Peter Armitage
Level 37
Grosvenor Place
225 George Street
SYDNEY NSW 2000

22 July 2002

The Secretary
Trade Practices Act Review
c/- Department of the Treasury
Langton Crescent
PARKS ACT 2600

Dear Sir

SUBMISSION TO THE COMMITTEE OF INQUIRY FOR THE REVIEW OF THE COMPETITION PROVISIONS OF THE *TRADE PRACTICES ACT* 1974 (THE "ACT").

I have been in practice as a solicitor since 1982 and have been involved in many mergers and acquisitions which have been considered by the Australian Competition & Consumer Commission ("**ACCC**") under its informal assessment process.

There is no doubt that the ACCC, through its informal assessment process, exercises considerable power in relation to acquisitions and mergers which raise any competition issues. That power is largely unfettered by Federal Court supervision because litigation will usually have consequences, including delay and uncertainty, which are commercially damaging to the proposed transaction. There is also no doubt that the process has considerable benefits for parties to a transaction who wish to minimise the risk that the transaction could be challenged as contravening section 50 of the Act. Any amendments to the Act which affect the competition test to be applied to mergers/acquisitions or the assessment process which the ACCC adopts need to be carefully assessed to ensure that the current, basically effective, process is improved and not impaired.

My submission concerning the test to be applied under section 50 is that it should be the same as other prohibitions in Part IV concerned with substantial lessening of competition. I consider that suggestions to incorporate a "public benefit" defence into the competition assessment for the purposes of section 50 may be misconceived. The prohibitions in Part IV of the Act, other than the *per se* prohibitions, apply to conduct or arrangements which have the purpose, effect or likely effect of substantially lessening competition. In particular, section 50 prohibits acquisitions of assets or shares which have the effect or likely effect of substantially lessening competition. It will frequently be the case that public benefits, such as increased efficiencies or enhanced ability to compete with imports or in export markets, can be achieved in a variety of ways. They may be achieved by joint ventures, by contractual arrangements, such as tolling or outsourcing, or by acquisitions or mergers. It is desirable, in my view, that the same competition test should apply, irrespective of the form a transaction takes. Accordingly, the competition test for the acquisition of shares or assets should only be amended to incorporate a public benefit defence if the same

amendment is made in respect of the other provisions in Part IV which prohibit arrangements which have the purpose, effect or likely effect of substantially lessening competition.

My submission concerning the informal assessment process is that it needs to be made more transparent. For the reasons outlined above (and in other submissions to the Committee of Inquiry) there is unlikely ever to be a body of case law concerning the application of section 50 to mergers and acquisitions in various industries. One of the frustrations for businesses, large and small, is the considerable uncertainty about the approach the ACCC will take to matters such as market definition, the assessment of the level of imports, barriers to entry and countervailing power in connection with a particular transaction. The ACCC's Merger Guidelines are helpful but necessarily generic.

I submit that the Committee of Inquiry consider recommending that the ACCC be required, by regulation, to publish reasons for each transaction it considers under its informal assessment process. Those reasons should include:

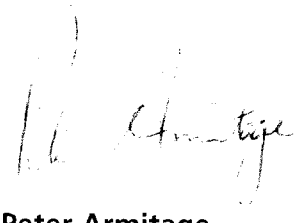
- the relevant market(s) identified by the ACCC and its reasons;
- the level of imports and the nature of the data accepted by the ACCC in that regard;
- the nature and extent of all relevant barriers to entry;
- the nature and extent of countervailing power in the market and the significance attached to it by the ACCC; and
- the ACCC's position concerning any other matters raised by the parties to the transaction.

Such reasons would produce, over time, a body of reasoning on mergers and acquisitions in Australia which would be of great assistance to businesses and their advisers. The fact that some of the information disclosed to the ACCC in connection with a proposed transaction is commercially confidential would not be, in my view, an impediment to the ACCC providing reasonably detailed reasons for its decisions. Reasons could be given without disclosing genuinely confidential information.

While there may be some parties to transactions which the ACCC has not opposed who are content with the fact that detailed reasons for the ACCC's decision were not published, that is not a reason, as a matter of public policy, for the ACCC not to be required to publish its reasons. In my view, part of the price for parties to a transaction receiving the benefit of the ACCC's informal assessment process should be a recognition that the ACCC will publish detailed reasons for its decision to oppose or not oppose the transaction.

It is not my intention that the publication of reasons would create a right of administrative review of the ACCC's decision.

Yours sincerely



Peter Armitage