28 August 2002

Sir Daryl Dawson
Chairman
Trade Practices Act Review
C/- TPA Review Secretariat
Department of the Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir Daryl,

I am enclosing two documents:

(1) a submission on “Market Definition in the Trade Practices Act” essentially containing the argument presented at the Trade Practices Workshop of the Law Council held on 23-25 August, 2002;

(2) a background paper (unpublished) on practice in the Trade Practices Tribunal which was initially prepared for an earlier Trade Practices Conference held in 1995 and revised in 1998: “Practical Aspects of Conducting a Hearing Before the Australian Competition Tribunal”.

As regards the latter, there may well have been changes since 1998. The membership of the Tribunal has changed, and the work has expanded from authorization appeals to encompass some Part IIIA questions on access. Nevertheless I am confident that certain distinctive features of the Tribunal’s approach would remain.

Yours sincerely,

[Signature]

Maureen Brunt
SUBMISSION TO THE DAWSON COMMITTEE

from

Maureen Brunt
29.08.02.

There is one feature of the Trade Practices Act that is glaringly inappropriate to the global challenge. This is the narrow definition of “market” contained in s. 4E and s. 50(6):

4E For the purposes of this Act, unless the contrary intention appears, “market” means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

50(6) In this section: “market” means a substantial market for goods or services in:
(a) Australia; or
(b) a State; or
(c) a Territory; or
(d) a region of Australia.

Particular exception is taken to the words “Market means a market in Australia.” A more expansive definition is required.

With some mergers with international implications it is possible to obey the sections’ commands in a purely formal way. One can take into account actual and potential import competition; one can take into account the actual and potential constraints upon domestic firms created by export markets; one can remark upon the pressures upon Australian corporations of the international market for finance. But in order to give any content to these forces one must necessarily examine the evidence relating to demand and supply elasticities, including business strategies,
emanating overseas. In the process of doing so, in effect one recognizes that the relevant market extends beyond Australia.

This does not necessarily happen. One consequence of the narrow market definition contained in s. 4E and 50(6) is that practitioners’ and business attention is unduly focused upon domestic evidence and argument when approaching the Commission, Tribunal or Courts. I myself have had this experience when sitting as a lay member of the Tribunal. There is also the problem, as occurred for example in the New Zealand Magic Millions case,¹ of persuading a judge, applying a parallel provision, that international competitive forces are relevant to the policy and language of the statute.

Moreover there are some fact situations whose analysis is rendered quite intractable by the existence of the statutory definitions. Consider, for instance, the once mooted joinder of the iron ore operations of Rio Tinto and BHP. The mind boggles as to how to apply the statutory command. In fact this would largely have been a merger for export.

In the globalization context the statutory definitions are at odds with various well known court and Tribunal pronouncements on the market concept. Consider QCMA.²

We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them...

**Dowling v Dalgety** (per Lockhart J)³

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¹ (1990) 3 NZBLC 101, 501
² (1976) ATPR 40-012 at 17,247.
³ (1992) ATPR 41-165 at 40,268.
As is often said, “market” is an instrumental concept, designed to assist in the analysis of processes of competition and sources of market power. In this case, it is the identification of a market that best enables the Court to evaluate the issues.

**Singapore Airlines** (per French J)\(^4\)

It is a focusing process and the Court must select what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law.

The Commission has “solved” the problem posed by the statutory definitions by adopting a posture of “flexibility”. See the **Revised Merger Guidelines** (1996):

5.62 Section 4E defines a market to be a market ‘in Australia’, while s.50(6) defines a market to be a market ‘in Australia, in a State or in a Territory’. Arguably, the Act does not require that the relevant market be defined as wholly within Australia, only that at least some part of it be in Australia. For practical purposes, there will generally be significant discontinuities in substitution between domestic and imported supply. In most cases, the Commission will define the relevant market to be Australia or a part of Australia (including imports). However, in some circumstances it may be relevant to define the market as broader than Australia, e.g. trans-Tasman, or even a world market.

Another publication, **Exports and the Trade Practices Act** (October 1997) states (pp14-15):

...the Commission takes the view that the Act does not require that the relevant market be defined as wholly within Australia, only that at least some part of it be in Australia.

\(^4\) (1992) ATPR 41-159 at 40,172.
In some circumstances the Commission has found it more practical to define the market as broader than Australia, e.g. trans-Tasman, or even a world market.

It gives examples of its treatment of the market as a world market.

Even so, I have the strong impression that, where international forces are taken into account by the Commission, it is often confined to import competition. Yet it would also be relevant to consider the pressures arising from participation in export markets as well as, more generally, the evidence relating to business strategies.

