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MERGER LAW IN AUSTRALIA

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1. Introduction

This paper describes the current merger control regime under Australia's competition law; outlines the framework for its administration; explores its legislative history and development; and examines the experience of its operation in Australia.[1]

Merger control is part of Australia's competition law, the *Trade Practices Act 1974* ('the Act'). The Act prohibits a range of horizontal and vertical anti-competitive conduct and anti-competitive mergers; has extensive consumer protection provisions; and provides for the regulation of public utilities.

Section 50 of the Act prohibits mergers or acquisitions which *substantially lessen competition* in a *substantial* market for goods or services in Australia, or that are likely to do so. If the Commission considers a merger contravenes the law it may take action in the court to prevent or unwind it. The Commission may accept undertakings (conditions) offered by the parties, which overcome the otherwise anti-competitive aspects of a proposal. Such undertakings are enforceable in the court.

An important feature of Australian competition law is that, if it can be demonstrated that a merger results in a sufficient benefit to the public, it can be authorised under a procedure which is quite separate from the competition assessment. It is a formal, transparent, reviewable, administrative procedure to allow an examination of public benefit as a basis for exemption of anti-competitive mergers on a case-by-case basis. This procedure is explained in greater detail further in the paper.

The paper focuses especially on the two changes to the competition test, namely, from *substantial lessening of competition* [SLC] to *dominance*, in 1977, and back to SLC, in 1993. It examines the arguments put forward by proponents of each view; and offers some insights of the competition agency from the experience of the operation of the two tests in the Australian market at various times over more than a quarter of a century.

2. The merger control regime in Australia

This section describes the statutory provisions; the criteria used in assessing whether competition has been substantially lessened; the assessment process; a statutory method for accepting enforceable conditions to allow otherwise unacceptable mergers to proceed; and the procedure for enforcement of the prohibition.

The following section considers the process of authorisation.

2.1 The competition standard and the assessment criteria

In essence, section 50 prohibits the acquisition of shares or assets if it would have the effect, or be likely to have the effect, of *substantially lessening competition in a substantial market in Australia.*[2]

Section 4E provides that, for the purposes of the Act, unless a contrary intention appears, "market" means a market in Australia and, when used in relation to goods or services, includes a market for those goods and services and other goods or services that are substitutable for, or otherwise competitive with, them.[3]

Section 4G provides that references to the *lessening* of competition shall be read as including *preventing or hindering* competition.

Sub-section 50(3) lists a number of factors for assessing whether a merger contravenes the prohibition. These 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 merger would result in the merged entity being able to significantly and sustainably increase prices or profit margins;
f) the extent to which substitutes are available, or are likely to be available, in the market;
g) the dynamic characteristics 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.

The Commission must consider all these factors but it may consider any other relevant factor.

There is no requirement to notify the Commission about proposed mergers to ensure that their competitive impact is assessed in advance. However, nearly all parties approach the Commission in advance and do not proceed with the merger until it has decided whether or not it will take action to oppose the merger.

2.2 The process of assessment of the effect of a merger on competition

In assessing mergers, the ACCC follows the criteria contained in the merger factors listed in sub-section 50(3), referred to earlier. However, the sequence of analysis of those factors in respect of a merger is not identical to the order in which they are set out in the Act. In fact, the Commission has organised the statutory factors into a five stage evaluation process.

The analytical sequence is designed to give clear signals of the Commission's likely attitude to merger proposals to the business community, at the earliest possible stage of the assessment process; and, thereby, to minimise the costs of compliance, data collection and analysis for the parties to the merger and the Commission.

The five-step process of assessment is as follows:

(1) The definition of the market in its product, geographic functional and time dimensions; and ascertaining whether it is a substantial one.

(2) Gauging concentration levels. The Commission has adopted twofold concentration thresholds below which it is unlikely to intervene in a merger. Generally speaking, if the merged entity would have a market share of more than 40%, that would suggest the possibility of unilateral market power. Alternatively, if it would have a share of more than 15% and the post-merger combined market share of the four largest firms would be greater than 75%, that would suggest the possibility of coordinated market power. In either of the above two concentration situations, the Commission would want to give the proposed merger further consideration. Concentration below the twofold threshold has come to be known as the 'safe harbour' and the Commission is normally unlikely to proceed further as the merger would usually be considered to be unlikely to SLC.[4]

(3) Where the merger crosses either of the concentration thresholds, the Commission will seek to assess whether actual or potential imports would be likely to constrain the merged entity. If they are, the merger is unlikely to be considered to SLC.

(4) If the merger crosses either of the concentration thresholds and imports are not seen to be an effective constraint, the Commission will examine whether there are significant barriers to the entry of new competitors. If there are not, it will not oppose the merger.

(5) In a concentrated market, unconstrained by imports and characterised by significant entry barriers, the Commission will examine whether any other factor, such as:

- countervailing bargaining power;
- the availability of substitute product from spare, expandable or convertible capacity;
- dynamic factors including growth, innovation or product differentiation in the market; or
- the elimination or creation of a vigorous and effective competitor

suggests that a substantial lessening of competition is, or is not, likely.

As a visual aid to understanding the process, the schematic diagram at Appendix 1 represents the five-step process to assess the competitive effect of mergers.

In practice, prospective parties to a proposed merger initially approach the Commission for informal, often confidential, discussions. They generally provide a submission seeking to make their case. Often expert economic analyses and opinion, together with legal argument, are provided. If the proposal is confidential, the Commission is unlikely to be in a position to provide the parties with its finalised view about the acquisition. The Commission normally requires the views of market participants before providing a final response whether it considers a proposed merger may or may not contravene the Act; hence it refrains from forming a view until after it has had an opportunity to test the submissions after the matter becomes public.

A key feature of the Commission's merger assessment work is its market inquiries. Besides seeking further details from the parties the Commission may consult customers, suppliers, competitors, industry associations, government agencies and departments, consumer groups, overseas agencies and trade unions, to seek their views about the likely effect on competition of the merger.

Such an approach conveys a market-oriented picture of the likely effect of a merger, rather than a theoretical construct, based on the parties' submissions, or the Commission's internal assessment thereof. While confidentiality of information has been a concern to parties, the Commission has sought to combine a sensitivity to confidentiality with obtaining relevant information.

If, after the merger has been made public, and the Commission has had an opportunity to make inquiries, it is considered unobjectionable in competition terms, the parties are informed accordingly. Where the Commission has formed the view that a merger is likely to SLC, the Commission will consider offers by the parties to modify the proposal, generally by structural changes, but occasionally by other means, to address the Commission's concerns, through section 87B undertakings (described below). The parties may choose to offer such undertakings or pursue their proposal without amendment. In the latter case, the Commission would have to institute legal proceedings to either prevent the merger or to unwind it in the rare case where it has been consummated. Private parties may not seek injunction. They may, however, seek other forms of relief outlined below, following discussion of section 87B undertakings.

2.3 Court enforceable undertakings to modify unacceptable components of merger proposals

Section 87B, introduced in 1993, provides that the Commission may accept written undertakings from a person in connection with any matter relating to the Commission's functions under the Act.[5] They can be withdrawn or varied with the consent of the Commission. Importantly, the Commission can take court action to compel observance of the undertaking.

The legislation recognises the practical benefits of the flexibility of such undertakings for merger control by explicitly providing for their acceptance and enforceability in the courts; they should be seen as a legitimate tool to allow modifications to permit mergers to proceed where they would, otherwise, not be allowed.[6]

2.4 The enforcement of the competition prohibition

The Australian Competition and Consumer Commission has (and its predecessor, the *Trade Practices Commission* had) the responsibility of administration of the Act, including the merger provisions.

The Commission, however, is not the arbiter of unlawfulness of a merger (ie. whether it does, or does not, substantially lessen competition) – that is the prerogative of the judicial system. The Commission or interested private parties may bring action in the

Federal Court of Australia for such relief as they are empowered to seek under the legislation – in the case of the Commission, injunction, pecuniary penalty and/or divestiture; in the case of private parties, for damages and/or divestiture. Appeals lie from a single judge at first instance to the Full Court of the Federal Court. Further appeals may be made to the *High Court of Australia*, the highest court in the land and the ultimate court of appeal under the Australian judicial system, but only by leave of that Court.

The competition test for mergers is the same as that for the main categories of anti-competitive conduct and, as noted earlier, exemption, through an "authorisation" process, is available for mergers on the same basis as for those types of anti-competitive conduct – public benefit outweighing anti-competitive detriment.

The authorisation process is described below, followed by an account of the evolution of the merger test. The arguments for and against each of the merger tests – dominance and SLC; the experience of the Commission in the administration of the merger law under the different tests applying at various times; and the lessons emerging therefrom are then discussed.

3. The public-benefit override to the pure competition standard – the authorisation process

This section discusses the statutory procedure for granting immunity to anti-competitive mergers, which may otherwise be unlawful, on grounds of preponderant public benefit. The statutory provisions are outlined; the test explained; and some examples are discussed. The administrative machinery for adjudication is then outlined.

3.1 The statutory provisions; their interpretation by the Commission and the Tribunal; and their implications for competition

A significant feature of Australian merger law is that anti-competitive mergers, which could be unlawful, can be authorised to proceed if the Commission is satisfied that, in all the circumstances, the merger would result, or be likely to result, in such a benefit to the public that it should be allowed to take place (s 90 (9)).[7] Authorisation confers immunity from court action. The Tribunal has made it clear that, for practical purposes, the test for authorisation is that the merger would, or would be likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition.[8]

Public benefit is not defined in the Act. The approach of the Tribunal, however, suggests that the authorisation process starts from the position that competition considerations are paramount; that the concept and approach to the *assessment of public benefit begins with the assessment of competition* and its impact on the efficient use of resources for the progress and benefit of society; and that the term should be given its widest possible meaning. It said:

> Public benefit has been, and is, given a wide ambit by the Tribunal as, in the language of QCMA (at 17,242), 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the

achievement of the economic goals of efficiency and progress'. Plainly, the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress' ; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.

