Seven Network Limited

Submission to the Trade Practices Act Review

August 2002

Executive Summary

Market based analysis

- The traditional market based analysis used in competition law is no longer effective in controlling anti-competitive conduct, particularly in the communications industry. The convergence evident in the communications industry provides a good example of the limitations of the traditional market based approach to competition analysis.
- It is critical to adopt a more flexible approach to regulating anti-competitive behaviour, in particular in relation to the communications industry, if Australia is to avoid ending up with a converged communications sector which is dominated by a small number of players.
- Seven proposes that the *Trade Practices Act 1974* should be amended to:
  - Require that the strategic implications on the relevant industry be taken into account when considering the competitive effect of conduct, including any such implication arising from the holding of minority interests in any relevant entity;
  - Require the ACCC to provide a written explanation of its consideration of the strategic implications.

Section 46 – Misuse of market power

- The current "purpose test" in section 46 should be replaced with an "effects test" based on the concept of "substantially lessening competition".
- Legislative guidance should be provided as to the intended scope of the term "substantially lessening competition".
- It is important that any "effects test" is appropriately drafted to ensure that legitimate business activity is not inappropriately impeded. The effects test should clearly require a causal link between the impact of behaviour and the taking advantage of market power to avoid catching legitimate business activity.

Process and accountability

- The Act should be amended to require the application of formal authorisation processes unless the proposed transaction is of such a minor nature that it would not be in the public interest to conduct a formal process.
- Timelines should be introduced in relation to ACCC processes.
- Parties should be allowed to have direct access to the Australian Competition Tribunal (ACT).
- The *Daniels* case undermines the operation of legal professional privilege which is essential for businesses to be properly advised of their rights and obligations under the Act and should be reversed by legislative intervention.
- The ACCC should be required to give reasons for decisions.

Penalties

- Seven supports the ACCC's proposal for increased civil penalties and criminal sanctions for 'hard core' cartels.

Access

- The general competition provisions of the Act must be complemented by an efficient and workable access regime in Part XIC.
- There are a number of deficiencies in the operation of the current access regime which impede the achievement of clear Government policy objectives and these should be rectified.

1. Introduction

The Seven Network Limited (**Seven**) welcomes the Federal Government's review of the competition provisions of the *Trade Practices Act 1974* (the **Act**). The review provides an important opportunity to ensure that the provisions of the Act continue to be appropriate for the needs of all Australian consumers and businesses, in particular in relation to the "new economy".

This submission addresses four main areas which Seven considers are critical to the review:

- The need to move away from applying a narrow "market based" analysis of anti-competitive conduct because a market based approach can lead to failure to identify anti-competitive effects, particularly in industries experiencing convergence;
- The need for the introduction of an "effects test" rather than a "purpose test" in relation to misuse of market power provisions;
- The need for increased penalties to provide an effective deterrent; and
- The need for improved ACCC process and accountability.

Although Part XIB and XIC of the Act relating to telecommunications specific competition and access have been excluded from the terms of reference of the review, this submission raises some issues relevant to these parts of the Act. The comments made in this submission in relation to Part IV of the Act presuppose the effective operation of a telecommunications specific access regime. To the extent that this is not currently the case, Seven believes that comment on these additional parts of the legislation is warranted in the context of this review.

2. Limitations of a strict "market based" analysis

2.1 Introduction

Traditional competition analysis has tended to focus on market definition. Seven believes that this approach has significant limitations, particularly in new economy industries experiencing "convergence" or "network effects".

For converging communications industry sectors, the market based approach to competition analysis has meant that strategic behaviour such as vertical and horizontal integration, acquisition of minority interests in entities and long-term contracts have not been considered to be anti-competitive because the integrating or contracting entities were considered to be operating in different markets, or because the interest acquired was not a controlling interest. Such unchecked strategic conduct has enabled the consolidation of market power by incumbent players allowing them to assume control of key bottlenecks for entry across industry sectors.

In Seven's view, the Act should be amended to require the examination of the strategic implications for industry when considering the competitive effects of any contract or understanding**,** acquisition of shares or assets, taking advantage of market power**,** or other conduct.

This approach would require a more rigorous strategic analysis of the competitive effects of industry behaviour that focuses on the outcome of a proposed transaction and how that transaction will affect the competitive state of the affected industry sectors. Of particular relevance to the converging communications industry is that such a strategic analysis would enable the assessment of competition beyond existing rivals and examine all relevant forces of competition, which may otherwise be overlooked in an analysis based on market definition.

Seven makes the following comments in the context of the broadcasting, telecommunications and related industry sectors. However, we believe that the issues considered have wider implications across all areas of business.

2.2 Background

Market definition in the communications industry

The ACCC has traditionally considered that broadcasting and other forms of media, such as cinema, newspapers, magazines, video games and the Internet, are not sufficiently substitutable from the perspective of the consumer to be considered to be part of the same market. Broadcasting has been considered to have an immediacy that those other forms of media (other than the Internet) did not have. In addition, in the past the ACCC has been of the view that free-to-air TV and pay TV are different markets, and most recently reaffirmed this view during its examination of the pay TV deal between Telstra/Foxtel and Optus.

The convergence of the communications industry has resulted in a fundamental blurring of the boundaries and distinctions between previously discrete communications sectors/markets.

In Seven's opinion the Act's emphasis on market definition has been ineffective in controlling anti-competitive conduct in the communications industry. In particular, the Act has been ineffective in controlling anti-competitive conduct in the process of convergence.

The limitations of the ACCC's traditional market focus in relation to the communications industry were the subject of considerable discussion during Professor Allan Fels' recent appearance before the Senate Environment, Communications, Information Technology and the Arts Committee Inquiry into the *Broadcasting Services Amendment (Media Ownership) Bill 2002*. A copy of the transcript of that evidence is attached as **Appendix 1.**

To some extent, the ACCC has conceded that its approach to the analysis of the communications industry has been too narrowly focused. In its submission to the Productivity Commission on Telecommunications Competition Regulation, the ACCC expressed the view that market definition for the purposes of measuring media influence involved significantly different, or broader, approaches to those that it currently takes. The ACCC also indicated that, once digital television was introduced, it would be likely to re-examine its approach to market definition which led it to conclude that free-to-air commercial television broadcasting and pay TV broadcasting were different markets.

However, in Seven's opinion, broadening the defined market will not of itself address the flaws of the ACCC's analysis of anti-competitive behaviour in the communications industry. Adopting a more flexible approach to regulating anti-competitive behaviour is critical if Australia is to avoid ending up with a developed converged communications industry which is dominated by a small number of players (most of whom currently could be described as being in a position to control the bottlenecks - including carriage services, content and means of access).

What is convergence

The term 'convergence' is often used in different ways. In general it refers to a blurring of previously clear boundaries between types of service operation and their means of delivery, and between types of data such as text, audio and video. The Productivity Commission Broadcasting Inquiry Report 2000 identified the following four layers of potential convergence in relation to broadcasting:

- Convergence of media products and markets;
- Convergence of media platforms;
- Convergence in corporate structures; and

- Convergence in media regulation and policy[1].

