Submission by Commonwealth Bank of Australia to The Trade Practices Act Review

July 2002

Commonwealth Bank

REVIEW OF THE TRADE PRACTICES ACT

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REVIEW OF THE TRADE PRACTICES ACT

Executive Summary

1 INTRODUCTION

1.1 Context

The Commonwealth Bank of Australia welcomes the opportunity to make this submission to the Review of the competition provisions of the Trade Practices Act 1974 (the Act) and their administration.

The Bank is a strong supporter of competitive markets and best practice regulatory oversight where intervention is justified and appropriate.

The Act occupies a critical place in the Australian economy. The objective of the Act is to enhance the welfare of Australians.

The ACCC, as administrator, consequently is a pivotally important regulatory agency.

In the Bank's view, productivity growth is the basis of national prosperity and welfare enhancement. Microeconomic reforms have contributed significantly to Australia's strong productivity growth of the past decade. This Review should focus on ways to change the Act and its administration so that it will further enhance Australia's productivity performance.

1.2 Terms of Reference

The Bank agrees with the Terms of Reference of the Review that effective competition laws contribute to the productivity, efficiency and growth of an open, integrated Australian economy.

It also agrees that key provisions of the Act need review in light of significant structural and regulatory changes affecting the competitiveness of Australian businesses, economic development and consumer interests.

The Bank particularly endorses the acknowledgment in the Terms of Reference that the Review should consider whether the provisions under review promote competitive trading which benefits consumers in terms of services and price.

This is particularly appropriate given that the objective of the Act is to enhance the welfare of Australians. The Bank's submission and its recommendations are underpinned by our focus on superior outcomes for our customers.

1.3 Submission by the Australian Bankers' Association

The Bank has been a party to the submission being provided to the Review by the Australian Bankers' Association (ABA).

2 MERGERS

2.1. The Need for Reform

Mergers are an important source of productivity enhancement. Increases in productivity, and the economies of scale and scope which underpin such productivity growth, enhance the ability of Australian firms to compete globally.

Productivity growth requires fixed capital investment. Competition policy and its administration must therefore be consistent with market-driven incentives for investment and growth.

The threat of acquisition (the market for corporate control) is an important spur to the operating efficiency of existing businesses. Legal rules that inhibit the competitive operation of the market for corporate control will reduce efficiency, productivity and welfare.

Australia therefore needs a merger control regime that preserves competitive market processes without impeding legitimate productivity-enhancing merger activity.

The small size of the Australian economy will always create difficulties in striking the right balance in merger assessments.

In the current environment of transformational change and global competitive forces in most industries, striking that balance has become even more challenging, and the costs of poor regulation and poor administration have increased.

The challenge for the Review is to identify improvements to the control and oversight of mergers that achieve a better balance between preservation of competitive markets and achieving merger efficiencies, and do so with a decision-making process that is more timely and cost efficient.

In the Bank's view there is a strong case for:

- refining the test that is applied in merger assessments (the Section 50 test);
- improving the informal clearance process; and
- improving the authorisation process.

2.2 Merger Test (Section 50)

2.2.1 The Present Test Focuses on the Transaction and the Acquirer Rather than the Market

The present test prohibits a merger if the merger would itself ***substantially lessen competition*****.**

This test accordingly focuses on the impact of the ***particular transaction*** and on the ***acquirer*** and not on the ***competitive state of the market*** after the acquisition.

The Bank submits that these impacts are not important in themselves and should not be the focus of the merger test.

The relevant issue is whether or not the market post-merger is effectively competitive, regardless of how competitive it might or might not have been prior to the merger.

2.2.2 The Test Should Focus on the Post-Acquisition Competitiveness of the Market

The Bank submits that a merger should be permitted if there would be ***effective competition*** in the market ***after the acquisition*****.**

Refocussing the test in this way provides a more logical point for examining mergers.

In practice this clarified focus accords with the current screening process outlined in the Commission's Merger Guidelines. Its evaluation process examines the structure of the market with the merger, the existence or otherwise of import competition, the height of barriers to entry, and countervailing power or other market characteristics.

The current merger assessment methodology addresses a single overarching question: ***will the merged entity be in a position to exercise market power on a sustainable basis?***

The Bank believes that this is the defining issue. The Act should therefore be amended to clarify that the state of competition post-merger is the issue to be assessed.

2.2.3 A Merger Should be Permitted if the Post-Merger Market will be Effectively Competitive

The Bank submits that a merger should be permitted if there would still be ***effective competition in the market following the acquisition*****,** even if the acquisition itself would affect the degree of competition in that market.

Recommendation

On this basis, the Bank advocates amending the provisions of section 50(1) of the Act to read as follows:

> **A corporation must not directly or indirectly:**
>
> **(a) acquire shares in the capital of a body corporate, or**
> **(b) acquire any assets of a person;**
>
> **if following the acquisition, there would not be, or not likely to be, effective competition in a market in which it operates.**

Complementary amendments to related sections of the Act should be adopted.

2.2.4 Removal of Section 50(3)(h)

The statutory merger factors include specific reference to "removal from the market of a vigorous and effective competitor" (Section 50(3)(h)).

This factor is irrelevant to the refocussed test proposed above.

Recommendation

The Bank therefore recommends that reference to "removal from the market of a vigorous and effective competitor" be deleted from section 50(3).

2.3 Impact of Global Competition

The Bank is particularly concerned that Australian enterprises increasingly face global competitors in Australia, and also that Australian enterprises need to be able to grow in size and resources to compete successfully in foreign markets.

Mergers allow Australian firms to realise productivity improvements. Enhanced productivity allows Australian firms to compete more effectively against global competitors in Australia and in global markets.

The Act needs to recognise that such productivity improvements are welfare-enhancing even if competition is lessened in one or more markets (provided competition is not reduced to the point of being ineffective – in this case, a public benefit test must be applied).

The rules for the assessment of mergers must take into account the need for productivity growth given the accelerating impact of global competition on Australian markets, including in service industries.

Statutory merger factors therefore should reflect the need for Australian corporations to be able to compete more effectively in a global context, both domestically and internationally.

This will allow due regard to be paid to Australia's relatively small size and open nature.

Recommendation

The Bank recommends that the following additional factors be included in section 50(3):

- **the likelihood of a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia;**
- **the likelihood of a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets.**

2.4 Market Dynamics

Competition analysis should be concerned with longer run, rather than short run or static effects of mergers. This is especially relevant in markets experiencing major structural changes under the impact of external forces, as is the case with the financial sector. In such markets, mergers are frequently a strategic response to those very forces of change.

Both the Act and the Commission's Merger Guidelines acknowledge the need to take dynamic characteristics into account. In practice, however, the Bank believes that insufficient regard is paid to dynamic change over time and its relationship to substitution possibilities on the supply side of markets.

The Bank recognises that this is a complex issue that involves knowledge of the unique characteristics of the industry concerned and the exercise of reasoned judgement as to future developments. Nonetheless, a future perspective is consistent with both the Commission's acknowledged analytical framework and previous rulings that "substitution possibilities in the longer run" is the appropriate time horizon.

The merger assessment process must have regard for the accelerating speed with which the structure and dynamics of markets now change.

Recommendation

In order to ensure appropriate attention is given to this future perspective, the Bank recommends section 50(3) be amended by the addition of the following factor:

- **the likely future state of competitiveness and contestability within the market, having regard to the speed of change in the characteristics of the market.**

In addition, section 50(3)(f) should be altered to provide:

- **the extent to which substitutes are available in the market or are likely to be available over a medium-term timeframe.**

2.5 Authorisation Test (Section 90)

2.5.1 The Public Benefits Test

The Bank accepts that the authorisation test needs to be broad and endorses the retention of the current merger authorisation test specified in section 90(9).

