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The Rationale for Mergers Law

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The focus on mergers in competition law comes from a recognition of the link between conduct in a market and the structure of that market. The production, pricing, marketing, selling and research decisions of firms are often largely responsive to the structural aspects of the market. While it is the case that the link between conduct and the underlying structure is not absolute, high levels of market concentration can often lead to a loss of the discipline generated by competitive markets.

Merger law guards against the exercise of unchecked economic power. There is a legitimate fear of concentrated power in its social and political dimension and a desire for the dispersal of power throughout society. The concentration of economic power might lead to the concentration of political power, an outcome, which would be contrary to democratic objectives.

At its simplest level, laws against anti-competitive behaviour such as price fixing, collusion and market sharing may be irrelevant if firms could merge for the purpose of getting around the behavioural laws.

This is not to say that competition agencies should have an inherent bias against mergers. Competition agencies recognise that mergers perform an important role in the efficient functioning of the economy. They allow firms to achieve economies and efficiencies otherwise unattainable. They provide an important discipline on under-performing firms and management.

However, they can also lead to an effect on competition such that there is increased scope for price increases, coordinated behaviour between competitors, and a lessening of the dynamic factors that lead firms to better use of resource and more responsive attitudes to consumer demand.

In the absence of merger law we would see harm to business as suppliers become uncompetitive, inefficient and costly. Those firms exposed to international trade need a competitive and efficient environment for survival. Weak merger laws would lead to higher prices and higher public demand for direct regulation of the concentrated sectors of the economy.
The test: substantial lessening of competition (slc) versus dominance

When the Trade Practices Act (1974) was introduced, the mergers provisions of s50 of the Act prohibited mergers or acquisitions, which resulted in a substantial lessening of competition in a market for goods and services.

The legislation was amended three years later in 1977. The threshold was changed to prohibit mergers or acquisitions, which resulted in or strengthened a position of control or dominance in a substantial market. The rationale for these amendments was to enable mergers to proceed, even to encourage them. The government of the day believed that it was necessary to allow more mergers to take place so that Australian firms could achieve economies of scale and improve international competitiveness.

The Trade Practices Commission (TPC) (1978) noted:¹

“The July 1977 amendments to the Act quite deliberately opened the gate for increased merger activity, and it has in fact been taking place. The only mergers now prohibited are those by which a company acquires or extends control or dominance of a substantial market in Australia or in a State.”

The Act did not provide a definition of dominance. In the Avis case,² the Federal Court listed the following criteria to assess whether Avis was dominant in the rental car market in Australia:

- the degree of market concentration;
- the capacity of the company to determine prices for its services without being inhibited by other firms;
- the extent to which the market is contestable;
- the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion and:


• the character of corporate relationships and the extent of corporate integration.

The TPC (1986)\(^3\) indicated in its merger guidelines that the dominance threshold was unlikely to be breached where:

• two well matched competitors remain in the market; or

• there are a number of small independent competitors with the potential to develop further: or

• there is effective competition from imports.

The TPC suggested that the threshold for an investigation would be where the acquiring firm would have 45\% of the relevant market and would be the largest competitor, or would be the largest competitor and have a market share exceeding that of its nearest competitor by fifteen percentage points or more.

Over time it appeared that the ‘control’ element of the test was irrelevant. Corones (1990)\(^4\) argued that the decision in the Avis case made it clear that ‘control’ was redundant since dominance was less than control. Consequently a firm which ‘controls’ a market must dominate.

Throughout the 1980s and into the 1990s there was considerable debate as to the appropriateness of the dominance test. The Australian application of the dominance test was questioned after a number of significant mergers led to high levels of concentration in major industries. The merger of Coles and Myer created a retail giant, capturing in excess of 20 cents of every dollar of retail sales. The acquisition of the Herald and Weekly Times newspaper group by News Ltd gave News Ltd around 70


percent of newspaper circulation. The acquisition of East West airlines by Ansett returned domestic aviation to a cosy duopoly.