We are already seeing convergence of products and of platforms in the communications industry in Australia. For example, the increased availability over the internet of traditionally paper-based media, such as newspapers and magazines, is leading to those media forms taking on the immediacy of television and radio broadcasting. Going forward, digital TV has the real potential to dissolve the current distinctions in functionality between TV, the internet, cinema and video games by combining the traditional functionality of television with higher degrees of picture quality and interactive content. Previously discrete media forms are being streamed towards common electronic delivery platforms as part of service packages or bundles which will compete for the same, or heavily overlapping groups of, targeted end-users.

Convergence of products and platforms is also associated with a convergence in corporate structures and of market power to the extent that dominant players in the market for one communications device or service, through the convergence of products and platforms, are able to become dominant players in other, previously distinct markets.

Recent market mergers and acquisitions in the USA highlight the potential for convergence of market power through the crossover of telecommunications, cable and television companies into other market segments as they seek to vertically (and horizontally) integrate their carriage and content businesses. For example, long distance telephone carrier AT&T has acquired the cable networks of TCI and MediaOne, along with an acquisition of a 25% interest in TimeWarner's cable system, which has given AT&T access to over 30 million cable homes (or half of the US cable market). In addition, AT&T are upgrading their telephony network with the view to offering TV, local and long distance calls and internet services on a single platform.

Convergence of market power has also occurred and is occurring in the communications industry in Australia, for example the pay TV service Foxtel, which is a joint venture between Telstra, PBL and News Corporation. A diagrammatic representation of the associated interests of PBL, News and Telstra throughout the communications industry (as at September 2001) is attached as **Appendix 2**.

In competition analysis, the phenomenon of convergence gives rise to additional issues such as the relationships between the different levels and dimensions of the marketplace (both currently and in the future) and how those relationship can cause or enable companies to engage in anti-competitive and strategic behaviour.

2.3 Competition problems arising from convergence

The fact that there is an environment where there are converging and interdependent interests at the level of content, infrastructure, service and delivery, gives rise to a number of competition concerns, in particular, the existence of bottleneck inputs and the ability and impetus for firms to engage in anti-competitive behaviour.

Seven's key submissions in relation to the impact of convergence on competition analysis are as follows:

- Convergence does <u>not</u> mean that the appropriate market for analysis of the communications industry is 'one big market'.
- Convergence <u>does</u> mean that many markets interact in strategically important ways that allow dominance in one market to influence the competitive state of other markets.
- Horizontal and vertical linkages (by ownership and by agreement) are key features of the competitive landscape in converging markets and must be taken into account in competition analysis.

[1] Productivity Commission *Broadcasting Inquiry Report 2000*, Report no. 11, AusInfo Canberra, pp.110-111

Appendix 3 sets out a list of possible segments comprising the converged media industry. In any strategic analysis of competitive effects, a broad range of combinations of industry sectors will be relevant to different transactions. Any attempt to regulate anti-competitive conduct by adopting an expanded view of a 'converged communications market' that included all these segments would fail to deal with the underlying economic concerns. Adopting a 'one big market' approach to the phenomenon of convergence would have a number of problems, including that:

- The wider market definition might allow mergers or other transactions (such as long-term exclusive supply contracts) that have anti-competitive effects and would otherwise not have been permitted;
- Mergers between large communications companies could be permitted because, in the context of the broad definition of the converged communications market, the percentage effect of the merger could make such mergers insignificant on their face. This would, of course, be detrimental to those non-dominant entities who are attempting to enter and compete in the converging communications industry;
- There may be significant gaps where there are sectors that, on their face, do not fit, but in practice, turn out to be significant in the convergence process;
- There is a danger that the definition becomes too prescriptive, inviting argument and legal challenge as to whether certain sectors or activities are captured by the definition;
- An emphasis on market definitions misses the main issue, namely whether or not there are likely anti-competitive effects from the transaction.

Relevant markets

When markets converge, vertical linkages (rather than horizontal linkages) between those with market power are "treacherous"[2]. Competition analysis therefore needs to assess the competitive effects of any transaction 'in any and all of the markets or industry sectors (whether or not 'submarkets') deemed relevant by customers and competitors[3]'. Such markets or industry sectors in the communications industry might include, for example, the following:

- Markets in which various forms of the media compete. There might be separate markets for free-to-air TV and pay TV.
- Various markets for the sale and purchase of inputs. These inputs will include sporting rights, rights to broadcast movies and other similar content.
- Markets for content packaging services.
- Markets for advertising services.
- Markets for the use of infrastructure services. These include the critical rights for pay TV providers of access to the HFC cable and satellite capacity. They might also include the market in which access is given to set-top-units (**STUs**) and the market for lease of satellite capacity.
- Markets for STUs. Given the importance of STUs, there are issues about proprietary control over the STU and who sets the standards.
- Markets for telephony services.

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[2] Alfred Marshall cautioned against allowing 'complementary monopolies' (those who buy and sell in vertical relationships) even when a public interest in common ownership can be identified. He referred to them as being "treacherous": Principles of Economics (1st ed, 1890, 8th ed, 1924, pp408-409).

[3] Alexander Schaub, 'Sports and Competition: Broadcasting Rights of Sports Events' 26 February 2002: www.europa.eu.int/comm/competition/speeches/text/sp2002_008_en.pdf

- Markets for the provision to consumers of any in-home directed services. Examples of such markets might include in-home banking, shopping, bill paying and internet gambling.

The EC competition regulator and EC courts have identified the importance of 'neighbouring markets ... many of them outside the traditional media arena proper, but now of decisive importance for media deployment and control'.[4]

Competition analysis should focus on effects

A debate about the appropriate market definition to apply in a converged communications industry sector misses the critical point, which is that it is the competitive effect that should be the focus of the analysis.

Seven considers that, in particular in industries that are experiencing convergence, competition authorities need to go beyond a mechanistic approach to market definition. A 'wide angle lens is needed to assess competition'[5]. The full competitive environment and effects need to be addressed when considering the effect of any transaction.

The UK Office of Fair Trading discussion paper on Innovation and Competition Policy supports Seven's view that that the traditional approach to competition policy, based on defining the relevant market, can be seriously flawed in some circumstances, in particular in high technology industries. The discussion paper advocates focusing on the alleged conduct and the effect of that conduct rather than focusing on the definition of the market[6].

2.4 Proposed solution - require ACCC to consider strategic implications

In Seven's view, to deal with the phenomenon of convergence, the Act should be amended to require that when considering any contract or understanding, acquisition of shares or assets, taking advantage of market power, or other conduct or action, the strategic implications on the industry must be taken into account, including any such implication arising from the holding of interests, whether or not controlling interests, in any relevant entity.