As for the Tribunal, that body has felt free to specify an international market if that is the reality. In effect it has said that the statutory definitions relate to Part IV of the Act, not to the authorization work of the Tribunal. In Koppers the Tribunal felt free to refer (at 42,825) to a geographic market that was “in part...national; but, in part, international.” It commented on the specification of the geographic market

in terms which extend beyond the national — quasi-international. That is the reality. We do not find it helpful to confine our attention too narrowly upon the domestic scene. For the Tribunal’s purposes it is essential that there be a specification of the market which enables the systematic study of the bases of actual or potential rivalry between Koppers and alternative sources of supply wherever Koppers may trade. In short, the delineation of relevant markets is but a first and preliminary step to enable the identification of relevant elements of market structure and associated processes of competition.

Yet were a merger case to reach the courts, a court might feel impelled to obey the statutory definition. And while, as has been said, in many cases it is

possible to take account of international forces by considering the impact of the actual and potential behaviour of overseas buyers and sellers upon Australian transactions, the focus of evidence and argument would be affected – and the judge must be persuaded, too, of the relevance of the overseas evidence.

All this is not to deny that the policy objective must have an Australian orientation. Section 2 states:

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.

For Part IV the objective to be maximized is the welfare of Australian consumers. (Cf the well-known pronouncement of the High Court in *QWI*.) For Part VII it is the benefits and detriments accruing to Australian society.

I should like to propose an amendment to the statute running in these terms:

"Market’ means a market in relation to Australia.“
PRACTICAL ASPECTS OF CONDUCTING A HEARING BEFORE THE
AUSTRALIAN COMPETITION TRIBUNAL

by
Maureen Brunt

Revision and update of a paper first presented at:
A Joint Conference organised by:
Business Law Section, Law Council of Australia and
The Law Society of Western Australia

on
THE NEW ERA OF COMPETITION LAW IN AUSTRALIA
July 1995,
Perth, Western Australia

7 May 1998
Introduction

The Trade Practices Tribunal is an Australian invention, designed to take some of the pressure off the courts, in what is largely a court-centred antitrust system, by offering a quasi-judicial resolution of some of the more economically complex trade practices matters. So in the initial design of the Trade Practices Act ("the Act") it was sought to partition subject-matter between the courts and the two administrative bodies - the Commission and the Tribunal - by remitting competition cases involving claims of efficiencies and other benefits to the public to the Commission and, on appeal, to the Tribunal.

For some time now I have been concerned that this dual adjudication system has not been fully understood by business, and that the nature of a case before the Tribunal has not been fully understood by legal practitioners. As evidence for the first contention one can cite the references in the business press to the "efficiencies" such as "rationalization benefits" that should in the view of the commentator impel the Commission to clear (as distinct from authorize) various prospective mergers from pursuit in the courts, when it is extremely doubtful that such efficiencies would be directly relevant under S.50 of the Act. As evidence for the second of my contentions, I can attest that in recent years the material placed before the Tribunal has too often been unnecessarily voluminous, with a significant quantum ill-directed or irrelevant to a proper definition of issues.

Perhaps the Tribunal itself is partly to blame for the latter problem, in that the Tribunal may not have adopted a stance that was sufficiently managerial and inquisitorial. However the extension of the Tribunal’s role under the new legislation will compel some rethinking of Tribunal practice and procedure. In any event, I welcome this opportunity to clarify certain practical aspects of a case before the Tribunal. Necessarily most of my comments relate to the authorization function rather than to the somewhat cloudy new access disputes function.
Extended Role Of The Tribunal Under the Competition Policy Reform Act 1995

These fall under two heads: the competitive conduct rules and the access rules. As regards the first, the coverage of the Act is now extended to most business entities in the economy. The slogan is “universal coverage”. Unincorporated enterprises and State and Territories Government business enterprises are covered. The scope for government exemption of specific industries and practices from the Act is severely restricted. Necessarily many of the enterprises newly subject to the Act wish to make applications for authorization of certain of their business practices in the first instance to the Commission but in some instances on appeal to the Tribunal. Further, there is a larger scope for authorization (and notification) of particular practices. Authorization is now available for price fixing agreements with respect to goods and for resale price maintenance. Third line forcing is now capable of notification. All this means that the scope of conduct capable of authorization by the Tribunal has been considerably extended.

Secondly, there is the new access regime under Part IIIA of the Act whereby access is to be given to the services of certain significant infrastructure facilities that it would be uneconomical to duplicate or otherwise extend.

The legislation envisages that there is a two stage process whereby a third party may gain access to such a service: first, declaration of a service by the designated Minister; and second, determination of the terms and conditions of access to the declared service. The Tribunal is made available for a variety of classes of review, whether from decisions of the designated Minister or determinations of the Commission.

In what follows, all but the final section is specifically directed to the long standing authorization function.
How does a Tribunal Hearing for Authorization Differ from a Court Proceeding?

