Globalisation and Competition Policy
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Introduction

As we all know, the international factor in the economic activities of countries has been increasing greatly in recent decades. Trade has grown even faster than economic growth in the last 50 years - so also have foreign investment and international capital flows. There are more multinational companies than ever before - roughly 60,000 multinational companies and their 500,000 foreign affiliates account for about one fourth of total global output.

The causes of this include:

- Economic growth itself which both creates ever increasing demand for imports and also increases the capacity of economies to produce exports; it also generates greater amounts of savings which may be invested domestically and internationally to meet the greater investment demands associated with economic growth.

- Technological innovation. This pervades most fields of economic activity but is especially great in the areas of information and communication technology. A sector particularly affected by technological growth in these areas is the financial services sector, which, in turn, facilitates higher degrees of financial and economic interaction between economies in different countries.

- Falling transport costs.

- International, as well as domestic, liberalisation of trade, investment and economic activity.

Generally speaking, globalisation has positive effects on promoting competition and in widening consumer choice. However, it can be associated, in some cases, with anti competitive behaviour on an international scale and this can pose problems for national governments which have difficulties in dealing with behaviour taking place in other countries that can affect their own economies.

In this paper I will particularly focus on the areas of global cartels and global mergers, although I shall also mention some other areas where the global dimension to anti competitive behaviour is relevant, including the debate about the interaction of trade policy and competition policy and some of the policy choices being discussed at the WTO and OECD.
Finally I will also discuss some of the issues for Australia, including the much asked question of whether merger law is hindering or helping Australia’s competitiveness. My conclusion will be that merger law is making a strong positive contribution to the efficiency and competitiveness of the Australian economy.

Some of the key themes which I wish to emphasise are:

- the new forces of globalisation, new technology and liberalisation are generally beneficial for consumers and business and for the efficiency of the world and national economies that make it up;
- in some respects they can reduce the need for intervention by competition regulators; and on other occasions they call for changed regulatory approaches on such matters as market definition;
- however, on important occasions these new forces can give rise to new forms and new areas of market power, anticompetitive conduct and consumer exploitation;
- there is a need to apply the traditional principles of competition law and policy and consumer protection in these new cases;
- in some cases there is also a need to consider changes in institutional arrangements. For example where anticompetitive behaviour crosses national boundaries enhanced international coordination or even a combined international effort is required;
- the pressures from these new forces on the Australian economy make it more important than ever to apply a vigorous competition law if we are to have an internationally competitive economy.

Global Cartels

Global cartels, that is, cartels organised on an international scale, have long existed ever since the beginnings of international trade. There is a long history of cartels, in particular, during the nineteenth and early parts of the twentieth century. Indeed, in 1907 an important US antitrust case sought to end the tobacco cartel which had divided up world markets between British producers who controlled the UK, US producers who controlled the US and the rest of the world which was divided up and allocated to either British or American producers who agreed not to compete in one another’s markets.

However, there appears to have been a sharp increase in the extent of global cartel activity, or at least in its detection, in the past few years. If there has been an increase in the amount of international cartel activity, rather than just an increase in the amount that has been detected, this is probably due to the impact of trade liberalisation. Liberalisation is generally good for competition, but it tends to put pressure on firms that have dominated particular local markets without much international competition. Facing competition for the first time, some of them tend to get together with producers in other countries who also face similar pressures because of the global character of liberalisation, to divide up world markets and to agree on prices and output.

The vitamins case is the most spectacular example. Vitamins is an important product supplied to the food processing industry and the animal feed industry.
There is also a small amount supplied to consumers directly. Food companies blend raw vitamins into things like bread, rice and juice. The animal feed industry buys huge amounts of bulk vitamins to produce healthier and faster growing livestock. An example would be huge chicken farms. The vitamins cartel affected $5-6 billion of US commerce. The worldwide effect would be much greater - over $20 billion.

There is evidence that the cartel increased prices by around 70 percent during the 1990’s.

The conspiracy appears to have begun in 1989 when executives at Roche AG, and BASF began holding talks about price fixing. They decided to carve up the vitamin market and to recruit other major vitamin makers to come in on the arrangement, like Rhone-Poulenc of France and Takeda Chemical Industries from Japan. Later, yet further vitamin producers joined the cartel. Nearly all world vitamin producers now face massive fines. Already Roche has paid fines of $US500 million and the total fines already collected exceed $US1 billion in the US alone. Fines in other countries and damages cases lie ahead.

The cartel appears to have operated in a fairly stable manner for over 10 years. There were frequent high level executive meetings. There were very detailed arrangements involved in the administration of the cartel, including careful budgeting, market allocation, price fixing and so on.

I think it is worth noting that vitamins are not produced very much in the United States. They are mainly produced in Europe and Asia. The American business culture is far more wary about entering into price fixing arrangements, although as I shall show in a moment, the Archer Daniels Midland’s conspiracy shows that one must be wary about this kind of generalisation.

In February this year there was an Australian sequel when the Federal Court imposed record $26 million penalties on three subsidiaries of overseas animal vitamin suppliers for price fixing and market sharing in contravention of the Trade Practices Act. The conduct in Australia was a manifestation of arrangements made overseas by the parent companies.

Another important cartel concerned Archer Daniels Midland which in 1996 paid $100 million to settle US charges about price fixing conspiracies that occurred with European and Japanese to fix the prices of feed additives. Some top executives are now in jail. The Archer case was revealed by Mr Mark E Whitacre an Archer executive who secretly tape recorded company executives discussing price fixing with rivals. In fact, he very conveniently was able to arrange for the videoing, as well as recording, of these meetings for a couple of years. An entertaining tape of the proceedings of this cartel is available. There is an excellent book called "The Informant: A True Story", by Kurt Eichenwald of the New York Times (2000)
The Archer Daniels Midland’s case involved international cooperation between American, Japanese and European firms to fix prices in the worldwide food and feed additives industries.

Another important case concerned UCAR International Inc which pleaded guilty in participating in an international cartel which agreed to fix prices and allocate market shares in the US $500 million graphite electrodes industry.