The amendment should specify the 'competitive forces' that must be examined to determine the strategic implications on the industry. The amendment should also require the ACCC to provide a written explanation of its consideration of those competitive forces. The form of the proposed amendment is attached as **Appendix 4.**

This view is based on the newer industrial organisation theories which recognise, particularly in the new networked and globalised economy, that companies engage in strategic behaviour. One of the main proponents of these theories is Professor Michael Porter of the Harvard Business School.

Professor Porter's thesis adopts the 'Five Forces' model which "is a dynamic approach to analysing industry structure, based on five competitive forces acting in an industry or sub-industry:

- threat of entry;
- threat of substitution;
- bargaining power of buyers;
- bargaining power of suppliers; and

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[4] Herbert Ungerer, 'Media in Europe: Media and EU Competition Law' 13 February 2002: http://europa.eu.int/comm/competition/speeches/text/sp2002_006_en.pdf.

[5] Chris Pleatsikas and David Teece 'The analysis of market definition and market power in the context of rapid innovation' (2001) 19 *International Journal of Industrial Organisation* 665 at 688.

[6] Office of Fair Trading, *Innovation and competition policy – Part 1 conceptual issues*, Economic Discussion Paper 3, March 2002.

- rivalry among current competitors"[7].

A diagrammatic form of the 'Five Forces' is attached as **Appendix 5**.

Professor Porter's thesis also adopts the 'Diamond' framework used to gauge the potential productivity of local business environment by considering four interacting components:

- context for firm strategy and rivalry;
- factor (input) conditions;
- demand conditions; and
- related and supporting industries.

A diagrammatic form of the Diamond framework is attached as **Appendix 6**.

The Porter thesis approaches industry analysis from a 'strategic' point of view. Conduct rather than structure alone (number of players, concentration) is the important focus of the analysis. Although structure is one element of the model, it is one to be considered in the light of the overall industry conditions as set out in the Five Forces and Diamond frameworks.

When analysing a merger or joint venture the effect of the proposed transaction on the 'health' of the industry (productivity gains) is the real issue. Especially in modern network industries this cannot be gauged by reference to the effect on concentration. In such industries:

- the old truisms about competitive benchmarks (eg price equals marginal cost) no longer apply;
- there is no single test of what is competition enhancing;
- strategic conduct plays a critical role. For example, passive, minority investments or long term supply contracts can impact upon the incentives of the players' conduct; and
- industries cannot be seen in isolation from each other. Many industries are critical inputs into the products of others.

The analysis is 'wholly future looking'. Considering whether or not a transaction leads to a substantial lessening of competition requires an understanding of the likely future alternative. For example, in considering an acquisition by a rival company, the proper comparison is not the future state of competition with and without the acquisition, but the future with the acquisition and the future with an alternative acquisition. A substantial lessening can occur by reason that one acquisition blocks another, even though that acquisition is not in itself anti-competitive.

Competition analysis on this basis therefore requires a fact-intensive analysis of all the forces and industry conditions. It is a broad-ranging analysis that is not hampered by particular market definitions. All markets become relevant on one view, for the focus is not on numbers but on conduct and industry output (quantity, quality and price). Market definitions are important only in so far as they assist in identifying the underlying competitive forces and industry dynamics.

Greater flexibility is built into the analysis as it accommodates new economic theories and also changes in the underlying market conditions. This allows greater freedom to argue for different treatment of similar deals at different times and with different parties. Each case is unique and the past is not a good precedent.

Professor Porter's approach also takes into consideration what he terms as 'clusters' or concentrations of interconnected companies and institutions in a particular field (see diagram of the Finnish Wireless cluster in **Appendix 7**)**.** This allows an analysis that has regard to new

[7] Professor Michael Porter, *Competition and antitrust : towards a productivity-based approach to evaluating mergers and joint ventures*, paper presented to the American Bar Association Antitrust Section Fundamental Theory Task Force, 11 January 2001, in *Perspectives on Fundamental Antitrust Theory*, American Bar Association Section of Antitrust Law, July 2001.

and emerging sectors, an approach which is particularly pertinent to any consideration of convergence.

This analysis allows the assessment of competition beyond existing rivals because it takes into account all sources of competition, some of which would be overlooked in a competition analysis based on market definition.

Adopting an effects analysis also allows the holding of small interests to be taken into account, not just majority or controlling interests. This would allow the competition analysis to take account of all types and levels of relationships within and between entities, and not be restricted to consideration of controlling interests.

Seven acknowledges that such analysis can be, and sometimes is, carried out under the current substantial lessening of competition test. However, in Seven's opinion, the new problems raised by the issue of convergence require new words to ensure that old attitudes do not persist.

Australian industry's ability to compete locally and internationally

One argument that is commonly put forward is that consolidation of local industry allows Australian companies to compete better in the global economy.

In Seven's view, the focus of any analysis of the competition effects of a merger or conduct should be on the impact on the domestic market, and arguments that consolidation allows an entity to compete in the global economy should be given little weight. This view is also supported by Professor Porter, who has stated that the rise of domestic monopolies and oligopolies in Australia is likely to impede the country's embrace of globalization.[8]

3. Section 46 – Misuse of Market Power

3.1 Introduction

Section 46(1) of the Act provides:

> *A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:*
>
> *(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
>
> *(b) preventing the entry of a person into that or any other market; or*
>
> *(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*

The intention of section 46 is to prevent anti-competitive conduct by companies with substantial market power. The objective is clearly an important one. However, Seven believes that this provision requires amendment to properly achieve that objective.

3.2 Focus should be on "substantial lessening of competition"

As currently drafted, the focus of section 46 is on whether certain conduct has occurred for the purpose of:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- preventing the entry of a person into that or any other market; or

[8] David James "How to kick global goals: If Australia wants global success, it must learn to exploit its unique local strengths" *Business Review Weekly* March 28-April 3 2002 pp.54-55

- deterring or preventing a person from engaging in competitive conduct in that or any other market.

In Seven's view, the apparent emphasis of this section on damaging a particular competitor or potential competitor does not deliver the most desirable public policy outcome. The objects of the Act are concerned with the promotion of competition generally and not the impact of actions on any particular corporation or person.

In Seven's opinion, section 46 should be redrafted to focus solely on whether the result of the proscribed conduct is the "substantial lessening of competition" (rather than the damage to any one person).

3.3 Difficulties with the "purpose test"

One of the most contentious areas of debate in relation to section 46 is whether the current "purpose" test should be retained, or whether it should be supplemented or replaced by an "effects" test.

In Seven's view, there are a number of problems with the current "purpose" test. Many have argued that the test is a subjective one, namely, that in order to establish that anti-competitive conduct has occurred in contravention of the Act, a party is required to establish the intent of the party whose conduct is the subject of the complaint. This is a heavy evidentiary burden which has frequently led to difficulties in mounting actions under section 46.

The ACCC has noted in its submissions to this review that, "in the absence of "smoking gun" documents, proving a relevant purpose under section 46 to the satisfaction of a court is an onerous forensic process"[9].

