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The Effect of International Mergers and Takeovers on Competition in Australia: Probabilities and Possibilities.

The Role of the ACCC

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The effect of international mergers and takeovers on competition in Australia: probabilities and possibilities. The role of the ACCC. Some local case histories that may clear the air.

The last eighteen months has seen a dramatic increase in the number of global mergers including Guinness Plc / Grand Metropolitan Plc; Price Waterhouse / Coopers & Lybrand; and PepsiCo / United Brands (Smith's Snackfoods). Furthermore, this trend shows no signs of abating as is evidenced by the current proposals before the Commission involving Exxon / Mobil; Coca Cola / Cadbury Schweppes; and British American Tobacco / Rothmans International. The impact of this increased merger activity is resulting in a number of interesting challenges for industry, the Australian Competition and Consumer Commission (Commission) and other overseas competition regulators. The Commission also notes that in reference to globalisation, a number of Australian companies are looking at offshore mergers and acquisitions as well.

The Commission recognises that many of these mergers are driven by a need to cut costs, increase productivity, enhance efficiencies of scale and a range of other reasons which are often driven by a desire to remain competitive in a global marketplace. Naturally the Commission will approach each merger proposal on a 'case-by-case' basis and will evaluate an international merger on its merits. The Commission is, however, concerned that there appears to be an assumption by some players that Australia will be forced to accept a merger between Australian subsidiaries of two overseas companies merely because the parent companies are merging. This is a view that needs to be dispelled as it is essential to the welfare of all Australians that the Australian economy remains competitive and the Commission will not approve a merger if it is likely to result in a substantial lessening of competition.

The *Trade Practices Act* through sections 50 and 50A provide the Commission with the necessary legislative tools to ensure that any mergers or acquisitions that occur in Australia whether they be Australian companies or the subsidiaries of overseas companies do not result in a substantial lessening of competition. My aim today is to give a general outline on how the Commission deals with both domestic and global mergers and I will use some case studies to highlight how the Commission has dealt with a range of issues that arise with a global merger.

History

Over the more than twenty year life of the Trade Practices Act, mergers have probably received more publicity than most other matters. They have also featured prominently in litigation undertaken by the ACCC, and its predecessor the Trade Practices Commission.

Given the emphasis on mergers in recent years, it is somewhat surprising that early anti-trust legislation lacked specific provisions against mergers. In Australia, the *Trade Practices Act* passed in Australia in 1965, and its 1971 successor, lacked a specific mergers provision. It was not until the 1974 Act was passed that this was rectified. Essentially, early legislation that was intended to deal with trade practices focused on conduct and did not seek to limit future problems by considering the implications of structural changes resulting from mergers.

Why The Focus On Mergers?

Merger and acquisition analysis constitutes an important part of the ACCC's work. Section 50 of the Act prohibits acquisitions which would be likely to substantially lessen competition in a substantial market in Australia, in a State or in a Territory or are likely to do so. This section was amended in 1993 from one which prohibited acquisitions that were likely to create or strengthen dominance of a market, to one which prohibits acquisitions that are likely to have the effect of substantially lessening competition in a market. The newer test encompasses firms with a lower threshold of market power, and permits consideration of the potential for the exercise of coordinated market power. The adoption of the substantial lessening of competition test in 1993 constituted a return to the test which operated at the time the Act first became law in 1974. Section 50 operates subject to the ACCC's ability to authorise (grant legal immunity to) mergers which would be likely to result in such a benefit tot he public that the acquisition should be allowed to take place.

The ACCC also examines joint ventures in a similar way. Although the reasons why parties enter into mergers and joint ventures might be substantially different, the ACCC's interest lies in the effect they have on a market. In most cases, the effects of mergers and joint ventures are very similar.

The primary reason for being concerned about mergers and joint ventures, especially between direct competitors, is that they increase the likelihood that the merged firm would have greater scope to set prices above the competitive level, or otherwise distort competitive outcomes, either alone or in coordination with other firms in the same market. Even so, the great majority of matters that are referred to the ACCC do not pose significant competition issues.