The US is currently investigating a number of other international cartels. There are over 25 Grand Jury investigations. There are still some major cartels still to be disclosed.

The above conspiracies involved secret meetings of high level executives in a number of countries around the world. Typically the meetings were held outside the United States where fear of imprisonment, high penalties and detection is greatest. A significant number of meetings were held in the Asian region.

Australian consumers are currently suffering from an international cartel that restricts their access to digital versatile discs (DVDs). The cartel, headed by major film studios in agreement with the manufacturers of DVD players, has divided the world into regions. This ensures that DVDs on sale in Australia will only function on a DVD player licensed for region 4 that includes Australia. The stated aim is to protect cinema ticket sales by preventing people viewing movies on DVDs in their homes before distribution to cinemas. The Australian subsidiaries of US film companies have been requested by the Commission to explain their actions. It will then decide what action can be taken.

I believe that the existence of international cartels on a rather large scale is an important reason why steps need to be taken to enhance the extent of international cooperation in competition law and also why every country needs to consider having a competition law and policy of its own.

**Global mergers**

In recent times there has been a spectacular increase in the extent of international merger activity, in one sector after another finance, communications, oil, airlines, pharmaceuticals, automotive, professional services and so on.

There are in fact more mergers than ever before. Worldwide merger and acquisition activity reached $US3.4 trillion in 1999. In the US alone, the dollar value of mergers reported annually increased from $US169 billion in 1991 to $US1.9 trillion in 1999 and the 5,000 mergers reported in the year 2000 are a three-fold increase over the past four years.

There are more mergers affecting many countries at the one time than ever before. Assets, customers, suppliers, actual competitors and potential competitors of merging entities are scattered across a growing number of
countries resulting in more national markets being affected by multi country mergers.

Mergers between large corporations affect a growing number of national markets. As tariff and non-tariff barriers are reduced, markets are deregulated, technical standards are harmonised, international transportation and communication networks improve, information technology matures and electronic commerce grows, markets become increasingly global, more corporations turn multinational, and markets can become exceedingly concentrated in some cases with the result that a growing number of mergers affect competition in a growing number of national markets.

At the same time to look at the matter from another perspective, more multinational firms are becoming exposed to merger review processes applied by a large number of national competition authorities. There are more competition authorities than ever before. Some 90 countries currently have, and about 20 others are in the process of having competition laws; more than 60 countries have premerger notification requirements, with Australia being something of an exception.

For the most part, global mergers are not anti-competitive and pose no major challenge to the global economy’s major competitiveness. Indeed, in many cases, they enhance competitiveness and improve economic efficiency by creating more efficient arrangements for international business transactions.

Whilst in most cases the reason for mergers occurring on a global basis reflect simple commercial logic without harm to competition nevertheless we must recognise that as in the case of global cartels some global mergers may have the aim of stultifying competition. Just as with global cartels there may be cases where trade liberalisation threatens firms with market power created or strengthened by trade barriers. As a result some firms in different countries that were previously largely protected from competition by trade and investment barriers face competition between themselves for the first time and may decide to merge.

It is therefore important that we be vigilant about global mergers.

**Can Small Countries Cope with Global Mergers?**

I am often asked whether in Australia or indeed in other smaller countries global mergers pose an economic threat with which we are powerless to deal.

My answer is, for the most part, the global mergers are not anti-competitive. Most of them are logical commercial developments occurring in response to the forces of globalisation, technological change and liberalisation. For example, many of the financial sector mergers in Europe are a response to the advent of the Euro which is leading to the emergence of a single European financial market. In the United States many of the financial mergers are a response to deregulation of financial markets which had previously prohibited operations on a truly national scale within the United States.
Likewise, telecommunications mergers have a great deal to do with the emergence of a liberalised approach to telecommunications and the breaking down of barriers to international transactions. Similarly with airline alliances.

Another reason why these mergers do not deeply concern me is that these days in particular, major anti competitive mergers are likely to be stopped by overseas authorities. In this respect, the United States after a rather quiet period in the 1980s has become far more active in the public enforcement of anti trust law. The early signs are that the Bush Administration will continue to be vigilant about mergers, even if it eases pressure a little on monopoly behaviour. The European Union is also far more active than in the past. Japan and Korea are also stepping up some of their anti trust activities. Indeed in some respects the real issue is that some global mergers have to be approved by so many regulators in so many countries that greater cooperation between regulators is required to prevent unobjectionable mergers from being inadvertently blocked.

However, it still remains the case that some mergers that occur internationally can damage competition and will force consumers to pay more in certain countries with particular market structures. Are these countries powerless to act?

My own view is that generally they are not, although there may be some exceptions to this generalisation. I shall take Australia as an example. When Gillette tried to take over Wilkinson Sword in the wet shaving market, the ACCC opposed the merger successfully in the Federal Court of Australia, even though the transaction occurred offshore. The ACCC succeeded in having a divestiture imposed upon the companies with the selling off of the Wilkinson Sword brands to an independent buyer for ten years.

This case established the jurisdiction of the *Trade Practices Act* with respect to off shore mergers and showed that strong remedies are possible.

Moreover, when a merger occurs that is anti competitive, it is often possible to resolve it in a manner that does not damage competition. A recent example was the attempt by the British American Tobacco Company (trading in Australia as WD & HO Wills) to take over Rothmans. In some countries this would not have damaged competition. However, in Australia it was clear that it would. There were only three companies WD & HO Wills, Rothmans and Philip Morris and imports were fewer than one per cent. The Commission considered that a merger of two of three big players would reduce competition. It opposed the merger. Following this, British American Tobacco and Rothmans decided to release 17 per cent of the total brands of cigarettes on the market and they were acquired by Imperial Tobacco, a major international tobacco organisation which has now entered aided by an initial 17 per cent market share and the introduction of its own well established brands into Australia. Some coincidental changes in tax law will also boost imports. As a result, there remains three strong credible players in the Australian market and the original merger between British American Tobacco and Rothmans has been able to go ahead in Australia as well as in other parts of the world.
The point is that very often practical solutions can be found to seemingly difficult problems.