Seven also notes the ACCC's comments that the purpose-based test is particularly unsuited to an examination of conduct in high technology and network markets. The communications industry is a case in point, where the incentives for unilateral anti-competitive activities are high and the potential for long-term damage to the competitive state of the industry is significant.

A purpose test may also fail to catch certain anti-competitive behaviour where it can be argued that there are multiple purposes for the relevant conduct. These arguments may be used to obscure the anti-competitive element in the mix. Such cases depend on the willingness of courts to recognize the anti-competitive purpose and give it due weight.

Confusion in the interpretation of purpose may also arise where there may be variable timeframes to take into account. In such cases, courts must identify whether the relevant purpose is the short, medium or long term one[10].

3.4 An "effect test"

Seven's view is that an effects test should replace the current purpose test in section 46 of the Act. This would minimise the evidentiary problems associated with the current purpose test and shift the focus of the misuse of market power to the consequences of the relevant behaviour.

Seven notes that the ACCC has recommended the introduction of an effects test to section 46 (as an addition to the current purpose test). The ACCC's arguments in favour of an effects test are that an effects test would:

- better serve the objects of the Act in protecting the process of competition and fair trading;

[9] Australian Competition and Consumer Commission: Submissions to the Trade Practices Act Review: June 2002, p80

[10] *South Sydney Districts Rugby League Football Club v News Limited* (2001) ATPR 41-824

- bring section 46 into line with the balance of Part IV, which is generally directed towards conduct that has the purpose or effect of damaging competition;
- overcome the enforcement difficulties associated with proving purpose in a range of circumstances;
- be better suited to examining conduct in new technology markets; and
- bring section 46 into line with similar prohibitions in overseas jurisdictions including in the US and Europe.[11]

Seven generally supports these conclusions. However, in Seven's opinion, the effects test should replace the current purpose test rather than merely supplementing it. The focus of competition regulation should be on anti-competitive effects, not purposes (and in Seven's opinion, the purposive element should be removed from section 45 of the Act as well).

A number of commentators, including the Business Council of Australia (BCA), have expressed concerns that an effects test could operate to prevent legitimate business activity. For example, the BCA have argued that successful competitive business strategies that result in increase of market share may be at risk of being considered anti-competitive simply because they may also result in a diminution of the market share of competitors.

Seven agrees that such a result would not be desirable. However, Seven believes that this is not the inevitable result of an effects test, provided the test is properly framed and applied.

To avoid catching legitimate competitive conduct, Seven believes that the drafting of the provision should specify that conduct can only constitute a misuse of market power if it has the effect of "substantially lessening competition". The meaning of "substantially lessening competition" should be clarified either in the Explanatory Memorandum to the legislation or possibly in the form of a legislative essay, similar to that provided in Schedule 1 to the *Broadcasting Services Act 1992*.

In Seven's view, legitimate business activity will not be caught by s46 to the extent that the section continues to be interpreted as requiring a causal link between the relevant conduct and the possession of market power. The requirement for a causal link was recently explored by the High Court in *Melway Publishing Pty Limited v Robert Hicks Pty Ltd* [2001] ATPR 41-805. *Melway* involved a company with substantial market power refusing to supply a distributor that was not one of its existing exclusive distributors. The debate in the case centred on whether the possession of market power "materially facilitated" Melway to do something which it would not (or could not) have done in the absence the market power[12]. In that case, the court held that the necessary causal link could not be established because Melway had an exclusive distribution system in place at a time when it did not have market power. Therefore, the court held that the maintenance of the distribution was not necessarily a use of market power. A recent article from the Australian Business Law Review, by Donald Robertson, on "Causal Concepts in Competition Law and Economics", which discusses the causal link required by section 46, is attached as **Appendix 8**.

The Business Council of Australia's concern that an effects test could operate to prevent legitimate business activity are ill-founded. A successful competitive business strategy that resulted in a substantial lessening of competition would only be prohibited by section 46 to the extent that the particular strategy would not (or could not) have been used by an entity that did not have market power[13].

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[11] Australian Competition and Consumer Commission: Submissions to the Trade Practices Act Review: June 2002

[12] A controversial issue is whether or not the causal test is whether the firm with market power "would" have engaged in the conduct if it did not have market power or whether the firm "could" have engaged in the conduct if it did not have market power. *Melway* appears to suggest that the appropriate test is whether the firm "would" or "would likely have" engaged in the conduct in the absence of market power, but it is not clear.

[13] Ibid

In Seven's view, removing the purposive element of section 46 is necessary to ensure that those with market power are regulated appropriately, to the extent that market forces are unable to deliver competitive outcomes.

4. Role of the ACCC – processes and accountability

4.1 General comments

In general, Seven believes that there should be an overhaul of the way in which the Act is administered. Process issues are some of the most important issues under the Act.

Processes should be fair (in the sense of transparent, consistent, administratively workable and responsive to the regulatory issue).

Seven also believes the Commission should take a more active and less paper-based approach in its administration of the Act. This may have the effect of lessening the delays involved in current processes.

4.2 Informal clearance - transparency

Despite the provisions of a formal authorisation process under the Act, the ACCC engages in informal processes, such as the current consideration of the Foxtel/Optus deal, whereby parties are able to negotiate with the ACCC to obtain approval for transactions that could potentially be in breach of the Act. This results in the whole process being held 'behind closed doors' where the issues raised, and the documents examined, are not open to public scrutiny.

One of the problems with this approach is that the only parties who have an opportunity to make fully informed submissions to the ACCC are those who are seeking approval for the proposed transaction. Thus, the ACCC gets only a very biased, one-sided view on issues relevant to the proposal, or indeed, on which are the issues that are relevant to the proposal. Other parties who may be effected by the proposal are not given an opportunity to present fully-informed submissions on the potential effects of the proposal. Submissions by such parties can only be made on the basis of media reports on the proposal, some of which could very well be misinformed speculation.

In addition, the ACCC has, on a number of occasions, indulged in some 'regulatory arm-twisting' by asking parties to give undertakings on matters that are totally unrelated to those that are the focus of the informal process.

Such informal clearance processes lack the fundamental transparency which Australians reasonably expect of their regulatory agencies, particularly when it comes to such important areas as competition and consumer regulation. It can reasonably be argued that there is a high risk of regulatory error in making decisions based on such informal processes, given that the ACCC does not have the benefit of submissions from potentially effected parties who have access to all the details relevant to a proper consideration of the proposal.

Seven considers that the Act should be amended to require the use of the formal authorisation processes unless the proposed transaction is of such a minor nature that it would not be in the public interest to conduct a formal process.

4.3 Timelines

The absence of timelines or deadlines in relation to a number of ACCC processes can result in significant delays and uncertainty. Delay is generally recognised as a factor crucial to the potential health or success of ventures. There have been many calls for the regime under the Act to require the use of timelines to avoid or prevent the deliberate use of processes under

the Act to delay the development of competition. Seven's drawn out access saga with Telstra/Foxtel is a clear case in point.