2.5.2 Expansion of Statutory Public Benefits

Section 90(9A)(a) requires the Commission to regard the following as public benefits:

- a significant increase in the real value of exports; and
- a significant substitution of domestic products for imported goods.

The Commission is also required to take into account "***all other relevant matters that relate to the international competitiveness of any Australian industry***" (section 90(9A)(b)).

Recommendation

The Bank advocates expanding Section 90(9A)(a) to require the Commission to regard as a benefit to the public:

- **a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia;**
- **a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets.**

2.5.3 Priority for Prudential Matters in Mergers Between Financial Institutions

As far as financial institutions are concerned, the reliability and safety of the payments system is vital and all other rights and interests are secondary, because without a sound and reliable payments system, the entire economy is vulnerable.

It follows that, in the case of mergers involving banks and other financial institutions, the reliability of the payments system is paramount, and the prudential soundness of the financial institutions concerned should take priority over all other interests.

There is currently a lack of prioritisation among Australian regulatory regimes between consumer protection, competition, corporations and prudential regulation. Explicit priority ought to be given to prudential regulation in the event of a conflict between the objectives of different regulatory regimes.

In the application of the merger tests under the Trade Practices Act, the Commission should be required to accord priority to prudential matters in consideration of a merger proposal involving banks or other relevant financial institutions. Because this obligation of the Commission should apply to the operation of the Trade Practices Act as a whole, it is recommended that a new section should be included as a general overriding provision in the Act.

Recommendation

The Bank recommends that the Commission be required by the Act to give priority to the soundness and safety of the payments system, and the strength of prudentially regulated institutions and the banking system as a whole, ahead of all other factors, in the exercise of its powers and functions.

2.6 Authorisation Timeframe

The merger authorisation process is infrequently used because it does not provide a commercially realistic process for merger assessment. Lack of certainty about the time required for a determination to be made is one of the detracting features of the process.

The Bank acknowledges that there are statutory provisions covering time limits on the Commission's deliberations. In practice, however, the capacity to extend the timeline by requests for further information makes the duration of the process indeterminate.

This uncertainty affects customers, staff and shareholders.

Recommendation

To address this uncertainty, the Bank recommends that:

- **stricter time limits should apply;**
- **requests for additional information should meet a materiality test; and**
- **objections by third parties should be subject to disciplines designed to deter unsubstantiated or vexatious submissions.**

2.7 Onus of Proof in Authorisation

The authorisation process places the onus on the applicant to satisfy the public benefit test.

In practice, this requires the applicant to substantiate both the competitive effects and public benefits.

The onus of establishing these two dimensions tends to create a protracted process in relatively complex mergers (it is virtually inevitable that mergers requiring authorisation will be complex).

To address this issue the Bank favours the adoption of a split onus of substantiation in the authorisation process.

Recommendation

The Bank recommends the adoption of a split onus of substantiation in the merger authorisation process. That is, once the merging parties have substantiated the likelihood of material public benefits from the merger, the Commission should have a period of 30 days to form its opinion on whether these public benefits would be outweighed by the likelihood of competitive detriment.

This process is fully consistent with the provisions of section 90(9) of the Act, which refers to "such a benefit to the public that the acquisition should be allowed to take place."

3 ADMINISTRATION OF THE ACT

3.1 The Act Has Become an Omnibus Statute

The Review is required to identify improvements to the Act or its administration to achieve a better outcome for competition law.

The Act has greatly increased in size, scope and complexity since originally enacted in 1974.

Substantial amendments over a quarter of a century have significantly expanded the scope of the Act and have commensurately increased the complexity of the enquiries and activities entrusted to the Commission.

The dual responsibilities, and increased coverage and functions of the Commission, demand that its system of corporate governance receive careful attention by the Review.

3.2 Governance Principles

Good principles of governance require at least some separation of powers and functions between those responsible for the policies, overall performance, and strategic direction of the organisation, and those involved in managing its operations.

Good principles of corporate governance in the private sector emphasise the need for clear accountabilities. The governance structure adopted for statutory bodies should also have an effective accountability framework.

There is no single governance structure that universally applies to statutory authorities, but independent Boards of non-executive appointees are common.

A notable variant is the Australian Tax Office, where significant changes in governance are occurring. A Board of Taxation has been established and the Government is in the process of establishing an Inspector-General of Taxation.

3.3 Governance of the ACCC

The original model adopted by the Act for the ACCC was a chairman and a number of full-time and part-time members. The chairman is the chief executive officer of the Commission.

With the expansion in the role of the Commission mentioned above, a common complaint across the business community is that the Commission uses the media inappropriately. There is nothing wrong with using the media to increase understanding of the law. On occasion, however, this use of the media is regarded by the Bank as prejudicial and inequitable, particularly where undue publicity is given to the early stages of an investigation. Corporate reputations can be damaged in the process even though no breaches of the law have been established.

Other public agencies charged with equally important investigations are more judicious in their dealings with the media and their public comments more generally.

Against this background, the Bank believes that a system of checks and balances should apply to the Commission. Alternative proposals are canvassed in sections 3.4 to 3.8.

3.4 Separate Board for ACCC

The Bank recommends that the Commission should be redesigned to incorporate an independent non-executive Chairman and a majority of independent non-executive Directors (or Commissioners).

The existing role of Chairman would become that of Executive Director. The Executive Director would be appointed by the Treasurer on the specific recommendation of the Board and would be responsible and accountable to the Board.

3.5 Statutory Accountability

The Bank recommends that, following the implementation of the recommendation in paragraph 3.4 above, the ACCC's directors and officers be subject to the standards of conduct applying to directors and officers of Commonwealth authorities under the Commonwealth Authorities and Companies Act 1997, with the necessary changes being made to that legislation.

3.6 Inspector-General of Competition

The Bank further recommends that an Inspector-General of Competition be appointed as an independent statutory officer to hear complaints about the administration of the Act. The Inspector-General should report any infringements to the Board for appropriate action.

The purpose of the reconstruction would be to impose a more effective governance structure on the Commission.

3.7 Preferred Governance Structure

Recommendation

The Bank submits that an independent Board for the ACCC is both consistent with principles of good corporate governance and addresses lack of accountabilities under the current structure. The Bank submits that the Commission should be restructured as a modern Commonwealth regulatory authority, governed by an independent Board composed of a non-executive Chairperson, independent non-executive directors and its Executive Director. The standards of conduct applying to its directors and officers should be those applied to directors and officers of Commonwealth authorities under the Commonwealth Authorities and Companies Act 1997, with the necessary changes being made to that legislation. The Bank also advocates the appointment of an Inspector-General of Competition. These measures will, in the Bank's view, act as a discipline on over-zealous use of discretionary powers, and give the business community greater confidence in their dealings with the Commission.

3.8 Alternative Governance Structure

The Bank has a strong philosophical attraction to governance structures that separate executive and Board functions in order to ensure appropriate accountability. However, if the proposal under 3.7 above is not adopted, as an alternative, **the Bank endorses the proposals recommended by the Business Council of Australia (BCA) and ABA.**

Recommendation

If the Bank's preferred model of an independent Board were not favoured by the Review Committee, as an alternative the Bank supports the proposals of the BCA and ABA which involve:

- **amendment to the Act to include specific guidance on the broad principles to be followed by the ACCC in the administration of the Act;**
- **introduction of a Charter of Competition Regulation which sets out the framework and processes within which Australian competition regulation is to be administered;**
- **creation of a Board of Competition Regulation to oversee adherence to the Charter; and**
- **appointment of an Inspector-General of Competition to investigate specific complaints against the decisions or behaviour of the ACCC.**

4 OTHER RECOMMENDED CHANGES TO THE ACT

4.1 Joint Ventures

Joint ventures are important business structures for the banking industry and are becoming increasingly common in Australia, both in banking and in the wider business sector.