In 1997-98, of the 176 matters considered by the ACCC, only 5 were opposed.

The ACCC Approach to Mergers

I would now like to comment briefly on the approach that the Commission follows when assessing merger proposals. This process is substantially the same regardless of whether it is a purely domestic merger or whether the merger forms part of an international merger.

As a guide for industry, the Commission published its revised Merger Guidelines in 1996 setting out the process for, and issues relevant to, its administration of the merger provisions. The guidelines do not bind the Commission, but they provide parties with an indication of what the Commission considers when investigating mergers and importantly indicate to industry what the Commission is looking for in a submission outlining a proposed acquisition. These Guidelines are currently being finetuned and the new Guidelines will be available within the next couple of months.

The guidelines provide a five stage process for the Commission's assessment of substantial lessening of competition. The steps are:

> **Market definition**. In establishing the market boundaries, the Commission seeks to include all those sources of closely substitutable products, to which consumers would turn in the event that the merged firm attempted to exercise market power. A market involves four dimensions namely: product, geographic, functional and time.
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> **Market concentration** ratios are assessed. If the market concentration ratio falls outside the Commission's thresholds, the Commission will determine that a substantial lessening of competition is unlikely. The Commission looks at concentration in two separate ways. The first assesses the post-merger combined market share of the four largest firms (CR4) and the Commission will examine the

matter further if their market share is over 75 per cent of the market and the merged firm will supply at least 15 per cent of the relevant market. Secondly, if the merged firm will supply 40 per cent or more of the market, the Commission will want to give the merger further consideration.

Potential or real **import competition** is looked at. If import competition is an effective check on the exercise of domestic market power, it is unlikely that the Commission will intervene in a merger.

Barriers to entry to the relevant market. If the market is not subject to significant barriers to new entry, incumbent firms are likely to be constrained by the threat of potential entry, to behave in a manner consistent with competitive market outcomes. A concentrated market is often an indication that there are high barriers to entry.

Commission looks to **other factors** which are outlined by the legislation (s50(3)). They include whether the merged firm will face countervailing power in the market, whether the merger will result in the removal of a vigorous and effective competitor, or whether the merger is pro-competitive, not anti-competitive.

Critical Mass Arguments

Business people frequently raise the question of whether or not the merger provisions of the *Trade Practices Act* prevent the mergers necessary for Australian firms to be of the size necessary to take part in global markets. The answer to this is rarely, if ever, and, if so, then only in circumstances where it is on balance undesirable because of the anti-competitive effect in the Australian market.

It is often argued that Australian industries need to develop the “critical mass” necessary to compete internationally. However, I think it is important to point out that obstacles to export growth may face industry participants of all sizes. It is not apparent that, simply by entering a collaborative arrangement like a merger or joint venture, a participant’s ability to compete internationally is enhanced. Size is often not necessary to enhance the ability to compete on world markets. It has been convincingly argued that, in many cases, domestic rivalry rather than national dominance is more likely to breed businesses that are internationally

competitive. When firms merge with the aim, for instance, of enhancing exports, there is the prospect that domestic prices may rise until they reach import parity (if the goods were previously priced below import parity) while exports are at a lower price. A merged entity may use its market power to increase domestic prices and so subsidise its export price. Ultimately, Australian consumers and industry may be forced to pay a higher price in order to underpin the merged entity's export sales. A report last year to the government which reviewed business programs in the context of an increasingly competitive global market noted that a lack of domestic competition was one of a number of impediments to building globally sustainable firms in Australia.

While size may not be necessary to enhance export opportunities, correct and complete market information is crucial. Small and medium sized enterprises may be disadvantaged when it comes to having access to adequate information -something that is often claimed to be an advantage of operating under a single desk system. However, ongoing improvements in information technology and electronic commerce suggest that this is likely to be less of an issue in the future.

Global mergers

I would now like to address some of the specific issues that arise in relation to Global mergers. One of the principal points to note is that it is now settled law that the Commission has the power to deal with a merger that is primarily an overseas merger. From the point of view of precedent, an important global merger that the Commission dealt with was the *Gillette / Wilkinson Sword* merger.

