Supplementary Submissions to the Trade Practices Act Review Committee by the Law Council of Australia

September 2002

1. Introduction

We refer to the meeting on 8 August 2002 between the Committee and members of the Council. The Committee asked the Council to provide a supplementary submission to address the following issues:

Misuse of market power:

- Why s46, when it was introduced, focussed on individual competitors, rather than on competition in a market; and
- whether the Council could provide any additional information about the cease and desist powers which have been introduced in New Zealand.

Public benefit:

- Whether the Council considers that any further guidance is needed on the meaning of public benefit.

Mergers

- What the Council's attitude is to requiring the ACCC to publish written reasons in informal clearance decisions on mergers;
- whether overseas experience supports a view that the introduction of mandatory pre-merger notification would lead to inefficiency;
- how the ACCC could be satisfied in an informal clearance that public benefits would be available and if they involved efficiencies whether the ACCC should be required to subsequently check that those efficiencies have materialised;
- what effect the Council believes the introduction of an independent review panel will have on the ACCC's informal clearance process;
- why the independent review panel proposed by the Council will have better skills to fulfil this role rather than the Tribunal; and
- how the Council proposes that the independent review panel can be a body created under the Act and make a decision about an informal decision which is currently not set out in the Act.

Exclusionary provisions

- Whether the Council's view on amendments to the law on exclusionary provisions has been affected by the High Court hearing of the *Souths* appeal.

Penalties

- What the Council's attitude would be to the introduction of an additional pecuniary sanction namely the confiscation of the ill-gotten gain.

Authorisation

- How the Council proposes that the apparent inconsistency in only allowing direct access to the Tribunal for mergers and not other conduct can be resolved.

Governance

- What view the Law Council has on governance, and in particular the suggestion of an oversight body.

In addition, the following issue has subsequently been raised as one which the Committee has asked the Council to respond to:

Section 155 Notices

- Are the ACCC's powers under s155(2) contrary to the practice in New Zealand, Canada, the US and the UK in that the competition regulators in each of these jurisdictions are required to obtain judicial approval in similar circumstances?

The Council's views on these issues are set out below.

2. Misuse of market power

2.1 Purpose

The Committee has asked us to consider why s46, when it was introduced, focussed on individual competitors, rather than on competition in a market.

(a) History of s46

There is no direct reference, in any of the relevant Second Reading Speeches, Explanatory Memoranda, text books or journal articles, to the rationale underpinning the drafting of the sub-sections of s46(1)(a) – (c) of the Trade Practices Act 1974 (Cth) (*Act*).[1]

While these materials have not provided an unequivocal answer to the question posed by the Committee, the following conclusion may be drawn:

Pre-1986, the threshold test for activating s46 of the Act, was one where a corporation was in a position substantially to control a market. This is a slightly lower threshold than a corporation being in a position of dominance although it is arguable that this threshold test was similar to the dominance test as proscribed in s2 of the Sherman Act and article 86 of the Treaty of Rome.

In light of the original threshold test, the three prohibited purposes as set out in sub-sections 46(1)(a)-(c), may have been examples of the kinds of conduct that were seen only to result from circumstances where a corporation, in a position substantially to control a market, or in an almost dominant position in a market, took advantage of its market power. That is, a corporation, that took advantage of its market power (that it had as a result of its position) would have the effect, or end result of, either eliminating a competitor, preventing entry or deterring or preventing competitive conduct.

(b) Trade Practices Act 1965

Considering the above proposition, there are two sources, although not definitive, from which the wording of the three sub-sections of 46 of the Act may have hailed. The first source is s37(1)(b) of the *Trade Practices Act 1965* (Cth) (***the 1965 Act***) which provides:

"For the purposes of this Act, a person engages in monopolisation if, being in a dominant position in the trade in goods of a particular description, or the supply of services of a particular description, in Australia or in a part of Australia, he takes advantage of that position so as to –

(b) engage in price cutting with the object of substantially damaging the business of a competitor or preventing a possible competitor from entering into competition with him."