The recently released ACCC draft guide for the resolution of telecommunications access disputes does not propose to include any such timelines, and it seems the ACCC has not heeded industry calls for such improvements.

4.4 Direct access to ACT

Seven proposes that the Act should be amended to allow parties to take their matters directly to the Australian Competition Tribunal (ACT), rather than first having to go through a protracted process with the ACCC.

It is submitted that this would produce efficiency benefits for the parties concerned, the ACCC and the ACT.

4.5 Privilege

In *Australian Competition and Consumer Commission v Daniels Corporation International Pty Ltd* [2001] FCA 244, the Full Court of the Federal Court held that the defence of legal professional privilege did not apply in relation a section 155 notice to produce documents to the ACCC. The Court held that the words of section 155 of the Act indicated Parliament's intention to exclude the privilege. This case has been appealed to the High Court.

Seven considers that the *Daniels* case significantly undermines the operation of legal professional privilege, which is essential for businesses to be properly advised of their rights and obligations under the Act. In Seven's opinion, the ruling should be reversed by legislative intervention without waiting for the outcome of the High Court appeal.

4.6 ACCC accountability – reasons for decisions

Currently there is an absence of a clear requirement for the ACCC to provide statements of reasons in relation to decisions made under the Act. Such a requirement is a basic element of accountability in relation to regulatory agencies, and would lead to a number of benefits, such as:

- facilitating transparency in ACCC processes;
- assisting parties to understand ACCC decision-making processes;
- providing more certainty in the application and meaning of the Act generally, and in relation to particular provisions;
- reducing the potential for regulatory error;
- enabling parties to assess whether or not ACCC decisions should be challenged.

5. Penalties

The ACCC's submission to the review recommend that it be a criminal offence for a large company to collude with a competitor to fix prices, rig bids, limit output or share markets. The ACCC recommends that individual executives and employees found to have been personally involved in the contravention would be liable to be imprisoned[14].

[14] Australian Competition and Consumer Commission: Submissions to the Trade Practices Act Review: June 2002, pp.20-58

Seven agrees that the current penalties available under the Act are insufficient to deter anti-competitive arrangements, and supports the introduction of criminal sanctions for officers and employees knowingly involved in flagrant and deliberate collusion. Seven agrees that criminal sanctions should only be introduced in relation to large corporations, and that the offences for which criminal sanctions would be available should be specifically defined activities, such as price fixing, bid rigging, limiting output and market sharing.

Seven also supports the ACCC's proposal that pecuniary penalties applying to corporations should be increased in order to provide an appropriate deterrent, and to minimise the prospect of potential gain from anti-competitive conduct. The ACCC's proposal is that the maximum penalty for a contravention should be the greater of $10 million or three times the value of any commercial gain from the contravention. The ACCC considers it would be appropriate for courts to have the power to substitute 10% of the firms Australian turnover during the infringement if it was too difficult to quantify the commercial gain from the contravention. Seven considers the ACCC's proposal to link the maximum penalty to the commercial gains from the infringement to be appropriate.

6. Access – Part XIC

Although Parts XIB and XIC of the Act relating to telecommunications specific competition and access have been excluded from the terms of reference of this review, Seven believes that there are several issues which need addressing in this regard. In particular, Seven believes that if the strategic analysis approach set out above is adopted it is crucial that it be underpinned by an efficient and workable access regime. Seven believes that the deficiencies in the current access regime include the following:

- Generally the complexity and hence the time taken to conclude the process - Seven's experience in attempting to gain access to the Telstra/Foxtel cable demonstrates that a dominant incumbent will invariably invoke whatever delaying device is available to it to resist having to comply with regulatory obligations;
- Inefficient arbitration processes, eg the fact that current arbitrations are not public and hence have no precedent value;
- Delays in production of information under s.155 of the Act;
- The need for the inclusion of some policy guidance in relation to the existing declaration process;
- Merits review or review under the *Administrative Decisions (Judicial Review) Act 1977* of access decisions being used as a delay tactic – C7's experience in attempting to gain access to Telstra's HCF cable being the classic example.
- Inconsistency between section 152AR(4) and 152CQ in relation to the date at which the reasonably anticipated requirements of the access provider or existing user are measured – this inconsistency creates uncertainty in the regime with the consequence that access seekers and providers are less likely to be able to resolve disputes.
- Problems in the implementation of s.152CQ(1)(f) relating to the costs of access;
- The need for a legislatively mandated declaration of digital transmission services and related ancillary services for pay TV and STUs. When the Telstra cable is eventually digitised, the analogue pay TV service which is the subject of the current ACCC access declaration will be phased out. Once it is gone, in the absence of a declaration of digital cable and other platforms, neither Foxtel nor Telstra would then be obliged to provide access to pay TV access seekers, effectively repealing the pay TV access regime, and furthering the maintenance of the monopoly of Foxtel in the provision of pay TV services in Australia;

In relation to the question of financial certainty for digitising the Telstra/Foxtel pay TV network, Seven is of the view that:

- no legislative amendments are needed as the existing legislation already ensures that access must be provided on fair terms that provide an adequate return on the investment;
- if the Government decides to enact special amendments:
  - (a) the 'financial certainty' protection that is sought by Telstra/Foxtel should only apply to future investments and not to any current or past investments;
  - (b) access seekers **must** be guaranteed access
    - immediately on expiration of any digital access holiday if the Government decides to grant one;
    - to set top units (STUs) and associated services such as the conditional access system (CAS) and subscriber management system (SMS);
  - (c) the price for access to these services must be specified up front so that clear financial terms are known to both Telstra/Foxtel and access seekers, with no matters left to the discretion of Telstra/Foxtel;
  - (d) the access obligation should not apply only to carriers and carriage service providers (CSPs), given the ease with which structures can be put in place to insulate key inputs such as STUs from the access regime in Part XIC of the Act which applies only to carriers and CSPs (see diagrams in **Appendix 2**)

Appendix 1 – Extract of evidence of Professor Fels given to Environment, Communications, Information Technology and the Arts Committee (Senate) on 22 May 2002

....

Senator Mackay --Thank you for your submission. In relation to this issue, would the provisions of the Trade Practices Act currently prevent one proprietor from owning the major newspaper, TV station, pay TV station and one of the radio stations in a particular area? Would you take us through that scenario?

Prof. Fels --The way the act works is that, in general, if there are mergers within a particular category of media, such as newspapers, then it applies. Obviously, there are some mergers between newspaper organisations which would be prohibited under the competition provisions of the act. Similarly, when TV or radio stations merge, we look at all those mergers.

The next question is about mergers between different categories. As a very broad generalisation, we regard them as separate industries in the economic sense, but I want to qualify that in a whole lot of ways. We look at matters at the time that they are presented to us, so any transaction would be considered in the light of its nature and also in the light of the latest developments in the industry. Looking back, I can point you to decisions we have made where we have concluded that newspapers, for example, are a separate market from TV or radio. Obviously, we would have a look at that were any cross-media matters or proposals presented to us.