Gillette Wilkinson Sword

On 27 August 1992 the Commission instituted proceedings against The Gillette Company, and others in relation to the 1990 worldwide sale of the Wilkinson Sword wet shaving business by the Swedish Match Group of companies. As a part of that sale, The Gillette Company (a US company) acquired, in effect the non-European union based Wilkinson Sword wet shaving businesses worldwide. The Gillette Company also financed (and took an

equity interest in) the management buyout (through a company called Eemland) of the European Union based Wilkinson Sword wet shaving businesses.

The Gillette Company was, following action by the US Department of Justice, subsequently required to sell the US Wilkinson Sword wet shaving business back to the management buyout company, Eemland. Eemland was, as a result of action by the EC competition regulators, subsequently forced to divest the entire European Union based Wilkinson Sword wet shaving businesses.

In New Zealand the acquisition by The Gillette Company of the NZ Wilkinson Sword wet shaving business was cleared by the NZ Commerce Commission.

In Australia, The Gillette Company accounted for about 50 per cent of all wet shaving products sold and Wilkinson Sword for about 17 per cent. The Commission was concerned that, in the event that the Gillette Company acquired control of the Australian Wilkinson Sword wet shaving business, it would dominate the Australian wet shaving market. In mid-June 1991, The Gillette Company advised the Commission that it had completed the acquisition of the Australian Wilkinson Sword wet shaving business through a series of offshore transactions involving New Zealand companies which had not carried on business in Australia. These New Zealand transactions were done in such a way that it appeared that they fell outside of the extra-territorial scope of the *TPA*.

The transactions were entered into without notice to, or being conditional on the approval of, the Commission.

The Commission claimed that s.50 applied to the overseas transaction and the assignment of the trademarks to the foreign Gillette Company.

The Gillette Company vigorously opposed the Commission proceedings and claimed that:

- the Federal Court had no jurisdiction over it as it was a foreign company which did not carry on business in Australia;

- s.50 of the *TPA* did not apply to the acquisition of the Australian Wilkinson Sword wet shaving business, as alleged by the Commission, as it was an offshore transaction;

- the Commission had not sufficiently alleged, or established at a prima facie level, any breach of s.50 of the Act; and
- sub-sections 81(1) and (1A) of the *TPA* which provide for the divestiture of assets or shares acquired, and the setting aside of acquisitions entered into, in breach of s.50, were unconstitutional.

The Gillette Company raised these matters before the Federal Court, Full Federal Court and the High Court. The Gillette Company was unsuccessful in these claims. In particular, the Court held that:

- there was prima facie evidence that The Gillette Company carried on business in Australia;
- the Gillette Company was subject to the jurisdiction of the Court;
- the Commission had established, prima facie, that The Gillette Company was subject to the *TPA* and that, prima facie, s.50 applies to the Australian part of the worldwide transaction notwithstanding that the transaction was entered into overseas;
- there is prima facie evidence that the conduct that the Commission has alleged in the Statement of Claim has occurred and that the conduct would constitute a breach of s.50; and
- sub-sections 81(1) and (1A) are constitutionally valid.

Subsequently, The Gillette Company approached the Commission and proposed settlement whereby, pursuant to an undertaking to be given by The Gillette Company to the Court, the Wilkinson Sword business in Australia will be licensed to and operated by a company fully independent of and unrelated to The Gillette Group of companies.

Not All Global Mergers Have an Impact on Competition in Australia

At any given moment in time there are a number of global mergers but not all of them have a direct impact on the Australian market. First, many, probably most global mergers do not have the effect of substantially lessening competition in any market in any country, just as

most mergers in Australia do not substantially lessen competition (as evidenced, for example by the small number of Australian mergers opposed by the ACCC).

Second, potentially anti-competitive global mergers are usually stopped (or modified) by regulators in North America, Europe and sometimes elsewhere.

