24 September 2002

Mr John Jepson
Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Jepson

The Securities Institute of Australia welcomes the opportunity to comment on the Trade Practices Act (the Act) and its administration.

We believe this Review offers a unique opportunity to ensure that competition policy balances two competing objectives: promoting domestic competition and allowing Australian businesses to achieve the economies of scale necessary to be internationally competitive.

In this submission we confine our comments to the merger provisions of the Act.

The Institute believes that mergers are an important means of achieving a more efficient and productive economy as they encourage the reallocation of assets and enhance management discipline, often by replacing under performing management with teams which are more motivated to growing the business faster and more profitably, maximizing shareholder value.

Any commercial activity carries a degree of risk and it is often this that drives innovation and competition. However, legislative or administrative impediments may lead to the abandonment of initiatives that may otherwise have positive benefits for Australia. We note the comments of the Industry Commission in its Information Paper, June 1996, that "the economic benefits forgone when efficiency-enhancing mergers or acquisitions are prevented or deterred can be durable".

Informal process for pre-merger notification

The Act provides no formal process for pre-merger notification and parties are encouraged to approach the Australian Consumers and Competition Commission (ACCC) on an informal basis as soon as there is any likelihood of a merger proceeding. The ACCC policy for dealing with mergers is set out in the Merger Guidelines, which were last updated in June 1999.

The Institute is concerned that under this informal process the ACCC does not provide full reasons for its decisions and that these decision are often inconsistent. The lack of transparency and accountability is of particular concern because although decisions can be challenged in the courts, this is generally not a viable option given the length of time taken for such an action, up to 12 months, and the commercial circumstances that surround a potential merger.

Authorisation process

Where a merger may contravene the competition provisions of the Act, authorisation may be sought on public benefit grounds. However, the authorisation process is rarely used in practice because of the stigma of appearing to be anti-competitive and the lengthy timeframe, up to six months, which exposes merger parties to competitors and adverse market reaction. Statistics provided by the ACCC indicate that

it examined on average only 1.2 merger authorisation applications per annum in the period 1993–1999 and none since that time.

Although parties have a right to appeal a decision from the authorisation process to the Australian Competition Tribunal (ACT), the lack of any legislative time imperative means that this process invariably imposes another layer of delay and uncertainty on a transaction.

Undertakings

Section 87B of the Act allows the ACCC to accept written undertakings in relation to a wide range of competition concerns, thus enabling merger parties to address competition concerns which may impede a proposed merger. However, we are concerned that commercial circumstances may often force merger parties to offer undertakings which are disproportionate to the competition problems they are intended to address.

Dual-listed companies

The Institute is concerned that the Act does not currently recognise the dual-listed companies structure as an alternative method of effecting a merger.

As parties to these arrangements are not the holding company of the other or a subsidiary of the other or subsidiaries of the same holding company, they do not come within the definition of 'related bodies corporate' in s. 4A(5) of the Act.

Recommendations

The Institute believes the Act would reflect a more commercially realistic approach to mergers if it provided parties with a more timely consideration of their proposal and greater certainty of outcome. Commerciality could be achieved by amending s. 50 to require the public benefits of a merger proposal to be considered at the same time as the implications for competition.

We also recommend the establishment of an independent panel as a timely and first point of review for mergers that are rejected by the ACCC. As a much less preferred alternative, the current authorisation review process should be amended to allow merger parties to apply directly to the ACT for review, and to require the ACT to respond within strict timelines when considering an application.

The Institute believes that the ACCC's Merger Guidelines should be expanded to provide more guidance on the circumstances in which enforceable undertakings will be used.

The Institute notes that the Act does not take account of dual-listed company structure and in light of recent trends, we believe this anomaly should be corrected by amending s. 4A(5) to include a reference to dual-listed companies.

If you have any queries please contact me on (03) 9643 4000 or our National Policy Manager, Peta Lewis on 8248 7556 or by email at p.lewis@securities.edu.au.

Yours sincerely

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Chair, Markets Policy Group