It is a fact that, as circumstances change, the commission finds that it has to adopt a different analysis of markets. For example, with home loans, once we would have been highly concerned about mergers which had the effect of reducing the number of lenders in the home loan banking market. Now we are somewhat more relaxed about that aspect of bank mergers because of the changes there. We used to regard the brewing market as a state by state market and now we see it as having changed and having national characteristics. So we do take account of certain changes.

Having said that, in the past we have looked quite a lot at this type of issue--particularly at the time of the Tourang transaction back in 1991. We did quite extensive market surveys and concluded at that time that newspapers and television were, in the economic sense, in different markets and were not close substitutes. That view, incidentally, is one which has been shared by competition regulators around the world. I cannot think of any who have taken a different view and I know of quite a number who have taken the same view. We have always wanted to make this extremely clear to people. We would not want them to think that, if you applied the Trade Practices Act alone to mergers in the media sector, it would be highly likely that the act could be used to block major mergers between major players in different forms of media. Having made that pretty clear now and over the years, I say that we would have to look at the issue as it presents itself in a modern form.

We did come back to the subject with some radio mergers and, again, we considered particularly whether advertising on radio was seen as a close substitute for TV or newspaper advertising, and we concluded that it was not. Superficially, one might think it is a close substitute but, talking to advertisers, advertising agents and so on, they did not see it as a particularly close substitute. There is a fair bit of evidence from industry, if it is pushed and if questions are put to it fairly sharply, that it sees them as separate markets.

Senator Mackay --With our apocryphal regional centre, you have said you are prepared to look at it, but currently your view would be that they are separate industries.

Prof. Fels --Yes. Turning to the question of looking in a particular region, I think--and I say this slightly more tentatively--we would tend to look at that regional market on its own.

Senator Conroy -- So that is back to a geographic market.

Prof. Fels --Yes, that would be my instinctive reaction to that. I have not really considered it a great deal, but a lot of advertisers are only aiming at the local market. Say they are Queensland people--quite a number of them are only interested in advertising in the region in which they sell. We would tend to see these markets as regional. We would be slightly strengthened in that view by the fact that the parliament recently introduced a change to the Trade Practices Act which tended to emphasise the importance of looking at regional markets when we are dealing with mergers and acquisitions. So it would come down to the regional market, I think, and we would do the same--

Senator Mackay --I will just explore that further because, for us, a pivotal question is what kind of checks and balances ought to be in the system if this legislation were to get through. In this situation of the apocryphal regional centre, just off the top of your head--I appreciate that you would need to look at it--how would you define a market? Would it be in terms of the reach of the TV station, the local newspaper or the local radio station? What if that did not exist? How would you determine the market? This, for us, is a critical point in relation to diversity and consumer choice in the regions.

Prof. Fels --I have not thought about it, and you have identified an immediate complication. Normally we can say, `It is a fish and chips market,' and that is pretty definite, but if you have something like a TV station with a wide reach, a radio station with a narrower reach and a newspaper with an even narrower reach it starts to become more complicated. I may even write to you about that--

Senator Mackay --That would be good.

Prof. Fels --but I will take an opening shot. We would probably take the widest geographic range--that would probably be TV--and make the market coextensive with TV and TV advertising.

Senator Mackay --I understand why you may want to do that, but this does present us with a problem. From our perspective, we would want the broadest checks and balances for any role you had. If you take the vertical slice of the apocryphal country town, you have the local rag. Say you have most of the major media owned by the same mob: your definition of market would be totally critical to whether diversity or competition was in fact being enacted. You may want to have a think about it, but it has been a recurrent theme throughout these hearings.

Prof. Fels --I will battle through this for a minute or two more. First of all, under the most traditional approach under the Trade Practices Act--and I am repeating half of what I said--supposing there were mergers within the newspaper sector alone in a country area, it would cover the respective areas of circulation of the two newspapers. That would be the starting point. If you have a big region with a town in it with, say, a couple of papers--there are some with two--we would look at their area of circulation; we would not look at the whole region, I do not think. There are some parts of Australia where we would take into account the existence of national newspapers, and others we might not. With regard to radio and TV and the area of coverage, if they could merge, again we would cover their area. If you had a TV station which covered this area that I am showing you here and the newspapers covered this area, I am not sure but we would tend to look at the position of the advertiser who wants to place ads. A lot of the advertisers just want to use the newspaper and there is no thought for them of going on television.

Senator Mackay --But they might use the local radio station.

Prof. Fels --We would tend to say that they are a separate market.

Senator Conroy --In this particular scenario, while we are trying to look at it from the advertiser's perspective, it is the consumer receiving the TV station, the newspaper, the radio and the question of diversity of opinion which is an extra added complication. It is a question of whether there is one view or three or four different views being put in the market of ideas and opinion, if you like, rather than just the market of the advertiser that is critical.

Senator Mackay --Exactly.

Prof. Fels --I have to be quite clear and frank about this. Whether even I like it or not, the fact is that, under competition law under the Trade Practices Act--under competition law everywhere--you would only look at the narrow economics question. You would not look at the market of ideas.

Senator Conroy --So this market for opinion is not your--

Senator Mackay --It is not your bag.

Prof. Fels --It is not our kettle of fish.

Senator Mackay --That is fair enough.

Prof. Fels --That is right. It would not come up under section 50. The only bit where the consumer would come in, which would not happen, is: supposing prices were to go up in newspapers, would they switch to watching television? That is a very minor economic question. The only place where diversity comes up for us as an issue--but this is entirely a second order point--is where we opposed a merger of a couple of newspapers. They might wish to apply for authorisation, even though it is anti-competitive. Then the law says that we have to be much broader and look at public benefit. Inevitably, a few broad questions about the market for ideas would come up and we might consider it then, but on the core application of the Trade Practices Act competition bit, we do not deal with the market for ideas.

Senator Conroy --I will move from a regional town to a metro area. If, for example, under the new environment created by this bill, it were passed, Telstra purchased Channel 9, Fairfax and major AM and FM stations in a metro market, would you be concerned about Telstra's degree of market power in media and telecommunications, given they already own half of Foxtel? Could you do anything about it under your test?

Prof. Fels --I will work my way through that bit by bit because it is the aggregation bit that stops me in my tracks in terms of giving you a quick answer. If Telstra moved on a free-to-air television station, our starting point is that we would tend to regard them as being in separate markets. I think you can only assume, as legislators, that the commission would not be very likely to oppose. We would look at it. There might be some non-obvious implication that would cause us to look at it.