Third, some global mergers may have little effect in Australian because the possible anti-competitive effects are mitigated by import competition. For example, the ACCC would need to look at any major global motor vehicle manufacturer mergers but that sector does see significant imports into the Australian market. Other mergers may cause concerns overseas without causing any competition concerns in the Australian market. An example of this type of merger was the merger between Guinness Plc and Grand Metropolitan Plc.

Guinness Plc /Grand Metropolitan Plc

Guinness Plc announced in late 1997 that it proposed to enter into a worldwide merger with Grand Metropolitan Plc.

Guineas Plc is involved in the production, marketing and sales of spirits and beers around the world, publishing and hotels. In Australia, Guinness spirit products were distributed by its local subsidiary United Distillers (Australia). Grand Metropolitan is a consumer goods company involved in food manufacturing, fast food restaurants, pubs and the production and marketing of distilled spirits. In Australia, GrandMet brands were distributed by Swift & Moore under an agency arrangement.

The Commission considered that the spirit industry was highly brand oriented and products tended to be marketed as individual brands rather than under the brand name of the supplier. Further, each brand tends to be specific to a particular category, and brand extensions do not usually cross spirit categories. The Commission found that the merged entity would control a number of category leaders but that the merger was likely to increase concentration only in the vodka and gin categories. The Commission concluded that the effect of the merger on concentration in scotch, which is the largest spirit category, would be minimal.

Because of the worldwide nature of the merger the Commission had discussions with competition regulators overseas including the New Zealand Commerce Commission, the United States Federal Trade Commission (FTC) and the Canadian Competition Bureau. The

regulators had different concerns based on the market conditions existing in their respective jurisdictions. Consequently, the merger proceeded with no divestiture requirements in Australia but with divestiture required in some of the other jurisdictions. On 16 October 1997 the European Commission announced that it had cleared the merger subject to conditions, including the divestment by the merged company of some brands on a regional or Europe-wide basis. On 15 December 1997 the FTC gave tentative approval to the merger after the companies agreed to divest their worldwide rights to Dewar's Scotch, Bombay Original Gin, and Bombay Sapphire Gin.

Globalisation of Competition Laws

Competition laws are rapidly reaching a level of maturity in several countries resulting in companies participating in a global merger being forced to address competition concerns that may arise in several jurisdictions simultaneously. On the one hand, this may raise the transaction costs for the companies involved and if not addressed has the potential to deter some beneficial mergers. On the other hand, all countries have the right to examine a merger proposal to ensure that it will not have a detrimental impact upon that country's domestic market. It is, therefore, important to find a medium that adequately addresses both points.

From a regulatory perspective it is beneficial to have a strong working relationship with competition agencies in other jurisdictions as this may assist the relevant agencies with their own enquiries. One possible solution for greater co-operation between countries could be through a uniform notification procedure for transnational mergers. This could result in countries adopting a basic set of questions which the merging parties would need to provide to all relevant competition agencies. Information which should be included would be matters such as: identifying the parties to the merger; a description of the merger; description of the activities of the parties in the relevant country; identifying the markets which the merger would impact upon both horizontally and vertically; and including certain key documents such as the contractual documents covering the sale and annual reports for the parties involved. A uniform notification procedure would assist the work of the regulator and may also reduce transaction costs for the merging parties by reducing the duplication of regulatory requirements in the different countries.

It must be stressed that any notification system is likely to be in addition to existing national laws as there are substantial differences in the merger control provisions of different countries. The impact of a uniform notification system could, however, have two beneficial side effects. First, it may lead, over time, to a gradual harmonisation of merger provisions. Secondly, the information that would be sought is material that would, in any event, need to be prepared for all the regulators involved in the process. This could result in reduced transaction costs for the parties and lead to enhanced co-operation between regulators as they have the same core information to work on.

This process of a uniform notification procedure is, however, only in its infancy and has more relevance to those jurisdictions where there is compulsory pre-merger notification. Australia does not have a legislated pre-merger notification or merger clearance system. Parties are not required to inform the ACCC of their intention to enter into transactions, but many choose to do so.