Another case we have dealt with was the Coca-Cola proposed acquisition of Schweppes. This was an interesting merger because it was never proposed that it should occur in the US where there were clear antitrust problems. The merger did not proceed in France where there were antitrust problems which were made clear in the Orangina case. Moreover, there were problems with the merger in the European Union.

Australia opposed the merger. It noted strong opposition by many outlets that sell Coke. Following that, Coca Cola put two proposals to try and meet our concerns but, in each case, the Commission believed that they could not overcome its concerns. The essential concern of the Commission was that the merging of the two sets of brands, ie, Coca-Cola brands and the powerful international brands of Schweppes. The undertakings to which I have referred and which were rejected by the ACCC, all failed to address this fundamental concern. They involved concessions about other minor brands and some other arrangements. The merger did not go ahead in Australia or in many other countries which shared our concerns.

Another interesting solution has occurred in a couple of cases where the Commission had initial concerns. When BHP, Australia’s major steel company, wanted to take over New Zealand Steel, the Commission believed that there could be some anti-competitive effects in certain parts of the steel market, even though international trade would take care of many problems. However, when the Commission objected, a practical solution was found. The Government agreed to reduce tariffs on an accelerated basis in relation to those parts of the market where there could have been an anti-competitive effect.

Accordingly, it is my provisional view that many of the problems for competition created by global mergers can be met by appropriate action in domestic markets. I cannot rule out the possibility that cases may arise where an offshore merger takes place that is harmful to Australia and for which it is not possible to fashion an appropriate Australian solution.

**Market Power**

The abuse of market power is one of the key issues for competition policy. However, it is not my intention to discuss issues of the abuse of market power occurring on a global basis other than to highlight one point. This is that the Microsoft case being pursued in the United States is essentially about anti-competitive arrangements in the United States which have a global effect. It is part of the global competition picture. Incidentally, the Microsoft case illustrates the importance of applying antitrust law to areas of the economy which are characterised by high rates of technological innovation, but that is a subject for another day.

**Trade and Competition.**
Before proceeding further, I would like to deal with one subset of the problems concerning the international dimension of competition policy. This concerns the interaction between trade policy and competition policy. I emphasise that this is only one aspect of the global competition policy scenario but this fact is not always recognised.

The essence of the debate about the interaction between trade and competition policy can be summarised as follows below.

First, trade policy liberalisation can be frustrated by failures in the enforcement of competition policy. For example, supposing a country liberalises trade, allowing a potential flow of imports following the reduction or elimination of trade barriers.

The benefits to consumers of this liberalisation can be defeated by restrictive practices in the liberalising market. For example, retailers in the liberalising market may reach agreement with manufacturers in the home market not to accept imports. Entry into that distribution sector may be difficult. Trade policy liberalisation in such cases can clearly be frustrated by failures to enforce competition policy properly, eg, if the regulator does not exist or fails to take action to stop anti competitive practices.

Second, it is important to note the reverse relationship. Trade policy can be highly anti competitive. For example, nearly all forms of import protection whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests. Trade policy can be usefully regarded as an area of competition policy that has gone badly wrong! It is important that the debate about the damaging effect on trade of failures in competition law enforcement be balanced by recognition of the damaging effects on competition and consumers of trade restrictions.

Third, it is important to note that in this debate there is another extremely important variable which may be at work regulation. Very often it is Government regulation rather than failures in the enforcement of competition law that are the true obstacle to imports, to trade liberalisation working and to competition working. What is needed is a three-way debate about the relationship between trade, competition policy and regulation, rather than a debate that is focussed too narrowly on trade protection and failures in competition law and enforcement.

**Intellectual Property Laws**

Intellectual property laws are an interesting example of the interaction of trade, competition and regulatory laws.

Intellectual property law has, in my view, been captured by the interests of producers in countries which are net exporters of intellectual property. In particular, the statutory restrictions on parallel imports under copyright law have enabled massive unjustified price discrimination between countries, have hindered and distorted competition and imposed draconian restrictions.
on international trade. In this part of the world, especially, we are losers from these laws.

I am heartened that some change is occurring in some parts of the world New Zealand has abolished parallel import restrictions, Australia has removed restrictions in some areas and Japan’s Supreme Court has relaxed them in patents.

There is a very lively debate in Europe at this very moment about parallel import restrictions. Generally speaking it was long ago recognised as incompatible with the free trade principles of the European Union that there should be restrictions on parallel imports of any products including those products protected by intellectual property law. However Europe has generally prohibited parallel importing of copyrighted, patented and other intellectual property protected products from the rest of the world. Just recently some courts in Europe have opened the door a little by indicating that the restrictions do not apply unless there are very explicit indications from the owners of copyright that parallel imports are restricted. A major case is currently before the European Court on this topic.

Another important point is that within the European Commission itself there is a policy, as distinct from legal, debate about whether parallel import restrictions should be removed. Sweden, which currently has the presidency of the European Union, is supported by a number of major countries in pressing for changes to the rules but with strong opposition apparently from France and Germany.

Even in the United States there is a debate about parallel import restrictions. The Supreme Court ruled that in relation to products made in the United States and exported to the rest of the world that the restrictions on parallel imports did not apply where those products were reimported into the United States. More recently there has been a lively debate about the justification of parallel import restrictions in relation to pharmaceutical products which are on sale more cheaply in countries such as Canada.

In Australia the Parliament is currently debating government proposals to remove totally import restrictions in relation to books and computer software.

