has an anti-competitive purpose. Overseas jurisdictions in Europe and in the United States, generally use an effect test. The rest of the Act is concerned with the purpose or effect of behaviour.



Section 46 gives legitimate protection to new entrants to industries dominated by major businesses. Moreover, in my view, such protection is legitimate and appropriate since it is limited to anti competitive behaviour harmful to competition.

What are the arguments against this proposal? The first is that the introduction of an effects test will dull competition.

It is not so argued in other countries, though there is lively debate about elements of abuse of market power laws. This is an old s.46 issue. Students of competition law know that this is the core tension in this part of competition law – a tension that has been present since the time of Rockefeller and his seemingly predatory behaviour. Most people accept that there are certain instances where business will misuse its market power in anti-competitive manner that is damaging to the economy and that there should be laws against this.

Equally, nearly everyone accepts that the law should not be taken too far or it will diminish competition rather than protect it.

In my view, the whole of s.46 is written with ample safeguards to protect legitimate competitive conduct. Indeed, it has been designed to avoid going too far. For any breach of s.46 to be substantiated in court, it has to be proved that a firm has a substantial degree of market power. Very importantly, it has to be shown in court that the firm has ‘taken advantage’ of its power - a requirement that distinguishes between legitimate and illegitimate anti-competitive behaviour. Finally the proscribed behaviour must be shown to have occurred. Safeguards therefore are already embedded in s.46.

The High Court has a view on this.

Mason C.J. and Wilson J said in the BHP/QWI case in 1989 :

“The object of s.46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. 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 the inevitable consequence of the competition s.46 is designed to foster. In fact, the purpose provisions in s.46(1) are cast in such a way as to prohibit conduct designed to threaten that competition – for example, s.46(1)(c) prohibits a firm with a substantial degree of market power from using that power to deter or prevent a rival from competing in a market. The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.”

Given this, firms, and more generally the competitive process, would not be disadvantaged by the addition of an effects-based test.

A question sometimes asked is:

“suppose a business faces competition and responds in an aggressive manner. Suppose that in doing so, its competitor loses sales and profits. Suppose that after the episode it is able to compete less hard. Has Section 46 been breached?”

My response is:

- ❖ generally no.
- ❖ the Courts have generally focussed on the effect on competition, not on competitors.
- ❖ even if a weakened competitor means, in some sense, less competition thereafter, this is generally not in itself an issue under the Act. If the outcome of seemingly weakened competition results from the greater efficiency, for example, of the successful competitor, eg lower costs, better service, etc and if the behaviour was of the normal commercial kind that would occur in a competitive market, there is no issue. Moreover, broadly, this answer applies whether there is a purpose or effect test or not.

- ❖ it is only when business oversteps the mark of normal tough competition that there is an issue. A possible example would be if a dominant firm responded to a new entrant by cutting prices below marginal cost for a substantial period with the effect of driving the new player from the market, thereby harming competition. This issue could be found to constitute a “taking advantage” of market power. If the law incorporated an effects test the key economic issue of whether the behaviour was anticompetitive or not would be considered in the context of the meaning of the words “take advantage” etc, not in the context of the impact of the introduction of the words concerning effect.

### **Speedier action under section 46**

The Commission is concerned at the length of time it takes to arrive at an outcome for cases under section 46 of the Act.

There are a large number of cases at present under s.46 where a final result takes normally takes five to seven years. Since the purpose of s.46 is to protect competition it is not very sensible to have a law that takes so long to come to a decision.

The other change therefore which the Commission considers is desirable is that s.46 should have a ‘cease or desist’ provision similar to that recently introduced in New Zealand, and similar to that available in Europe.

There are provisions in the law already for the Commission to obtain interim injunctions. However, these have not worked especially well over the years. There have also been some interesting experiments in the telecommunications part of the Act to introduce competition notices that have rather similar aims to cease and desist notices.

The Commission is working on a number of safeguards for this power.

#### **4. Transparency, public confidence and institutional performance**

Ladies and Gentlemen.

I want now to turn to the important issues of transparency, public confidence and institutional performance. To put things in full and proper context, however, it's worthwhile to recall the motivation of the Parliament of Australia when it passed the Act almost thirty years ago. The then Attorney General made the following remarks:

'The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices...These practices cause prices to be maintained at artificially high levels...they interfere with the interplay of market forces which are the foundation of any market economy; (and) they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries.'

Although these sentiments remain true today, other things have changed.

The Australian economy is simultaneously more open, and arguably in some sectors more concentrated than it was in 1974.