If Telstra moved on Fairfax, there would be the same answer. It is unlikely. In regard to Fairfax, if there were some activity where they competed in some fashion and we had a problem with it, I am sure that what they would do is then just sell off the bit where there was a problem. I remember the print media inquiry in the early 1990s where some fringe problems were raised with Tourang about overlapping magazine interests. I think the answer from the Tourang side was that, if there was a problem, they would still go ahead with the transaction and sell off the magazine. If there is a minor overlap, I am sure that the parties would deal with that by selling off the offending bit.

With Telstra and Foxtel, the presence of Telstra in Foxtel itself is already an issue that everyone is aware of. Telstra's competitors have an interest in gaining access to content, yet their major competitor has 50 per cent of Foxtel and, therefore, can veto Telstra competitors from getting content from Foxtel. The media owners of the other 50 per cent of Foxtel might well want to be made available to just everyone. They might want a healthy price. That is normal functioning of

markets. There is no problem with that, but there is already an issue about Telstra's role in Foxtel. As you know, most countries have laws prohibiting that kind of thing.

Senator Conroy --Are you listening, government?

Prof. Fels --This has not happened in Australia. To be fair, there has been a slightly different history because Optus moved into media and Telstra followed it as an openly proclaimed defensive strategy. Going back before trying to deal with this very hard one about if it took over everything: the kinds of problems that I have just mentioned that we have with Telstra being in Foxtel largely arise from Foxtel having such a large control of media content, particularly if the proposed merger of the two went through. We have not made any decision on that at this stage, but the problem is acute. Putting it in oversimplified terms and slightly unfairly to Foxtel, they have control of the key pay TV content and there is no-one else one can go to for substantive content. That is a slight exaggeration.

I will retrace my steps for a minute. If they moved on Nine or Fairfax, I am not so sure that this issue would arise if they are doing it separately. If they manage to get Nine and Fairfax on top of Foxtel, I am sure we would look at it a lot harder. I could not rule out the possibility that it might well get through. As you can see, I cannot give an instant call on that one.

Senator Conroy --I appreciate that.

Prof. Fels --It is a hard one.

Senator Conroy --The issue of convergence has come up a lot. I think Senator Tierney has waved his Palm Pilot around a lot on this over the last 48 hours.

Senator Tierney --It is in for repair.

Senator Mackay --That puts you out of the loop.

Senator Conroy --With regard to that issue of convergence, we had Professor Hilmer in today talking about how the industry is changing and platforms are converging. Does that leave you with a changed view of what the market is? They are not separate and distinct industries anymore--it is about content. One of the reasons C7 fell over was because it lost the footy coverage--the other three ganged up on Channel 7. I know that came before you and you made a ruling to leave it alone--maybe that was because you knew Carlton was going to have such a good season you did not mind if your C7 subscription fell over. It is that issue of content that seems to be the one that is in the industry's mind now rather than platform.

Prof. Fels --Yes, content in some ways can be the key bottleneck, as the pay television issue illustrates. There are a lot of complications in this and I will just mention one to give you an idea of what I mean. We have generally regarded pay television as a separate market from free-to-air and looking around the world most courts, regulators and a fair number of experts have agreed on that view. We have taken the view, and we have said it in a few submissions, that in certain parts of the world where there are numerous free-to-air stations--10, 12 or 15, as I think you would find in some parts of the United States--the multichannelling distinctiveness of the pay TV starts to look less different than it does at the moment. At the moment, we have this sharp difference of just a few free-to-airs all doing mass-appeal broadcasting and then this very different type of pay television.

Supposing you had a very large number of free-to-air channels or digitised free-to-air and each of them did multichannelling, then pay television would not look terribly different. We would probably say that is one market. So the changing world has the potential to affect the views that we would take. Over the next five or seven years, on most scenarios, my assumption would be we will continue to see newspapers, television and radio continuing to be separate in economic terms.

…..

Senator Mackay --Apparently this is a big issue. In relation to the answers that you have given previously, do you regard the current provisions of the Trade Practices Act as adequate in terms of the proposed change regimen on cross-media ownership?

Prof. Fels --Given our job--the promotion of economic competition--yes, we are happy that they do the job that they are meant to do. They also make a contribution to having diversity in the media, because they particularly stop excessive concentration within any one class of media. But, as you have heard today, they do not do a great deal about cross-media mergers.

….

Senator Tierney --Finally, on competition and the effects of cross-media laws on that over time, we have had groups like Fairfax appear here today. They have said to us that if these rules did not exist they would be able to extend their business in various ways. Austereo, which is a radio group, said that they have run out of areas where they can actually grow and they have gone offshore to a number of companies. Can you just comment on the legislation, in terms of changing the cross-media laws and the possible impact of improved competition, perhaps, in this communications area?

Prof. Fels --I can certainly say that as long as the Trade Practices Act continues it will make a contribution to there being diversity in media ownership, because it prohibits mergers within particular categories of media. I have always regarded the competition law as being a very important part of media policy. That is also why, even though it is very obvious to all of you, we wanted to repeat this basic view that whatever happens it is important that the act continues to protect the process of competition to the maximum extent.

On the question of whether the present cross-media rules inhibit or help competition, we have never really done an analysis of that. Indeed, I can partly get out of answering some of the question by saying that we have the National Competition Council whose job it is to look at the effects of legislation on competition and, in addition, the Productivity Commission happened to do a review. I cannot quite remember what the Productivity Commission said was their view on whether the cross-media rules actually inhibit competition or not. I think they did say that it inhibited competition.

Senator Tierney --People are nodding behind you as well.

Prof. Fels --I think most economic bodies would have said that in the economic sense--

CHAIR --They set down a series of preconditions, I think.

Prof. Fels --They had the preconditions thing, yes. I think that they still wanted a cross-media, public interest test.

CHAIR --Suppose a media organisation was granted an exemption certificate: would it be possible for other players to then appeal to you under the Trade Practices Act, claiming there was a problem with competition?

Prof. Fels --In theory, yes, because if they were granted an exemption under the piece of legislation we are talking about they would still be covered by the Trade Practices Act. However, as I said earlier, if they were in different sectors to begin with--for example, they were granted an exemption from the rule that says that a TV station cannot own a newspaper--it is probable that it would not be an issue under the Trade Practices Act.

CHAIR --Because you would interpret them as being in different markets.

Prof. Fels --Yes.

….

Senator Mackay --Professor Fels…. On the Gordian knot question we were talking about earlier, I did not quite follow your analysis. This was in relation to the scenario of Telstra, Nine, Fairfax, 2UE and Nova. I took you to say that there was a strong possibility that that type of scenario could go through. I was not quite sure, so I thought I should clarify it with you.

Prof. Fels --Any confusion you may have is because I did not give a clear answer and I am not totally clear. As I started talking about it, I thought, frankly, having regard to the fact that I am talking to a legislative group, that it would be imprudent to leave you with the impression that it would definitely be a problem under the Trade Practices Act. I would prefer you to have the view--and this is my view, too--that it might well be quite okay under the Trade Practices Act. I gave you a stronger view that if Telstra wanted any one of those separately it would probably be okay under the Trade Practices Act. If it wanted the whole lot, it could raise issues. Again, given this idea of separate markets in the media, I do not know that it would be a problem. I think my starting point is it would not be, but obviously I would look at it fairly closely.