There have been some improvements in the position concerning CDs as a result of the reforms. The CD reforms were introduced at around the same time as the Australian exchange rate fell sharply and this meant that the extent of price reductions was not very large. However if one takes real CD prices at the time of the reforms and adjusts them for changes in the exchange, then the current level of prices is some $7 below that projection. In other words in the absence of reforms it is arguable that the price of compact discs would have risen to around $35.00 whereas they are now priced at around $28.00. Of course in some major outlets which have purchased parallel imports the prices of new release CDs are around $20.00.
The ACCC is currently involved in litigation before the Federal Court of Australia in which it alleges that certain record companies acted unlawfully by organising international boycotts of Australian markets and by pressuring retailers in Australia not to accept parallel imports. If the Commission’s allegations are upheld it will be a demonstration of the need to back-up trade liberalisation with the appropriate application of competition laws to stop the benefits from being eliminated by anticompetitive behaviour.

Another important reform to parallel imports concerns the legislation which now prevents the use of copyright in packaging and labelling from being used to prevent parallel imports. The legislation covers a wide range of products including food, drinks, clothing, footwear, toys, spare parts, cleaning agents, perfumes and many others.

The Ergas inquiry into the relationship of intellectual property laws and competition policy has concluded that all the restrictions on parallel imports should be removed rather than a piecemeal approach that is that the New Zealand approach should be adopted.

**Policy Issues**

Let me now turn to some policy issues. First it seems obvious that in an economy characterised by ever increasing degrees of economic interaction between countries with ever greater activity on the part of multi national firms with global cartels and global market power that some kind of international effort is needed to deal with some of the problems. National governments alone cannot deal with all global problems.

Not only is it clear from the preceding discussion that more steps need to be taken at an international level to deal with global and other forms of global anticompetitive conduct, but it is also clear that there are some areas in which business would benefit from the adoption of a global approach eg the improved processes for dealing with multi-jurisdictional mergers.

Business is becoming increasingly organised on a global scale but competition policy is still largely organised on a national basis.

By and large competition policy has lagged behind other fields of corporate regulation fields such as those concerned with fraud, tax evasion, money laundering and so on in regard to international cooperation.

A target for all regulators in the new century is greater cooperation to stem the power of international cartels. This includes a greater sharing of information, often lacking in the past. Progress is being made, however, as demonstrated by a bilateral treaty with the US to share confidential information. There is also increased cooperation between the US and the EU and more discussion in international forums.

There is no international regulator to combat the cartels which means the regulators of all countries must work as a team.
The OECD is one forum in which a great deal of activity is occurring. A key emphasis is on "convergence". The idea here is to have member countries within the OECD adopt as far as possible similar competition laws and similar vigorous levels of enforcement of them. Equally importantly a convergence is sought in relation to the many countries who are not members of the OECD who are currently introducing or considering introducing competition laws. The OECD is playing a significant role in ensuring best practice in all these countries.

Regarding the issues of the interaction of trade and competition policy discussed earlier, much of the intellectual input into this subject is coming from the OECD but even more importantly the World Trade Organisation (WTO) has established a working group discussing issues about the inter-relationship between trade and competition policy.

Recently there have been important steps taken towards establishing a Global Competition Initiative and/or to establish a Global Competition Forum, the latter being at the OECD. This is being driven by a number of factors. The USA is uncomfortable with the idea of the WTO having decision making powers in relation to competition questions and is keener on a separate initiative. The European Union also supports the idea of a global competition initiative. The OECD for all its valuable work is seen as having some limitations because its membership does not include major developing countries and it is an organisation made up of governmental representatives only. Accordingly there is discussion of taking an initiative which would extend beyond the OECD or the WTO but be complementary to them.

There is virtually no thought at this stage of establishing a world competition authority nor of establishing a world competition law. Indeed most people think that such an ambitious undertaking would be likely to distract attention from the real progress being made on a day to day basis in increasing the cooperation and convergence between countries.

**Globalisation and Mergers in Australia**

The Commission has persistent critics who claim that merger policy is harming the Australian economy. It is driving company headquarters offshore and preventing the development of large Australian companies that can compete against the international conglomerates on the Australian market and beyond.

The virulence and persistence of the attacks on the Commission raises the question of motive. Do the attackers want the unfettered right to establish monopolies so they can dominate the market and, by raising prices, earn greater profits? This may bring cheers from shareholders but not necessarily from consumers or other companies that buy inputs from the monopolies. Australia is far from alone in its interest in mergers and the Commission’s critics should realise that governments worldwide have created strong laws to
prevent the creation of cosy cartels. They have also empowered strong anti-trust agencies to enforce laws to protect consumers and small business.

If our most persistent critic, the Business Council of Australia, were serious about promoting large internationally competitive Australian companies it would acknowledge the benefits of competition. Would Australia’s big companies be internationally competitive if they had to secure their raw materials from a monopoly supplier, export through a monopoly transport company or raise finance from a monopoly bank? And what about consumers? If we had no merger law in Australia, consumers could shop at Woolcoles supermarket, buy petrol at Moshell and get beer from Carlion. Such monopolies would surely mean no competition.

The firms the Business Council represents are the major winners from more competitive markets. Strong domestic competition has lowered their costs and enabled them to compete internationally.

**National Champions**

It is claimed that if we don’t change the merger provisions of Section 50 of the Trade Practices Act then Australian companies will be prevented from reaching a size big enough to compete in global markets. Some of you will have heard this called the "critical mass" or "national champion" argument.

My initial response to the national champion argument is that obstacles to export growth are not necessarily overcome by firms developing dominance in the domestic market. A certain size is not a prerequisite to export success, a fact often demonstrated by the overseas success of moderate-sized and even small Australian firms. Observers of the rural economy following the dismantling of compulsory marketing schemes have noted the drive and initiatives of rural cooperatives and individual farmers.

I do not believe that the Trade Practices Act or the ACCC are preventing many mergers and certainly not those ones which could be justified on international grounds.

Each year the Commission opposes fewer than five per cent of the mergers notified to it and of those a number are often resolved by means of undertakings. Over the last five years 1,108 mergers and acquisitions have been considered by the Commission. Thirteen mergers have been opposed. A further 28 mergers have been resolved by undertakings. Appendix A provides a list of mergers that the Commission has opposed and a further list of mergers that the Commission has approved subject to undertakings.