As a general point, the competitive pressures experienced by companies in the traded-goods sector are intense because of tariff reforms and greater exposure to global competition.

Yet the structure of some parts of the non-traded goods sector, which is the area of real interest to the Commission, is arguably more concentrated than was the case almost thirty years ago.

This must make reasonable people pause for thought. For as structure tends towards monopoly and monopsony, so then behaviour can more easily become monopolistic or monopsonistic.

This means that the Commission needs to be diligent in enforcing competition law.

But more than this, the Commission needs to be fair in enforcing competition law.

For a public institution like the Commission, transparency, public confidence and institutional performance are matters intimately linked.

Furthermore, they are all first rank issues.

Transparency, includes the accurate communication to the Courts, the public and the Parliament of Australia details of the statutory activities of the Commission.

Public confidence includes that citizens understand and broadly support, in principle, the Commission in its endeavours to apply competition and consumer law without compromise, fear or favour.

Institutional performance includes the performance of the Commission's duties in an efficient, fair and comprehensive manner, in full accordance with the law.

Transparency enables the Commission's performance in the application of trade practices law to be measured and improved - strengths are understood and acknowledged, and weaknesses, in so far as they exist, are also made apparent.

By enhancing public confidence the Commission facilitates the operation of the Trade Practices Act, and catalyses behaviour that is in accordance with the provisions of the Act. To the extent that the diligent enforcement of the Act itself contributes to a more competitive economy, we contribute to an improved standard of living in this country.

The starting point, however, of all of this is transparency. The Commission must be transparent and open. Moreover, procedures must be fair and efficient.

I want to canvass this subject of transparency and I want to discuss also the issue of the Commission's procedures.

We start from the reasonable premise that the Australian public deserves an account as full as possible of the activities of the Commission. Moreover, we believe that the Australian public is capable of determining its own views according to the facts of particular arguments. The Commission therefore believes in disseminating information about the Act and about its activities as widely as possible.

You will be aware that this practice of the Commission has received strong criticism from some in the business community.

However, in s.28 of the Act, Parliament formally provided for the Commission to make general information about the Act available to those engaged in trade or commerce, the general public, and consumers.

In addition, the GST legislation explicitly provided for the release of public notices (quickly dubbed shame notices by the Commission) in relation to overcharging it considered was occurring under the GST.

By publishing its activities the Commission has explained its actions against those alleged to have breached the Act and those penalised by the courts for breaches, and detailed court enforceable orders to prevent any future breaches.

To provide information the Commission engages in a discourse on a number of levels.

We make comment to the media. Commissioners and staff give speeches. We issue discussion and technical papers and make available detail of our technical modelling.

To better inform small business about their rights and obligations, the Commission's Small Business Unit operates a successful Outreach program. To inform rural businesses and consumers the Small Business Unit runs a 'Competing Fairly' forum, which involves satellite broadcasts to over 60 towns throughout Australia.

We maintain over twenty public registers that detail matters arising from the operation of the *Trade Practices Act 1974*, the *Prices Surveillance Act 1983* and the *ASIC Act 1989* (to the extent of our minor involvement in it). We also maintain a number of 'voluntary' public registers.

Of course, the Commission has more formal lines of accountability. Our most important accountability is of course to the courts. At present we have over 80 cases in court.

We are also obliged to provide an annual report to the Parliament of Australia, and we are held accountable for enforcement activities through appearances before a number of Parliamentary Committees.

In 2000-01, the Commission appeared before the Senate Economics Committee three times, and twice before the House of Representatives Standing Committee on Economics, Finance and Public Administration, which reviews the Commission's annual reports.

In addition, the Commission is subjected to the closest scrutiny in Senate Estimates hearings.

The Commission also provides information to numerous ad hoc committees, and considerable resources are dedicated to providing answers to Senate orders. For example, the Commission has produced reports for the Senate on anti-competitive practices by health funds and insurers, and is in the process of completing a report on prices paid to suppliers by retailers in the grocery retail industry.

Accountability for the Commission's enforcement activities is also provided by the ability of parties to complain to the Commonwealth Ombudsman. The Ombudsman is empowered to consider and investigate complaints from parties who believe that they have been treated unfairly or unreasonably by the Commission.

In addition to the Commonwealth Ombudsman, decisions by the Commission can be reviewed under Freedom of Information, by the Australian Competition Tribunal (in relation to authorisations) and by the Administrative Appeals Tribunal

Ultimately, however, as an enforcement agency, the Commission needs to prosecute and prove cases in court, under tight evidentiary rules. In this country, the law and the courts keep us all honest. To succeed we need to prove the allegations we make. As a consequence, we are cautious, careful and considered.