(The publishers) … had their own concept of efficiency in mind – a command system that responds to the imperatives of the task of physical distribution and simplifies administration. But in the context of the Act, efficiency as a benefit must mean obtaining the best use of society's resources. Using the language of QCMA (at 17,245), an efficient system is one that would deliver 'the kinds of goods and services the community wants … supplied in the cheapest possible way', recognising that both the composition of output and the organisation of supply must be responsive to changing conditions of demand and supply.[9]

Indeed, in the assessment of *public benefit* the Tribunal considered it appropriate to start with an assessment of the *competitive impact* of the proposed acquisition. In QCMA, the Tribunal described the process (and, implicitly, gave the reasons for adopting the analytical sequence referred to above) as follows:

(1) A merger may positively enhance the competitive process and thus give rise to a substantial benefit …
(2) But the benefits claimed may or may not mention competition. … Nevertheless, our appraisal of all the listed claims must depend upon our appreciation of the competitive functioning of the industry, with and without the merger.
(3) A claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process.
(4) ... the substantiality of benefits needs to be measured against likely anti-competitive effects (and other detriments).
(5) Quite generally, the Tribunal's role is seen as forming one of the means of achieving the policy objectives of the Act, namely the preservation and promotion of useful competition.[10]

In its merger guidelines, the Commission says:

6.45 Furthermore, when comparing the situation that is likely to prevail with and without the proposed merger, it is critical to consider the likely durability of the claimed public benefits.[11]

In *Re: Howard Smith Industries Pty. Ltd.* (1977), ATPR 40-023, the Tribunal said, at p. 17,334:

If a merger is likely to result in the achievement of economies and a considerable cost saving in the cost of supplying a good or service this might well constitute a substantial benefit to the public, even though the cost saving is not passed on to the consumers in the form of lower prices. Nevertheless, if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the Tribunal, because the benefits are not being spread widely among the members of the community.

In *BHP/Koppers,* the tribunal said:

... the delineation of the relevant markets is but a first and preliminary step to enable the identification of relevant elements of market structure and associated processes of competition. Such analysis of competition enables not only the identification of anti-competitive detriment as required by the test imposed by the Act, it also facilitates the exploration of the role that is played by the relevant conduct, the subject of the Koppers application, in achieving the claimed benefits to the public ...[12]

The above extracts from some Tribunal determinations clearly show that *competition* is the overriding consideration, the starting point for analysis, and the backdrop against which claimed *public benefit, including enhancement of the competitive process*, is to be viewed in the assessment of an authorisation application. While cost savings from productive efficiencies are regarded as a benefit there is some bias to consumer surplus. The test itself is strict, with the goal of economic efficiency, through competition, clearly forming the overwhelming weight of consideration.

As can be seen from the extracts from some of the Tribunal's determinations, efficiency is seen in an holistic way, in the authorisation assessment. Allocative and dynamic as well as productive efficiencies are assessed with appropriate weighting. Productive efficiency is seen as a benefit but forms part of the overall equation. The assessment of public benefit is closely linked with the competition analysis. The latter is at the core of public benefit consideration and forms the overwhelmingly significant element of the overall weighting of such benefits.

Section 90 (9A) was included in the Act in 1993 in recognition of the need to take international factors into account in assessing the benefit of mergers. It provides that in an application for authorisation of mergers:

> In determining what amounts to a benefit to the public for the purposes of sub-section (9):
>
> (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
>
> (i) a significant increase in the real value of exports;
>
> (ii) a significant substitution of domestic products for imported goods; and
>
> (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Authorisation allows even one company dominance under SLC where international competitiveness benefits outweigh detriment.

In the authorisation process, it is not necessary for the Commission to show that the merger substantially lessens competition; it only need be satisfied that it gives rise to public benefit and that such benefit outweighs the lessening of competition.

Parties seeking authorisation must apply to the Commission and the onus of satisfying it about the preponderance of public benefit over the lessening of competition rests with the applicants.

Submissions may be made by the parties and any interested party. The statutory requirement that such submissions (except for confidential business information eg. business costs, secret formulae, acquisition consideration etc.); the Commission's determination; and its reasons; be put on a register, for public access, ensures that the process is ***transparent***.

The law prescribes a ***time-limit*** of 30 days; extendable to 45 days for complex cases; with extension for time taken by the parties to respond to information requests; or by their agreement.[13]

The statutory requirement to provide written determinations and reasons therefore, and the provision for an administrative review mechanism described below, ensures that the Commission is ***accountable*** for its authorisation determinations.

Authorisation is a subsequent and separate step from competition assessment under s.50. ***Claims are tested rigorously***; there are rights of recourse to administrative ***review***. There are good reasons for such a process – a dispensation is being granted from a significant economic law which applies to business generally. The public interest demands that proper processes and safeguards, such as those outlined above, apply.

There have not been a large number of authorisation applications. Of them, not all have been successful. A few interesting authorisation determinations, which illustrate the principles mentioned above, are outlined below.

(i) *Adelaide Brighton/Cockburn Cement*[14]. 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 UK, (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, much wider, markets, which could be authorised. Section 87B undertakings were offered and accepted, which included certain conditions, to reduce the anti-competitive effect of the merger.

(ii) *Davids/Composite Buyers Limited.*[15] 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.[16]

(iii) *DuPont/Ticor*[17]. 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. 90% of domestic demand, which was growing, was satisfied by the domestic producers, with *DuPont* the major importer. Despite the anti-competitive risk from potential co-operative arrangements arising from high domestic 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.

(iv) *Wattyl/Taubmans.*[18] This was an application for authorisation of a proposed merger between the second largest manufacturer of architectural paints and the third largest, *Taubmans.* The number of players in the market would effectively have been reduced from three to two and the harm to competition was not inconsiderable.[19] The benefits were deemed to be small. The fact that the merger would give rise to Australian ownership was considered to be a benefit, but only a small one and not sufficient to warrant authorisation. The Commission opposed it.[20]

(v) *CSR/Mackay Refined Sugars/E.D. and F. Man.*[21] This was a proposed merger in the refined sugar market in 1993. The latter two entities were well advanced, in their own joint venture, as a new entrant, in commissioning a large, new sugar refinery with advanced technology to transport both bagged and bulk refined sugar by ship. The parties claimed that the tri-partite merger (in which the original joint venture would be subsumed) was likely to generate substantially higher exports of sugar. The Commission formed the view that the merger was likely to be highly anti-competitive in the domestic market, with the merger effectively reducing the number of competitors from four to three; the joining of the two largest competitors in terms of capacity; a large, vigorous and effective competitor being prevented from entering; and a tariff on sugar imports, together with the high costs of transporting refined sugar, limiting the ability of imports to constrain the domestic refiners. The claims of substantial enhancement of exports by the parties could not be substantiated. There was some reason to think that, at best, additional export earnings would have been minimal, and exports could, in fact, be reduced. On this basis, the Commission denied authorisation.[22]

In summary, 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, applying in wider areas, justifies the grant of authorisation.

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

- international competitiveness has been accepted as a reason to allow mergers where that benefit exceeds the anti-competitive detriment. Such benefit is closely scrutinised and where unsubstantiated, is not accepted.

- The anti-competitive effect is taken very seriously in the weighing up of detriment against claimed benefit.

3.2 The administrative framework for adjudication of authorisation applications

The Commission is the primary body for adjudication of applications for authorisation of mergers (and certain types of anti-competitive conduct capable of authorisation).

The Australian Competition Tribunal is (and its preceding body, the *Trade Practices Tribunal* was) a body established by the Act to review various determinations of the

Commission[23].

The Tribunal reviews authorisation determinations of the Commission in relation to mergers, on the application of any interested party ie. by an aggrieved merger party (usually where the proposal has been denied authorisation); or by competitors, customers or consumers opposing a merger, (usually where authorisation has been granted).[24]

4. The legislative history of merger regulation

In the *Trade Practices Act 1974*, merger control provisions were introduced for the first time in Australia.[25] It prohibited mergers which "*were likely to have the effect of substantially lessening competition in a market for goods or services*". [26]

The debate, however, continued. The merger provision was examined by a Government-appointed *Trade Practices Act Review Committee* (the *Swanson Committee*) in 1976. While the terms of reference of that Committee allowed it to examine all aspects of the merger prohibition, it supported the retention of merger control provisions, in its prevailing form, with a minor change to exclude insignificant mergers from consideration.[27]

Following the report, however, the Government decided to introduce a different test: the prohibition of mergers where, as a result, the merged entity would be, or be likely to be, in a position to *control or dominate a market,* or where such an existing position was substantially strengthened a, it .

The dominance threshold operated for sixteen years.

The issue resurfaced in 1983. A green paper, *The Trade Practices Act – Proposals for Change,* issued by then Attorney-General, the Honourable Gareth Evans, canvassed the issue of reverting to the previous SLC test. In the event, only the removal of *control* was legislated, largely on the grounds that the term was redundant, given that *dominance,* a lesser standard, was included in the prohibition.[28]

The debate, however, continued, with two parliamentary committees inquiring and reporting on the merger test (among other issues relating to the Act) between 1989 and 1991. First, the *House of Representatives Standing Committee on Legal and Constitutional Affairs* (the *Griffith Committee*) by majority, recommended retention of the dominance test on the basis that it found insufficient evidence to justify a change.

The *Senate Standing Committee on Legal and Constitutional Affairs* (the *Cooney Committee*) then considered the issue in its report in December 1991 and, by majority, recommended a reversion to the SLC test.

The recommendation was accepted by the Government which enacted amendments to re-instate the SLC test for mergers in 1993. Until this time, no criteria, for the determination of dominance or SLC, had been legislated, but the re-instatement of the SLC test was accompanied by the non-exhaustive statutory merger factors in sub-section 50(3), referred to earlier, to facilitate certainty of interpretation. Furthermore, the non-exhaustive criteria of export enhancement, import substitution and international competitiveness, for the consideration of merger authorisation applications, were also included at this time, to ensure that globalisation issues were taken into account.[29]

While the above changes were occurring, the interpretation of dominance began to change in Europe as well as in Australia. Australian courts saw dominance as unilateral market power and continued to do so throughout the period that test was extant. Over time, there were signs that the interpretation of dominance by the courts could be moving to a lower standard.[30] In the period 1977 – 1993, however, the Australian courts did not move to concepts of collective dominance. Towards the end of this period, initiatives for change to SLC began to emerge and, in 1993, the legislative change from dominance to SLC was made.[31]

In New Zealand, the judicial interpretation of dominance continued as single firm dominance, where *Telecom New Zealand* was found to be dominant in the national market for standard switched telephone services.[32]

The Australian Government has just instituted a Committee of Inquiry to review the competition provisions of the *Trade Practices Act* which has been empowered, among other things, to consider whether the Act provides sufficient recognition for globalisation factors; the ability of Australian companies to compete globally; and whether it provides an appropriate balance of power between small and big business. This includes a consideration of the merger provisions. [33]

5. What is the appropriate test?

The key arguments in support of each test, many of which were canvassed in the debate during the Cooney inquiry, form a useful context in which to examine the Australian experience under both ***dominance*** and ***SLC*** and they are discussed below.