The Second Reading Speech of the *Trade Practices Bill 1965* states that the Bill makes examinable four types of practices. The four types of practices consist of conduct stemming from the possession of economic power and one of these types of conduct is the practice of monopolisation. The Second Reading Speech provides:

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[1] The following materials have been examined: Trade Practices Act 1965 and Second Reading Speech of the corresponding Bill, Trade Practices Bill 1974 – Second Reading Speech for House of Representatives , s2 of the *Sherman Act,* Article 86 of the *Treaty of Rome* and *Europemballage Corporation and Continental Can Company Inc v E.C. Commission* [1973] CMLR 199 (*Continental Can*), *Trade Practices Amendment Act 1977* (Cth). , *Trade Practices Revision Act 1986* (Cth).

Stated briefly, examinable monopolisation takes place where advantage is taken of a dominant position to do one of three things, namely to induce a refusal to deal with someone, to engage in price cutting to substantially damage a competitor, or impose conditions that could not be imposed but for the position of dominance.

Therefore, s37(1)(b) of the 1965 Act indicated that the specific conduct of damaging a competitor or preventing a competitor from competing, was indicative of a person engaging in monopolisation by taking advantage of a dominant position.

This accords well with the theory that the three types of conduct (two of which are referred to in the 1965 Act, are examples of the kind of conduct that results where a corporation takes advantage of its position substantially to control a market (or virtual dominance)). Notably, price cutting (or in current monopolisation theory, predatory pricing) although held to be an examinable practice under s37 of the 1965 Act, is not mentioned in s46 of the Act. However, price cutting can nevertheless be a manifestation of an abuse of market power and such conduct can fall within the ambit of s46 today.

(c) Article 86 of the Treaty of Rome

The second source of the drafting of s46 of the Act may be from the judicial interpretation of article 86 of the Treaty of Rome in *Continental Can.*[2] In this case, the Court of Justice of the European Communities dealt with a decision of the European Communities Commission (***EC Commission***), which had accused Continental Can Company New York, of contravening article 86 of the Treaty of Rome by 'abusively exploiting a dominant position which it is alleged to have held in a substantial part of the Common Market…'.[3]

Continental Can held that abuse of a dominant position arising from a substantial change in supply structure, that jeopardises consumer choice in a market, such that it almost eliminates competition, will amount to abusive conduct under article 86 of the Treaty of Rome. Furthermore, unlike s46 of the Act, the abusive behaviour can be found to exist regardless of a causal connection between the market power and the conduct.

Conduct as described in each of the three sub-sections of s46 of the Act (that is, elimination of or substantial damage to a competitor, prevention of a person from entering a market, or deterring or preventing a person from engaging in competitive conduct) can result in an elimination of competition.

From *Continental Can,* it is evident therefore, that if a corporation is in a position of dominance in a market, abuse of that dominance can result in one or all three of the kinds of conduct enumerated in s46(1)(a)-(c) of the Act.

As the test in the original Act was largely imported from article 86 of the Treaty of Rome, it is arguable that the original legislative intent behind the drafting of s46(1) of the Act was derived, at least in part, from the underlying rationale of article 86 of the Treaty of Rome and subsequent judicial interpretation of that article.

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[2] *Europemballage Corporation and Continental Can Company Inc v E.C. Commission* [1973] CMLR 199

[3] See n2 at 222

(d) Development of s46

The Second Reading Speech of the Trade Practices Bill 1974 provided no assistance in determining the rationale underpinning the drafting of the relevant sub-sections. The Second Reading Speech merely states that s46 will prohibit an enterprise, which is in a position to control a market, from taking advantage of its market power to eliminate or injure its competitors.

The Act was amended by the *Trade Practices Amendment Act 1977* (Cth). The Swanson Committee looked carefully at s46 including s46(1)(a)-(c) but only recommended two minor alterations to the language of s46 which were subsequently implemented by the *Trade Practices Amendment Act 1977* (Cth). The change relevant for this discussion was:

1. The substitution of the words 'for the purpose of' for the word 'to' in subsection (1).

The rationale behind this proposed amendment was to clarify the position that only a *purpose* to monopolise is required and not actual proof that the monopolistic purpose has been achieved.