The special role accorded to joint ventures in competition policy was recognised by the inclusion of the joint venture exception in the Act. However, there is considerable uncertainty as to its application.

Recommendation

The Bank supports the comments and recommendations made by the ABA in its submission on changes to both sections 4D and 45A to clarify the operation of the Act as applied to joint ventures. The Bank also supports the ABA's recommendation that the ACCC issue a binding guide on its approach to regulating joint ventures under the Act.

4.2 Third Line Forcing

The Bank further submits that this Review provides the opportunity to address some other anomalies in the current legislation, particularly the introduction of a competition test into the provisions of section 47 of the Act dealing with third line forcing.

This matter is dealt with comprehensively in the submission of the ABA. The Bank is both a party to and supports the proposal in that submission.

Recommendation

The Bank recommends the introduction of a competition test into the provisions of section 47 of the Act dealing with third line forcing and that a related company exception be introduced.

5 PROPOSALS BY OTHER PARTIES

Any proposed changes to the Act must be productivity-enhancing or deliver greater equity in application and enforcement than under existing arrangements.

There had been a number of amendments proposed by other organisations in the lead-up to this Review. These proposals include:

- The introduction of divestiture powers;
- Reversal of the onus of proof in actions as to purpose in section 46;
- The introduction of an effects test; and
- The introduction of cease and desist powers.

Recommendation

The Bank submits that these proposals would reduce welfare through increasing business uncertainty, adding to costs of compliance and enforcement, and providing a means for inefficient businesses to shelter from the competitive process. The Review should reject the introduction of these changes.

Further proposals have been made to introduce criminal provisions into the Act for what has been termed "hard-core collusion".

The Bank's corporate values embrace an uncompromising commitment to honesty and integrity. Consistent with those values, the Bank regards collusion as reprehensible behaviour.

Given the scope for threats of prosecution of company directors and officers to be misused in a media campaign, the legislation should require any proposal by the ACCC that such prosecution be made be given the prior approval of the responsible Minister. This will achieve political accountability should the powers be misused.

Recommendation

If the Review were to conclude that there is a case for criminal penalties for identified culpable behaviour, the Bank would support this approach provided that:

- **coverage applies to all organisations, regardless of size; and**
- **the provisions are introduced into the criminal code.**

At the time of finalising this submission, the Bank had not had time to digest and respond to the submissions to this Review of other parties. Some of these submissions, particularly that of the ACCC, address the above matters in considerable detail. The Bank may wish to respond to those matters with a subsequent submission to the Review.

6 SUMMARY

The objective of the Trade Practices Act is to enhance the welfare of Australians. Welfare is improved by enhancing the productivity performance of Australian enterprises. The Bank strongly submits that the recommendations in this submission will deliver better outcomes in line with that key objective.

1 INTRODUCTION

1.1 Context

The Commonwealth Bank of Australia welcomes this opportunity to make a submission to the Review of the Competition Provisions of the Trade Practices Act.

The Bank is a strong supporter of competitive markets.

The objective of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection.

This objective places the Act in a critical position in the Australian economy.

Competition policy should be both framed and administered with a focus on the process of competition, rather than to protect individual competitors.

Competition can lead to stronger growth in productivity, higher incomes and a rising standard of living.

Competition imposes a discipline on firms to operate in the most efficient way possible. Competition also ensures that firms respond to changing consumer tastes and preferences. The Bank therefore embraces the competitive process as the way to secure superior outcomes for customers.

This objective of competition policy was articulated in the Hilmer Review of National Competition Policy in 1993:

> "Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds."[1]

Productivity growth underpins growth in income, employment and living standards. These are crucial outcomes in enhancing the welfare of all Australians.

Productivity growth, supported by enhanced competition, is essential for Australia's economic well being.

This would be the case irrespective of the global environment. However, in an increasingly globalised world, the imperative for productivity growth, and the policies that support productivity increases, become even more important.

[1] Hilmer, F. (Chairman), Raynor, M. and Taperall, G. (The Independent Committee of Inquiry) 1993, National Competition Policy, AGPS, Canberra.

The Act plays a central and vital role in promoting increases in welfare for all Australians by fostering productivity-enhancing competition.

Microeconomic reforms contributed significantly to Australia's remarkably strong productivity performance of the past decade. This Review should focus on ways to change the Act and its administration so that it will further enhance Australia's productivity performance over coming decades.

1.2 Terms of Reference

The Bank agrees with the Terms of Reference of the Review that effective competition laws contribute to the productivity, efficiency and growth of an open, integrated Australian economy.

It also agrees that key provisions of the Act need review in light of significant structural and regulatory changes affecting the competitiveness of Australian businesses, economic development and consumer interests.

The Bank particularly endorses the acknowledgment in the Terms of Reference that the Review should consider whether the provisions under review promote competitive trading which benefits consumers in terms of services and price.

This is particularly appropriate given the objective of the Act is to enhance the welfare of Australians. The Bank's submission and its recommendations are underpinned by our focus on superior outcomes for our customers.

The Bank is particularly concerned that Australian enterprises increasingly face global competitors in Australia and also that Australian enterprises need to be able to grow in size and resources to compete successfully in foreign markets.

The rules for the assessment of mergers must take into account the remarkable impact of global competition on Australian markets.

1.3 Submission by the Australian Bankers' Association

The Bank has been a party to the submission being provided to the Review by the ABA.

2 MERGERS

2.1 The Need for Reform

Section 50 of the Act prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Mergers are an important source of productivity and efficiency improvement which boosts welfare. Economies of scale and scope enhance the ability of Australian firms to compete effectively in an increasingly globalised world. Globalisation has increased the need for Australian firms to be efficient and to have suitable scale in their operations.

Competition has a key role in promoting productivity growth. But competition is an intermediate objective in the quest for productivity growth. This central role of productivity growth in enhancing a nation's standard of living has recently been articulated by Professor Michael Porter:

> "Productivity growth is central because it is the single most important determinant of a nation's standard of living."[2]

Porter's view is that productivity growth should be the key determinant of merger analysis:

> "Since the role of competition is to increase a nation's standard of living via rising productivity, *the new standard for antitrust should be productivity growth*, rather than limiting price/cost margins or profitability. All practices scrutinized in antitrust should be subjected to the following question: how will they affect productivity growth? If a merger, joint venture, or other arrangement will significantly enhance productivity growth, it is probably good for society (as well as the firms involved).[3]

This focus on the importance of welfare enhancement is clearly displayed in the Act. The object of the Act is to 'enhance the welfare of Australians'.[4]

The Act sets out in clear terms its object. It is unfortunately true that the means by which that object is to be achieved are drafted in such a fashion that they have become a possible source of confusion. The object is to be achieved 'through' competition, fair trading and consumer protection rules as set out in the Act.

An approach to competition analysis which accords with the object of the Act is required.

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[2] Michael E. Porter, "Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures", Based on a presentation to the American Bar Association, Antitrust Section, Fundamental Theory Task Force, Washington DC, January 11, 2001. Page 131.

[3] Ibid, page 143.

