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The Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Parkes
ACT 2600

By email

Dear Sir

Submission to the Dawson Committee

1 Introduction

I am a Senior Associate with Freehills, Melbourne. I practice exclusively in the area of competition law and have done so for over 10 years. I am the principal author of *Market Definition: Competition Law and Practice* (1998) (with Brian Kewley). I have also delivered numerous papers to trade practices conferences on topics including market power and market definition. I make this submission in my personal capacity.

2 Summary

My submission concerns the structure and operation of section 50 of the *Trade Practices Act* 1974 (**TPA**). My contention is that the existing provision prevents many mergers and acquisitions that would have provided benefits to the Australian community. Section 50 should, therefore, be amended in the manner recommended below.

The problem I identify is the result of mergers being assessed exclusively on their effects on competition. The law anticipates the importance of benefits the merger could generate, but only in the context of authorisations. This bifurcation of issues has lead to questions of benefit being ignored. That is the case because of the practical reality that merger parties will generally not apply for authorisation.

3 The practical problem

As the Committee is aware, the practice in Australia has been for companies proposing an acquisition that raises competition issues to approach the Australian Competition and Consumer Commission (**ACCC**), requesting, what is commonly referred to as, an "informal clearance". That involves the ACCC providing a comfort letter to the parties involved, stating that it has no intention of intervening in the transaction prior to completion. The ACCC provides informal clearances where, after conducting some inquiries, it believes that the proposed acquisition will not substantially lessen competition in the market it defines. During the 2000/2001 financial year, the ACCC considered 265 mergers, asset sales and joint ventures on this basis.

In most cases, a merger will not proceed unless the ACCC provides an informal clearance. The ACCC will refuse to grant an informal clearance where it is not convinced that the acquisition will not substantially lessen competition. Merger parties will attempt to address the ACCC's concerns using a number of means (such as by providing further information and offering section 87B undertakings). But, where they fail, so does the merger.

It is open to merger parties to apply for authorisation under section 88. And that would be forthcoming if the merger is sufficiently beneficial. However, most business people tend not to be willing to apply for authorisation. Practitioners will generally support this point. It is also evidenced by the fact that not one of the authorisations granted in 2000 and 2001[1], nor any of the authorisations under consideration or granted in 2002 have involved mergers and acquisitions.

The reasons for this include the following:

- it is a public process, compromising the confidentiality of some transactions;
- it is a relatively slow process, in circumstances where expedition is often critical;
- it involves considerable expense; and

[1] calendar years

- there is always the risk that any interested party will seek a review of the ACCC's determination by the Australian Competition Tribunal.

In respect of the last point, it is open to competitors to use the system strategically. In the 1994 attempt by Davids to acquire Foodland, its attempt was thwarted by a competitor seeking an ACT review. The time delays involved in the review prevented the deal proceeding.

It necessarily follows that those mergers and acquisitions that would otherwise qualify from authorisation – that is, those mergers and acquisitions that would provide an overall public benefit – are currently not proceeding, thereby depriving the community of those benefits.

There is a question concerning the number of these mergers. If there are few, the cost of the problem I have identified could be relatively insignificant. ACCC figures could suggest that this is the case. Its 2000/2001 Annual Report notes that the ACCC objected to only 13 of the 265 mergers and acquisitions proposed in that financial year. 10 of those objected to ultimately proceeded after the parties provided enforceable undertakings. Only three proposed mergers in 2000/2001 did not proceed. However, these figures neglect those mergers where the parties choose to abandon the merger instead of approaching the ACCC because of competition concerns. They cannot be quantified. My experience suggests that there are a not insignificant number.

4 The recommendation

The problem I have identified can be remedied if the public benefit considerations of the authorisation process were incorporated into the principal prohibition in section 50. For the sake of clarity, an acquisition of assets or shares would only be unlawful under the proposed section 50 if it:

(a) had the likely effect of substantially lessening competition in a substantial market in Australia; and

(b) any public benefits resulting from the acquisition proceeding do not outweigh the detriments.

Under such a provision, the ACCC would have the power to consider benefit in addition to questions of competitive effect. It could then provide informal

clearances for mergers and acquisitions that do not currently proceed because of competitive concerns.

5 Implications of the recommendation

This recommendation is not intended to "water down" the Australian law, but to improve it. It does that in three ways:

(a) improving the efficiency and effectiveness of merger law;

(b) assisting the achievement of the Act's objectives; and

(c) decreasing the costs of compliance.

The proposal is an attempt to make the existing law operate more effective and efficient. The TPA acknowledges that competition is not the ultimate standard for assessing conduct. There is provision for consider other benefits to the Australian community. However, under the existing structure, they are largely ignored. Ensuring that those other considerations are taken into account therefore improves the law's effectiveness – as against its own objectives – and its efficiency.

Second, the existing regimen has created a perverse and somewhat ironic result. Competition is promoted because it theoretical produces optimum allocative and productive efficiency.[2] That maximises societal welfare by eliminating deadweight loss. However, in more complex and realistic models, competition cannot achieve that by itself. Efficiency may be improved by measures other than or, at least, in addition to competition, such as structural change. It is this point that underlies my submission. By allowing these mergers to proceed, the objective of the TPA is more effectively furthered.

Finally, the proposed section 50 will reduce the transaction costs of completing many mergers. The ACCC will often raise concerns about a proposed merger. It is effectively asking the parties to convince it that its concerns are unfounded and that the proposal will not lessen competition substantially. That leads to the parties – and ultimately the ACCC – devoting significant resources to the further and more rigorous examination of those issues raised. However, this is necessary only because the effect on competition is the sole test. If questions of benefit were relevant, that additional effort may become unnecessary. That is, an informal

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[2] Varian, H.R. 1999, *Intermediate Microeconomics: A Modern Approach*, W.W. Norton & Co., New York, pp.15-16

clearance may be appropriate despite any competition concerns because the demonstrated benefits of the merger proceeding will outweigh any detriment, even assuming the ACCC's concerns about the competitive effect of the merger were fully justified.

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I would be happy to elaborate on any points made in this submission if the Committee wishes.

Yours faithfully
Freehills
per:

Martin I. Algie