In some respects these figures overstate and in other respects understate the effect of the Trade Practices Act.

The numbers overstate the degree of intervention by the Commission because many mergers are not notified to or considered by the Commission. Unlike most other countries there is no compulsory requirement to pre-notify
mergers to the ACCC. As a rule, the Commission only considers mergers where there is some kind of competition issue or some kind of referral to it by other parts of government or by businesses wishing to be ultra cautious. The vast majority of mergers in Australia either do not raise issues about competition or are too small to qualify for consideration by the Commission under the Trade Practices Act.

In some respects the statistics may understate the effect of the Trade Practices Act. There are certain mergers that no business would consider because they are unthinkable under the Trade Practices Act.

It is also sometimes suggested that many mergers are considered by business as possible but they are not proceeded with because it is known that the Commission will oppose them. I am sceptical of this argument. The Commission is sounded out about mergers on a confidential basis but not a great deal. The Chief Executive Officers of most Australian businesses are not shrinking violets. They are not afraid to sound out the Commission about mergers that they dream about and I consider it improbable that there are many cases where mergers that might have some justification are not advised to the Commission at least informally. The fact is, however, that this does not occur on a significant scale.

It is worth noting that the top ten takeovers in the year 2000 by dollar value attracted very little ACCC interest and there was ultimately no opposition. The top ten takeovers proposed were:

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<th>Target</th>
<th>Bidder</th>
<th>Value $m</th>
<th>Result</th>
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<tbody>
<tr>
<td>1: Woodside Petroleum</td>
<td>Shell Petroleum</td>
<td>9,866.67</td>
<td>Current</td>
</tr>
<tr>
<td>2. Colonial Limited</td>
<td>Commonwealth Bank</td>
<td>7,611.52</td>
<td>Successful</td>
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<tr>
<td>3. Comalco Ltd</td>
<td>Rio Tinto Invest</td>
<td>5,325.90</td>
<td>Successful</td>
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<tr>
<td>4. North Ltd</td>
<td>Rio Tinto Invest</td>
<td>3,501.73</td>
<td>Successful</td>
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<td>5. AAPT Ltd</td>
<td>TCNZ Aust</td>
<td>2,211.98</td>
<td>Successful</td>
</tr>
<tr>
<td>6. Advance Prop Fund</td>
<td>Stockland Trust</td>
<td>1,167.78</td>
<td>Successful</td>
</tr>
<tr>
<td>7. QCT Resources Ltd</td>
<td>Metcoal Holdings</td>
<td>895.50</td>
<td>Successful</td>
</tr>
<tr>
<td>8. Email Ltd</td>
<td>Smorgon Distribution</td>
<td>815.49</td>
<td>Successful</td>
</tr>
<tr>
<td>9. Advance Prop Fund</td>
<td>Mirvan Funds</td>
<td>791.66</td>
<td>Unsuccessful</td>
</tr>
<tr>
<td>10. Email Ltd</td>
<td>Smorgon Distribution</td>
<td>785.59</td>
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An examination of mergers from earlier years shows the same.

Another important fact is that the ACCC has not opposed mergers in the last decade where import competition or potential import competition is significant. There is a very long list of examples. I shall merely mention BHP’s acquisition of New Zealand Steel and later of Tubemakers; AMCOR’s acquisition of APPM (later split up by AMCOR); Email’s acquisition of Southcorp; North Ltd and Rio Tinto; but there are many many others (they are listed in our Annual Reports).

Thus, in considering mergers the potential or real import competition is assessed, an important factor because of globalisation. If import competition is an effective check on the exercise of market power, it is unlikely the Commission will intervene in a merger. It has not rejected any merger where imports, independent of the merged parties, have been sustained at more than 10 per cent of the market.

It is in the sectors of the Australian economy exposed to international competition that the argument that firms need scale to compete globally is most relevant. Yet in this sector the Act is simply not an obstacle at all to mergers.

In sectors not exposed to international competition, some mergers are opposed, although I stress that this is only a minority.

We also look at "other factors" including product substitution, entry barriers, whether the merged firm will face countervailing power in the market, whether the merger will remove a vigorous and effective competitor or whether it is pro or anti competitive in general.

Often a merger is allowed to proceed if undertakings are given. In May last year the Commission decided not to oppose the acquisition of Colonial Limited by the Commonwealth Bank subject to significant undertakings to minimise any decline in competition.

As I have said earlier globalisation and other factors require change on the part of the Commission in its approach to the analysis of competition. A major change in our priorities has been the fact that the Commission in the last ten years has not opposed mergers where there is import competition. However there are other areas in which our approach to competition analysis has changed in line with market change. One example concerns the analysis of the banking industry. Ten years ago the Commission considered that there was a
lack of competition in the market for home loans and had it been considering any bank mergers at that time it would have been concerned at the effects on the home loan market.

However since the advent of mortgage-originators there has been vigorous competition and the Commission would be unlikely to oppose mergers between banks on the grounds that they lead to any reduction in competition for home loans.

Likewise 20 years ago the Commission looked at the brewing industry on a State by State basis. Each State seemed to be insulated from other States. However during the 1980s interstate competition increased. When brewer mergers were presented to the Commission it looked at them on the basis that Australia has a national market in brewing production reflecting this change in market circumstances. There are many other areas where economic change brings about changes in market definition.

Incidentally it should not be thought that just because business is concerned with emphasising global concerns in markets that this concern is universally shared. Parliament is currently considering amendments to the Trade Practices Act which would emphasise the need to take into account regional elements of markets in assessing markets in relation to mergers.

**Authorisation**

The merger provisions are not an obstacle to firms achieving the economies of scale needed to be internationally competitive. The key is that there must be public benefits.

In deciding whether to authorise a merger, the Commission considers all the potential public benefits. Under the Trade Practices Act, public benefits are specified as including a significant increase in the real value of exports and significant import substitution. The Commission must also take into account all relevant matters relating to the international competitiveness of Australian industry. They include whether a proposed merger would have adversely effect the ability of smaller companies to expand or develop export markets.