After the 1977 amendments, s46 provided that:

(1) A corporation that is in a position substantially to control a market for goods or services shall not take advantage of the power in relation to that market that it has by virtue of being in that position for the purpose of
(a) eliminating or substantially damaging a person, being a competitor in that market or in any other market of the corporation or of a body corporate related to the corporation;
(b) preventing the entry of a person into that market or into any other market; or
(c) deterring or preventing a person from engaging in competitive conduct in that market or in any other market.

As stated above, the threshold requirement, at this time, was that the section only applied to a corporation that was in a 'position substantially to control a market'. Although the phrase does not strictly translate to mean dominance, it has arguably a very similar meaning.

In its pre-1986 amendment form, s46 of the Act did not prevent the kinds of anti-competitive conduct as proscribed in s46(1)(a)-(c), unless the relevant corporation was in a position substantially to control the relevant market. It was accepted by 1986, that the threshold test, 'in a position substantially to control the relevant market', was extremely tough when applied strictly. As a result, the section had a narrow operation and could apply only to a few highly powerful corporations with the requisite amount of market power.

It was acknowledged that there were many corporations with a substantial degree of market power, yet, who were not in a position to effectively 'dominate' or 'substantially to control' the relevant market, but were still engaging in conduct that would otherwise have been construed as falling within one of the categories of conduct proscribed in sub-sections 46(1)(a)-(c).

As a result of the fact that corporations *not* in a position substantially to control a market could engage in the prohibited conduct and not strictly fall within the ambit of s46, it was necessary that the threshold test be lowered. The rationale behind the lowering of the threshold test was so *'corporations with a sufficient degree of market power to seriously harm or exclude competitors and which abuse their market power in that way will attract the operation of the section.*[4]

Therefore, s46 was amended to catch predatory conduct engaged in by a corporation with a 'substantial degree of market power' as originally recommended by the Blunt Committee in 1979.[5] The amendment of the threshold test from 'in a position substantially to control' to 'substantial degree of market power' is the point at which the focus shifted away from a corporation which held an almost dominant position in a market, however the three types of proscribed conduct that were drafted in light of the original test remained unchanged.

The proscribed purposes in s46 might be interpreted as promoting competition as well as promoting economic freedom. The proscribed purposes are consistent with the promotion of competition in the following way. The competitive constraints confronting a business with substantial market power can come either from incumbents that are already established in the market or from potential entrants that have yet to enter the market. The proscribed purposes make it clear that a business with substantial market power may not use that market power to attack either of these forms of competitive constraints: it may not use its power for the purpose of lessening the constraint imposed by incumbents; and it may not use its power in order to lessen the constraint imposed by potential entrants.

(e) Conclusions

In conclusion, as the threshold test was lowered in 1986, it is now more difficult for a corporation to actually engage in the types of conduct as proscribed in sub-sections 46(1)(a)-(c), as this conduct was originally proscribed in relation to corporations that were in a position substantially to control a market, that is, corporations that were almost dominant in the relevant market. A corporation that only has a substantial degree of market power is now in contravention of the Act if it misuses its market power for the purpose of achieving one of the proscribed outcomes.

2.2 Cease and desist

The cease and desist powers in s74A-74D of the *Commerce Act 1986 (New Zealand)* (***Commerce Act***), were introduced at the initiative of the Ministry of Economic Development.

When the provisions were considered by the Commerce Select Committee, the Committee were unable to reach agreement, due to the range of views expressed in submissions. The Commerce Select Committee Report noted the following opposition to the introduction of cease and desist powers:

"[M]embers considered that a cease and desist order-making power will have many disadvantages. The orders may be automatically appealed in significant cases. In moderate cases, orders may offer little advantage over current enforcement tools. Moreover, the orders may negatively impact on the credibility and reputation of the

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[4] *The Trade Practices Act: Proposals for Change* Paper A Explanation of Proposals in the Exposure Draft Trade Practices Amendment Bill, 1984 paragraph 26