5.1 Scale, international competitiveness and domestic market power

The proponents of the *dominance* test essentially argued that, in smaller economies, such as Australia, firms should be able to maximise scale and scope economies, thereby enhancing efficiency and productivity to enable them to compete more effectively with much larger foreign competitors at home and abroad. This came to be known as the "national champions" argument.[34]

Those in favour of the *SLC* test argued that the underlying principle of competition policy requires that mergers which substantially lessen competition should be prohibited.

The economic evidence strongly suggested that concentrated markets led to the exercise of market power. It was argued that while dominance addressed single firm market power, it did not address coordinated conduct. They pointed to the significant costs imposed on consumers and intermediate businesses under the dominance test. The SLC test, on the other hand, addressed both single firm market power (including dominance) as well as coordinated market power.[35]

During the period of the dominance test, a number of very prominent mergers had not been opposed and many argued that they had caused significant competitive harm.

Those would have been likely to have been scrutinised and probably opposed under an SLC test. The most prominent ones were:

- *Coles-Myer*. This was a merger between two of the three largest competitors in the department store and discount department store retailing sectors of retailing[36]. A merger in the supermarket sector, shortly thereafter, between *Woolworths* and *Safeways,* combined two of the four largest integrated supermarket chains. [37] The overall impact of these two mergers appeared to be a substantial increase in concentration in the retailing sector. In these major areas of retailing, the Commission did not oppose mergers of leading firms, under the dominance test, which led to substantial increases in concentration.

- In the newspaper market, two of the three national newspaper publishing groups, *News Ltd* and *Herald & Weekly Times* had merged, leaving *Fairfax* as the only remaining significant competitor.[38]

- In the national domestic aviation market, a merger between *Ansett Airlines* and *East West Airlines* reduced the number of interstate competitors from three (*Qantas, Ansett* and *East-West),* to two. While *Qantas* and *Ansett* were substantially larger than *East West*, it was a vigorous and effective competitor on the trunk routes it competed on, with good prospects of growth.[39]

A number of other mergers that did not infringe the dominance standard, but would have required examination under an SLC test, and many of which might have been opposed, were identified by the Commission to the Cooney Committee.[40]

The Commission also expressed concern about markets that had either been recently de-regulated or were candidates for imminent deregulation such as *airlines* and *telecommunications* where mergers short of dominance were likely to defeat the objectives of deregulation.

Experience showed that competitiveness at home bred efficiency and competitiveness abroad. The conclusions of Professor Michael Porter, of the Harvard Business School, in his book, *The Competitive Advantage of Nations*, played a persuasive role:

> A strong anti-trust policy – especially for horizontal mergers, alliances and collusive behaviour – is fundamental to innovation. While it is fashionable today to call for mergers and alliances in the name of globalization and the creation of national champions, these often undermine the creation of competitive advantage. Real national competitiveness requires governments to disallow mergers, acquisitions and alliances that involve industry leaders ... Companies should, however, be allowed to acquire small companies in related industries when the move promotes the transfer of skills that could ultimately create competitive advantage.

While there were concerns that a strong merger law could prevent firms achieving scale and scope economies to compete effectively on international markets, in the traded goods sector, where international competitiveness arguments were most relevant, the introduction of the SLC test did not prevent mergers. Not only does import competition feature prominently in the consideration of competitive constraints; authorisation is also possible, where international competitiveness on domestic and overseas markets, is mandated by the statute as a consideration, even where the merger leads to single firm dominance, as discussed under the topic of authorisation above.

In the non-tradeable sector, largely insulated from international competition, market power led to cost increases for downstream firms, whose international competitiveness was adversely affected.[41]

Competition reform of the "utility" sector (eg. electricity; water; railways; telecommunications; gas pipelines), which often involved vertical and horizontal separation of large suppliers, would be undermined by anti-competitive mergers, which the Commission would be unable to prevent under a dominance test[42].

5.2 The certainty from maintaining the status quo of the dominance test versus the costs of adjustment to the SLC test

The proponents of the dominance test also argued that there was no need to change to SLC since they considered that the dominance test worked well - it was simple to understand; SLC was much more complex; would require adjustment; assessment would require more time; and all these factors would lead to costly uncertainty.

The advocates for an SLC test argued that standard economic concepts, based on well accepted economic theory and experience, underpin the SLC test and provide clarity. As noted earlier, there were signs of a possible trend by the courts to a gradual lowering of the single firm dominance standard, thereby making the nature of the standard less clear. Recent European experience of a drift, from the concept of unilateral market power under a dominance test to coordinated market power based on the concept of collective dominance, suggests that had the 1993 change not occurred, Australian courts might well have also gradually drifted away from the clarity of single firm dominance to the less conceptually clear collective dominance standard on a case-by-case basis. In fact, during the Cooney Inquiry, there were informal discussions about various alternative options such as: measures to lower the test of dominance by broadening it to catch more anti-competitive situations, while retaining the existing substantive test; widening the test to include concepts such as joint, collective or shared dominance; to retain the dominance test but set criteria which were close to the SLC test; to adopt the SLC test but define it using criteria based on single firm dominance. It was decided that all such modifications to the test were conceptually unclear and would be likely to cause confusion, thereby making them difficult to administer. In addition, it was believed that, in principle, the SLC test was appropriate.

5.3 Consistency, value added by mergers and other issues

Proponents of the SLC test argued that there was a need for consistency between the merger test and that applying to the conduct provisions. Firms prohibited from price-fixing could achieve the same outcome through merger – a very strong incentive to merge.[43]

Arguments, based on "event studies" and "accounting studies" of the outcomes of mergers, that they led to substantial economic benefits, were put forward to the Cooney Committee; the former relating to value generated, as measured by stock-market capitalisation; the latter based on profitability.[44] No firm conclusions could be drawn from such studies as their findings were contradictory.

The Committee also considered the results of a study by the Bureau of Industry Economics, into the effects of four mergers in three sectors of the manufacturing industry, one involving automotive batteries, two in the roof tiles sector and one in pastry products, over the period 1985 to 1989.

Broadly, the study concluded that, both, the anti-competitive detriments and the rationalisation benefits, were small. Causal links between the mergers and the benefits were not demonstrable.

The Cooney Committee concluded that, overall, quantitative studies about the benefits of mergers were inconclusive.

In considering the arguments, it is useful to remember that the two parliamentary inquiries were conducted against the backdrop of the 1980's which experienced the notorious excesses of big business.[45]

6. What difference did the changeover make? Some key practical lessons from the Australian experience

This section draws on the experience of the Commission under the two merger tests – dominance and SLC. It discusses the differences in merger assessment between the two tests. It refers to particular cases that were opposed under the SLC test that probably would not have been opposed under the dominance test; and significant ones not opposed under the dominance test that would have either been opposed, or at least merited close scrutiny, under the SLC test. It also explores issues of certainty, complexity, transparency, accountability and time taken for assessment.

6.1 The difference in the competition standard - mergers opposed under the SLC test where they would probably have been allowed under the dominance test

The key lesson from the Australian experience of the two tests is that the SLC test is a more stringent standard which prevents both single firm dominance as well as coordinated conduct. From this point of view, it is worthwhile to examine the operation of the SLC test in terms of mergers opposed that would probably have been allowed under a single firm dominance test.

With the benefit of nine years of experience of the operation of the SLC test since its re-instatement in 1993, it is worthwhile to refer briefly to some mergers which were examined where they would not have been under the previous dominance test:

(a) *Retail banking* –The four largest banks have sought to acquire the smaller, regional banks. The regionals made a distinctive contribution to competition by their efficient, customer-friendly approach and were vigorous and effective competitors. By contrast, the four majors had "look-alike" profiles, with poor customer appeal and broadly comparable market shares. An acquisition by a major bank of the largest regional in a State effectively reduced five significant competitors to four, and was considered likely to SLC. The Commission closely examined such acquisition proposals.[46]

On the other hand, under the dominance test, the acquisition of regional banks by any of the big four could not even have been examined as there was no possibility of single firm dominance resulting. Further, even mergers between the four majors would not have been subject to examination under the dominance test unless the result was likely to be a single bank dominating the market.

In respect of any possible proposal for merger between any two of the four largest banks, as it happens, a current Federal Government policy on banking prevents such mergers (the so-called "four pillars" policy). [47] If, however, such a proposal emerged under the SLC test, in the absence of the four pillars policy, that would require detailed assessment.

(b) *Petroleum refining and marketing* - Under the SLC test, the Commission initially opposed a proposed merger between *Caltex* and *Ampol*, the fourth and fifth largest competitors, which would have reduced the number of competitors from five to four. In the absence of import competition, the Commission considered that the merger would be likely to SLC. However, the parties offered conditions in undertakings to sell certain port terminals to make independent imports possible. These were considered sufficient to allay the Commission's concerns and the merger was allowed to proceed.[48]

Under a dominance test, the Commission could not have opposed that merger. Indeed, it could not have opposed mergers between the remaining four major competitors unless they resulted in single firm dominance. In fact, under the SLC test, the Commission subsequently indicated its concern about a joint refining venture between *Shell* and *Mobil* followed almost immediately by another similar proposal between *Caltex* and *BP*. Both were carefully scrutinised by the Commission before they were abandoned by the parties for commercial reasons.