At the same time, economists began to express considerable doubt about the need for domestic firms to dominate their home markets to ensure international competitiveness. Porter⁵ (1990) was particularly influential, arguing that industry structures where one or two large firms dominate should be avoided because such structures generally lack the domestic competitive pressures to encourage them to be efficient and to innovate. Porter argued:

“A strong anti-trust policy, especially in the area of horizontal mergers, alliances and collusive behaviour is essential to the rate of upgrading in an economy. Mergers, acquisitions and alliances involving industry leaders should be disallowed”.

A fundamental problem with the dominance test was that a merger could place a firm in a position to engage in anti-competitive conduct without dominating a market. It does not allow a focus on mergers and acquisitions that may reduce competition in a particular market irrespective of whether dominance has been obtained by a single firm.

Even if the international competitiveness argument in favour of weaker merger laws had some credence, it is relevant only to mergers in the traded goods and services sector of the economy. Substantial parts of the Australian economy are not directly subject to the discipline of import competition. Anti-competitive behaviour in tightly oligopolistic markets where such markets sell into competitive markets subject to import competition might seriously damage the competitiveness of those firms in industries subject to competitive discipline from imports.

A number of Government reviews of various parts of the Trade Practices Act led to the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee)⁶ recommending that the mergers test be changed back to one of substantial lessening of competition. The TPC argued that the underlying philosophy of Part IV of the Trade Practices Act is that any actions which substantially lessen competition in a

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⁶ Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee) (1991) Mergers, Monopolies and Acquisitions. Canberra AGPS.
substantial market, should be prohibited unless authorised on public benefits grounds.
The less rigorous dominance test under s50 was inconsistent with this philosophy and
could have had the effect of encouraging firms to merge for the purpose of avoiding the
more stringent anti-competitive provision of other sections of Part IV.

There were also criticisms that the dominance test had failed to deliver the gains in
efficiency and international competitiveness that would supposedly be achieved by
allowing more mergers. Clarke\textsuperscript{7} argued that the dominance test had in fact weakened
the capacity of Australian industry to compete internationally by reducing the need for
it to compete domestically. He further argued that the dominance test allowed a high
level of public injury before the merger provisions of Australian competition law would
be activated and that such injury could be prevented under a substantial lessening of
competition test.

This issue had also been noted by the dissenting members of the Griffiths Committee\textsuperscript{8}
(a review established prior to the Cooney Committee to review parts of the Trade
Practices Act). The dissenting members stated that market dominance was not an
essential pre-condition to abuse market power and that it was possible for a company to
engage in anti-competitive behaviour without being in a position to dominate its
market.

The dominance test was not without its advocates. Pengilley\textsuperscript{9} strongly opposed the
changes back to substantial lessening of competition. It was claimed that the
dominance test was well understood and more certain. However, there is no evidence
that either test is more certain or well understood than the other. In many instances, a
fundamental point in deciding whether there is a breach of the s50 merger provisions is

\textsuperscript{7} Clarke R. 'Trade Practices Policy and the role of the Trade Practices Commission'. Australian

\textsuperscript{8} Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs
(Griffiths Committee) (1989). Mergers, Takeovers and Monopolies: Profiting from Competition?
Canberra AGPS.

\textsuperscript{9} Pengilley W. Merger Policy: Why did the Cooney Committee answer the Trade Practices
the definition of the market. As Johns notes\textsuperscript{10} it may be the case that fewer mergers are likely to require judgments as to market definition if there is a high threshold for mergers via the dominance test, but this is only because fewer mergers are subject to scrutiny. It is no easier to define a market under a dominance test than one of substantial lessening of competition.