[4] Section 2 of the Act provides, 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

The small size of the Australian economy can make the narrow application of the competition provisions detrimental to the goal of boosting productivity. In a small economy such as Australia, there are a number of industries that are characterised by a relatively small number of firms. This increases the probability that a productivity-enhancing merger will lead to an increase in market concentration and be judged to lead to a substantial lessening in competition in a market. This outcome would lead to a lower overall level of welfare than if the productivity-enhancing merger were allowed to proceed.

Australia's competition policy needs to recognise the productivity-enhancing benefits of scale efficiencies and have appropriate regard for the size of domestic markets in a globalising competitive environment.

Continuing strong productivity growth requires capital investment. Capital investment, sourced either domestically or from offshore, needs to be encouraged by a supportive business and regulatory environment.

The merger assessment process needs to be changed so that Australia has the best chance of encouraging capital investment, boosting productivity and raising its standard of living. To this end, a number of recommended changes to the Act are addressed in the sections to follow.

2.2 Merger Test (Section 50)

2.2.1 The Present Test Focuses on the Transaction and the Acquirer Rather Than the Market

The present test prohibits a merger if the merger would itself ***substantially lessen competition***.

This test accordingly focuses on the impact of the ***particular transaction*** and on the ***acquirer*** and not on the ***competitive state of the market*** after the acquisition.

The Bank submits that these impacts are not important in themselves and should not be the focus of the merger test.

The only relevant issue for competition theory is whether the market will be ***competitive*** after the acquisition.

The misdirected emphasis of the present law is exhibited in section 50(3)(h) which requires taking into account whether the acquisition **"*would result in the removal from the market of a vigorous and effective competitor*"**. This factor is emotive and irrelevant: the competitive status of a particular target is of no consequence if the market itself will remain competitive after the acquisition.

The key issue in assessing whether a merger is welfare enhancing is to look at the degree of market power which each of the remaining firms is able to exert. The removal of an effective competitor from the market may have no relevance.

The goal of competition policy should be to protect the ***process of competition,*** rather than individual competitors as the means of enhancing productivity and welfare.

2.2.2 The Test Should Focus on the Post-Acquisition Competitiveness of the Market

The Bank submits that a merger should be permitted if there would be ***effective competition*** in the market ***after the acquisition***.

Refocussing the test in this way provides a more logical point of examining mergers.

The alteration may appear slight, but the current examination tends to involve a two-dimensional test: it attempts to embrace both the ***state of competition*** in the market ***after the acquisition***, while also focusing on the impact of the particular transaction. This latter dimension inevitably tends to focus on the ***outcome for the acquirer***, not to the ***state of competition*** in the market after the acquisition.

The examination should not focus on the particular transaction and the impact on the acquirer, but on the ***state of competition in the post-acquisition market***, even if the transaction itself would affect the intensity of competition.

In practice a clarified focus on the state of the market post-acquisition accords with the current screening process outlined in the Commission's Merger Guidelines. Its evaluation process examines the structure of the market with the merger, the existence or otherwise of import competition, the height of barriers to entry, and countervailing or other market characteristics.

The current merger assessment methodology addresses a single overarching question: ***will the merged entity be in a position to exercise market power on a sustainable basis?***

The Bank believes that this is the defining issue. The Act should therefore be amended to clarify that the state of competition post-merger is the issue to be assessed.

2.2.3 A Merger Should be Permitted if the Post-Merger Market is Competitive

The Bank submits that a merger should not be opposed if, on a forward looking view, there would still be effective competition in the market following the acquisition, even if the acquisition might itself affect the degree of competition in that market.

Recommendation

On this basis, the Bank advocates amending the provisions of section 50(1) of the Act to read as follows:

A corporation must not directly or indirectly:

(a) acquire shares in the capital of a body corporate, or
(b) acquire any assets in a person;

if following the acquisition, there would not be, or not likely to be, effective competition in a market in which it operates.

Complementary amendments to related sections of the Act should be adopted.

2.2.4 Removal of Section 50(3)(h)

As noted above, **section 50(3)(h) requires that there be taken into account:**

- **the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor.**

The Bank submits that this factor should be removed because it is irrelevant to the refocussed test proposed. It is not necessary to look backward at what would be lost, but rather look forward to what will be left.

Recommendation

The Bank therefore recommends that reference to "removal from the market of a vigorous and effective competitor" be deleted from section 50(3).

2.2.5 The Treatment of Merger Efficiencies

The purpose of the Act is to enhance economic welfare. Consideration of economic welfare must take into account potential increases in dynamic efficiencies and supply side gains caused by improvements in productivity. Mergers that increase productivity should therefore be welcomed, not impeded.

For that reason, greater flexibility should be afforded to take account of efficiency gains from a merger within the informal clearance process.

Recommendation

The Bank therefore commends to the Review the proposals of the BCA and ABA that a more explicit role for efficiencies should be provided for in the merger clearance process.

2.2.6 An Informed Market for Corporate Control

The informal merger clearance process generally provides a timely and flexible procedure for assessing mergers. However, the Bank shares the view of the BCA and ABA that the process could be improved by increasing its transparency.

The Commission has generally issued substantial reasoning behind mergers in the banking industry. However, this has not been the case in other industries. The Commission often provides only a short media release on its reasons for its decision, rather than detailed reasoning.

The lack of detailed reasons means that there is limited scope for external analysis of the Commission's decisions and the way in which it applies the merger guidelines.

This increases the uncertainty of the merger process and limits the opportunity for independent assessment of the Commission's evaluations and conclusions.

Recommendation

The Bank therefore believes that the Commission should be obliged to release a summary of its methodology, analysis and conclusions in merger determinations.

2.3 Impact of Global Competition

The Bank is particularly concerned that Australian enterprises face global competitors in Australia and also that Australian enterprises need to be able to grow in size and resources to compete effectively in foreign markets.

The ability of Australian firms to compete effectively against global competitors, either in Australia or in global markets, is enhanced by productivity growth. Productivity growth makes Australian firms more efficient thereby improving their prospects of being internationally competitive.

The rules for the assessment of mergers must take into account the need for sustained productivity growth given the accelerating impact of global competition on Australian markets, including in service industries.

Recommendation

The Bank therefore recommends that the list of statutory factors should include the need for Australian corporations to be able to compete more effectively in global competition both domestically and internationally.

This will allow due regard to be paid to Australia's relatively small size and open nature.

Additional factors recommended for inclusion in section 50(3) are:

- **the likelihood of a significant enhancement in the ability of an Australian enterprise to compete effectively with global competitors in Australia;**
- **the likelihood of a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets.**

2.4 Market Dynamics

A forward-looking view of market conditions is an essential element of merger analysis. This is especially important in industries which are experiencing rapid change and technological innovation.

The time dimension over which the process of competition is viewed is therefore a vitally important aspect of merger analysis.

Competition analysis is concerned with long run, not short run effects. This is built into the very concept of the 'market' that is relevant to competition analysis:

> 'A market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.'[5]

In markets characterised by rapid change (under the impact of such forces as changing customer needs, technological innovation, regulatory change and globalisation), this aspect of competition analysis is critical, for a failure to properly incorporate time into the analysis is likely to seriously misinterpret the relevant counterfactual.

Under the combined impact of the forces mentioned above, change can be transformational in character. In these circumstances, historical data and current market structures serve as little guide to the future competitive environment.

[5] *Queensland Cooperative Milling Association Limited* (1976) ATPR 40-012 (Trade Practices Tribunal).

The use of a market definition without attaching an adequate time dimension to that market will necessarily give rise to distorted conclusions about the state of competition in that market. The more rapid the change, the more distorted will be those conclusions.

Section 50(3)(g) requires the Commission to consider the "dynamic characteristics of the market, including growth, innovation and product differentiation."