(c) A New Zealand entity, *Rank*, sought to acquire *Foodland Associated Ltd*, the largest grocery wholesaler in Western Australia which supplied various independent supermarkets, operating under banner groups, and also controlled a number of large supermarkets itself. The proposed acquirer had entered into collateral agreement with *Coles-Myer*, one of the two largest integrated wholesale/retail supermarket groups in the country, to subsequently transfer the entity to it. The Commission successfully opposed it; and the merger did not proceed. [49] Under a dominance test, the Commission would not have been able to examine it because *Woolworths*, a national, integrated supermarket chain, was a significant, remaining competitor.

(d) *Wattyl/Taubmans.* [50] This matter has been discussed earlier under the description of the authorisation procedure. Before being considered under that formal procedure, the Commission had previously considered it under the informal competitive effects assessment process and opposed it under the prevailing SLC test whereas, under a single firm dominance test, it would probably not have been scrutinised and, even if scrutinised, would almost certainly have been allowed.

(e) *Optus/AAPT*. This was a proposed merger between the second and third largest players in fixed line telephony, where there would have been a reduction in the number of competitors from three to two. The key point is that under a dominance test, it could not even have been examined. Although the ACCC does not usually oppose mergers between the second and third largest competitors, it did so in this case and the merger did not proceed.

(f) *British American Tobacco Pty. Ltd (W.D. & H.O. Wills)/Rothmans. British American Tobacco (BAT)* sought to acquire, through its Australian subsidiary, *W.D. & H. O. Wills,* the *Rothmans* businesses in Australia. Each of these two parties had approximately a third of the market as did *Philip Morris*. Import competition was negligible, because of the special way cigarettes were taxed at that time. Under the SLC test the proposed merger of *BAT* and *Rothmans* was opposed as it would have given rise to a structure where the merged firm had some 62% of the market, with *Philip Morris* having most of the remainder. Under the dominance test, it is unclear what the outcome would have been. The merged firm would have had a very large market share but it would have faced competition from a serious competitor, *Philip Morris,* and it might or might not have been concluded that single firm dominance resulted. In the event, *BAT* and *Rothmans* were able to proceed with the merger after selling some brands accounting for about 17% of the market to *Imperial Tobacco*, a major new entrant into the market which had both its own international brands as well as those representing 17% of the market sold to it by the merged entity.

6.1.1 The significance of product differentiation [and geographic and temporal discontinuities] for assessment of SLC vs dominance in mergers

A further area of difference between the assessment of competitive effects under dominance and SLC occurs in markets characterised by differentiated products.

In a market with, say, ten competitors, three competitors may supply products that are, collectively, differentiated from the remaining products. While a merger between two of the three may or may not lead to coordinated conduct across the entire market, it could well strengthen the acquirer’s brands, with substantial anti-competitive effects in the segment of the market occupied by them. In such a case, it would be important to assess the anti-competitive effects in that segment of the market and whether it has the net effect of SLC in the market as a whole.

In some cases, mergers that involve low shares of some broader market may produce significant anti-competitive effects, where the parties supply the closest substitutes for each others’ products. In other cases, apparently larger mergers may actually be less anti-competitive, if the parties produce complementary product ranges in a differentiated product market. A further issue is where, on the one hand, a merger results in concentration which crosses the thresholds but creates a large entity, which is more evenly matched with the market leader.[51]

Similarly, the “market share” of imports may tell us little about their ability to constrain the conduct of the merged entity. Often, imports in differentiated product markets will be of a niche character with limited distribution infrastructure in place. In these circumstances, they complement, rather than compete, with the domestic output. In order to place any significant constraint on the merged entity, overseas producers would have to reorient their production and establish more extensive distribution facilities in Australia.

Similar issues may arise in markets differentiated in their spatial and temporal dimensions.[52]

The analysis of such product [or geographically or temporally] differentiated markets would take account of linkages or discontinuities in demand or supply under the SLC test whereas they are unlikely to be considered under the dominance test.

6.2 Certainty, complexity, transparency, accountability, assessment time, and costs to business

In the nine years that the SLC test has been in force, the law appears to have been clear – the non-exhaustive, but mandatory merger factors for assessment of competitive effects has possibly contributed to greater certainty; the inclusion of criteria relating to the enhancement of international competitiveness for authorisation, has ensured that globalisation issues are considered.

There was a slight rise in the rejection rate at the commencement of the SLC test, suggesting initial uncertainty from incomplete knowledge/poor risk assessment of likelihood of failure. It may also have been partially attributable to parties “pushing the envelope”. Whatever the reason, the rejection rate soon began to return to its longer term rate - on average, only a small number of mergers are blocked. It is argued that ‘self-selection’ is a factor skewing the rejection rate down (ie. that clearly unacceptable mergers are not put forward). This itself suggests that certainty is a feature of the administration of the regime.

The ACCC has sought to give timely and clear guidance via informative and practical guidelines on its approach to merger assessment, which are similar to those issued by the anti-trust agencies in the United States. The SLC merger guidelines were actually issued before the change to SLC was implemented.

The need for transparency and information dissemination has been addressed by a mergers register even though not statutorily required for the informal assessment of competitive effects.[53]

The following statistics, for the year 2000/2001, are provided to indicate the time taken to make decisions under the “informal” competition assessment procedure.[54]

Duration	Number of matters
More than 9 weeks	45
6 – 9 weeks	23
4 – 6 weeks	37
2 – 4 weeks	48
Less than 2 weeks	112
Total number of matters	265

For authorisation determinations, statutory time limits apply, as mentioned earlier.

Business and community access to ongoing guidance about the Commission’s approach has been facilitated by public release of reasons and detailed analyses in complex informal assessments and in authorisation determinations.[55]

The approach of the Court to the SLC test since its re-instatement has not really been tested. Only two pieces of litigation, neither involving detailed and substantive consideration of the SLC test, has occurred. *Rank-Coles/Foodland* [56] was an application by the Commission for an interim injunction which, having been granted, led the parties to abandon the proposal. *Adsteam-Howard Smith/Brambles*[57] was an application for interim injunction by the Commission which was refused because the Court concluded that divestiture was a viable remedy if the Commission succeeded in the substantive case, rather than on the prospects of the parties succeeding in proving the merger was lawful. The Commission decided it would not pursue the matter due to the practical difficulties of securing divestiture.

Similarly, the approach of the Tribunal has not been tested either. There has been no pronouncement on the difference between dominance and SLC from the Tribunal. There are few challenges to Commission decisions in the Court and Tribunal. This is most probably because parties do not believe that they are likely to successfully reverse them on the basis of their competition analysis or public benefit reasoning. Critics of the process argue that another factor is the length of time it takes for the Court or Tribunal to make decisions.

7. The issue of globalisation

An issue frequently raised in Australia is whether the Act blocks Australian firms from acquiring the size needed to take part in globalisation. Some issues relating to globalisation have already been discussed in this paper. By way of overview, however, the following are key points.

- The Commission opposes relatively few mergers.
- In the last decade or more, the Commission has never opposed a merger where import competition is significant i.e. more than 10% of the market.
- It is in the trade-exposed sector, where, arguably, firms need substantial scale to face up to international competition, that the issue is most relevant.
- Even where a merger is anti-competitive, it is possible for the parties to seek authorisation by the Commission (with a right of appeal to the Tribunal), on grounds of preponderant public benefit. The authorisation procedure enables each case to be assessed on its merits.
- As noted earlier, there are conflicting views on whether encouraging domestic mergers helps or hinders firms from becoming internationally competitive.

7.1 The assessment of globalisation claims

The following are some examples of cases where issues of globalisation arose.

(a) *The Australian Stock Exchange/Sydney Futures Exchange* – the market for exchange trading of financial instruments. The stock market is increasingly important to a growing number of ordinary Australians. The parties claimed that the merger would benefit Australia but chose not to seek authorisation, because they considered it did not SLC. The Commission's enquiries in the market suggested the opposite - that it would SLC. The *Sydney Futures Exchange* and the *Australian Stock Exchange* were potential competitors. Under Australian law, foreign exchanges could not trade Australian shares overseas, as claimed by the parties. When the parties we informed that the Commission opposed the proposed merger, they went their separate ways and now they do compete directly.

(b) *Pirelli Cables/Metal Manufacturers* – Claims of imports were greatly exaggerated. Of far greater concern, the Commission's investigations uncovered evidence of an illegal arrangement between a company with operations in New Zealand, and one of the local manufacturers party to the merger proposal, which effectively amounted to a mutual 'no compete' agreement in each other's area of operation. The merger was allowed subject to the abandonment of the 'no compete' agreement.

Furthermore, there are significant markets that are commonly accepted as not being exposed to international competition. Some of the significant merger proposals considered in this sector are:

(a) *Various retailing sectors.* The consequences of the Coles/Myer merger, which occurred under the dominance test, have been discussed earlier. Nevertheless, in appropriate circumstances, the Commission has not opposed some significant mergers in this sector, even under the SLC test eg *Bunnings/BBC Hardware.*

(b) *Financial services.* Bank mergers have been discussed earlier. Large mergers in this sector involved banking and insurance - *Suncorp-Metway/AMP-GIO;* and *Commonwealth-Colonial*, which were allowed, the latter following undertakings.

(c) *Rail Transport.* The privatisation of a Federal Government owned east-west trans-continental rail freight transport business and one owned by the New South Wales Government on the east coast north south corridor involved a bidder for both and such a combination was not opposed - *Lang-Toll/NRC-Freightcorp;*

(d) *Franklins sell-off.* This was a sale of various supermarkets owned by Franklins in the course of its exit from the market. The Commission did not oppose the sale of various stores to different purchasers.

(e) *The health sector* is one in which the Commission has been closely involved. A merger in the private hospital sector, *Health Care of Australia/Australian Hospital Care*; was not opposed, following section 87B undertakings to divest some hospitals. Other examples are the *radiology* and *pathology* sectors, where a number have not been opposed, although a few were opposed.

On the other hand, the introduction of the SLC test has not had the effect of preventing any mergers in the traded goods sector ie. in circumstances where imports were an effective constraint. The ACCC has allowed mergers, some with enforceable undertakings to modify them, although they resulted in domestic “monopoly” or near monopoly, on the basis of import competition - either actual or potential. The following are examples:

(a) *Kobe-Alcoa acquisition of Comalco’s aluminium rolling mills.* Potential import competition from foreign rolling mills was taken into account to allow this merger which created a domestic “monopoly” in aluminium canstock.