Nothing could be simpler, fairer and more accountable.

Ladies and Gentlemen.

I understand that comment by the Commission about investigations (which is very rare as I explain below) or cases is unpopular with the businesses. Some claim this should not happen and that it is 'trial by media'.

It is not.

It is an intrinsic part of accountability.

It is also not 'trial by media' to report the commencement or outcome of a trade practices case at court. The Courts have said this often.

I believe that public discussion leads to a clearer understanding of important issues. That said, the Commission however, is careful in its handling of investigations. We think procedural fairness essential.



As a general rule, when there is an investigation or when there is a complaint made to the Commission against a particular company by a person or a competitor, the Commission does not make that matter public. Sometimes the complainant does. Occasionally there is a leak from within a firm, which wants to make matters public for reasons of its own. Occasionally, when the Commission is conducting investigations, people who are being questioned let the press know. These are matters the Commission does not control.

As background, after receiving information from a ‘whistleblower’, the Commission entered the premises of a number of major oil companies and inspected and copied documents. The information provided to us suggested possible collusion by oil companies and possible unlawful anti-competitive conduct in other petroleum products. As a result, we had reason to believe that there may have been a contravention of the Act, and it is on these grounds that we are so empowered to act.

Having come into possession of such information, the Commission has an obligation to investigate.

Given the prominence of the companies involved, I suppose it was only to be expected that the actions of the Commission would attract some attention, and be the subject of some criticism. For example, comment has been that actions by the Commission were unjustly harming the reputation of businesses – that we use media ‘hype’ that is ‘totally unfair, unreasonable and unjust’.

The practice of the Commission is that we generally conduct investigations away from the glare of publicity.

In this case however, the whistleblower then contacted *The Daily Telegraph* directly. Media knowledge of the matter therefore came, not from the Commission, but from a concerned private citizen.

I want to make this clear. It is my view that it would be quite wrong if the powers conferred upon the Commission were abused – as would be the case if we acted on vague suspicion, or went fishing for information.

Under the Act, companies have recourse to the Federal Court if they want to challenge the investigation itself. I would say that the Commission behaves conservatively and carefully – there have been many challenges to investigations that we have launched, but we have won on almost every occasion.

In this particular matter, we are also confident that our behaviour would be vindicated in any court action.

I am not claiming that everything the Commission does is perfect. This is not my claim. But the onus is on critics – the critics who claim the Commission is not accountable and that the Commission's public manner is 'unfair, unjust and immoral' – to propose a credible and honest alternative.

Ladies and Gentlemen.

I want now to turn to the issue of process, and how the Commission deals with matters that come before us for administrative determination. In particular, I want to canvass the process whereby the Commission assesses merger proposals, and how we authorise mergers that, otherwise, would result in a substantial lessening of competition.

The notification of mergers is not compulsory in Australia. The position here therefore contrasts with that of most other countries in the world. Around 39 jurisdictions in the world have formal notification requirements for mergers, including the United States, the European Union, and Japan.

However, the Commission encourages parties to contact us, on an informal basis, as soon as there is a likelihood that an acquisition may proceed, and well before the completion of an acquisition. This smooths the path of those seeking approval.

The Commission believes that, given the law, its current system of informal notification works well in the circumstances and has received strong endorsement for this view. For example, the Trade Practices Committee of the Law Council of Australia commented that:

‘...informal clearance is an important service...and plays an important role in the efficient regulation of merger activity in the Australian economy...The Commission’s record for expedition in non-contentious mergers, is excellent, and in the Committee’s view, there is no basis for changing the present system.’

Compared to other countries, the mergers process of the Commission is administratively efficient. The system in other countries has been criticised because of the compliance burden it imposes, especially given that most transactions raise no anti-competitive concerns.

Most mergers do not raise significant competition concerns and are handled quickly, with the Commission promptly advising parties that it does not intend to take any action. Most transactions then proceed on the basis of that advice. For less complex matters and for those that are confidential, the Commission tries to complete its analysis within ten to fifteen calendar days.

Not unreasonably, for more complex matters or for those that appear to cross the Commission’s merger concentration thresholds more extensive analysis is required. It takes about one month for market inquiries and consideration. Within this group are a small number of highly complex and major transactions that raise substantial issues, and these take from six to eight weeks.

The Commission may need to request additional information on these and this may extend the time frame. Time frames may also be extended if parties put mergers on hold for commercial reasons or to amend proposals.