The Tribunal was designed to be a kind of half-way house between the Commission and the Federal Court; hence the label “quasi-judicial”. It has a mixed membership, both judges of the Federal Court as presidential members and “lay members” “qualified for appointment by virtue ... of knowledge of, or experience in, industry, commerce, economics, law or public administration”: S. 31(2). A Division of the Tribunal for a particular matter will consist of a presidential member and two lay members. Over the years the typical composition of a Tribunal for a particular matter has been the presiding judge, a businessman (or possibly a person experienced in public administration) and an economist.

The Act says rather little about the conduct of hearings: see Part IX, Div. 2. But what is said is important. The hearings are to be in public except in special circumstances. Section 103(1) states

“In proceedings before the Tribunal -

(a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
(b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
(c) the Tribunal is not bound by the rules of evidence.”

Moreover the Act states explicitly that natural persons may appear, although it has been usual for parties to be represented by a barrister or solicitor. There are usually one or more Directions Hearings to establish a timetable for staged receipt of pre-hearing materials and the dates for the hearing itself. The crucial evidence to be tendered prior to the hearing has normally been the written statements of witnesses, including expert witnesses.

All this is not, it might be thought, so very different from a court of law, especially when it is noted that the public hearings are somewhat formal, with the president a judge and the parties typically represented by members of the legal profession. But there is an enormous and fundamental difference from the conventional court action - and one that is
not, it seems, fully appreciated by some members of the legal profession who appear before us. This is that these are not primarily adversarial proceedings. Lawyers, steeped in the adversary system of our courts, tend to find adversaries in the Tribunal, in either their opposing numbers or in the Commission. But neither is appropriate - at least as a central preoccupation. The objective for an applicant for authorization is not to defeat these adversaries but to "satisfy" the members of the Tribunal.

Section 90 of the Act, which governs authorization determinations states in a typical “test” that the Commission, and on appeal the Tribunal, must be “satisfied in all the circumstances” that the conduct the subject of the application “would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result” from the proposed conduct etc: S.90(6). Hence the prime necessity of directing evidence and argument to members of the Tribunal, with particular regard to the mixed composition of that Tribunal.

Nor is there a sense in which the adversary is to be thought of as the Commission. While the matter arises as an appeal from a determination of the Commission, a “review by the Tribunal is a re-hearing of the matter”: s.101(2). It is a “hearing de novo”. As the President stated in Media Council (No. 2)\(^2\) citing earlier Determinations,

“The Tribunal must engage in a rehearing in the fullest sense and it must reach its own conclusions on the evidence. The reasoning process of the Commission is not itself the subject of this inquiry.”

It follows that there is no presumption that the Commission’s prior Determination was right or wrong. It follows, too, that it must be the original applicant for authorization who makes the running, irrespective of which party is the applicant for a Tribunal re-hearing. As a matter of convenience and economy, the Tribunal may elect to receive certain evidence that was given to the Commission in the same form. But the applicant for authorization starts again as regards making the case for authorization - and necessarily goes first in the hearing.
There is another way in which the Tribunal hearing is very different from the private adversarial action. This lies in the feature that the Tribunal's central and direct concern is the public interest. The touchstone is net public benefit, i.e. likely benefit to the public that would outweigh likely detriment to the public arising from the contemplated business conduct. It follows that those who appear before the Tribunal must resist the temptation to adopt a narrow combative stance vis-à-vis the other parties and, rather, orient themselves to discerning what might be the Tribunal's concerns. Typically the Tribunal takes an expansive view of the issues; it will be interested in likely big effects in the longer run; and the various members, with their mixed backgrounds, will not be slow to indicate what interests or troubles them.

The Structure Of A Case

In *John Dee* the Tribunal stated the "guiding principles" governing the grant of authorization in summary form as follows (misprint corrected):

"• First, it is for the parties seeking authorization 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;

• Second, since the likely benefits and detriments to be considered are those that would result from the proposed conduct, the Tribunal is required to consider the likely shape of the future both with and without the conduct in question, and

• Third, that task will generally entail an understanding of the functioning of relevant markets with and without the conduct for which authorisation is sought."

The Tribunal now refers to this criterion as "the future-with-and-without test". *See Media Council (No. 4)* and the references cited therein.

To express a test formally in this way emphasizes two essential requirements: prediction and causation. Plainly we must be concerned with future likelihoods: what is likely to happen in the future with the conduct? What is likely to happen without the conduct? Further, if the disputed conduct is permitted to continue, we must be satisfied
that the conduct results or is likely to result in a benefit to the public that outweighs any anti-competitive detriment.