Domestic rivalry is the critical factor in export success. Strong domestic competitors create highly visible pressures on each other to improve. Domestic firms are under pressure to export so they can grow. There is also pressure to innovate. So the removal of competitiveness is not necessarily good for exports.

The authorisation provisions of the Act are available to those firms wanting to ensure international competitiveness through acquisition. A merger can be authorised even if it will lessen competition providing there are compensating public benefits.

**Moving Offshore**
It’s inevitable that more Australia companies will move offshore. After all, we have moved into the era of globalisation. The company names quoted by the Business Council in briefings to the media as likely to decamp for overseas have had few problems with the Commission. They include BHP that acquired New Zealand Steel without objection from the Commission, AMP that acquired GIO, Brambles, Lend Lease and NAB, (which acquired MLC) none of whom have had a merger blocked by the ACCC. Even Pioneer, sometimes quoted as an example, did not apply to merge with CSR.

Preventing mergers, it is claimed, will force companies to re-locate overseas. There is no evidence of this.

There are several reasons why firms go offshore and merger policy is at the bottom of the list. A major reason is taxation policy, others are to get closer to their customers and that gaining market entry may be difficult for offshore suppliers.

The Business Council’s agenda over the years has been to weaken merger law. Some CEOs want a soft law; others want no law even if this means an economy with a bunch of monopolies that cannot compete internationally.

The impact of anti-competitive mergers and joint ventures can be a loss of consumer welfare and an adverse impact on the costs of affected industries. Remember, once industry structures are in place, they are difficult to alter and may lead to higher prices, lower quality, poor service and a dearth of innovation.

A merger might create supply bottlenecks for smaller companies and restrict market entry or access to crucial facilities. Third parties must have access to supplies at a competitive price.

The argument underlying many claims for mergers is that in fact Australian firms should be allowed to merge in Australia and thereby to achieve higher earnings which can be used to subsidise their attempts to enter and compete successfully in overseas markets. In other words sometimes the argument amounts to no more than that the Australian consumer should be expected to subsidise firms that want to compete internationally. Ultimately in fact they are being asked to subsidise consumers in other countries. This is a difficult argument to accept.

It is also sometimes argued that what is needed in Australia is not a merger law but appropriate laws to regulate possible anticompetitive activity that might occur following a merger. When this point is pursued it is often not backed up by proposals to in some way strengthen our present laws. The argument does involve a much higher degree of regulation that many would find acceptable. The Commission for its part does not as a matter of policy accept the idea that a merger should be permitted providing that there is price regulation of some form once it has taken place. It believes in nipping the problem in the bud. It is also very often the case that the Trade Practices Act for all its virtues is not able to deal properly with anticompetitive conduct that
occurs after a merger. Suppose two firms merge and this increases the possibility of collusion with other firms in the industry. Cooperation between firms is not unlawful under s45 of the Trade Practices Act unless unlawful communication between them can be demonstrated to a Court. If a merger merely makes it easier for firms to cooperate lawfully and to raise prices as a result there is nothing that can be done about it under the Trade Practices Act other than to block the merger in the first place. Likewise there are similar significant restrictions on the use of s46 of the Trade Practices Act to deal with behaviour which amounts to an abuse of market power.

**Positive Agenda for Merger Policy**

So far I have been discussing globalisation and mergers. I would like to end by emphasising that merger law plays an extremely important role in the less competitive parts of the non-traded goods and services sector of the Australian economy. Of particular importance is its role in deregulating industries. Mergers and other forms of anticompetitive behaviour can play an important role in diminishing competition. The Commission is mindful of the fact that there is need for structural change in many deregulating areas and only occasionally blocks mergers in these areas. However this is a key area where some mergers can undo the procompetitive effects of deregulation. This will require scrutiny in the years ahead.

**Deregulating Sectors**

The real agenda of merger policy relates largely to the deregulating sectors of the economy. Deregulation gives rise to circumstances in which mergers are likely to occur. Some mergers are necessary for efficiency and should not be blocked. Others are sought to undo the pro-competitive effects of deregulation and may need to be opposed.

In recent years State, Territory and Commonwealth governments have initiated various pro-competitive reforms, involving horizontal and vertical disaggregation of government owned monopolies, corporatisation or privatisation and the removal of various restrictions on the operation of free markets. These initiatives were given further impetus by the Competition Principles Agreement, whereby all governments agreed to a systematic review of all legislation restricting competition.

As a consequence of this, the assessment of privatisation proposals has become a much more significant part of the Commission’s work in recent times. In many cases involving individual asset sales, a number of bidding consortia require individual consideration. The Commission role is to ensure that the acquisition of an asset does not result in a substantial lessening of competition in a market. In assessing privatisations, the Commission considers the existing interests of all bidders.

In the great majority of cases, bidders for privatised assets do not raise competition concerns and therefore do not raise problems under the Act. However, In the case of certain asset sales in the Victorian electricity sector
the Commission did object to some bidding consortia. The Commission did so where it took the view that the interests of certain consortia parties would have raised potential competition concerns through horizontal linkages in the Victorian electricity generation sector.

In the case of the privatisation of Hazelwood power station, for example, the Commission raised its concerns with one bidding consortium. No further action was taken as the structure and composition of the consortium were changed during the course of the sale process in such a way that the Commission’s initial concerns were no longer relevant to the bid. In another case involving the sale of Loy Yang A power station the Victorian Government sales group required bidders to give certain undertakings addressing the Commission’s competition concerns about board representation and information flows.

In performing its assessment of any proposed acquisition, one of the matters which the Commission must take into account is the likelihood that the acquisition or merger would result in the acquirer being able to significantly and sustainably increase prices or profit margins.

Network industries can differ from others in that market power and the associated ability to increase prices is not always proportional to the amount of capacity controlled by any particular organisation. Market power can also arise through technical characteristics of, for example, electricity generators - for example, at peak periods gas or hydro generators with the ability to "ramp up" quickly may have greater market power than base load generators with larger capacity.