The Bank submits that the speed of change in these "dynamic characteristics" must also be explicitly considered in order to take account of the evolving competitiveness of rapidly changing markets, accessible over time to a variety of new competitors.

The factors listed in section 50(3) tend to be static. Although "likely" outcomes are to be taken into account, no specific reference is made to evolving future markets – yet rapidly evolving markets tend to give rise to a wide field of substitution possibilities.

Recommendation

To address this omission, the Bank recommends that the following additional factor be included in section 50(3):

- **the likely future state of competitiveness and contestability within the market, having regard to the speed of change in the characteristics of the market.**

The Bank further recommends that section 50(3)(f) be altered to provide:

- **the extent to which substitutes are available in the market or are likely to be available over a medium-term timeframe.**

2.5 Authorisation Test (Section 90)

2.5.1 The Public Benefits Test

The Bank accepts that the general authorisation test needs to be broad and endorses retention of the current merger authorisation test specified in section 90(9).

2.5.2 Expansion of Statutory Public Benefits

Section 90(9)(A) requires the Commission to regard the following as public benefits:

- a significant increase in the real value of exports; and
- a significant substitution of domestic products for imported goods.

The Commission is also required to take into account ***"all other relevant matters that relate to the international competitiveness of any Australian industry"*** (section 90(9A)(b)).

Recommendation

The Bank advocates expanding section 90(9A)(a) to require the Commission to regard as a benefit to the public:

- **a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia;**
- **a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets.**

2.5.3 Priority for Prudential Matters in Mergers Between Financial Institutions

As far as financial institutions are concerned, the reliability and safety of the payments system is vital and all other rights and interests are secondary, because without a sound and reliable payments system, the entire economy is vulnerable.

It follows that, in the case of mergers involving banks and other financial institutions, the reliability of the payments system is paramount, and the prudential soundness of the financial institutions concerned should take priority over all other interests.

There is currently a lack of prioritisation among Australian regulatory regimes between consumer protection, competition, corporations and prudential regulation. Explicit priority ought to be given to prudential regulation in the event of a conflict between the objectives of different regulatory regimes.

In the application of the merger tests under the Trade Practices Act, the Commission should be required to accord priority to prudential matters in consideration of a merger proposal involving banks or other relevant financial institutions. Because this obligation of the Commission should apply to the operation of the Trade Practices Act as a whole, it is recommended that a new section should be included as a general overriding provision in the Act.

Recommendation

The Bank recommends that the Commission be required by the Act to give priority to the soundness and safety of the payments system, and the strength of prudentially regulated institutions and the banking system as a whole, ahead of all other factors, in the exercise of its powers and functions.

2.6 Authorisation Timeframe

The Act already recognises the needs for parties to a merger to obtain a timely decision. Authorisation applications are to be decided expeditiously, and there is to be no pre-decision conference.[6]

The reasons for this are obvious – businesses cannot be put on hold for an extended period while a strategic option is adjudicated by a third party. The mere presence of uncertainty is a cost, especially to listed companies whose shares are being traded.

Notwithstanding the existing statutory time limitations, few mergers are taken to authorisation. In the Bank's view, the uncertain duration of the process is one of the disincentives at work here. Process uncertainties include:

- The time that even informal clearances can take. Although the Commission does set itself guidelines as to how quickly it will deal with mergers, these are voluntarily imposed and there are no remedies if they are exceeded.
- The Commission can, and often does, in both informal clearances and formal authorisations, extend the period taken by requesting further information from the parties. In the case of formal authorisations, the Commission is given power to do so by the Act.[7] This, in itself, cannot be the cause of complaint if the parties have not given sufficient information to the Commission for its consideration. However, there is no discipline on the Commission to substantiate the need for additional information. A materiality test would help to address this omission.

Uncertainty as the duration and outcome of an authorisation application adds to merger transaction costs.

Uncertainty is a major cost which adversely affects customers, staff and shareholders.

One thing that can be done to reduce the transaction costs of mergers is to address the timing issue.

6 Sections 90(11) and 90A(1) of the Act.

7 Section 90A(11A) of the Act.

The Bank therefore recommends that:

Recommendation

- **the Act should impose stricter time limits on the Commission to deliver a decision on the merger;**
- **the Commission should be entitled to ask only for further information that, in its considered opinion (judged on objective criteria), would lead to a materially different result from that which could be reached absent the information;**
- **the Commission should therefore be required to justify any extension of time by written reasons that must specify exactly what is required and what benefits that it asserts will be obtained by obtaining the information. There should be statutory time limits by which the information must be given, if possible, and a time limit on the Commission decision once the information has been provided;**
- **third parties objecting to a merger should be required to lodge a formal written objection; and**
- **there should be strict time limits placed on objecting third parties to provide written reasons for objecting to the merger. If those parties cannot articulate in writing their concern, they should not be able to interfere in the commercial decision-making of the merging parties.**

2.7 Onus of Proof in Authorisation

Currently, the test to be met by a party applying for authorisation is that the Commission must be:

> 'satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.'[8]

Applying the law as it currently stands, the onus is on the applicant to satisfy the public benefits test:

> "It is for the parties seeking authorisation to satisfy the Tribunal that benefit to the public is likely and that there will be sufficient public benefit to outweigh any likely anti-competitive detriment." (re John Dee (Export) Pty Ltd (1989) 95 FLR 250 at 267)

The onus of establishing these two dimensions tends to create a protracted process in relatively complex mergers (it is virtually inevitable that mergers requiring authorisation will be complex).

[8] Section 90(9) of the Act.

Recommendation

The Bank recommends the adoption of a split onus of substantiation in the merger authorisation process. Once the merging parties have substantiated the likelihood of material public benefits from the merger, the Commission should have a period of 30 days to form its opinion on whether these public benefits would be outweighed by the likelihood of competitive detriment.

If the Commission forms such an opinion, it should give notice in writing to the merging parties to that effect, accompanied by a statement setting out its reasons for forming the opinion. If such notice is not given, then the merger shall be taken to be authorised.

In reaching such opinion the Commission may seek such relevant information as it considers reasonable and appropriate, plus any other information given to it by the applicants concerned or by anyone else.

The Commission can also issue a statutory demand for information. Parties would serve their own interests by indicating their case as to competition. Obviously there would need to be reasonable co-operation in the matter having regard to the fact that the parties are the ones who know the relevant circumstances. The Bank sees this as a position analogous to that which applies with the notification of exclusive dealing process under section 93 of the TPA.

Recommendation

The Bank therefore recommends that a section be inserted in to the Act to the effect that, in seeking authorisation, the onus on the applicant is discharged if it can substantiate that there are material public benefits from the merger.

3 ADMINISTRATION OF THE TPA

3.1 The Act Has Become an Omnibus Statute

The Review is required to identify improvements to the Act or its administration to achieve a better outcome for competition law.

The Act has greatly increased in size, scope and complexity since 1974.

As originally enacted, the Act focused mainly on Part IV (Mergers) and Part V (Consumer Protection).

Substantial amendments over a quarter of a century have significantly expanded the scope of these parts and have commensurately increased the complexity of the enquiries and activities entrusted to the Commission.

There was always a tension in the Act between the mindset required of Commission officers in dealing with mergers and the mindset required to champion consumer protection.

The change in the merger test in 1992 and the significant expansion of the consumer protection provisions have considerably increased the difficulties for the Commission in maintaining a dispassionate view in dealing separately with mergers and consumer protection.

The workload of the Commission has also been increased by a number of other major tasks, including with respect to access regimes, unconscionable conduct, industry codes, GST price monitoring, and special oversight of the telecommunications industry.