**The merger test, the need for scale and national champion.**

Since the merger test was changed back to one of a substantial lessening of competition, big business in Australia has continually lobbied for a return to the dominance test. One of the most regular complaints is that in a small domestic market firms need to be able to merge so that they will be able to more successfully compete overseas. It is claimed that firms need to reach some ‘critical mass’ in order to achieve economies of scale and scope of sufficient magnitude that they can be competitive in international markets. Proponents of this argument claim that in small markets only one or two firms can achieve this critical mass. Such firms become ‘national champions’ with domestic dominance sufficient to compete in global markets.

According to the CEO of CSR, Peter Kirby:

“To be strong offshore, you need a strong home base. You need to have a secure cash and profit flow to take the risks involved in international expansion. You need a home base which does not unduly distract management attention”.

Weak merger law would inevitably lead to the creation of domestic duopolies and monopolies. There is an inference from the general argument for national champions and the specific comments from Kirby that merger law should allow the development of domestic monopolies for the specific purpose of taking advantage of consequent market power. Put bluntly it is saying ‘Allow us to charge high prices in the domestic economy where we have market power and we will use the profits generated to subsidise overseas expansion’.

Kirby’s\textsuperscript{11} response to such concerns is surprising.

“The criticism that local consolidation would cause customers to pay extra to subsidise overseas expansion, need not be the case. Why can’t my subsequent behaviour be monitored?”

Economists and competition agencies have long recognised that the most efficient form of behavioural monitoring is to maintain competitive market structures in the first instance. Regulation of monopoly power will always be a second best solution when compared to the market discipline brought by competitive markets.

Even many in the Australian business community do not support the national champions approach. A survey conducted by Australian Business Limited\textsuperscript{12} earlier this year found that over 60 percent of businesses surveyed said that more big business mergers should not be allowed in order to create national champions.

The national champions argument is not supported by economic theory or research. Johns\textsuperscript{13} commented:

“Empirical evidence does not support the view that firms in a small economy must command a large share of the domestic market in order to achieve international competitiveness through economies of scale. The emphasis on economies of scale reflects a static view of the sources of competitive advantage. Dynamic factors such as product and process innovations, skill development and improvements in management practices are often more important. It is not clear that these dynamic sources of competitive advantage are strengthened by having few rivals in the domestic market. Indeed the opposite is probably true, since it is competition, which forces firms to upgrade their performance”.

One of the few major Australian studies of mergers and subsequent performance was conducted by the Bureau of Industry Economics\textsuperscript{14} some years ago. The Bureau

\textsuperscript{11}Kirby, P. ‘Is the Branch Office All We Can Aspire To?’ Speech to the Securities Institute of Australia 21 June 2001.


\textsuperscript{13}Johns, B.L. op cit p 662.

\textsuperscript{14}Bureau of Industry Economics (1990) Mergers and Acquisitions Research Report 36 Canberra AGPS.
examined the outcome of three significant mergers, which had occurred under the dominance test in the 1980’s. It found that:

“there was a substantial lag between the mergers and any apparent increase in productive efficiency.”

It is interesting to note that in the three industries studied, pastry products, roofing tiles and automotive batteries, no world class export oriented Australian firm appears to have emerged yet. Perhaps the ‘substantial lag’ has not yet been long enough.

More that a decade ago Porter\(^\text{15}\) found a strong empirical link between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry. He found few examples of national champions, which were internationally competitive. Instead he found that most national champion were uncompetitive despite often being heavily subsidised and protected.

In a more recent analysis of the issue Sakarika and Porter\(^\text{16}\) undertook a detailed analysis of the international competitiveness of Japan. They concluded that domestic rivalry was positively associated with international trade performance. Competition at home fosters success abroad.

Porter (2001)\(^\text{17}\) concluded:

“When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their supplies and firms in related industries will become less productive. This demonstrates the danger in arguments about the creation of ‘national champions’ in an industry in the home market in order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will quickly lose its competitiveness abroad”.

\(^\text{15}\) Porter, M.E. (1990) op cit


A dominance test, such as that applied in Australia between 1977 and 1993, will not lead to a more internationally competitive market environment and is more likely to damage than assist the development of internationally competitive firms.