The Commission has also focussed on mergers and acquisitions within the electricity industry because of concerns arising from the fact that the sector is not subject to the competitive discipline of import competition and because of the lack of direct substitutes for electricity.

In its authorisation determination on the National Electricity Code, the ACCC expressed concern over the structure of the market in a number of jurisdictions. The issue of market structure is not only crucial at the commencement of the National Electricity Market (NEM) but will be of on-going interest, particularly in respect of possible re-integration of firms participating in the NEM. Concerns also include possible mergers within each segment of the market, arrangements whereby NEM participants operate in upstream or downstream sectors (such as a generation company also operating a retailing business) and merger proposals between different energy suppliers (such as an electricity industry participant buying a gas industry participant).

**Convergence**

The last issue of convergence is one that the ACCC is likely to have to consider in assessing mergers and acquisitions in the utilities sector in the future. There have, for example, been recent reports in Australia of joint ventures and
acquisitions involving telecommunications companies and energy distributors and retailers. The development of multi-utility service provider companies is a logical further step.

Convergence raises challenges to effective competition policy, in terms of possibilities for regulatory ‘bypass’ and for incumbents if the policy approach and the manner of regulation is uneven across the different industry sectors. It can also be argued that convergence holds the potential to create substantially-resourced business units holding market power. At the same time however, convergence may lead to industry growth and diversity and therefore lead to greater competition between products and greater choice of suppliers for customers. There are arguments for convergence in terms of economies in carrying out common functions eg integrated billing for energy; reduced consumer transaction costs. These benefits are likely to be maximised by having an integrated regulator which takes a consistent approach across industry sectors.

Reaggregation

Another issue that the ACCC is likely to have to consider in the near future is that of reaggregation of utility companies. Consider for example, the possibility that in Victoria the five power generation companies seek to merge or to take over or to be taken over by the distribution companies. Of course there are some cross ownership restrictions built into Victorian law (until around 2002). If these mergers went ahead they could undo the pro-competitive effects of the Victorian divestiture of the former State Electricity Commission of Victoria. Likewise when deregulation gives rise to the replacement of state by national markets, firms often manoeuvre and merge in order to cope with the new situation. Again sometimes there are considerable efficiency gains, but at other times with considerable anti-competitive effects.

To take the energy industry as an example, there are several kinds of mergers which may arise for consideration in future. First, horizontal mergers within a state, eg. between power generators or distributors within one state located in the same state. Secondly, there may be vertical mergers between, for example generators and distributors in the state. Thirdly, there may be conglomerate mergers between different utilities, eg, between gas and electricity utilities, in the distribution and or retail field. Fourth, there may be interstate mergers combining some or all of the above elements.

These matters will fall to be assessed under S50 of the Trade Practices Act. In assessing them, one background factor worth noting is that the ownership structure of the energy industry and some other deregulating industries has been greatly affected by public ownership arrangements over the years. The ownership pattern which might have emerged in a privatised market subject to competition laws was not present owing to the preference of most Governments for the public utilities to have both horizontal and often vertical integration. Clearly the deregulation of current public utilities brings advantages compared with the artificial integration established by Governments. For example, the Victorian disaggregation of the electricity industry would seem to represent an improvement over the pre-existing
monopoly arrangements. However it is not especially likely that an initial disaggregation will yield the optimum ownership patterns in the industry. In free markets, reliance is placed on the workings of the capital markets to achieve more efficient ownership arrangements and on competition policy to make sure that those arrangements are not anti-competitive (unless they can be shown to be in the public interest). The present Victorian electricity market starts without the benefit of these processes unfolding over the years. It is quite likely that restructuring pressures will arise to create more efficient arrangements. The possible efficiency benefits of such mergers will need to be recognised and accepted under the Trade Practices Act. Equally however, it will be important to ensure that mergers are not simply anti-competitive and designed to undo the pro-competitive effects of deregulation.

These kinds of considerations apply to all mergers in sectors of the economy undergoing deregulation.

**Merger Policy**

Merger policy makes an important contribution to the achievement of a competitive and productive Australian economy. Regulation of anti-competitive mergers is an important part of National competition policy. Trade practices merger law conforms with the principles of natural competition policy agreed to by all Australian Governments when the Hilmer Review was established. These principles included:

1. No participant in the market should be able to engage in anticompetitive conduct against the public interest;

2. Conduct with anticompetitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and evidence of the public costs and benefits claimed. (See Hilmer Inquiry, Terms of Reference).

Merger policy is not some necessary evil. Rather it has a positive contribution to make to Australia’s international competitiveness. If mergers are allowed to occur without the application of competition law, then our exporters and import competitors will be supplied uncompetitively and inefficiently and their capacity to compete in world markets will be hindered.

A general point which needs to be made about mergers is that most of the matters that receive detailed consideration from the ACCC are mergers which are close to the margin, that are, in other words, borderline. Critics could sometimes argue that there is inconsistency in decisions. Whilst I do not agree with this, the significance of the criticism must be placed in context. When a series of close mergers is considered by the Commission, it is not so difficult to mount a case of apparent inconsistency. Often there will be very similar structural circumstances, but the Commission will go in different ways depending on the weight accorded to particular factors. The fact that the Commission has to make difficult ‘on-balance’ decisions about a few
borderline mergers each year does not mean that there is not general consistency in the application of the Act to the vast majority of mergers which it must consider.

**Wattyl/Taubmans**

There are always some contentious decisions. One which has been discussed in recent years has been the Commission’s treatment of the mergers in the paint industry. The Commission was informed in August 1995 of the proposed merger of Wattyl and Taubmans. It advised the companies that it would oppose the merger. They eventually sought authorisation the following April and the Commission refused the authorisation. Just as the Tribunal hearings began Taubmans was acquired by a new entrant to the market.

There has been some comment on the delay in the matter. It was certainly not the fault of the ACCC. The question of paint mergers have been discussed very extensively during the Cooney Senate inquiry into mergers and the Commission’s concerns about paint mergers had been made very clear. When the Commission was informed in August of the proposed merger, it promptly advised the parties of its very considerable concerns. They chose however not to go to court or to seek authorisation until April in the following year. It is not surprising that in this time another buyer emerged.