As was said in *QIW*:

"Plainly we should take into account any likely changes to the business environment in which the proposed conduct would operate. We should also assess the benefit and detriment from the proposed conduct in light of any alternative conduct that would thereby be ruled out. In the present context, this does not mean that we undertake some mechanical comparison of the desirability of alternative merge scenarios; but the terms of s. 90(9) require us to appraise the acquisition the subject of the application for authorization 'in all the circumstances', and those circumstances include the likely alternatives to the merger in question."

I give two examples of the approach in practice. In *Concrete Carters*, an early case concerned with the authorization of industry-wide bargaining between producers of premixed concrete and owner-drivers regarding pay rates and conditions, systematic attention was given to evidence and argument on "the probable alternative".

The evidence pointed to the conclusion that "in the absence of authorization, the TWU will assume the full representation of the Applicants [the owner-drivers] and ensure the maintenance of industry-wide rates and conditions". The Tribunal concluded that, in the absence of authorization, a competitive outcome would not emerge but, rather, the substitution of one form of collective bargaining for another. And on the basis of this prediction it made its assessment of benefit and detriment to the public.

In *QIW* Queensland Independent Wholesalers Ltd was contesting the proposed acquisition of Composite Buyers Ltd by Davids Ltd. The Tribunal made its assessment of likely benefit and detriment on the basis of three alternative scenarios: the acquisition of CBL by Davids; the acquisition of CBL by QIW; and a combination of what was referred to as "the current shareholdering stalemate". The Tribunal commented:

"The test is not to compare the present situation with the future situation, were the acquisition to take place: a "before and after" test. Rather the test is to appraise the future, were the acquisition to take place, in light of the alternative outcome, were the acquisition not to take place: the "future with-and-without" test."
Another feature of the *John Dee* formulation is the emphasis upon the role of market definition. While, as was said in *QCMA*,9 "mere specification of markets cannot be determinative by itself of some ultimate issue", it is nevertheless the "essential first step" in organizing evidence and argument. Put shortly, we are concerned with how in future market forces would work with and without the conduct for which authorization is sought.

In *Tooth & Tooheys*10 the Tribunal emphasized two general points of methodological importance:

"First, it is not just the width of the market that is important but its total structure, both actual and potential, and the likely competitive conduct of its participants. Second, the specification and analysis of the market has significance not just for the identification of detriment but also for the establishment of benefit."

The latter point is not always appreciated. The establishment of benefit to the public entails more than some listing of predicted desirable characteristics of the future shape of an industry, such as "economic development", "improved efficiency". Categories of "benefit to the public" must be the likely result of the practice or conduct for which authorization is sought. There must be a causal connection. In language repeated in a number of the Determinations, the establishment of benefit will "commonly depend upon an appreciation of the competitive functioning of relevant markets, with and without the conduct in respect of which authorization is sought".11

**Market Definition**

Market definition is such an important element in Tribunal cases that I take the opportunity to make a few "obvious" points that are sometimes missed.

For the Tribunal's purposes, the identification of markets is very much an analytical tool. It is a mapping of economic relationships within the area of the economy under examination. There may well be more than one market of interest. As was said in *Tooth & Tooheys*,12 "we seek to identify the area or areas of close competition of relevance for the applications".
A problem sometimes arises in that practitioners, seizing upon the term "product market" (as distinct from "geographic market", "functional market", etc.), identify collections of close substitute products without regard to what might be the relevant market transactions. It needs to be emphasized that we are concerned to focus upon actual or potential transactions between business firms and that both buying and selling transactions or markets may be relevant. It is these actual or potential transactions between buyers and sellers that can be mapped in a diagram showing the inter-relationships within the area of the economy under examination.

It is to emphasize this perspective that the Tribunal in recent cases has adopted a formulation of the market concepts as follows:

"For trade practices adjudication, the market is the network of actual and potential transactions between buyers and sellers of goods and services that are, or could be, in close competition. This is to express the concept with complete generality."\textsuperscript{13}

An earlier paper summarized the steps that are required: \textsuperscript{14}

First: Start with a specification of the conduct claimed to be unlawful (or for which authorisation is sought).
Secondly: Study the precise terms governing breach, in light of the policy of the Act and remedy sought.
Thirdly: Identify the firm(s), or division(s) of the firm(s), that undertake the conduct.
Fourthly: Seek the effective market-place constraints upon the firm(s)' conduct through identifying the relevant market."

We are concerned with the behaviour of business firms or divisions of firms as was emphasized quite recently in the New Zealand case of \textit{Power NZ vs Mercury Energy Ltd}. The case concerned a prospective takeover of Power NZ by Mercury, both distributing electricity in the greater Auckland region. The Court criticized what it termed the "disembodied quality" of the Commerce Commission's approach to market definition, in that it focused upon "markets as collections of substitute products (including services) quite unrelated to the business firms that undertake their production and marketing".\textsuperscript{13} The Court accepted counsel's closing submission: \textsuperscript{16}
“the merger calls for an appropriate set of market definitions which will accommodate both (i) the services/products and their substitutes, and (ii) all the firms in rivalrous conduct”.