[5] For a comprehensive history of the debate on the effects test, starting in 1979 with the Blunt Committee, see Landrigen, Peters and Soon, "An Effects Test Under s46 of the Trade Practices Act: Identifying the Real Effects", (2002) 9(3) CCLJ 258

Commission. The Treasury considers that the orders are unlikely to substantially reduce costs or delays in cases involving the Act. The Commission does not support the orders. In its view, being able to apply for interim injunctions is a sufficient safeguard. In the majority of the cases, where an interim injunction could have been sought, the Commission has managed to effect agreement. This would be a marked change to the way in which the Commission operates at present and, in the Commission's view, is neither required nor desirable for the New Zealand situation."[6]

Although the provisions were inserted into the Commerce Act on 1 April 2002, the government considered that their implementation should be delayed, to allow the Commerce Commission time to put in place mechanisms to ensure procedural fairness. They have not yet been brought into effect by an Order in Council.

To this end, the Commerce Commission has recently appointed two part-time Cease and Desist Commissioners, who will only make themselves available when a cease and desist order is sought, and will not be involved in any other Commerce Commission work. Our understanding is that the appointment of these additional Commissioners, who stand apart from the Commerce Commission, and are able to make independent decisions as to whether a cease and desist order is appropriate, was considered necessary on the basis that these Commissioners would effectively be acting as judge and prosecutor in his or her own Court.

Both of these Commissioners are barristers and one is a former Commerce Commission member. As a result, they have the necessary 'judicial' experience to make reasonable determinations as to whether a cease and desist order is necessary, or whether ordinary injunctive measures would be sufficient.

A number of practical issues still remain to be determined by the Commerce Commission before the provisions will be brought into operation, including:

- how the concept of need to act urgently can be applied in a manner consistent with the procedural requirement to have a hearing;
- how the Cease and Desist Commissioners can be accessed urgently;
- what resources are to be made available to the Cease and Desist Commissioners; and
- how those resources can be kept independent from other Commissioners and the Commerce Commission staff.

As the cease and desist powers have not yet come into force, there is no practical New Zealand experience for the Committee to draw on. However, given that the New Zealand provisions already contain procedural safeguards which are not incorporated in the ACCC proposal,[7] the problems which have been encountered in setting up procedures for the implementation of the provisions are of serious concern.

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[6] Commerce Select Committee Report on the Commerce Amendment Bill, (296-2), presented 2 February 2001

[7] Law Council of Australia Dawson Review Submission, p35

3. Public benefit

The Committee has asked the Council to provide a view as to whether further legislative clarification is needed in relation to the meaning of "public benefit". In the Council's view, a sufficient level of guidance is already provided in the Act and the authorisation decisions of the ACCC and the Tribunal.

3.1 Guidance in the Act

Although the Act does not define what constitutes a public benefit, s90(9A) provides some guidance in the case of mergers. That section provides that the ACCC (in addition to other benefits to the public which may exist) must regard the following as benefits to the public:

- a significant increase in the real value of exports,
- a significant substitution of domestic products for imported goods, and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

3.2 Authorisation

The concept of benefit to the public is broad. It has been held that public benefit is anything which is "of value to the community generally".[8] As such, the public benefit includes "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".[9]

In *Re ACI Operations Pty Ltd*[10] The ACCC recognised a large number of factors which could be viewed as benefits to the public. The list of factors included:

- economic development (for example in natural resources, through encouragement of exploration, research and capital investment),
- fostering business efficiency,
- industry rationalisation resulting in more efficient allocation of resources and in lower or contained production costs,
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions,
- industrial harmony,
- assistance to efficient small business (for example guidance on costing and pricing or marketing initiatives which promote competitiveness),
- improvement in the quality and safety of goods and services and expansion of consumer choice,

[8] *Re Queensland Co-operative Milling Association; Re defiance Holdings Ltd* (1976) 25 FLR 169 at page 182.

[9] *Re Queensland Co-operative Milling Association; Re defiance Holdings Ltd* (1976) 25 FLR 169 at page 182.

[10] (1991) ATPR 50-108.