The branch office economy argument

A variation of the national champion claim that has attracted some attention recently is the so-called branch office economy threat. Some advocates of weaker merger laws have claimed that the application of a substantial lessening of competition test to mergers forces Australian firms to move their headquarters offshore. While not very clearly articulated it would appear that the claim is that merger law prevents firms from acquiring domestic rivals so they are forced to grow overseas and then will move their headquarters offshore.

The President of the Business Council of Australia, John Schubert claimed\(^{18}\) that if merger law was relaxed Australian firms would be able to grow bigger in Australia and thus the move offshore would be delayed.

It is difficult to understand any logic behind this claim. Firms will typically undertake investment which provides the best returns. In many instances that will be overseas. Such decisions are not necessarily related to a perceived inability to acquire domestic rivals. Further, Schubert appears to be arguing that even if merger law was significantly watered down to allow domestic firms to achieve monopoly power at the expense of domestic consumers and businesses, the move offshore would be delayed at best.

The reality is quite different. A recent survey of offshore investment by Australian firms undertaken by the Productivity Commission (2002)\(^{19}\) concluded that Australian mergers regulation did not rate as a major influence on respondents’ decisions to produce or relocate offshore. It found that merger law ranked lowest among

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commercial and government related factors identified as likely to influence decisions about locating headquarters overseas.

**Application of merger law in Australia**

Section 50(3) of the *Trade Practices Act* provides a non-exhaustive list of factors, which must be taken into account in determining whether an acquisition would have the effect or likely effect of substantially lessening competition. Those factors are:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristic of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor: and

(i) the nature and extent of vertical integration in the market.

Section 4G of the Act provides that for the purposes of the Act, references to the lessening of competition include references to preventing or hindering competition.

The extent of international competition is specifically taken into account in Australian merger analysis. Import competition is specifically listed as a factor, which the Commission is required to consider.
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 pre-merger notification requirements, with Australia being among the exceptions.

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 to be vigilant about global mergers.

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

A significant issue is whether in Australia or indeed in other smaller countries global mergers pose an economic threat that competition agencies are unable to deal with.

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 are not a major concern 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?

Generally they are not, although there may be some exceptions to this generalisation. 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 offshore 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 this 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 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 the merging of the two sets of brands, ie,
Coca-Cola brands and the powerful international brands of Schweppes. Proposed
undertakings 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.

When BHP, Australia’s major steel company at the time, 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.
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 Commission has long recognised that globalisation changes the boundaries of many markets. Competition may come from sources other than domestic firms. The Commission has accepted that imports can be a most significant constraint on the exercise of domestic market power. It has not objected to any merger where comparable and competitive imports have held a sustained market share of 10 percent or more for at least three years.

In its application of this general rule, the Commission has actually been even more liberal. It is not the historical share of imports which is the significant factor influencing current market power, but the potential of imports to constrain the future price and output decisions of the merged firm. Consequently, the Commission has in some instances, not objected to a merger proposal, even where imports were less than 10 percent but there was still the strong potential for imports to constrain domestic market power.

For example, some years ago the Commission did not oppose the merger of the whitegoods manufacturing facilities of Email and Southcorp despite the merger leading to a single domestic manufacturer. Imports were strong and easily sufficient to constrain the domestic monopoly. More recently the Commission did not oppose the merger of Ardmona and SPC, Australia’s only producers of canned fruit despite the fact that imports of canned fruit accounted for less than 10 percent. Market inquiries revealed that there has been a glut of canned fruit on world markets for many years. The product is highly tradeable and import and domestic distribution is not difficult.

Mergers in the traded goods sectors of the economy rarely generate major competition issues. The Commission’s focus of concern is more typically on the non-traded sector.
The competitiveness of the trade-exposed sector depends to a high degree on the competitiveness of the non-traded goods sector that supplies many essential inputs to traded goods. The analysis of mergers and the application of a substantial lessening of competition test in service and infrastructure industries is essential, to ensure that the traded goods sector is not subject to rising domestic costs brought about by abuse of market power of their less competitive suppliers.