(b) *Fowler/Caroma*. This was a merger between two manufacturers of vitreous bathroom ware which resulted in the merged firm controlling more than 95% of the market. The possibility of imports led to its being allowed.

(c) *George Weston Foods Ltd and Bunge Ltd – starch businesses.* This is another internationally traded commodity and the merger was allowed despite high domestic concentration.

(d) *Manildra Group/Weston Bioproducts & George Weston Foods Ltd (some flour and gluten assets).* Gluten was an internationally traded product. Merger allowed with some divestiture of starch and starch sugar assets.

(e) *SPC/Ardmona;* This merger resulted in a domestic “monopoly” in fruit canning, with 90% of the market and no alternative buyer of fruit from fruit growers. The Commission did not oppose the merger because of import competition, although undertakings for some grower-processor discussion arrangements were accepted as a condition.

(f) *Southcorp/Email;* This merger, reducing domestic competitors from three to two, was not opposed on the basis of import competition.

Some others are: (i) *Consolidated Alloys/Radiant* – (lead sheeting); (ii) *GNB/Australian Battery Company* (automotive and industrial batteries); (iii) *Dow Chemical/Huntsman Chemical* (polystyrene); (iv) *ICI/Auseon* (PVC); (v) *ANI/National Castings* (steel and alloy iron castings); (vi) *Allied Colloids/Imdex* (synthetic flocculants); (vii) *UCB/Orica* (oriented polypropylene); (viii) *Amcor/APPM* (paper wholesaling); (ix) *BHP/NZ Steel* (steel production);

In all these instances, either one major domestic supplier resulted, or the market became very highly concentrated, but it faced significant competition from imports.

As already discussed under the topic of authorisation, some were authorised on international competitiveness grounds. An example mentioned there is *Dupont/Ticor*. This was a merger involving chemicals used in leaching impurities from gold ores, where the ACCC permitted a merger, despite a near-domestic-monopoly resulting.

7.2 The Globalisation dynamic in competition assessment

The debate about globalisation is not static, just as globalisation itself is dynamic and has competition consequences. Markets change and a merger rejected at one time may be acceptable at another eg. because of a rise in the share of imports.

An example is the *Southcorp/Email* merger. It involved whitegoods (refrigerators, washing machines, freezers, dishwashers, cooking appliances etc). It would have been rejected, under any test, if import competition was not an effective constraint at that time. Yet, under SLC, it was allowed due to import competition. However, dominance does not resolve competition problems – where there is no import competition eg. in the non-traded sector, as discussed earlier.

Another example is that of sugar refining. The original proposal was rejected, both under the informal competition assessment procedure, as well as under the authorisation procedure, as discussed earlier in this paper. In 1997, circumstances had changed. The tariff had been removed; freight costs had reduced, thus reducing the import parity price. There was a significant increase in world and regional refining capacity, particularly in Asia and the Middle East, thus increasing the import constraint on domestic prices. Under the informal competitive effects assessment process, a section 87B undertaking to make import facilities in Western Australia available to potential independent importers ensured that anti-competitive effects in that State would be avoided and it was concluded that the joint venture was unlikely to substantially lessen competition.

8. Conclusions

Australian merger law has a number of significant features:

1. It has experimented with both a dominance test and an SLC test and appears likely to remain permanently with the SLC test.

2. The SLC test generally covers a wider range of mergers particularly those likely to give rise to enhanced possibilities of co-operative behaviour.

3. It takes account of possible significant anti-competitive effects in segments of markets characterised by product differentiation.

4. Benefit was seen in changing from dominance to the conceptually clear SLC criterion rather than experiencing uncertainty through a gradual change in the law through the judicial precedents of case law.

5. The changeover from the dominance test to the SLC test was accomplished relatively smoothly in terms of certainty for business.

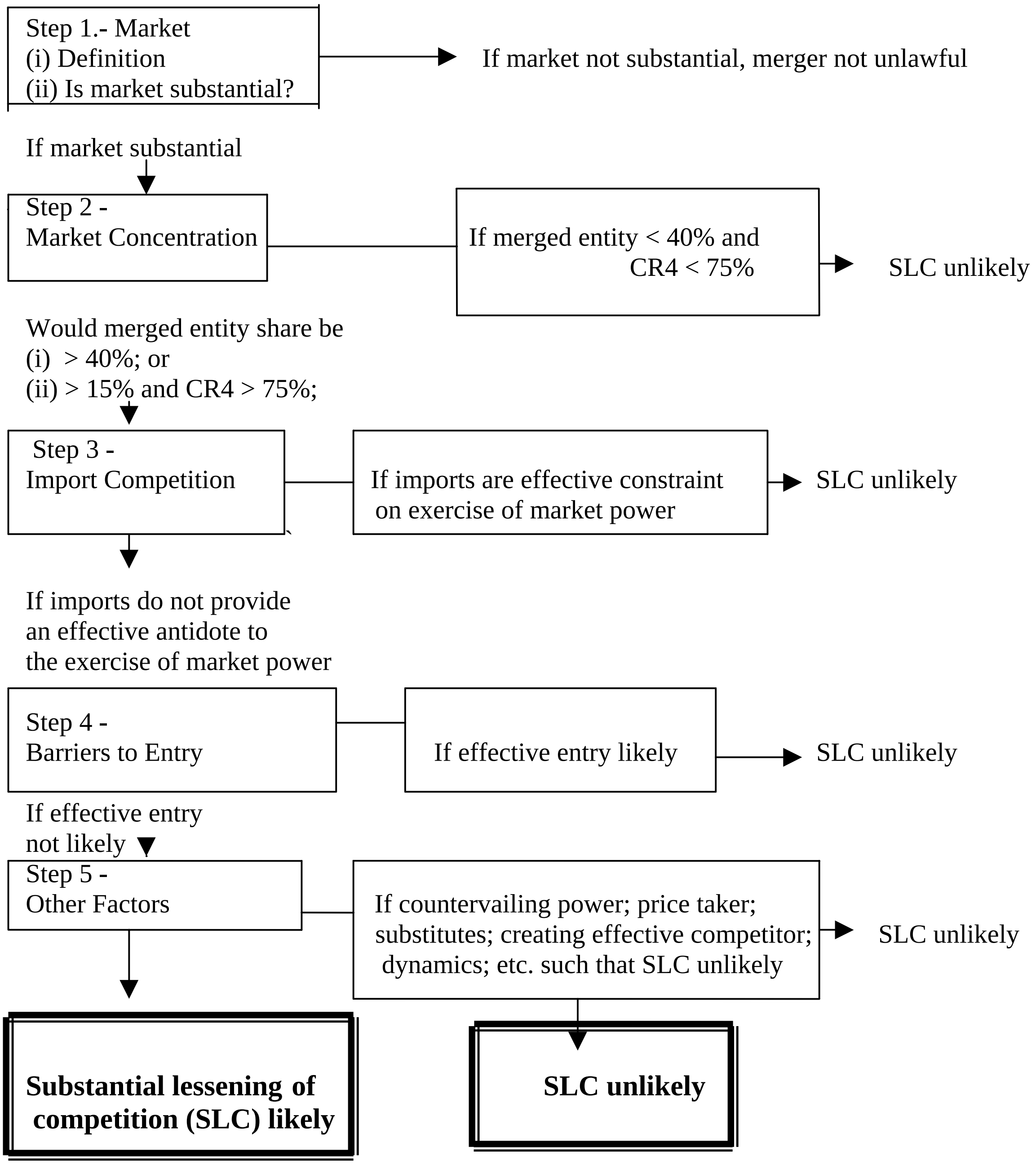
6. Australia has an authorisation procedure under which anti-competitive mergers can occur if a sufficient public benefit can justify this. Although there are few authorisation applications, it enables approvals of mergers in those instances where a benefit to the public can be demonstrated.

7. Moreover, in relation to claims that the merger law needs to take account of a case for mergers necessary in a global world, the Commission's acceptance of mergers in the traded goods sector and the existence of authorisation means that, even with the SLC test, there are few obstacles to genuinely justified mergers needed in a globalised world.

Appendix 1

The assessment of effect of a merger on competition

The five-step process outlined below in schematic form is explained in section 2.2 of the paper.



Endnotes

[1] In this paper, the term “merger(s)” include(s) acquisition(s), whether of a partial or complete interest, involving the structural combination of share capital, assets or business interests. Sometimes a merger forms part of a wider joint venture and there are implications arising under the “authorisation” process (described later in the paper) which are discussed at note 13 below.

[2] Mergers taking place overseas which are likely to substantially lessen competition in a market in Australia, are also regulated (under section 50A). Parties in Australia, involved in mergers falling within section 50A, can either approach the Commission for an informal competition assessment (as do parties to domestic mergers falling within section 50), or apply to the Commission for authorisation (a description of this procedure is contained further in the text of this paper, in section 3, and in notes 7 – 18 below). The standard of unlawfulness and interpretational criteria are identical to those applying to domestic mergers covered by section 50. Where such a merger does not give rise to public benefits which outweigh the detriment arising from a substantial lessening of competition, and the parties intend to proceed with the merger, without modification that is acceptable to the Commission, it can, and would need to, challenge it in the Tribunal, to prevent or unwind it. The tribunal has original jurisdiction in assessing such mergers.

[3] Sub-section 50(6) defines a market for merger assessment as being a *substantial* market in Australia, or a State, Territory or region of Australia. This was a consequence of the 1977 amendments (referred to later in the paper) following the report of the Government-appointed *Trade Practices Act Review Committee* (the *Swanson Committee*) in 1976. Concern about the former Trade Practices Commission’s involvement in some mergers in insignificant markets led the Committee to recommend a monetary threshold for acquisitions of $3 million annual turnover. The resulting legislation limited the application of the merger prohibition to *substantial* markets, which represented implementation of an alternative approach to adopting the monetary threshold.