Current Co-operation between the regulators

Even without uniform notification provisions there has been an increase in the level of co-operation between regulators. Confidentiality requirements are one of the key issues limiting greater co-operation between regulators. It is, however often in the companies best interest to waive confidentiality requirements in order to enable information sharing between regulators as this is likely to enhance the processing of the merger enquiries. The Coopers and Lybrand / Price Waterhouse merger involved a high degree of co-operation between different regulators.

Coopers and Lybrand / Price Waterhouse

The Commission was informed in November 1997 that Coopers and Lybrand / Price Waterhouse intended to merge their operations globally. This matter was complicated by an announcement that KPMG and Ernst & Young were also considering a global merger. This would have resulted in the 'big six' becoming either the 'big five' or 'big four'. The big six accounting firms operated in the markets for auditing and accounting; corporate recovery and

insolvency; taxation advice; corporate financial services; management consulting; and actuarial services.

The merger raised similar issues in the United States, Canada and Europe. The parties were, therefore, approached by the Commission, the Department of Justice in the US, DG IV in Europe and by the Canadian Bureau of Competition to waive confidentiality for information exchange between all four competition agencies. The parties did not have any objections to the information sharing which enabled the Commission to share information with the other regulators.

The Commission was able to finalise its own enquiries and announced on 13 March 1998 that the merger was unlikely to substantially lessen competition in Australia. Similar decisions were reached in other jurisdictions enabling the parties to complete the deal. The KPMG / Ernst & Young merger was called off by the parties for commercial reasons.

Possible Solutions to Competition Concerns

I would now like to cover some of the methods that may be used to address certain competition concerns. I must, however, stress that there is no set formula for every case and what is suitable in one case may not be suitable in another.

Authorisation

One of the most powerful tools available to a company that risks breaching s.50 is to seek an authorisation. Australia, unlike many other countries provides for the possibility of granting an authorisation which permits a party to be in breach of the *TPA* in the event that there are public benefits to offset the competition concerns. Since 1993, the *TPA* has explicitly stated that export generation, import replacement or contributions to the international competitiveness of the Australian economy are public benefits.

Clearly the framework of the *TPA* is not an obstacle to allowing Australian firms to merge to achieve the scale necessary for international competitiveness providing there is a sufficient public benefit. There are in fact many cases where authorisations have been permitted. Over half of authorisations have in fact been successful. A number of them have related to cases where the merger would cause a substantial reduction in competition in Australia but would

bring international type benefits. The ACCC's publication on 'Exports and the Trade Practices Act' provides a number of case studies including the DuPont/Ticor merger authorisation (1996) which illustrates the Commission's approach to international issues in an authorisation application. The publication identifies the kinds of arguments which the Commission considers most relevant to claims for mergers that will enable Australian firms to take part in world markets, even where the effects may be anti-competitive in the home market. There are of course instances in which the trade off of loss of competition in the home market versus benefits to Australia from a firm playing a role in world markets is unfavourable in terms of the public interest and in some cases mergers create monopolies or 'home champions' in the home market. They are not necessarily firms well prepared to compete in world markets as Professor Michael Porter's study, The Competitive Advantage of Nations demonstrated. ("Exports and the Trade Practices Act" also lists a number of other mergers where the Commission has taken into account the global nature of markets and the competition constraint imports place on Australian industry, for example, Dow Chemical/Huntsman Chemical, Chemcor/Hoeschst Plastics, ICI Australia/Auseon.)

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DuPont/Ticor

DuPont and Ticor applied for authorisation for *inter alia* a joint venture between their subsidiaries to take over and expand Ticor's sodium cyanide manufacturing plant. Sodium cyanide is a chemical agent that is essential for the extraction of gold from its ore.

The industry has a high concentration internationally, with only three major international producers of sodium cyanide, two of whom had significant shares of the Australian market. The Australian market was close to self sufficient, with about 90 per cent of domestic demand satisfied by domestic production. DuPont was the major importer of sodium cyanide into the Australian market.