**Authorisation and enforceable undertakings**

The substantial lessening of competition test is designed to maintain competitive markets. However, the *Trade Practices Act* recognises that there may be circumstances where the costs associated with anti-competitive conduct are not as great as the benefits, which also accrue from such conduct. Thus, the community would be better off if the conduct is allowed to continue even though it is anti-competitive. This is the rationale behind the authorisation process.

Authorisation is a process of granting immunity, on public benefit grounds, for mergers and acquisitions, which would or might otherwise contravene s50 of the Act. Once authorisation is granted, neither the Commission, nor the Minister, nor third parties can take action under the Act to overturn the acquisition.

Authorisation is a subsequent and separate step from the competition assessment contained in s50. It is a highly transparent process. It has a rigorous testing of claims through public consultation with rights of recourse to administrative review. It is important that such a process be separate and public: in granting authorisation the Commission is giving immunity from a significant economic principle. It is allowing firms to substantially lessen competition, and thereby gain substantial market power, even monopoly power.

It is not unreasonable therefore to expect that there should be a thorough testing of public benefit claims and that there should be scope for participation in the process by parties likely to be affected such as customers (both consumer and business), competitors, suppliers and others.

In making its evaluation the Commission adopts the approach set out by the former Trade Practices Tribunal (now the Australian Competition Tribunal) of comparing the
position that would apply in the future were the proposed acquisition not given effect, with the position in the future which would arise if the proposed acquisition occurred. This effectively requires an integrated analysis and weighing up of public benefit and public detriment.

Public benefit is not defined in the Act, except to the extent that it requires that significant increases in exports or import replacement be considered as public benefits and that the Commission take account of all relevant matters relating to international competitiveness.

The Tribunal\textsuperscript{20} did indicate that the term should be given its widest possible meaning;

\begin{quote}
“anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements…the achievements of the economic goals of efficiency and progress”.
\end{quote}

The Commission has taken a broad approach to public benefit and has identified a range of matters which could constitute public benefit including:

\begin{itemize}
\item economic development;
\item fostering business efficiency, especially where this results in improved international competitiveness;
\item industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
\item expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
\item industrial harmony;
\item assistance to efficient small businesses, such as guidance on costing and pricing or marketing;
\end{itemize}

\textsuperscript{20} Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd (1976) ATPR 40-012 at 17,245
• initiatives which promote competitiveness;

• improvement in the quality and safety of goods and services and expansion of consumer choice;

• supply of better information to consumers and businesses to permit informed choice in their dealings;

• promotion of equitable dealings in the market;

• promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;

• development of import replacements;

• growth in export markets; and

• steps to protect the environment.

The Commission’s decision can be reviewed by an application to the Tribunal. An application for review may be made by the applicant for authorisation or by any person the Tribunal is satisfied has a sufficient interest in the matter. When the Tribunal undertakes its review it is more than an examination of the Commission’s findings or procedures. It examines the matter on the basis of material placed before it, which may include material not provided to the Commission.

The authorisation process provides considerable scope for firms to get mergers completed even where they have anti-competitive consequences. It is an option not available in many other jurisdictions. It is able to incorporate a wide range of matters into its analysis.

Australia’s authorisation regime has received critical acclaim for its ability to incorporate efficiency considerations into the merger investigation process. According to Griffin and Sharp, Griffin, J.P. & Sharp, L.T. ‘Efficiency issues in competition analysis in Australia, the European Union and the United States’ Antitrust Law Journal 64(s) Spring 1996 pp 649-682
“Australia,…is currently more progressive in its incorporation of efficiency considerations to proposed mergers than the European Union and the United States. Australia now appears to be the most progressive of the three jurisdictions considered here in its application of economic tools and adaption to the globalisation of business”.