[4] These concentration thresholds are more generous than those used in Canada and the United States. In Canada, an economy broadly comparable with Australia, respective shares used are 35%, for single firm market power; and 10% for the merged firm, with 65% for the leading four-firm aggregate share, for coordinated power. In the US, although a different measure is used – the Herfindahl Hirschmann Index; mergers involving markets with the leading four firms having a combined share of less than 75% could well merit scrutiny, as could those resulting in a single firm market share of 35%. In New Zealand, a smaller economy than Australia, with a dominance test for mergers, a market share of 40% is used as a threshold measure for analysis of dominance.

[5] Except in relation to Part X – the competition regime for the international liner cargo shipping. Clearly, where a merger is seen to lead to significant anti-competitive harm, the Commission cannot countenance it. Where the major portion of a merger proposal is innocuous; the anti-competitive components are capable of being remedied by modification of the original proposal; and the parties offer such modification to get their proposal through; it would be undesirable for the Commission to reject such offers.

The Commission, however, has an obligation to ensure that the undertakings it accepts achieve their intended effect ie. remedy the anti-competitive harm in a practical and effective way. To correct a structural problem, it is advisable to adopt a structural remedy rather than a behavioural one. Hence, the Commission will generally only agree to accept structural undertakings.

[6] Such undertakings not only facilitate modifications to anti-competitive mergers; they also enable the Commission to prevent or remedy unlawful conduct, in contravention of the anti-competitive conduct prohibitions, without the necessity of lengthy and costly litigation.

[7] This authorisation procedure is also available for certain other anti-competitive conduct prohibitions, although the test is expressed differently for anti-competitive conduct – ie. that the Commission must be satisfied that in all the circumstances that the conduct would, or would be likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

The original criteria of public benefit, in the 1974 legislation, was that a merger [or restrictive conduct] "…*results, or is likely to result, in a substantial benefit to the public, being a benefit that would not otherwise be available, and that, in all the circumstances, that result, or that likely result, as the case may be, justifies the granting of the authorisation*. While the "*not otherwise available*" criterion is no longer a requirement, there must be a nexus between the claimed public benefits and the proposed merger or conduct. Furthermore, the Commission considers that it is still relevant to examine whether the benefit may be available otherwise than by the proposed merger or conduct when considering the situation which is likely to prevail with and without the merger or conduct. If a benefit may be otherwise available, it is likely to receive less weight in the Commission's analysis.

[8] While there is some difference in the language of the tests for the authorisation of mergers and that certain conduct affecting competition or involving exclusive dealing, the Trade Practices Tribunal expressed the view that the tests are essentially the same in *Re: Media Council of Australia (No. 2)* (1987) ATPR 40 – 774 at p 48,419.

[9] The Tribunal in *Re: Victorian Newsagency* (1994) ATPR 41 – 357 at p. 42,677 citing *Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40-012 at p 17,242.

More generally, the following have been recognised as public benefits in various cases considered by the Commission and/or the Tribunal: rationalisation; business efficiency; international competitiveness; regional employment, especially prevention of large dislocational effects; cost savings to all levels of the supply chain; promotion of competition; equitable dealings in markets; export growth; import replacement; economic development eg. via exploration, research and capital investment; assistance to enhance small business efficiency eg. in costing, pricing and marketing to enhance competitiveness; industrial harmony; quality and safety improvement; expansion of consumer choice; and improvement of information to consumers and business to promote informed choice.

[10] QCMA, op. cit., at p 17,244 – 17,245.

[11] The merger guidelines quote from the work of Professor Maureen Brunt, a prominent economist and former, long-standing, economist member of the Tribunal: *The Australian Antitrust Law after 20 Years – a Stocktake,* in *Review of Industrial Organisation,* Vol. 9, No. 5, 1994, p. 508:

> The present writer would agree with the proposition that there must be public benefit in saving resources but would advance a third view, that it is not the immediate distribution of benefits that is important but their durability. If a merger, for example, gives rise to rationalization economies and higher profits that are not 'passed on to the consumer', one needs to ask why this is so. It may well reflect enhanced market power which would need to enter the benefit-cost equation; and there may well be a question of whether the lack of competitive pressure will allow productivity gains to be lost – benefit to be dissipated – in slackness and rent-seeking activities.

[12] Review of TPC notice revoking the protection conferred by notification of exclusive dealing: *BHP/Koppers purchasing agreement* (1981), ATPR 40-203, at p 42,828.

[13] Where a joint venture associated with a merger is the subject of an authorisation application under section 88 (1), in respects of agreements affecting competition, in tandem with one for the merger under section 88 (9), the law requires that both be considered simultaneously with the merger time-limit applying to both. In such a situation, the pre-determination notification process, conference requirement and time gaps applying to them – statutory requirements under section 90A, for section 88 (1) authorisation applications, all require compliance within the merger authorisation time limit. Such a situation was encountered in *CSR Ltd, Mackay Sugar Co-operative Association Ltd, E D & F Man Australia Pty Ltd & Newco* (1993), ATPR 50 – 138. The Commission's authorisation determination in that matter discusses the effect of the relevant provisions.

[14] *Adelaide Brighton Limited; Cockburn Cement Limited; Rugby Cement Plc Limited; Adelaide Brighton Cement Limited;* (1999) ATPR 50 – 272.

[15] For a discussion of this matter, see *Davids Ltd (1995)*, ATPR 50-185; *Queensland Independent Wholesalers,* (1995) ATPR 41-438; *Davids Ltd* (1996), ATPR 50-224.

[16] This paper does not discuss the extensive debate and some litigation over the question whether wholesaling to supermarkets was best seen as a separate market or was just one part of the market for the wholesale/retail distribution of groceries.

[17] *DuPont (Australia) & Ors* (1996) ATPR 50-231

[18] *Wattyl (Australia) Pty. Ltd, Courtaulds (Australia) Pty. Ltd. & Ors.* (1996), ATPR 50 – 232.

[19] A reduction from three to two players in a market is not necessarily anti-competitive – it depends on the circumstances prevailing in the market at the time. In this case, the Commission formed the view it was anti-competitive.

[20] First, under the informal competition assessment procedure; then, when the parties indicated an intention to proceed with the merger, in the Court, securing interim injunctions; then, in the authorisation process because the public benefits claimed were not considered to outweigh anti-competitive detriment. The parties commenced administrative review proceedings in the Tribunal but subsequently discontinued them.

[21] *CSR Ltd, Mackay Sugar Co-operative Association Ltd, E D & F Man Australia Pty Ltd & Newco;* op. cit.

[22] This proposal was revived in 1997, when, under different circumstances, discussed further in this paper, under globalisation issues, it was allowed.

[23] In addition to authorisation determinations, the Tribunal can review the Commission's price arbitration determinations for large scale industrial facilities subject to mandatory access regimes; and determinations on "notifications" of exclusive dealing. Notification is a procedure which confers immediate and ongoing protection on certain exclusive dealing conduct until revoked by the Commission. Under this procedure, it is necessary to determine, first, whether the conduct does SLC, and if so, secondly, that the anti-competitive detriment is not outweighed by public benefit, before a notification can be revoked.

The Tribunal also makes determinations in relation to the domestic consequences of overseas mergers – see next note.

[24] If an overseas merger subject to section 50A (see note 2 above) is consummated, the Commission can, and must, if it wishes to prevent or unwind the domestic consequences of such mergers, seek a determination and appropriate orders from the Tribunal, within six months. For assessing the impact of overseas mergers, the Tribunal has original jurisdiction.

[25] Regulation of anti-competitive mergers has had a chequered history in Australia. In 1962, Sir Garfield Barwick, then Attorney General, put forward proposals to control mergers considered to be anti-competitive, to accompany other measures to control restrictive trade practices; however, the merger proposals were not included in the subsequent 1965 competition statute.

The striking down of that law on constitutional grounds by the High Court of Australia in the *Concrete Pipes* case in 1971 led to a revision of the law in that year, in the form of the *Restrictive Trade Practices Act 1971*, but again, no merger control provisions were included. *The Commissioner of Trade Practices* (the statutory Officer responsible for administration of the legislation) observed the effect of the loophole on the market between 1971 and 1974, and drew attention in his 1973/74 annual report to the lawful option of merging, to overcome the prohibition on price-fixing, which was being resorted to by corporations, at p 5, as follows:

> (After describing his challenges to price-fixing in the *Concrete Pipes, Frozen Vegetables and Fibreboard Containers* cases; outlining the unsuccessful takeover in the first; and successful

mergers in the next two) "They [ie. the mergers] may turn out to be justifiable depending on their own special circumstances, but at least it is beyond argument that the merging of competitors, who have previously been parties to restrictive agreements, is the ultimate restriction of competition between them.

[26] This was also the test adopted for collusion (other than price-fixing, and, in subsequent legislation, primary, and certain secondary, boycotts, – which, together with the vertical conduct of resale price maintenance and third line forcing, were *per se* contraventions); and exclusive dealing (the general category of vertical conduct other than those in parenthesis above). In addition to providing for the *authorisation* procedure discussed earlier (see note 7 above), the legislation also provided for a *clearance* procedure for mergers (as well for some significant restrictive conduct). Under the previous legislation, anti-competitive agreements ("examinable agreements") could be lodged and received legal protection until challenged in the *Trade Practices Tribunal*. The onus rested on the Commissioner of Trade Practices the to challenge them in the Tribunal by seeking to have them declared against the public interest; unlawful; and, therefore, set aside. The 1974 legislation shifted the onus on the parties to ensure that they did not enter into unlawful mergers or engage in prohibited conduct. This procedure was an administrative process empowering the Commission to declare the subject merger (or conduct, as the case might have been) did not infringe the competition-lessening standard, on the voluntary application of a party. This was also a transparent process with submissions ; the Commission's decision; and its reasons therefor; placed on a public register. Accountability was also built in by requiring reasons for decision and providing for review by the Tribunal. The second reading speech indicates that the purpose of the clearance procedure was to provide certainty for business through an avenue to obtain a definitive view on their proposals for merger or other conduct.

The clearance procedure was abolished in 1977 when the merger test was lowered to dominance. At the time, the Minister then responsible for the Trade Practices Act, the Hon. John Howard, Minister for business and consumer affairs, in his second reading speech to the amending legislation, said:

> As the law relating to mergers is now only to be concerned with questions of control or domination of a market, the procedure for clearance and the previously proposed $3m threshold test have been eliminated. This now means the total removal of the clearance procedure from the Act.