The Commission considered that there was potential for anti-competitive conduct, stemming mainly from the entrenchment of the existing market structure and the limited role imports were likely to play in imposing a competitive constraint on domestic prices. With DuPont, which previously was the major importer of the product, removed as a potential entrant in its own right the joint venture would reduce the effectiveness of imports as a competitive constraint.

The Commission considered that the undifferentiated nature of the product, combined with the oligopolistic nature of the industry, had the potential to lead to cooperative arrangements between the major players at the expense of competition.

In its determination of public benefits the Commission accepted that increased production would satisfy increased demand otherwise likely to be satisfied by imports, thereby assisting Australia's external trade account over the medium to long term. While it was questionable whether significant export of the product would be forthcoming (due to the increase in domestic demand expected), this did not detract from the import substitution benefits. The authorisation was granted.

Divestiture

It is interesting to note that the majority of global transactions before the Commission relate to consumer goods. These include British American Tobacco/Rothmans International, Coca Cola/Cadbury Schweppes, and Pepsico/United Biscuits (Smith's Snackfoods) which involved strong brands and trade marks. Australia is generally seen as a significant market where brands and trade marks do have value. Therefore, there is a possibility in some mergers to transfer certain brands or trade marks to an independent third party in order to alleviate the possible anti competitive effects of the proposed merger.

If the Commission reaches the conclusion that a merger is likely to substantially lessen competition it is difficult to accept that an overseas company would let the affected brands/operations diminish in value. The brands themselves are worth significant amounts of money and the companies would maintain or seek value to them. With global mergers it may be possible to structure deals to overcome the specific competition concerns in Australia. The PepsiCo/United Brands (Smith's Snackfoods) is a good example of a case where the Commission's competition concerns were overcome through the divestiture process.

PepsiCo/United Brands (Smith's Snackfoods)

In November 1997 the Commission was notified by PepsiCo, the USA parent company of Frito-Lay Australia, that it intended to acquire from United Biscuits (Holdings) Plc a number of businesses including The Smiths Snackfood Company.

PepsiCo advised the Commission that as a condition of the acquisition it intended to divest a portfolio of brands and production facilities sufficient to ensure that the acquisition did not result in a substantial lessening of competition. The Smiths Snackfood Company produces such Australian brands of salty snack foods as Smiths Original Potato Chips and Twisties.

After conducting market inquiries the Commission formed the view that, without simultaneous divestment, the acquisition would result in a substantial lessening of competition. It was concerned to ensure that divestment created a vigorous and effective competitor with the ability to constrain the actions of Frito-Lay in Australia.

To this end the Commission obtained an undertaking from PepsiCo that it would complete the acquisition of The Smiths Snackfood Company only in conjunction with a simultaneous

divestiture of assets. Undertakings were also obtained to ensure the smooth transition of the sale assets to Dollar Sweets.

The divestiture process resulted in the creation of Snack Brands Australia, which will own the original Frito-Lay production facilities and several Australian brands such as CC's and Cheezels. The buyer identified for Snack Brands Australia was Dollar Sweets Holdings, owner of Players Biscuits as well as AV Jennings Homes. It considered that, owned by Dollar Sweets, Snack Brands would have the benefit of a parent company with experience in manufacture and wholesale of grocery products. The Commission also noted the support provided to Dollar Sweets by its largest shareholder – Thorney, the investment arm of Pratt Industries.

The Commission concluded that, in light of the purchase of Snack Brands Australia by Dollar Sweets Holdings, the acquisition of the Smiths Snackfood Company by PepsiCo was unlikely to result in a substantial lessening of competition.

Structure of Mergers

Divestiture may not always address the competition concerns arising out of a proposed merger. In those cases it is worth remembering that mergers can be structured in such a manner that it does not apply to Australia. There are examples of mergers applying only in some countries as is evidenced by the current Coca Cola / Cadbury Schweppes merger. I must, however, stress that this case is only used as an example to highlight the structure of this merger proposal rather than giving an indication of any possible competition concerns that the Commission may have with this case.