Identification of the functional dimension of the market continues to be challenging. The Tribunal’s approach is indicated in the recent case of *QIW* concerning David’s desire to acquire Composite Buyers, both operating in independent grocery distribution.

In *QIW* much turned upon the functional specification of the market, i.e. whether there should be distinguished a wholesale market in grocery distribution in NSW and Victoria which would be monopolized by Davids were the acquisition of CBL to take place. The essential point of principle to be applied by the Tribunal was that “wherever there are market transactions of significance there is a need to distinguish a separate function level”.17

In that case it was found that “there is, in fact, significant market activity at the wholesale level”. However, this was confined to the independent grocery sector since “some 70% at wholesale in Australia passes through the hands of vertically integrated chains”. And the most realistic portrayal of competition in grocery distribution, it was concluded, was to start with a vision of national competition between integrated chains and independent wholesalers supplying independent retailers. That overall perspective was then refined by distinguishing “a functional sub-market encompassing transactions between the independent wholesalers and retailers.”18

Finally, the element of time in market definition can cause difficulty. If a market is “an area of close competition”, how much time should be permitted to elapse in identifying actual and potential competitors?

The question was posed in striking fashion in a recent case, *AGL Cooper Basin*.19 The conduct that was the subject of the determination under review was a long term gas supply contract, running over 30 years from its signature in 1971 to at least 2006. Yet the conventional specification of markets in trade practices work refers not to a span of years but to the “operational time” required “for organizing and implementing a redeployment of
existing capacity in response to profit incentives" as usefully discussed in *TCNZ vs Commerce Commission.*

While the Commission submitted that the time dimension of the market should be approximately one year, in deference to this conceptualization, it was felt generally, both by the parties and the Tribunal, that this traditional approach would not do justice to the dynamic quality of the gas market setting and the emerging processes of competition.

The solution was found in the specification of an "expanding market definition" - a market expanding over time - with both the geographic market and the product market expanding over time. The Tribunal went on to say:

"In considering this expanding market, we specify three dated markets of interest: the market in 1986, the market today, and the market in "the future" - perhaps ten or fifteen years hence. Quite obviously the geographic market is expanding over this time period, and the product market is also expanding ..."

The moral to be drawn from this story is that the market concept, while fundamentally the one concept, is capable of flexible application: it is, as often said, a tool of analysis. In *AGL Cooper Basin* the approach adopted was consistent both with commercial reality and the traditional methodology of market definition and was apt to expose the issues in the matter.

**Establishing "Benefit To The Public"**

Public benefit has been, and is, given a wide ambit by the Tribunal. In the words of *QCMA,* public benefit is "anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress".

In *Victorian Newsagency* the Tribunal went on to stress that, insofar as efficiency is concerned, it is the economic concept that is relevant:
“Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society’s resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass ‘progress’; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.”

The newspaper publishers had described their distribution system as “very efficient”, “rather like a military operation”. In the Tribunal’s view, the publishers

“had their own concept of efficiency in mind - a command system that responds to the imperatives of the task of physical distribution and simplifies administration. But in the context of the Act, efficiency as a benefit must mean obtaining the best use of society’s resources. Using the language of QCMA (at 17,245), an efficient system is one that would deliver “the kinds of goods and services the community wants ... supplied in the cheapest possible way”, recognizing that both the composition of output and the organization of supply must be responsive to changing demands and conditions of supply.”

The Tribunal went on to find that the Victorian Newsagency System is inefficient in that it gives rise to retailing and delivery services broadly unresponsive to varying consumer demands with costly and inflexible supply arrangements.

Applying the “future with-and-without” test, an applicant for authorization might hope to demonstrate one or more of the following:

- First, and most obviously, the conduct under review might give rise to efficiencies. See, as examples, Hattick and Koppers. There would be a need to consider the circumstances likely to prevail in the absence of such conduct. Consider, for example, a claim that a proposed merger would likely yield rationalization economies. The question would be: What is the causal connection between the merger and the delivery of rationalization economies? What would happen in the absence of merger? If the merger would enhance the market power of the participants, is there a less restrictive alternative route to rationalization? If there were, this need not be decisive - but it would be relevant.

- Second, the conduct under review might improve market performance in some non-economic dimension. As an example, in Media Council (No. 2) the Tribunal accepted that the Advertising Codes, by comparison with a free market situation, would protect
children from harmful and offensive advertisements, thus delivering one source of the requisite public benefit.