The mindset required to assess complex mergers is different from the mindset required vigorously to enforce consumer protection and unconscionable conduct provisions. Indeed, the tension between the Commission's various roles has given rise to an unfortunate tendency by the Commission to refer pejoratively to "*Big Business*".

In summary, the ACCC is today obliged to deal with a large number of tasks and activities, some of which are perceived as inconsistent or at least as creating a bias within the Commission in performing different functions.

Examples include:

- the investigation and recommendation of legal action against companies and executives with whom the Commission must still deal even-handedly on a variety of other matters; and
- advancing the interests of "***consumers***" against "***big business***".

The dual responsibilities, and increased coverage and functions of the Commission, demand that its system of corporate governance receive careful attention by the Review.

3.2 Governance Principles

Good principles of governance within any major corporation or public authority require at least some separation of powers and functions between those responsible for the policies, overall performance and strategic direction of the organisation and those involved in managing the operations of the organisation.

The Bank's own experience strongly favours the separation of Board and management, with an independent non-executive chairman and a majority of non-executive directors.

Good principles of corporate governance in the private sector emphasise the need for clear accountabilities. The governance structure adopted for statutory bodies should also have an effective accountability framework.

There is no single governance structure that universally applies to statutory authorities – witness the different models adopted by the Reserve Bank of Australia, the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

A notable variant is the Australian Tax Office, where significant changes in governance are occurring. A Board of Taxation has been established and the Government is in the process of establishing an Inspector-General of Taxation.

3.3 Governance of the ACCC

The original model adopted by the Act for the ACCC was a chairman and a number of full-time and part-time members. The chairman is the chief executive officer of the Commission.

With the expansion in the role of the ACCC mentioned above, a common complaint across the business community is that the ACCC uses the media inappropriately.

There is nothing wrong with using the media to increase understanding of the law and to reinforce appropriate standards of behaviour.

On occasion, this use of the media is regarded by the Bank as prejudicial and unfair, particularly where undue publicity is given to the early stages of an investigation. Corporate reputations can be damaged in this process even though breaches of the law have not been established.

Other public agencies charged with equally important investigations are more judicious in their dealings with the media and their public comments more generally, and are more careful about the rights of corporations and individuals involved in investigations before a finding has been made. As an example, the Bank understands that ASIC has a strong protocol that it will not normally comment about investigations until charges are laid.

The Review could recommend a number of ways of dealing differently with the complex and occasionally inconsistent obligations of the ACCC.

Obvious examples would include:

- establishing a separate body or panel within the ACCC to consider merger clearance or authorisation applications; and
- imposing strict protocols on the ACCC, including with respect to publicity and the use of the media.

The Commission argues that it is accountable to the courts, the tribunal, under administrative law, to parliament, to ministers and to review committees.

This significantly overstates its accountabilities, as none of these parties or processes have an overarching control over the Commission. The actual accountability in most cases is specific and limited. For example, whilst ACCC decisions are subject to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 ("ADJR"), many actions taken by the ACCC are not decisions for the purposes of ADJR.

In Electricity Supply Association of Australia v ACCC[9], Finn J in the Federal Court criticised the approach of the ACCC in pursuing issues (which had arisen in the dispute) through the media.

An approach to investigations and information gathering by the Commission which uses the media to signal its position on issues and actions before findings are complete can cause the reputation and brand of individual companies (and individual officers) irreparable damage. The concept of brand is vitally important to business – indeed it accounts for a significant element of the value of most commercial entities.

Inappropriate use of the media can amount to prejudicial conduct, destruction of value and a denial of natural justice.

Against this background, the Bank believes that a system of checks and balances should apply to the Commission to ensure that competition regulation and administration is working to the best advantage of Australians.

3.4 Separate Board for ACCC

The ACCC is an important Commonwealth regulatory authority. Its governance structure should reflect its substantial and varied public responsibilities.

The Commission was established before the current model for Commonwealth regulatory authorities was designed. The Commonwealth model now incorporates modern precepts of regulatory governance and accountability.

[9] 2001 FCA 1296

Recommendation

The Bank submits that the Commission should be restructured as a modern Commonwealth regulatory authority and that it should be governed by an independent Board composed of a non-executive Chairperson, independent non-executive directors and its Executive Director.

The ACCC would then become the Australian Competition and Consumer Authority ("ACCA").

The existing role of Chairperson would become that of Executive Director.

A Board structure is already used for several comparable regulatory authorities including the Reserve Bank and the Australian Prudential Regulatory Authority ("APRA").

The Bank submits that APRA is the appropriate modern regulatory model for the proposed ACCA. Under the APRA legislation, the Board:

- is responsible for determining policies (including goals, priorities and strategies); and
- may delegate any of its powers to a Board Member or member of APRA's staff.

"ACCA" should have a similar governance structure. Part II of the Act should be amended as follows:

- Amend s6A to reflect the fact that the Commission is to be the "Authority";
- Insert after s6A:

"7. Establishment of Board

There is to be a Board of management of the Authority.

8. Board's functions

The Board has the following functions:

(a) to determine the Authority's policies (including goals, priorities, strategies and administrative policies); and

(b) to ensure that the Authority performs its functions properly, efficiently and effectively; and

(c) to ensure that the Authority's operations are conducted having regard to its objects.

9. The Board's powers

The Board has power to do anything that is necessary or convenient to be done for or in connection with the performance of its functions.

10. Constitution of Board

(1) The Board shall consist of a Chairperson, an Executive Director and such number of other members as are from time to time appointed in accordance with this Act.

(2) The members of the Board shall be appointed by the Treasurer.

(3) Before the Treasurer appoints a person as a member of the Board or as Chairperson, the Treasurer must:

(a) be satisfied that the person qualifies for the appointment because of the person's knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection; and

(b) consider whether the person has knowledge of, or experience in, small business matters; and

(c) if there is at least one fully-participating jurisdiction – be satisfied that a majority of such jurisdictions support the appointment.

(4) At least one of the members of the Board must be a person who has knowledge of, or experience in, consumer protection.

11. Appointment of the Executive Director

(1) The Executive Director is the chief executive of the Authority.

(2) The Executive Director is to be appointed by the Treasurer by written instrument, at the express recommendation of the Board.

(3) The Executive Director is to be responsible and accountable to the Board."

- The suggested provisions are not exhaustive – further details will need to be elaborated.

3.5 Statutory Accountability

The Bank recommends that, following the implementation of the recommendation in paragraph 3.4 above the ACCC's directors and officers be subject to the standards of conduct applying to directors and officers of Commonwealth authorities under the Commonwealth Authorities and Companies 1997, with the necessary changes being made to that legislation.

3.6 Inspector-General of Competition

An Inspector-General of Competition should be appointed to investigate complaints about the administration of ACCA. The Inspector-General would be appointed by the Treasurer and be an independent statutory office.

Following an investigation, the Inspector-General would prepare a report for the Board which would include findings and recommendations.

The Board would be empowered to take appropriate action in relation to any officer adversely named in a report of the Inspector-General.

Recommendation

The Bank recommends that an Inspector-General of Competition be appointed as an independent statutory office.

3.7 Preferred Governance Structure

Recommendation

The Bank submits that an independent Board for the ACCC is both consistent with principles of good corporate governance and addresses lack of accountabilities under the current structure. The Bank submits that the Commission should be restructured as a modern Commonwealth regulatory authority, governed by an independent Board composed of a non-executive Chairperson, independent non-executive directors and its Executive Director. The standards of conduct applying to its directors and officers should be those applied to directors and officers of Commonwealth authorities under the Commonwealth Authorities and Companies Act 1997, with the necessary changes being made to that legislation. The Bank also advocates the appointment of an Inspector-General of Competition. These measures will, in the Bank's view, act as a discipline on over-zealous use of discretionary powers, and give the business community greater confidence in their dealings with the Commission.