**Authorisation applications**

There have been a number of significant merger authorisation applications. Not all applications have been successful. Some of the most prominent cases are outlined below.

1. *Adelaide Brighton/Cockburn Cement.* This was a commission determination on an authorisation application for a merger which, in its view, reduced competition in the markets for cement and lime in certain areas of Western Australia. However, public benefits, including rationalisation benefits as well as increased competitiveness in all other markets in Australia, partly arising from the international experience and financial strength of Rugby Cement of the United Kingdom (which would become involved in the ownership structure) was considered to justify the authorisation. This is an example of a merger which substantially lessened competition in one market (and, therefore, likely to contravene the Act) but which gave rise to preponderant public benefits, including increased competition, in various collectively wider, markets, which could be authorised. Section 87B undertakings were offered and accepted by the Commission, which included certain conditions, to reduce the anti-competitive detriment of the merger.

2. *Davids/Composite Buyers Limited.* This was a merger in the grocery wholesaling sector of supermarket distribution, which resulted in ‘monopoly’ provision of such services to independent supermarkets. The anti-competitive effect was assessed as limited, because a wholesaler’s market power was heavily constrained by the large, integrated supermarket chains. On the other hand, substantial productive efficiencies, a significant proportion of which were likely to be passed on to consumers, were accepted as being of sufficient public benefit to justify the authorisation.
3. *DuPont/Ticor.* This was a merger in the sodium cyanide market. The product is used to extract gold from ore by leaching out impurities. The world market was highly concentrated with only three producers, two of which operated in Australia. Ninety per cent of domestic demand, which was growing, was satisfied by the domestic producers, with DePont the major importer. Despite the anti-competitive risk from potential cooperative arrangements arising out of high domestic market concentration and the removal of DuPont as an independent importer, the Commission authorised the merger because increased domestic production, although unlikely to generate exports due to growing domestic demand, was likely to replace imports, the volume of which was likely to otherwise increase.

4. *Wattly/Taubmans.* This was an application for authorisation to enable the second largest manufacturer of architectural paints in Wattyl, to acquire the third largest manufacturer of architectural paints in Taubmans. The number of significant players in this market would have been reduced from three to two and the Commission believed that the detriment to competition would not have been insubstantial. The fact that the merger would give rise to increased Australian ownership was considered to be a public benefit, but not sufficient to warrant the potential anti-competitive detriment caused by the merger. In this case, the Commission believed that the reduction in the number of big producers from three to two would have made price increases more likely, to the detriment of consumers. The Commission opposed this authorisation application.

Section 87B of the Act allows the Commission to accept legally enforceable written undertakings in connection with matters where it has the power or function under the Act. They provide a flexible alternative to simply opposing an acquisition where the Commission believes the acquisition is likely to substantially lessen competition.

The Commission provides merger parties with an explanation of its reasons when it believes a merger proposal will breach s50. Merger parties might then provide the Commission with undertakings designed to address those concerns.

In the case of merger undertakings, the Commission has favoured those, which attempt to address the market structure. Structural undertakings often involve the divestiture of identifiable assets of the merged businesses to a new entrant or an existing smaller
player in a particular market. They are generally more effective in maintaining competition and are more easily monitored and enforced that undertakings that require merger parties to behave in particular ways.

The above examples show that:

- anti-competitive effects in some areas, outweighed by the benefits of efficiencies from rationalisation and increased competition generated by the merger, justifies granting authorisation;

- productive efficiencies which enhanced competitiveness and which were likely to be passed on to consumers have been accepted as public benefit; and

- international competitiveness has been accepted as a reason to allow mergers where that benefit exceeds the anti-competitive detriment.

Applying Australian merger law

Notification of mergers is not compulsory in Australia. However, the Commission encourages parties to approach it, on an informal basis, as soon as there is a real likelihood that the proposed acquisition may proceed. Australia’s position is different to that of most other countries. Many jurisdictions have formal notification for requirements for mergers, including the United States, the European Union and Japan.