There was no elaboration of the reason for removing the clearance procedure. Presumably, it was expected that (i) the reduction in the number of mergers falling for consideration under the dominance test would be so significant; (ii) the test would prove so clear; and (iii) so few acquisitions would be caught by the prohibition; as to virtually obviate uncertainty, thereby rendering the clearance procedure unnecessary.
The criterion of *being a benefit that would not otherwise be available* for the grant of authorisation was also removed by the 1977 amendments in the reformulation of the authorisation test for mergers.

[27] In the first item of its terms of reference, the *Swanson Committee* was asked to consider:

> (a) Whether the Act is achieving its intended purpose of the development and maintenance of a free and fair market, and whether Australian consumers are benefiting from the Act;
> (b) whether the Act is causing unintended difficulties or unnecessary costs to the Australian public, including Australian business;
> (c) whether in the current economic circumstances of Australia, the operation of any part of the Act inhibits, or is likely to inhibit, economic recovery, contrary to the economic objectives of the Government; and
> (d) the measures open to the Government, by way of amendment of the Act or otherwise, to improve the operation of the Act in the light of (a), (b) and (c) above.

In considering the most suitable merger regime for Australia, the *Swanson Committee* specifically dealt with two main issues – (i) whether merger control was desirable; and (ii) whether it should take the form of a prohibition (ie. a self-enforcing mechanism); or confer immediate and automatic protection through registration, with the onus of examination and challenge resting with the Commission on statutory criteria – this option implicitly raised the issue of the desirability of a more lenient regime restricting its operation to a few, exceptional cases.

The Committee said, at p 47:

> 8.6 In our view, there are two main reasons for including merger provisions in any competition policy law:
>
> (a) merger provisions are necessary to prevent the possibility of achieving, by merger, anti-competitive results prohibited elsewhere in the same law;
> (b) merger provisions ensure that the control of significant capital assets in the community does not change hands in circumstances that disregard any anti-competitive effects of the change.
>
> Our view is that merger law is needed but that its application should not be as sweeping as that of the present law. In particular the law should not apply to the smaller acquisitions: damage to competition is much more likely to occur where larger companies are involved. We deal below with a proposal to have a monetary threshold. If our recommendations are adopted the law would not in future apply to the small business type mergers to which it now applies.

The Committee did not recommend the grant of automatic and immediate protection for mergers through a registration procedure, with the onus on the Commission to examine and challenge them, although it had specifically considered such an approach, as an alternative to the prohibition approach.

[28] The Federal Court (Mr Justice Northrop) in its judgment in *TPC v Ansett Transport Industries (operations) Pty. Limited*, (1978) ATPR 40-071, had earlier found that *control* was a more onerous standard than *dominance* and, therefore, redundant.

[29] Short time limits were also imposed on the Commission for the disposition of authorisation applications involving mergers. The amendments stipulated 30 days for making determinations on merger authorisation applications, extendable to 45 days for complex matters with suspension of time running for the time taken by applicants to provide information sought by the Commission; as well as by their agreement. Previously, the Act provided for a time limit of four months for consideration of merger authorisation applications by the Commission.

At this time, a previous provision, sub-section 50 (2C), inserted by the *Trade Practices (Transfer of Market Dominance) Amendment Act 1986*, was also repealed. It had provided that a bare transfer of market dominance (sometimes referred to as "bare transfer of monopoly power") be disregarded for the purposes of assessing whether dominance had been acquired or strengthened. By way of history, the Trade Practices Commission had decided, under the informal competition assessment procedure, not to oppose the acquisition of the *Swan Brewery*, a brewer in Western Australia with almost the entire market, by the *Bond Corporation*, in **[]** because it was a *mere transfer of dominance*, without *lessening competition*. However, in **[]**, the Trade Practices Commission, under the informal process for assessment of competitive effect, decided to oppose the acquisition of *Broken Hill Proprietary Co. Ltd*, a company with the overwhelming proportion of the steel making market (with interests in petroleum exploration and other markets as well) by *Bell Resources Ltd*, a company not involved in any of the markets in which the target competed. This decision was made on the basis that the will of the Parliament was not known as to whether the acquisition of existing dominance was permissible. The Commission sought and obtained interim injunctions from the Court to prevent the acquisition occurring before a full hearing. The proposal was abandoned. The provision had then been inserted. The provision had the effect of excluding from the consideration of acquisition or enhancement of dominance under that test, the mere transfer of dominance, without more, from one entity to another. It was repealed because it was no longer necessary under the SLC test.

[30] In *TPC v Ansett*, op. cit., at p. 17,723, although the *Avis* share of the car rental market was estimated at between 43 and 46%, which, according to Northrop J, might

> tend to suggest that *Avis* may be in a position to dominate the car rental market in Australia,

its acquisition by *Ansett* was not considered to be either acquisition or strengthening of dominance. While he took account of a competitor's objective of becoming the no.1 car rental operator, *(Budget),* he did not consider entry barriers to be significant. The judgment focused entirely on the issue of single firm dominance.

While, in *TPC v Australia Meat Holdings Pty. Limited,* (1988) ATPR 40-876, at p. 49,465, the market share of fat cattle purchases of 48% of the acquirer, *Australia Meat Holdings,* of an export abattoir, operated by *Thomas Borthwick and Sons Pty. Ltd,* was not considered dominant by Wilcox J. he gave weight to the plan for future joint buying by shareholding companies of AMH who were also competitors; the fact that a company, *Tancred N.Q.* though unrelated in a formal sense to any of the parties, shared half its board of directors with *Tancred,* one of the shareholders of AMH, therefore aggregating its market share with those of the acquirer and target to reach 64%; and the highly competitive profile of the target, *Borthwick.* The "amicable corporate relationship" between AMH and *Queensland Meat Export Co. Ltd,* (part of the *Vestey* group), the other large independent competitor, which had not exhibited a strong competitive profile, in contrast to the target, *Borthwicks,* was not given weight on the basis that there were no formal agreements between them, although the possibility of such agreement in the future was noted. This judgment traverses a range of issues now widely accepted as being relevant to an analysis of both unilateral and coordinated market power, as represented by the SLC test including: consideration of the implications of corporate linkages not amounting to control; giving weight to the vigorous and effective competitive profile of the target; and recognising the existence of tacit behaviour between competitors, with the possibility of future overt collusion. Such an approach, while adjudicating on single firm dominance, dealt with issues that are now considered very relevant to the SLC test.

[31] In Europe, while Article 2 of the Merger Regulation is expressed to apply to concentrations creating or strengthening "a" dominant position, the Commission has developed the concept of collective dominance, effectively approaching the SLC standard.[31] Its position has been affirmed by the judiciary – the European Court of Justice and the European Court of First Instance. C.f. European Court of Justice in *French Republic v Commission,* [1998] 4 CMLR 829; and *Societe Commerciale des Potasses et de l'Azote (SCPA) and Enterprise Miniere et chimique (EMC) v Commission* [1998] 4 CMLR 829; and Court of First Instance in *Gencor v. Commission* Case T- 102/96, 25 March [1999] 4 CMLR 971.

[32] *Clear Communications v Telecom New Zealand;* TCLR No. 5, 413, at p. 418

[33] The Terms of Reference for the Committee of Review say, in part:

> In establishing a review, the Government is aware of concerns, among other things:
>
> - that Australian businesses increasingly face global competition and need to compete locally and internationally;
> - that excessive market concentration and power can be used by businesses to damage competitors; and
> - the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the Act.
>
> 1. The Committee is to review the operation of the competition and authorisation provisions of the Act, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:
>
> (a) inappropriately impede the ability of Australian industry to compete locally and internationally;
> (b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
> (c) promote competitive trading which benefits consumers in terms of services and price;…

[34] Big business argues that an SLC test frustrates the achievement of economies of scale and increased efficiency to enhance international competitiveness; hence a dominance test is desirable.

Small business and consumers argue that large size does not guarantee international competitiveness; that the costs of the exercise of market power in the domestic market would be borne by consumers, directly, in the form of end prices of goods/services produced by the large firms involved, as well as indirectly, in the form of higher prices of intermediate goods/services produced by them which were inputs to downstream firms. Small firms buying from the large firms and those supplying them, argue that their prices would be, respectively, raised and lowered above and below competitive levels. Such effects hamper the efforts of those small firms to compete effectively in world markets.

[35] The concept has been described in the Commission's *Merger Guidelines* (at para 5.11) as follows:

> Market power may be exercised either unilaterally by a single firm, or coordinated among firms. The unilateral exercise of market power does not depend on the cooperation of other market participants. A firm with unilateral market power can assume that its rivals will behave competitively in response to market prices, but nevertheless their capacity to defeat a price rise is limited. In contrast, the coordinated exercise of market power depends on the cooperative or accommodating actions of other market participants.

[36] There was a view that *Coles* and the *Myer – Grace* group competed in different segments of the market. While this was true of the department store segment, in which *Coles* did not compete, it was not true of the discount department store segment, in which its *K-Mart* chain competed directly with the *Target* chain of the *Myer-Grace* group. The merger also enhanced the combined firm's strength in the department store segment in which its only other competitor was *David Jones*.

[37] The resulting market structure consisted of *Coles* and *Woolworths* becoming the two leading integrated supermarket chains with *Franklins* a smaller third; and a number of independent supermarket groups supplied by wholesalers. The three large chains ultimately achieved a combined market share of some 80% of the dry/packaged goods market according to the 1999 report of the Joint Select Committee of the Australian Parliament on the retailing sector entitled *Fair Market or Market Failure*. That Committee concluded that the major chains had acquired a substantial degree of market power, enhanced by vertically integrated structures, and expressed concern about their activities with respect to small retailers (Executive Summary of report).

[38] The Commission submitted to the Cooney Committee that despite securing divestiture to overcome dominance in two State markets, the 1987 merger between *HWT* and *News Ltd.* had substantially lessened competition in the market by the removal of *HWT* as a "major competitive force".