Parties are encouraged to approach the Commission at the earliest opportunity as this enables the Commission to carry out its assessment and the associated market inquiries as expeditiously as possible.

The Commission does not oppose most mergers in Australia. In 2000-01, we considered 265 mergers, assets sales and joint ventures. Of these, the Commission objected to thirteen on the grounds that they were likely to substantially lessen competition; ten later proceeded after parties signed s.87B undertakings to eliminate anti-competitive effects. The remaining three were withdrawn following the Commission's opposition.

Recent examples of mergers approved by the Commission include: **Bunnings** and **BBC Hardware**; **Toll and Lang's** acquisition of **National Rail/Freight Corp**; the **Grain Pool of WA** and **Cooperative Bulk Handling Authority**; **Suncorp/Metway** and **AMP/GIO**; the acquisition of **Wreckair Hire** by **Coates**; **Mayne's** purchase of **Faulding**; and the **Commonwealth Bank's** acquisition of **Colonial**. In another recent example, we allowed the **Andersen** and **Ernst and Young** merger.

The fact is that Commission opposes fewer than five per cent of the mergers notified to it, and opposes no merger proposal where imports make up ten per cent or more of the market. Moreover, the Commission has not opposed any merger in the last decade where import competition is significant.

That said, if a merger has the effect of substantially lessening competition, then it will be opposed by the Commission.

Most recently the Commission rejected **Australian Pharmaceutical Industries Limited** and **Sigma Company Limited**, because together they would have constituted around 70 per cent of the market in pharmaceutical and healthcare products, and because barriers to entry were considered to be high.

I referred to the process of authorisation. This is a formal mechanism by which the proponent of a merger or acquisition that would otherwise result in a substantial lessening of competition, receives authorisation on the grounds of public benefit.

This is important. Recognising that the topology of the Australian economy was different to that of other nations, Parliament enacted authorisation provisions that trump the substantial lessening of competition criteria.

That is, proponents who believe their merger, which lessens competition, also provides public benefit have recourse to authorisation.

The Commission has a period of 30 days to consider an authorisation application, which may be extended to 45 days for complex matters.

An application for authorisation is a public process in which any interested party may make a submission, which are open for inspection on a public register. As you would expect, there is also provision for maintaining the confidentiality of sensitive information.

Under s.90(9), the Commission will not grant authorisation unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

Section 90(9A) provides that in determining what amounts to a benefit to the public, the Commission must have regard to:

1. a significant increase in the real value of exports
2. significant import substitution
3. other relevant matters that relate to the international competitiveness of any Australian industry.

The key point here is that for those companies that believe a merger would result in public benefit because, for example, it would enhance international competitiveness, then a procedure already exists.

It seems to be simple to me. If a proposal for merger generates public benefits because of say, increased export or enhanced international competitiveness, then companies should apply for authorisation. The fact is that, whatever public comments have been made about the shortcomings of the Act and the importance of international competitiveness, application since 1993 has been made for merger authorisation on only twelve occasions. Of these seven applications were granted by the Commission, four were denied and one was withdrawn.

Ladies and Gentlemen. Procedural flexibility is also provided by s.87B introduced in 1993 – a provision that enables the Commission to accept written undertakings in connection with, amongst other things, mergers and acquisitions.

Undertakings are a flexible alternative to simply opposing an acquisition where the Commission believes that the acquisition is likely to substantially lessen competition.

Where the Commission forms the view that a proposed acquisition is likely to substantially lessen competition in breach of s.50, it provides reasons for that view. Parties then have the option of proposing undertakings to reduce or eliminate the stated competition concerns.

In the case of merger undertakings, the Commission usually favours ‘structural’ undertakings, because they are more effective in maintaining competition and are more easily established, monitored and enforced.

In this discussion on mergers and process let me conclude with these comments. The provisions of the Act are robust in their coverage – as was the intention of Parliament. In the separate matter of administration, however, the Commission has struck a good balance between timeliness, transparency and efficiency of process.

Reasonable people, grinding no axes, should therefore treat assertions that the Act requires modification, and that 'it is outdated and in urgent need of reform' with a cautious and steady scepticism.

## **5. Conclusion**

Ladies and Gentlemen. I want to conclude on this note.

I believe that the Commission faces an important and busy year. I understand that the Review is of considerable importance. However, I also believe that it is essential the Commission pays close attention to our normal and usual business, which is the firm and proper enforcement of Australia's competition law.

I want to assure you that this is the Commission's exact intention. Thank you for your time today.