3.8 Alternative Governance Structure

If an independent Board is not adopted, the Bank supports alternative structures designed to:

- impose external corporate governance standards of the Commission; and
- require the Commission to report to, or at least consult with, independent non-executive individuals.

Recommendation

If the Bank's preferred model of an independent Board were not favoured by the Review Committee, as an alternative the Bank supports the proposals of the BCA and ABA which involve:

- **the Act be amended to include specific guidance on the broad principles to be followed by the ACCC in the administration of the Act;**
- **a Charter of Competition Regulation be established to guide the development and implementation provisions of the Act;**
- **a Board of Competition Regulation be established as the body responsible for oversighting the implementation and operation of the Charter; and**
- **an Inspector-General of Competition be appointed to investigate specific complaints about the decisions or behaviour of the ACCC.**

4 OTHER RECOMMENDED CHANGES TO THE ACT

4.1 Clarification of the Application of the Act to Joint Ventures

Joint ventures are important business structures for the banking industry and are becoming increasingly common in Australia, both in banking and in the wider community. Their use is importantly related to network economics, which can be an important source of efficiency and product innovation.

The special role of joint ventures in competition policy was recognised by the inclusion of the joint venture exception in the Act. However, there is considerable uncertainty as to its application.

Recommendation

The Bank supports the recommendations in the submission by the ABA on changes to sections 4D and 45A to clarify the application of the Act to joint ventures.

The Bank also supports the ABA's recommendation that the ACCC issue a binding guide on its approach to regulating joint ventures under the Act.

4.2 Third Line Forcing

The essence of third line forcing is tying the consumer to the goods or services of another – ie, the consumer is required to enter into two separate contracts.

Third line forcing is the only activity referred to in section 47 which is a *per se* breach of the Act. Other exclusive dealing contracts and arrangements are subject to competition tests.

There are cases, however, where third line forcing is beneficial to consumers. A large number of loyalty programs, discount arrangements and group offerings of products now exist.

These can bring benefits to consumers:

> "It is a mistake to think that TPT [*third line forcing*] is bad . . . there are possible, offsetting efficiency reasons for tying." [10]

McEwin states that a competition test should be introduced into the third line forcing provisions, in order to combat the "true abuse of monopoly power." [11]

[10] McEwin, "Third Line forcing In Australia", (1994) 22 *Australian Business Law Review*, 114, at 135.

[11] ibid.

The Bank supports this proposal. Whilst **third line forcing, because it can bring benefits in certain circumstances, ought not to be a *per se* breach, it ought to be controllable. That control is resolved by the introduction of a competition test.**

This matter is dealt with comprehensively in the submission of the ABA. The Bank is both a party to and supports the proposal in that submission.

Recommendation

The Bank recommends the introduction of a competition test into provisions of section 47 of the Act dealing with third line forcing and introduction of a related company exception.

5 PROPOSALS BY OTHER PARTIES

A number of amendments to the TPA have been proposed by various parties. These deal in particular with divestiture powers, changes to section 46 and the introduction of criminal sanctions. The comments to follow deal with the generalities of these proposals. The Bank reserves the right to make supplementary submissions to address specific inclusions in other submissions to the Review.

5.1 Divestiture Powers

During the recent Inquiry into sections 46 and 50 of the Act by the Senate Legal and Constitutional References Committee, two proposed amendments were referred to the Committee, one of which was the introduction of a new power relating to divestiture. The Act already contains provisions for divestiture (in section 81), which can apply where there has been a breach of section 50.

The proposed section 50AA is, however, far more wide reaching. Divestiture could be ordered by the Court (on an application by the Commission) where mere ownership of either shares or assets has the effect of substantially lessening competition.

This proposal is regarded by the Bank as unacceptable. As the Law Council of Australia noted in its submission to the Inquiry, such a power goes "much further than any known foreign precedent."

The proposed section 50AA would enable the Commission to break up companies which have not engaged in any wrongdoing under the Act. Breaking up what is essentially a unitary entity could have a drastic effect on a company's activities – it could seriously affect not only the company itself, but those with whom it deals. Efficiencies, built up over a period of time and beneficial to consumers, could be lost.

The proposal would entail major business uncertainty, thereby having an entirely negative effect on investment (including foreign investment) as well as innovation and growth.

Recommendation

The Bank opposes the introduction of divestiture powers in section 50 of the TPA.

5.2 Reversal of the Onus of Proof as to Purpose in Section 46

Section 46 of the Act is intended to prohibit anti-competitive behaviour by corporations that have a substantial degree of market power. Behaviour which is competitive must be distinguished from that which is anti-competitive. The purpose of the behaviour goes to the heart of this distinction.

A number of proposed amendments to section 46 were recently considered by the Senate Legal and Constitutional Committee. One of those was the reversal of the onus of proof in relation to the purpose element in actions brought by the Commission under section 46.

The proposal is that, once the ACCC can demonstrate that a corporation has a substantial degree of market power and that it has taken advantage of that power, then the onus rests with the corporation to show that it has not taken advantage of its power for a purpose prohibited by section 46(1).

Section 46 is designed to promote and foster competition for the welfare of consumers.

Competition can be very aggressive, as noted by Mason CJ and Wilson J:

> ". . . the object of section 46 is to protect the interests of consumers, the operation of this section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort…and these injuries are the inevitable consequence of the competition section 46 is designed to foster." [12]

Part of this process of vigorous competition is aggressive price setting behaviour by firms as acknowledged by Wilcox J:

> "Traders commonly fix prices with the intention of diverting to themselves custom which would otherwise flow to their competitors. In doing so, they realise that, if they are successful, the result will be to damage – in some cases, even to eliminate – those competitors. But such conduct is the very stuff of competition, the result which Part IV seeks to achieve." [13]

The reversal of the onus of proof would place an enormous burden on the party involved. It essentially has to prove a negative; ie, that it did *not* act with a particular purpose in mind. This can be most difficult to do. The general principle is that "he who asserts must prove." It does not sit with concepts of "good regulation" that a party under investigation has to establish its innocence.

Normal competitive behaviour could be constrained if the onus is on a company to prove that, in actions that affected a competitor, it did not have requisite intent.

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[12] *Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177, at 191.

[13] *Eastern Express Pty Ltd v. General Newspapers Pty Ltd* (1991) 30 FCR 385, at 409-410.

In the Bank's view a reversal of the onus of proof cannot be justified for the following reasons:

- the Commission has successfully prosecuted several cases under the existing section 46 for abuse of market power;
- the reversal of burden of proof would place businesses in an impossible position of being forced to prove a negative;
- consumer welfare would suffer from less vigorous competition; and
- a reversal in the onus of proof would lead to a significant increase in business uncertainty, undermining businesses willingness to both invest and to engage in competitive rivalry, leading to further deterioration in consumer welfare.

Recommendation

The Bank strongly opposes the reversal of the onus of proof in section 46 of the Act.

5.3 Introduction of an Effects Test

The Commission has previously signalled its support for an effects test.

In the Bank's view competitive behaviour would be significantly restrained under an effects test. The purpose test catches actions which are anti-competitive, whereas the effect test catches *all* actions which adversely affect a competitor, irrespective of the intention behind them.

An effects test does not distinguish actions that ultimately lead to enhanced consumer welfare.

One proposed solution to the intractable problems that would be caused by an effects test is to institute "some kind of authorisation provision." [14]

This would merely create further problems. It would be unworkable for corporations to have to obtain authorisation before undertaking a strategy that could affect a competitor.