[39] The Commission considered that competition suffered on major eastern trunk routes and nationally. While intra-state competition in New South Wales was resolved and divestiture was agreed in Western Australia to resolve competition problems there (the latter was subsequently frustrated by commercial difficulties and the refusal of the State Government to license the proposed acquirer), adverse competition consequences in national and eastern trunk markets could not be prevented

[40] They were:

> *Allied Mills/Fielders Gillespie* – reduction from three major players in the bread market to two. *Fielders Gillespie*, a vigorous price competitor, was removed by the acquisition, leaving *George Weston* and *Allied Mills* in the New South Wales market.
>
> The Commission considered *Power Brewing*, a new brewer competing vigorously, could be acquired by either of the other two large, national brewers under the dominance test [this in fact subsequently occurred]; and existing oligopolies in *media, retailing* and *petroleum*, could be subject to further concentration, including acquisition of new entrants.
>
> The acquisition by *ICI (Dulux)* of *Berger* and *British Paints*, reduced the number of significant players from four to three. The prices of architectural paints rose by 35% post-merger.
>
> In the steel pipe and tube market, the *BHP* acquisition by *Tubemakers* of *McPherson* reduced the number of players from three to two and raised issues of foreclosure of distribution through vertical

> integration. The merging parties were the two major players and they were integrated into distribution. The third, *Palmer Tube*, a vigorous competitor, was not. *Tubemakers* had earlier "notified" exclusive ties with distributors (see note 23 above for a description of this process) but it was revoked by the Commission. This was an example of firms resorting to a merger to circumvent other, more stringent, prohibitions on anti-competitive conduct.
>
> *Mobil/Esso* and *Ampol/Solo* also concerned the Commission – a reduction from five players in the petroleum products retailing market to four. *Solo* was an aggressive price competitor and prices rose in metropolitan areas post acquisition.

[41] While Australia's exports have historically consisted largely of mineral resources and farm produce, manufacturing and service industries are beginning to emerge as significant export earners.

Tourism is an example of a growing market competing with the foreign tourism industry and dependent for its costs and efficiency on a competitive domestic aviation market. The latter has been deregulated, but is not subject to international competition. The services markets generally and some traded goods markets are dependent on inputs the suppliers of which are not exposed to international competition, such as gas transmission pipelines, electricity, telecommunications and rail.

Such goods and services markets may themselves be tradeable or constitute inputs to other tradeable markets. However, they may be dependent on inputs such as "utility" type services eg electricity, gas transmission, railway, water and telecommunications, provided by the large-scale firms in the non-tradeable sector operating "essential facilities". Hence, ensuring competition in non-tradeable markets is essential to internationally efficient and competitive markets in the traded sector.

While the debate about the test and legislative change was occurring in the late 1980s and early 1990s, micro-economic reform was proceeding as well. Large, "utility" type industries were being privatised; and separated vertically and horizontally to encourage efficiency through competition. Some had been made subject to competition law even before privatisation.

In this sector, national competition policy reforms, introduced about the time of re-instatement of the SLC test, have specifically created a regime to ensure reasonable access to the large facilities in the non-tradeable sector described above. It is particularly necessary that the non-traded sector should be prevented from raising costs to downstream industry by merging to concentration levels crossing the SLC standard, but short of single firm dominance. This was precisely what was threatening to happen. The change in the test allowed the Commission to prevent such mergers in some markets, such as dairy processing and grain marketing, in advance of deregulation, as a pre-emptive move to avoid competition.

[42] Such large-scale, "essential facility" based service providers, usually government-owned, were being reformed under arrangements agreed between the Federal Government and the State and Territory Governments under the aegis of the Council of Australian Governments (COAG) (see note 41 above).

[43] In the original 1962 competition law proposals by the then Attorney-General, Sir Garfield Barwick, there was no suggestion of adopting a standard for mergers which was more lenient than that which was intended to apply to the anti-competitive conduct prohibitions - in the event, no merger control measure was legislated in the 1965 legislation resulting from his proposals.

The 1974 legislation, which introduced merger control, adopted the same SLC test for mergers and for anti-competitive conduct.

Under the dominance test, the effect of the lack of consistency was referred to by the Trade Practices Commission in its 1977-78 Annual Report (at p. 4), as follows:

> … mergers can proceed whether or not they lessen competition, provided only they do not involve the acquisition of control … of substantial markets.

[44] The first approach was criticised on the basis that capital market predictions were not necessarily accurate and, in any case, could be based on expectations of profit arising from increased market power/higher prices rather than productivity increases.

[45] The chief executives of some of the largest corporations in the country, such as Alan Bond of *Bond Corporation*; Laurie Connell of *Rothwells Bank*; Christopher Skase of *Quintex Corporation*, were either under investigation or had been arraigned for serious breaches of fiduciary duties under the corporations regulatory system. Such companies had become insolvent in circumstances suggesting dishonesty or serious incompetence, on a large scale, was involved.

[46] See *Westpac Banking Corporation/Challenge Bank Ltd; Westpac Banking Corporation/Bank of Melbourne Ltd*.

[47] So long as this policy is in force, there will be no occasion for the Commission to examine any proposal for a merger between any two of the four largest retail trading banks.

[48] Some saw the two firms as major suppliers of independents, and considered a merger would create a stronger firm, thereby enhancing competition; but the ACCC took a different view – that reduction from 5 to 4 in the absence of import competition was anti-competitive. Subsequent merger proposals, if proceeded with, would have reduced the number of players to two if the dominance test were in force in Australia at the time.

[49] This was achieved by securing an interim injunction from the Court to prevent the merger proceeding – *Trade Practices Commission v Rank Commercial Limited & Others.* (1994), ATPR, 41-331.

[50] *TPC v Rank Commercial & Ors; o*p., cit.

51 Sometimes, where concentration thresholds are crossed, there may be an argument for allowing a merger on the basis that a stronger competitor is created. This was the argument advanced in support of the *Wattyl/Taubmans* merger proposal. *Dulux* was the market leader while the proposed parties to the merger would, combined, roughly match the leader's size. The three firms' products were differentiated from other products as a result, among other things, of strong brands created by intensive advertising. A substantial proportion of the diversion of customers from the merged firm, following a price rise by it, would probably have gone to the remaining firm in the differentiated product segment of the market, and vice-versa. Neither would have been likely to have encountered a constraint from the non-differentiated segment because the diversion of customers to that segment would probably have been insufficient to defeat the price rise by competing it away. The Commission considered the argument, that the creation of a stronger competitor to the market leader, would be pro-competitive but rejected it.

52 Similar differentiation may exist in relation to geographic discontinuities. For example, area A may be contiguous to area B and suppliers in those two areas are competitive with each other; area B is contiguous to area C, with competition between those two areas; but areas A and C, being substantially separated, are not in competition with each other. However, a linking effect may effectively combine all three areas in the one market. To a lesser extent, such variations in the levels of demand or supply at different times leading to price differentials, eg. in peak/off peak and seasonal variations in the supply and pricing of electricity, may also create some discontinuity, without amounting to different markets. Such issues have been considered by some overseas agencies. For a discussion of the implications of geographic discontinuities, see paras 5.55 – 5.57 of the Commission's merger guidelines. For a discussion of temporal discontinuities, see New Zealand Commerce Commission, *Business Acquisitions Guidelines,* 1996, p. 14; and UK Office of Fair Trading, *Competition Act 1998: Market Definition,* formal consultation draft, 1998, p. 22. For a more detailed discussion of this concept and its relevance for competition assessment, see the Commission's merger guidelines, paragraphs 5.48; and 5.55 – 5.58 and Brunt, op. cit., 1990, at pp. 104-105; S G Corones and Neville Norman (1994), *Markets, Competition and Market Power*, ATPR 2-555.

[53] The merger register of ("informal" or non-statutory) competition assessments, available for public access, is separate from the statutory public register required to be kept for authorisation applications. The merger register entry is made public after the decision has been made on a proposal and contains

relevant information including the parties involved; the market; analysis in terms of the statutory merger factors; date of commencement of matter and decision; the outcome and reasons for opposing or allowing the merger. Of course, no details are made available while a merger is still confidential, nor is confidential business information included. The register can be accessed electronically as well as in physical form.

[54] The process of merger assessment was streamlined some years ago. A Merger Committee, consisting of the Chairman and nominated commissioners initially consider merger proposals. Non-contentious decisions are made and reported weekly to the Commission for ratification. The Committee can refer significant matters for Commission consideration or the Commission can decide to consider such matters in lieu of consideration by the Committee. This has reduced the average time taken for assessment.

It should be recognised that, in the case of a number of mergers, usually the larger or more complex ones, the Commission does give an early indication to the parties of possible problem areas, soon followed by a decision. The parties often ask the Commission to withhold implementing its decision until further information they provide has been considered. Further, the negotiation of the detail of undertakings offered, to address the Commission's concerns, often takes substantial time. These processes delay the final disposition of those merger proposals disproportionately beyond the time of the initial decision and are reflected in the substantial time taken for finalisation of a minority of merger proposals.

In its merger guidelines, the Commission says, at paragraph 4.14, that where the merger is public, and:

- the Commission is satisfied that the concentration thresholds are not crossed, it may inform the parties within 10 to 15 days that it does not propose to take any action at that time;
- where the concentration thresholds appear to be crossed, the Commission will usually require about a month to make market inquiries and consider the matter;
- In those few major cases which raise very substantial issues and with which the Commission is likely to have a problem, the Commission may take six to eight weeks to fully consider the matter.

However, it is the Commission's experience that some parties fail to provide timely information, in which case the Commission's time frames may be extended. Similarly, where there are delays in conducting market inquiries until the proposal becomes public, the Commission's time frame will be correspondingly extended.

[55] See for example, background competition analyses in *Westpac/Challenge Bank; Goodman Fielder/Bunge Industrial Ltd.; Westpac/Bank of Melbourne; Australian Stock Exchange/Sydney Futures Exchange; Commonwealth Bank of Australia/Colonial Bank Ltd* and various authorisation determinations.

[56] *TPC v Rank Commercial & Ors;* op., cit.

[57] *Australian Competition and Consumer Commission v The Adelaide Steamship Company Limited & Others* (1996) ATPR 41-462.