Coca Cola / Cadbury Schweppes

The Coca Cola Company announced on 11 December 1998 that it proposed to acquire Cadbury Schweppes' beverage brands in more than 120 countries for approximately US$1.85 billion. Schweppes and Canada Dry tonic waters, club sodas and ginger ales are included, as are a variety of juice products, bottled waters and dilutables. The transaction also includes the acquisition of beverage plants in Ireland and Spain. This transaction, however, does not apply to the US, France or South Africa. This highlights the manner in which a global

merger can be structured to apply to most countries whilst leaving some key markets outside the scope of the merger.

Undertakings

Section 87B has become a very important part of the *TPA*. 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 cause 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 can 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. There is, however, opposition by some 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 accept undertakings confidentially. These were the National Foods Limited proposed takeover of Pauls Limited and Wesfarmers attempt to acquire ICI's Australian assets which were, however, both aborted for commercial

reasons. The Commission is very hesitant indeed about agreeing to undertakings that are given privately but it does not rule them out totally. It should also be noted that undertakings apply equally well to purely domestic mergers as they do to global mergers.

Tariff / Non-Tariff Barriers

One issue that I would like to raise is that in addition to the standard solutions of authorisations, divestitures and s.87B undertakings there are other options that could be looked at in order to address competition concerns. In some cases imports may be restrained due to high tariffs or due to onerous safety standards. If these matters can be addressed either through tariff reductions or changes to the Australian standards then imports may become viable and act as a restraint on any potential misuse of market power by the merged firm. The recent Caroma / Fowler Bathroom Products merger provides a good example of how changes to safety standards may alleviate the Commission's concerns.

Caroma / Fowler Bathroom Products

The Commission was initially concerned about Caroma's acquisition of the James Hardie vitreous china manufacturing operations because this would give it over 90 per cent of the market.

Caroma is part of the GWA International Ltd manufacturing group. It produces a range of bathroom products including vitreous china toilets and basins. Fowler had been the only other manufacturer.

During the Commission's market inquiries in relation to this matter it became clear that many industry participants were concerned about Caroma's place on technical committees which draft Australian plumbing fixtures standards. In particular, it was feared that Caroma would inherit Fowler's positions on these committees and be able to unduly influence standards in its favour. The Commission accepted from Caroma enforceable undertakings to withdraw two representatives from these committees so that its representation would be the same as importers of toilets and basins.

While imports of toilets and basins were less than 10 per cent, the Commission expected that imports would grow substantially in the future and impose a constraint on the behaviour of Caroma, particularly from highly efficient Asian producers.

Conclusion

A concern is sometimes expressed that in a world of global mergers national competition authorities are powerless. This concern is greatly overstated.

Many, if not most, global mergers are not anti-competitive.

If they are, they are likely to be blocked by North America or European Authorities (the complaint from multinational companies is that approvals are needed from so many authorities that mergers are unnecessarily impeded, an issue receiving OECD attention).

Even if they are anti-competitive in some overseas countries, they may not be in Australia, depending on market circumstances such as the state of import competition and the structure of the market.

If they are, on the other hand, anti-competitive in Australia there is normally jurisdiction under the Trade Practices Act to deal with them; remedies are usually available in the form of fines , injunctions, undertakings, authorisation, and a power to divest.

Moreover, where undertaking are appropriate, practical commercial solutions are usually available eg. brands or assets can be sold off; or companies can often be “held separate” ie. a merger may proceed in some countries but not others where there are anti-trust problems.

Appropriate policy offsets may be applied eg. when BHP took over New Zealand Steel, Australian steel tariffs were lowered to neutralise the anti-competitive effect.

It is only rare that a global merger that lessens competition in Australia is likely to pose great difficulties. There have been few, if any of these, in recent years.

The effect of international mergers and takeovers on the Australian market is something that is examined on a case by case basis by the Commission. My aim today has been to give both a general outline on how the Commission examines all mergers and also highlighting some aspects that arise specifically in relation to international mergers. I would also like to note that the Commission’s approach to competition law enforcement was recognised last year by a study reported in the Economist (16 May 1998, p. 121) which stated that ‘Australian laws are the best in the world at preventing unfair competition’ and ranked Australia’s competition laws as the fairest.