The Bank can only reiterate that an **effects test would destroy the very thing that s46 is designed to foster.**

Recommendation

The Bank recommends that proposals to introduce an effects test be rejected.

[14] Official Committee Hansard, Joint Committee on the Retailing Sector, 13 July 1999, at RS 1161.

5.4 Cease and Desist Orders

The Commission has indicated that it needs power to issue "cease and desist orders". These would be limited to cases of alleged abuse of market power. This again would be an unwarranted extension of powers.

There are numerous problems with this proposal – firstly the tests for abuse of market power lack definition.

Secondly, the power to issue a "cease and desist" order equates to the issuing of an interim injunction by a Court. It could be argued that such an order would be an exercise of judicial power, and consequently prohibited on constitutional grounds.

In any event, Courts, when issuing injunctions, are bound to apply certain principles.

These principles do not apply to the Commission.

In the absence of checks and balances the Commission would, in effect, have wider discretion than the Courts.

Recommendation

The Bank opposes the introduction of cease and desist powers for the ACCC.

5.5 Criminal Sanctions

Further proposals have been made to introduce criminal provisions into the Act for what has been termed “hard-core collusion”.

The Bank’s corporate values embrace an uncompromising commitment to honesty and integrity. Consistent with those values, the Bank regards collusion as reprehensible behaviour.

Given the scope for threats of prosecution of company directors and officers to be misused in a media campaign, the legislation should require any proposal by the ACCC that such prosecution be made be given the prior approval of the responsible Minister. This will achieve political accountability should the powers be misused.

Recommendation

If the Review were to conclude that there is a case for criminal penalties for identified culpable behaviour, the Bank would support this approach provided that:

- **coverage applies to all organisations, regardless of size;**
- **the provisions are introduced into the criminal code; and**
- **approval of the responsible Minister is required prior to any prosecution being recommended by the ACCC.**

6 LIST OF RECOMMENDATIONS

1. The Bank recommends that a merger should be permitted if the post-merger market is competitive. Consequently, Section 50(1) of the Act should be amended to read as follows:

   A corporation must not directly or indirectly:

   (a) acquire shares in the capital of a body corporate, or
   (b) acquire any assets in a person;

   if following the acquisition, there would not be, or not likely to be, effective competition in a market in which it operates. (Refer section 2.2.3)

2. The Bank recommends that Section 50(3)(h), which requires that there be taken into account:

   - the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor,

   should be removed from the Act. (Refer section 2.2.4)

3. The Bank recommends that a more explicit role for efficiencies should be provided for in the merger clearance process. (Refer section 2.2.5)

4. The Bank recommends that the Commission should be obliged to release a summary of its methodology, analysis and conclusions in merger determinations. (Refer section 2.2.6)

5. The Bank recommends that the statutory merger factors should include the need for Australian corporations to be able to compete more effectively in a global context both domestically and internationally.

   Additional factors recommended for inclusion in section 50(3) are:

   - the likelihood of a significant enhancement in the ability of an Australian enterprise to compete effectively with global competitors in Australia;
   - the likelihood of a significant enhancement in the ability of an Australian enterprise to compete effectively in global markets.

   (Refer section 2.3)

6. The Bank recommends that the merger assessment process must have regard for the accelerating speed with which the structure and dynamics of markets now change. The Bank recommends that section 50(3) be amended by the addition of the following factor:

   - the likely future state of competitiveness and contestability within the market, having regard to the speed of change in the dynamic characteristics of the market.

In addition, section 50(3)(f) should be altered to provide:

- the extent to which substitutes are available in the market or are likely to be available over a medium-term timeframe. (Refer section 2.4)

7. The Bank recommends that the statutory public benefits considered by the Commission in section 90(9A)(a) should be expanded to include:

- a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia;
- a significant enhancement in the ability of an Australian enterprise to compete effectively in global markets. (Refer section 2.5.2)

8. The Bank recommends that the Commission be required by the Act to give priority to the soundness and safety of the payments system, and the prudential strength of institutions and the banking system, ahead of all other factors, in the exercise of its powers and functions. (Refer section 2.5.3)

9. In order to make the merger authorisation process more commercially realistic the Bank recommends that:

- the Act should impose stricter time limits on the Commission to deliver a decision on the merger;
- the Commission should be entitled to ask only for further information that, in its considered opinion (judged on objective criteria), would lead to a materially different result from that which could be reached absent the information;
- the Commission should therefore be required to justify any extension of time by written reasons that must specify exactly what is required and what benefits that it asserts will be obtained by obtaining the information. There should be statutory time limits by which the information must be given, if possible, and a time limit on the Commission decision once the information has been provided;
- third parties objecting to a merger should be required to lodge a formal written objection; and
- there should be strict time limits placed on objecting third parties to provide written reasons for objecting to the merger. If those parties cannot articulate in writing their concern, they should not be able to interfere in the commercial decision-making of the merging parties. (Refer section 2.6)

10. The Bank recommends the adoption of a split onus of substantiation in the merger authorisation process. That is, once the merging parties have substantiated the likelihood of material public benefits form the merger, the Commission should have a period of 30 days to form its opinion on whether these public benefits would be outweighed by the likelihood of competitive detriment. (Refer section 2.7)

11. The Bank submits that an independent Board for the ACCC is both consistent with principles of good corporate governance and addresses lack of

accountabilities under the current structure. The Bank submits that the Commission should be restructured as a modern Commonwealth regulatory authority, governed by an independent Board composed of a non-executive Chairperson, independent non-executive directors and its Executive Director. The standards of conduct applying to its directors and officers should be those applied to directors and officers of Commonwealth authorities under the Commonwealth Authorities and Companies Act 1997, with the necessary changes being made to that legislation. The Bank also advocates the appointment of an Inspector-General of Competition. These measures will, in the Bank's view, act as a discipline on over-zealous use of discretionary powers, and give the business community greater confidence in their dealings with the Commission.
(Refer section 3.7)

If the Bank's preferred model of an independent Board were not favoured by the Review Committee, as an alternative the Bank supports the proposals of the BCA and ABA which involve:

- The Act be amended to include specific guidance on the broad principles to be followed by the ACCC in the administration of the Act;
- A Charter of Competition Regulation be established to guide the development and implementation provisions of the Act;
- A Board of Competition Regulation be established as the body responsible for oversighting the implementation and operation of the Charter; and
- An Inspector-General of Competition be appointed to investigate specific complaints about the decisions or behaviour of the ACCC. (Refer section 3.8)

12. The Bank recommends changes to sections 4D and 45A of the Act to clarify the operation of the Act as regards joint ventures. The Bank also recommends the Commission issue a binding guide to regulating joint ventures under the Act. (Refer section 4.1)

13. The Bank recommends the introduction of a competition test into the provisions of section 47 of the Act dealing with third line forcing and introduction of a related company exception. (Refer section 4.2)

14. The Bank recommends that proposals to introduce divestiture powers be rejected. (Refer section 5.1)

15. The Bank recommends that proposals to reverse the onus of proof in actions brought by the Commission under section 46 be rejected. (Refer section 5.2)

16. The Bank recommends that proposals to introduce an effects test be rejected. (Refer section 5.3)

17. The Bank recommends that proposals to introduce cease and desist orders be rejected. (Refer section 5.4)

18. If the Review were to conclude that there is a case for criminal penalties for identified culpable behaviour, the Bank would support this approach provided that:

- coverage applies to all organisations, regardless of size;
- the provisions are introduced into the criminal code; and
- approval of the responsible Minister is required prior to any prosecution being recommended by the ACCC.

(Refer section 5.5)