The voluntary, informal notification system has, on balance, resulted in administrative efficiencies and a comparatively light regulatory burden on firms. The merger notification system of other countries has been criticised because of the compliance burden it imposes, especially given that many transactions raise no anti-competitive issues.

The informal process tends to result in expeditious turnaround of merger proposals. In less complex matters the Commission tries to complete its analysis within 10 to 15 calendar days of receiving a submission from the parties. More complex matters or those that appear to cross the Commission’s merger concentration thresholds require more extensive analysis.
The informal process provides merger parties with opportunity to seek preliminary assessment of a merger proposal on a confidential basis. This option is not always available under systems of formal notification. A confidential assessment allows the parties and the Commission to discuss any issues that may be identifiable without market inquiries and provides the parties with an opportunity to consider their response prior to the proposal becoming public.

Of course the Commission would not provide unconditional advice that there was no breach of the merger provisions while the transaction remained confidential. Nevertheless, it is possible for the informal system to provide merger parties with some degree of certainty prior to any public announcement of the proposal.

Some critics of the Australian approach have claimed that there is sometimes a lack of transparency in Commission processes. The Commission does not publish merger decisions. Most mergers do not generate competition issues and publication is likely to contribute little but increase administrative formality. The Commission provides merger parties with extensive feedback of its views in those cases where in the Commission’s view, the proposal is likely to breach the Act. It might be possible for the Commission to publish more merger decisions if a formal process of notification with specific information requests and public provision of information by the merger parties was introduced.

However, despite the criticism, there is little evidence that the informal process needs to be replaced. The legal profession has in the past endorsed the Commission’s informal clearance process with the Law Council of Australia\(^22\) commenting that:

> “The Trade Practices Committee of the Law Council believes that the existing informal notification system works very well…informal clearance is an important service provided by the ACCC to the business community, and plays an important role in the efficient regulation of merger activity in the Australian economy”.

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Merger statistics

Merger statistics show that the number of mergers the Commission opposes is quite small. While the number of mergers examined has been steadily rising, the percentage opposed remained very low.


Of the 265 assessed in 2000-2001, 13 were opposed. Of that 13, ten proceeded following the provision of undertakings.

Some mergers in the traded goods sector have resulted in domestic sole suppliers or near sole suppliers. In these sectors arguments about the need for critical mass are strongest and in these sector mergers rarely are opposed.

Between 1975 and 1992 the Commission examined 38 merger authorisation applications at an average rate of 2.1 applications per year. Of those 22 were granted, 15 were denied and one was withdrawn.

Since the substantial lessening test was reintroduced in 1993 the Commission has examined 12 merger authorisation applications at an average rate of 1.2 applications per year. Of these 12 applications, seven were granted, four were denied and one was withdrawn. Overall, the Commission has granted more than 50 percent of merger authorisation applications.

Conclusion

There is no substantive evidence that the substantial lessening of competition is damaging the Australian economy. Recent criticism that the Commission has an anti-merger bias is not supported by evidence. Very few mergers are opposed. Nor is Australia’s regulatory stance on mergers inconsistent with that of most countries. The United States, Canada and New Zealand have a substantial lessening test in regard to mergers. The United Kingdom is moving to enact a substantial lessening test. The European Union published a Green Paper in 2001 that examined the possibility of changing its merger law to substantially lessening test. Even now, the collective
dominance test and the manner of its assessment are similar to that undertaken by the Commission.

Competition plays a vital role in promoting economic efficiency. The weight of evidence is that strong domestic rivalry is an important contributing factor to the international success. Such rivalry comes from strong merger law embodied in a substantial lessening of competition test. Dominance tests harm the efficient operation of the economy and benefit only the merger parties. An appropriate end is to note that the Chairman of the Mayne Group, Peter Smedley, was recently reported in The Australian newspaper, ‘I don’t think I have seen a player hurt in a duopoly’.