- Third, the conduct in itself might be regarded as having value for society. As an example, "professional" standards of work and acceptance of fiduciary responsibility were accepted as benefits in Consulting Engineers.30

- Fourth, it is conceivable that the conduct might give rise to, or be associated with, desirable market processes. Examples are the acceptance of co-operative enterprise (Rural Traders Co-operative)31 and of the value of industrial harmony (Concrete Carters)32 as benefits to the public.

Establishing "Detriment To The Public"

The Act speaks of balancing likely benefit to the public against "the detriment to the public constituted by any lessening of competition that would result, or be likely to result" from the proposed conduct under examination. These are the terms of S.90(6). There is some variation in statutory language used to express the test that must be satisfied if various types of conduct are to be authorized. In particular, there is the variant expressed in terms of "such a benefit to the public" that authorization should be granted: see S.90(8) and S.90(9). Nevertheless it has been the Tribunal's view, often expressed,33 that the "practical application of this language gives rise to a test that is essentially the same as that required by subsection 90(6)" and variants. It is the one test.

Interestingly it was only in its most recent Determination in Victorian Newsagency34 that the Tribunal gave a formal characterization of "detriment to the public":

"In the present context, anti-competitive detriment refers, in the language of s. 90(6) to "the detriment to the public constituted by any lessening of competition that would result, or be likely to result" from the system under examination. As with the assessment of benefit we give the characterization of the "detriment to the public" a wide ambit, namely, any impairment to the community generally; any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency, in the sense we have adopted."
In that case the Tribunal found that there were two major classes of detriment: inefficiency, and denial of commercial freedom and economic opportunity.35

Yet, and indicative of the Tribunal’s broad and flexible approach, the Tribunal has been willing to admit the possibility that anti-competitive behaviour “may in certain circumstances be a positive benefit”. The point arose in Media Council (No. 2)36 and was affirmed in Victorian Newsagency:37

“In our opinion, conduct that answers the statutory description of anti-competitive lessening of competition does not necessarily constitute anti-competitive detriment for the purposes of sec. 90. It is erroneous to equate anti-competitiveness with detriment. Anti-competitive behaviour may in certain circumstances be a positive benefit.”

In Media Council (No. 2) the Tribunal was concerned to assess the advertising industry’s system of Advertising Codes. It was a self-regulation system, a “system of private regulation by the Media Council, in supersession of the market”38 It was inherently anti-competitive, in that the system could only function through the exercise of comprehensive market power.39

“It is a system of private regulation of the market for advertising messages. It is effective because all significant competitors, on both sides of the market, are either bound by its rules or are induced to conform. The Codes describe attributes of advertising messages which are different from those that would emanate from the freer market alternative. The Codes are collectively implemented and enforced, such that the outcome constitutes an exercise of very significant market power.

Thus, the collective implementation of the Codes is, of its essence, anti-competitive. It places constraints upon the functioning of the market for advertising messages; it changes the quality of the products emanating from that market and the manner in which they are produced. Clearly, also, those different advertising messages change the perceptions and, hence, the demands of consumers and thereby influence the functioning of the markets for advertised products. In thus characterizing the Codes as anti-competitive, we adopt as our general concept of anti-competitive conduct any system (contract, arrangement or understanding) which gives its participants power to achieve market conduct and performance different from that which a competitive market would enforce, or which results in the achievement of such different market conduct and performance.”
In the event, the Tribunal found significant public benefit to result from aspects of this system.

The Role Of Economics And Expert Economic Testimony

It will be plain from the preceding that authorization cases have a high economic content. Indeed, there is greater scope for economic analysis in the typical authorization application than in the typical restrictive practices court case in that we must endeavour not only to establish likely changes in competition but also the implications for public benefit and detriment.

Accordingly the participation of economist experts in Tribunal hearings is always welcome and almost invariably helpful. One would think that it is helpful not only to the Tribunal but also to the parties, in that the use of economists will normally assist them to present their best case for the Tribunal's consideration.

The testimony of an economist expert is unlikely to be decisive. We should all accept this with equanimity. It is partly because of the nature of economics itself. As Keynes expressed it in a famous passage:40

"The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions."

Where economists on either side in adversary litigation disagree, it will be largely because they are presenting competing models of the functioning of the market under the spotlight. The court or Tribunal can find assistance from the very debate between the competing models of the economists - "partisan economists"!

The second way in which economics can be useful to the law is in supplying various economic concepts such as "economic efficiency", "opportunity cost", "common costs", "cross-subsidization" etc. An economist can advance matters by explaining their meaning. Whereas with the first contribution of the economist, it is a matter of debate or argument as
to whether the model truly represents reality - something for the court to assess - with the second contribution it is a matter of right or wrong - something for the economist to assess.

It follows that the economist expert can best assist the Tribunal in two ways:

- first, in enabling the parties to mount their best case in initial presentation; and
- second, in participating in final argument in appropriate ways regarding the merits of the application.