Throughout the period from August until April, the Commission continued to make its attitude clear. At one stage there was a serious proposal to resolve the issue by Wattyl selling at least one of its major brands. It is understood that this proposal was recommended by management to the board of Wattyl, but the board rejected the compromise.

There are two possible views of the merger between Wattyl and Taubman. The first was that the combined entity would have a market share of around 45 per cent, approximately equal to the share of Dulux. It was argued that a new, larger, stronger firm could compete more vigorously against its big competitor.

The other view was that the competition between Wattyl and Taubmans was very important for the promotion of competition generally in the paint market and that their merger would create a much quieter state of affairs in which two big firms co-existed comfortably. The Commissions market enquiries tended to suggest that the latter was more likely to occur.

Was the outcome a good one? There is a strong argument that the final outcome has been highly desirable. Following the acquisition of Taubmans a merger occurred between Taubmans and Bristol which has led to a state of affairs in which the paint industry now has three strong national competitors. Had the Commission not opposed the merger, there would have only been two competitors and it is the Commission’s view they would not have competed as hard as is likely in the present situation.

**Undertakings**
S87B has become a very important part of the *Trade Practices Act*. However it has attracted greatest attention in relation to its use in merger situations even though in fact the Commission is very sparing in its use of undertakings to resolve merger questions.

The Ampol/Caltex merger provides the best known example. The Commission formed the view that the merger was likely to substantially lessen competition and so advised the parties. They sought reasons for the Commission’s decision and then suggested undertakings which would neutralise the anti-competitive effects of concern. The Commission after much consideration and negotiation accepted undertakings and the merger went ahead. The ACCC did not see itself as engaging in social engineering, even in this case. The parties had sought to merge and in doing so to engineer an outcome in which the petroleum products market would be much less competitive than in the past. The Commission needed to be satisfied that the undertakings balanced or neutralised the anti-competitive effects. Whether this is called engineering or not is a semantic matter. The fact is that the Act clearly contemplates that undertakings will be used in these situations. The benefit is that mergers can go ahead and realise many of their benefits.

The question of whether undertakings should be negotiated publicly is sometimes raised. The ACCC’s preference is that undertakings should normally be made known publicly before being accepted so that there is a full opportunity of assessing their likely effects on, the market place, aided by players currently involved in the market place. These is, however, opposition by firms which want to make undertakings confidentially.

There are some circumstances in which the Commission may accede to such requests. These include cases where the ACCC is reasonably well informed about the industry’s history and circumstances as it was in the dairy industry where it has considered a range of mergers in recent years. There are two merger proposals which it was highly unlikely would have been able to proceed had the Commission not agreed to undertakings given in private. These were the National Foods case, discussed above, and the eventually aborted Wesfarmers attempt to acquire ICI’s Australian assets. The Commission is very hesitant indeed about agreeing to undertakings that are given privately but it does not rule them out totally.

**Concluding Remarks**

In this paper I have discussed a number of international dimensions to competition policy. The ever increasing number of international transactions in the economy points to a need for greater policy efforts at a global level to deal with them. Australia needs to participate in these efforts. One of the key reasons is that there is some danger that international cooperation between such major countries as the United States, the European Union and even Japan will ignore Australian interests. There is some danger that they will look at the effect of cartels or mergers in their own countries and ignore their effects in far away countries like Australia.
Within Australia, globalisation poses important challenges for competition policy. In some respects it eases the task for competition policy. It also means that changes must be made, for example wider definitions of the market as I believe has been occurring at the ACCC.

In many respects however globalisation strengthens the need for a competition law in Australia. If the supply of inputs to our export and import competing industries is done uncompetitively or inefficiently, our capacity to take part in the global economy is harmed.

**APPENDIX A**

**Opposition and Resolution by Undertakings in the last five years**

Over the last five years, 1118 mergers and acquisitions have been considered by the Commission. Of these 13 mergers have been opposed. A further 28 mergers have been resolved by undertakings.

The mergers that the Commission has opposed are as follows:

- Pioneer International Limited & A Class Blocks/Q Blox Concrete Masonry (1996)
- Foxtel & Australis Media (1997)
- Wattyl Limited & Taubmans (1996)
- Cable & Wireless Optus & AAPT (1999)
- Visy Industries Pty Ltd & Stone Container Australia (1999)
- AES Transpower Private Limited & Energy Brix (1997)
- Simsmetal & Wanless (Qld operation) (1997)
- Rexel SA & Metal Manufacturers (1998)
- TNT Australia & Mayne Nickless (1998)
- The Coca-Cola Company & Cadbury Schweppes (beverage brands only) (1998)
- Qantas Airways & Hazelton Airlines (2001)

The mergers that the Commission has approved subject to undertakings are as follows:

- PaperlinX Limited & Spicers (2001)
- Mayne Nickless & Australian Hospital Care (2001)
- Gunns & North Forest Products (2001)
- Wesfarmers & IAMA (2001)
- Australian Pharmaceutical Industries Ltd & Soul Pattinson (1999)
- Ansett Airlines & Hazelton Airlines (2001)
Frito Lay Australia & Smith Snackfood Co (1997)
SCIA & Cremations (Newcastle) Holdings (1997)
Sigma Co Ltd & Amcal (1998)
GWA International & James Hardie (1997)
Adelaide Brighton Limited & ABCL (1999)
Metal Manufacturers Limited & Pirelli Cables (1999)
L’Air Liquide/Air Products & BOC Group (1999)
BP Australia/BP Amoco & Burmah Castrol plc (2000)
Waratah Towage & Hunter Towage Services (1998)
Glaxo Wellcome Australia & SmithKline Beecham (2000)
Smorgon Steel/OneSteel & Email (2000)
Smorgon Steel & Metalcorp (1999)
Austereo Limited & JMB (94.5 FM & PMFM) (1996)