Senator Mackay --On the face of it, it would, but in terms of the process I guess is what you are getting at.

Prof. Fels --Are you talking about the process--

Senator Mackay --I am talking about the application of the act.

Prof. Fels --The processes they would apply we would have a look at over the competition law, and it might well be not opposed.

Senator Mackay --Thank you.

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Appendix 2 – Interests of PBL, Telstra and News (as at September 2001)

Appendix 3 - Segments of converged communications industry

A converged communications industry comprises one or more of the following segments:

(a) carriage services, including carriage services provided by:

- (i) terrestrial commercial television broadcasting licensees;
- (ii) providers of national broadcasting services;
- (iii) subscription television broadcasting licensees;
- (iv) commercial radio broadcasting licensees;
- (v) datacasting licensees;
- (vi) carriers;
- (vii) carriage service providers;
- (viii) Internet service providers;
- (ix) satellite operators;
- (x) licensees under the Radiocommunications Act 1992;

(b) content services, including content services provided by

- (i) commercial television broadcasting licensees;
- (ii) providers of national broadcasting services;
- (iii) subscription television broadcasting licensees;
- (iv) commercial radio broadcasting licensees;
- (v) datacasting licensees;
- (vi) other content service providers as defined under the Telecommunications Act 1997;
- (vii) newspaper proprietors;
- (viii) other print media providers;
- (ix) Internet content hosts within the meaning of the Broadcasting Services Act 1992 (BSA);
- (x) the providers of content for hosting on the Internet, including news services;
- (xi) film makers;
- (xii) production houses;
- (xiii) cinema distribution organisations;
- (xiv) other content distribution organisations;
- (xv) sporting organisations;

(c) facilities used for the provision of carriage services referred to in (a) above, including

- (i) facilities as defined in the Telecommunications Act;
- (ii) facilities as defined in the BSA;
- (iii) designated associate facilities as defined in the BSA;

(iv) transmission towers;

(v) the sites on which facilities referred to in (i) to (iv) above are situated, including the relevant land, buildings or structures;

(vi) conditional-access customer equipment as defined in the Telecommunications Act;

(vii) applications program interfaces;

(viii) subscriber management systems;

(ix) electronic program guides;

(x) electronic navigation software;

(xi) any other software essential to the operation of facilities referred to in (c).

Appendix 4 - Proposed amendment to the Trade Practices Act

Amendment 1 – New section

Insert immediately after section 4N:

Section # Commission must examine competitive forces

Without limiting the matters that may be taken into account, the Commission must, when considering the competition effects of:

a) a contract or understanding;

b) an acquisition of shares or assets;

c) the taking advantage of market power, or

d) any other conduct or action in relation to compliance with the Act,

examine the strategic implications for any market of such contract, understanding, acquisition, taking advantage, conduct or action, having regard to the competitive forces acting in the market or any other market, including the:

e) the extent to which any efficiencies are achieved in the market or any other market and the extent to which those efficiencies are likely to be passed on to consumers in the form of lower prices or better quality goods or services;

f) the dynamic characteristics of the market or any other market, including growth and innovation;

g) threat of new entrants into the market, or any other market;

h) the height of barriers to entry to the market or any other market;

i) the level of concentration in the market or any other market;

j) the extent to which substitute products or services are, or are likely to be, available in the market or any other market;

k) the power of buyers of products or services provided in the market or any other market;

l) the power of suppliers of goods and services to the market or any other market;

m) rivalry among current competitors in the market or any other market;

n) the degree of countervailing power in the market or any other market;

o) the actual and potential level of import competition in the market or any other market;

p) the likelihood that the contract, understanding, acquisition, taking advantage, conduct or action would result in any party being able to significantly and sustainably increase prices or profit margins;

q) the likelihood that the contract, understanding, acquisition, taking advantage, conduct or action would result in the removal from the market or any other market of a vigorous and effective competitor; and

r) the nature and extent of vertical integration in the market or any other market;

Amendment 2 – Repeal of section 50(3)

Delete section 50(3).

Amendment 3 – New section

Insert immediately after section 157:

Section ### Commission to give written explanation of examination of competitive forces

(1) The Commission must provide a statement of reasons in relation to its examination of the competitive forces referred to in sections #(e) to (r), including the conclusions it has reached in relation to each of those competitive forces, to the persons who are parties to the matter being considered under section #(a), (b), (c), or (d).

(2) The Commission must, by notice in the *Gazette*, publish a version of the statement of reasons required under subsection (1), however, the version need not contain any commercially sensitive information.

Review of informal decisions

It is recognised that the Commission may reach conclusions on the matters referred to in proposed section # and decide not to exercise a power of intervention under the Act. At present, there may be no provision for review of such 'informal decisions'.

Provision should be made for review of 'informal decisions' made by the Commission in accordance with proposed section #. Merits review could be conducted by the Australian Competition Tribunal, while review on matters of law should be available under the *Administrative Decisions (Judicial Review) Act 1977*.

A possible useful model might be the more formal process that New Zealand used to have in relation to clearance of business acquisitions under s.66 of the *Commerce Act 1986* where decisions were reviewable by the New Zealand High Court under s.91 of that Act.

'Five Forces' legislative essay

The proposed amendment to the Act could include a discussion of the application of the 'Five Forces', in the form of a legislative essay similar to that provided in Schedule 1 to the *Broadcasting Services Act 1992*. The essay would act as a guide to the ACCC in conducting an analysis of the competition effects of transactions.

Variation on proposed amendment

A variation of the proposed amendment is to amend the Act to insert a power for the Minister to direct the ACCC to take into account the strategic implications of the types of transactions referred to above. However, there are some broader issues to be considered with this option.

Section 29(1) of the Act currently provides for the Minister to give a direction to the ACCC in connection with the performance of its functions or the exercise of its powers. But section 29(1A)(a) specifically excludes Parts IIIA, IV, VII, X, XIB, and XIC from the ambit of this ministerial power of direction. This exclusion was inserted in 1995 and the Explanatory Memorandum to the amending Act states that the reason for the exclusion is to give equality of treatment between Commonwealth, State and Territory Ministers once the reach of the Act had been extended to apply nationally. The exclusion would prevent the 'national' nature of the National Competition Scheme from being subverted by a direction to the ACCC from the Commonwealth Minister in a situation where not all the State and Territory Ministers agree with the direction. We assume those concerns were to do with State/Territory-based industries and would not apply to industries such as telecommunications that have traditionally been regulated at the federal level.

Appendix 5 – Five Forces Analysis

Appendix 6 – Diamond Framework

Appendix 7 – Finnish Wireless Cluster

Appendix 8 – Article - Donald Robertson, 'Causal Concepts in Competition Law and Economics' (2001) 29 *Australian Business Law Review* 382