Typically, the Tribunal will require economists’ written statements to be submitted a week or so after the non-expert statements. These may well assume a partisan form since, quite apart from any other consideration, economists will be best briefed on their own side’s story. But then at the end of the reception of non-opinion evidence, and prior to the legal representatives’ (or parties’) final submission, the Tribunal will likely be keen to canvass with the economists what their final views might be. At this point the Tribunal will endeavour to establish areas of agreement and points of difference remaining between the experts. The economists may wish to express some new or modified views. The economists may be asked to confer. Over the years the Tribunal has experimented with a variety of techniques directed to enabling the economist witness to make a connected presentation rather than be confined to short responses to cross-examination. This is not to say that cross-examination of economists cannot perform a useful function however!

In recent cases the Tribunal has been using with great success a new technique for the reception of economists’ final opinions on the issues, what might be called a “seminar technique”. The technique was described by the President of the Tribunal (Lockhart, J.) in QIW4 thus:

“At the conclusion of all the evidence (other than the evidence of the experts) and before the commencement of addresses, each expert was sworn immediately after the other and in turn gave an oral exposition of his or her expert opinion with respect to the relevant issues arising from the evidence.

- Each expert then in turn expressed his or her opinion about the opinions expressed by the other experts.
- Counsel then cross-examined the experts, being at liberty to cross-examine on the basis:
that questions could be put to each expert in the customary fashion one
after the other, completing the cross-examination of one before
proceeding to the next or,

(b) that questions could be put to all or any of the experts, one after the
other, in respect of a particular subject, then proceeding to the next
subject. Re-examination was conducted on the same basis.”

In QIW four economists appeared. The total time required for the experts’
testimony was only 3½ hours but was immensely helpful to the Tribunal.

The New Merger Regime

The merger amendments of 1992 came into force on 21 January 1993. The Tribunal
has reviewed only one merger under the new legislation so far. This is QIW. However a
few comments may be made.

First it should be said that the Tribunal is fully seized of the importance of an
expeditious hearing. The Act sets down a 60 day limit as the norm. There are operational
and market realities to be respected. Moreover some parties will be tempted to use the
Tribunal process as a delaying tactic. More than ever the public interest demands that the
Tribunal control the timetable and establish very early what will be the important issues.

It may well be possible to use much of the factual material laid before the
Commission. The argument may need to be couched somewhat differently however in
response to the Tribunal’s concerns. And the parties will need to be geared to supply
further information that the Tribunal considers relevant at the Tribunal’s request.

QIW contains a number of pointers to the Tribunal’s approach to merger review
under the amended legislation. First, the Tribunal affirmed that its established approach to
the analysis of competition and market power, market definition, public benefit and
detriment remained applicable.42 Next, it reiterated the point first made in QCMA that the
Tribunal is not first to inquire whether an acquisition or merger will breach s.50 in that the
“issues for determination by the Court in the event of prosecution are different from those
for determination by the Tribunal when authorization is sought”.43 Even so, it was pointed
out that the Tribunal’s approach to the assessment of competition under the authorization
test should be consistent with the indicia of competition now contained in s.50 of the Act; and it was explained how the methodology first proposed in QCMA is indeed consistent with s.50.\textsuperscript{44} Finally, the status of undertakings given to the Commission in the course of an application for authorization was canvassed, with the President concluding that, "the undertakings have no existence independently of the application to the Commission for authorization and of the authorization subsequently granted by the Commission".\textsuperscript{45}

The Tribunal gave particular attention to procedure. The very successful utilization of the "seminar technique" for the reception of economists' opinion evidence has already been noted. In addition, the Tribunal took special care in the handling of the preliminary directions hearings to develop a series of questions for the parties, pointing to what the Tribunal saw at that stage as the major issues. It has been found helpful - and an economy in both time and evidentiary weight in a very literal sense! - for both lay members to participate with the President in these quite detailed directions' hearings.

As with other authorization matters the Tribunal will endeavour to manage a review in the interests of relevance and economy, and to minimize an unhelpful adversarial approach. As an example, the Tribunal sees merit in all participants replying simultaneously rather than sequentially to the questions posed.

**The Role Of The Tribunal In Settling Access Disputes**

The introduction characterised the Tribunal's new function in settling access disputes as "somewhat cloudy" at this stage. Nevertheless it helps to fix ideas if we set down systematically the expressed requirements of the legislation.

The first category of Tribunal review is from decisions of the designated Minister regarding declaration of a service (Subdivision B of Part IIIA) This category encompasses decisions of the designated minister to declare, refuse to declare or refuse to revoke the declaration of a service. It also covers ministerial decisions on the effectiveness of State and Territory access regimes (e.g. railway services).
We are instructed that:

"The review by the Tribunal is a re-consideration of the matter."

"For the purposes of the review, the Tribunal has the same powers as the designated Minister."

It is a question yet to be addressed whether the choice of the term "re-consideration", as distinct from "re-hearing" (the term used in connection with the authorization function), is to be regarded as significant. Certainly it is provided that the presiding member of the Tribunal may require information and other assistance from the Council including the making of reports.

The Tribunal is given power to vary declarations as well as power to affirm declarations or set them aside. This is important since the power to vary the declaration of a service may well offer the opportunity to vary the specification of the bottleneck facility under consideration in the interests of the promotion of competition or of the public interest more generally.

The second category of review (Division 3, Subdivision C) is from the arbitrated determinations of the terms of access by the Commission. This is described as a "re-arbitration", with the Tribunal having the "same powers as the Commission", and with the information and other assistance for this category of appeal to be furnished by the Commission. The constitution of the Tribunal for a re-arbitration, the rules governing the decisions of questions, the arbitration procedures are all to be totally at the discretion of the Tribunal itself, for Ss 37, 39 to 43 (inclusive) and 103 to 110 (inclusive) of the Act are not to apply in relation to re-arbitration of a determination made by the Commission. On the other hand, by implication the Tribunal's review of the decisions of the Minister are to utilize its usual procedures subject to whatever is implied by the use of the term "re-consideration", since no mention is made of any such variation in that case.

There is finally a third category (Division 4) of review: reviews of decisions of the Commission not to register a privately negotiated contract for access to declared services
(with implications for enforcement). Here the review by the Tribunal is a "re-consideration" with the same approach to be followed as in the first category just described.

To comment generally upon the role of the Tribunal in settling access disputes, plainly it is intended that great reliance be placed upon the Tribunal itself to establish appropriate procedural rules and practices, and workable methodologies for handling the relevant evidence and argument. It will be a large task. But some comfort can be found in these considerations: The core of the work must lie in the assessment of the potential to create and use extreme market power to the detriment of the public interest. It is the type of inquiry, at a very general level, in which the Tribunal has great experience. Questions of market definition, barriers to entry and efficiency will be at the heart of the work. There will be the opportunity, if not the necessity, to attempt to define the desirable boundaries of a declared service in the particular case. Second, it is likely that some principles of general applicability will emerge, since most if not all of the relevant facilities have the analytic characteristic that they are network industries with larger common costs. And finally, some reassurance can be found in the mixed composition of the Tribunal's membership, a characteristic that has proved very valuable in the past. Indeed it may well be that the very existence of the Tribunal made possible the enactment of the access provisions.
1. Cf Drummond J in Davids Holdings Pty Ltd v Attorney-General of the Commonwealth (1994) ATPR 41-304 at 42,098: "Provisions such as S.50 are not tools designed to enable the Court to strike a balance between the economic advantages that might flow from the economies of scale and other efficiencies resulting from a particular merger, on the one hand, and the economic detriments of the merger, such as increased prices that consumers may have to pay, on the other ... Any such balancing exercise is for the Trade Practices Commission to carry out in dealing with an authorization application under Ss. 88(9) and 90(9), not the Court that has to consider whether S.50 bars a particular merger." The issues are canvassed in Maureen Brunt, "The Australian Antitrust Law After 20 years - A Stocktake" (1994) 9 Review of Industrial Organization 483 at 510-11.


7. Ibid at 17,473.

8. Supra n.5 at 40,961.

9. Re QCMA and Defiance Holdings (1976) ATPR 40-012 at 17,245.


11. Concrete Carriers, supra n.6 at 17,459. See also Tooth & Tooheys, supra n.10, at 18,194 and Media Council No. 2, supra n.2, at 48,431.

12. Tooth & Tooheys, supra n.10, at 18,196.

13. Media Council (No. 4) (1996) supra n.4 at 42,262.


15. Power NZ Ltd vs MercuryEnergy Ltd [1966], NZLR 586 at 705.

16. Ibid at 706.

17. Supra n.5 at 40,951.

18. Ibid at 40,952.


23. QCMA , supra n.9, at 17,242.


25. Ibid at 42,682.
Ibid at 42,683-4.


See Hatrick, supra n.27, in which this point was first made.


In re Rural Traders Co-operative (W.A.) Ltd (1979) ATPR 40-110.

Supra n.6.

See John Dee supra n.3, at 50,206.

Supra n.24 at 42,683.

Ibid at 42,683-685.

Supra n.2 at 48,418-9.

Supra n.24 at 42,654.

Supra n.2 at 48,434.

Ibid at 48,436.

See the Introduction to the various Cambridge Economic Handbooks, published by C.U.P. in the inter-war period.

Supra n.5 at 40,925.

Ibid at 40,925-928.

Ibid at 40,928.

Ibid at 40,952-953.

Ibid at 40,929.