- supply of better information to consumers and businesses to permit informed choices in their choice,
- promotion of equitable dealings in the market,
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain,
- development of import replacements,
- growth in export markets, and
- steps to protect the environment.

The ACCC has also considered Australian ownership and increased health and safety of employees to be public benefits.[11]

Some of the items that the ACCC has considered as public benefits seem not to qualify as public benefits under the Tribunal's definition that public benefits must be of value to the community generally. In particular, such benefits as expansion of employment in particular regions and assistance to efficient small business seem to be identifying benefits to particular sectors with benefits to the public generally.

The Trade Practices Tribunal has held that "in the context of merger, the most important class of benefits and detriments will normally consist of impacts upon economic efficiency, whether positive or negative. Economic efficiency refers to the best use of society's resources and encompasses allocative efficiency, production efficiency and dynamic efficiency".[12]

Further, the Tribunal has recognised in *Re QCMA*, that a merger may result in public benefit where the target is a failing firm, despite the fact that it did not find that this was the case on the particular facts. Here the Tribunal stated:

"We accept that in the typical case of a failing company an argument can often be made out to the effect that the public would benefit from a takeover by a more vigorous operator. But this is not the typical case…There may come a time in a few years when its departure from the flour and bread scenes is more clearly imminent. Then the public benefit might well be invoked to justify a complete takeover. But that time has not yet arrived."[13]

A broad range of factors which may be considered benefits to the public is desirable because it increases the likelihood of efficient resource use and enhances consumer welfare.[14] This is a fact which has been recognised by the Trade Practices Tribunal which stated that "It is undesirable to attempt to fix in advance the limits of what the concept of "benefit to the public" encompasses or to exclude, in advance, from its ambit any contribution to the legitimate aims pursued by society".[15]

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[11] *Wattyl (Australia) Pty Ltd, Courtauls (Australia) Pty Ltd & Ors* (1996) ATPR (Com) 50-232 at 56-547.

[12] *Re Queensland Independent Wholesalers Limited* (1995) ATPR 41-438 at 40-961.

[13] (1976) 8 ALR 481 at 544

[14] R Smith and T Grmiwade, "Authorisation: Some Issues", [1997] 25 *Australian Business Law Review* 351 at page 357.

[15] *Re Rural Traders Co-Operative (WA) Ltd* (1979) 37 FLR 244 at 262.

The public benefits which arise from a proposed merger or acquisition will always depend heavily on the facts and circumstances of the merger in question. As such, it is appropriate that the Act leaves the determination of what constitutes the public benefit to the ACCC or the Tribunal who have the opportunity to consider the facts surrounding the merger.

While the Tribunal states that the test of public benefit is broad, published reasons from both the ACCC and the Tribunal provide adequate guidance as to the types of factors which may constitute the public benefit.

4. Merger

4.1 Written reasons

The Council considers that there are potential advantages in requiring the ACCC to publish written reasons in relation to its informal merger clearance decisions, in terms of transparency and in the interests of building up a body of precedent. However, the weight of international experience indicates that if the ACCC were required to give written reasons in relation to every informal clearance application, these potential advantages may be outweighed by the inefficiency associated with the increased administrative burden and the potential for the ACCC's analysis to stagnate.

(a) International Competition Policy Advisory Committee Report

The merits of requiring competition authorities to give written reasons has been recently considered in a report by the International Competition Policy Advisory Committee (***ICPAP***). The ICPAP report noted that in Europe, where the EC Commission is required to make written decisions on mergers, a large body of precedent has developed to guide future parties and agency officials. However, it also noted that written decisions create a danger of ossification, through the creation of a situation where agencies may be overly concerned with following precedent and as a result, resist modifying their analysis even when antitrust analysis evolves or factual circumstances change.

The ICPAP Committee concluded that benefits could be achieved without imposing an undue burden, by clearly articulating the rationale underlining decisions where the agency decides to challenge, as well as not to challenge, "significant transactions".

(b) New Zealand experience

Unlike the Act, the Commerce Act contains a formal clearance procedure, which requires, among other things, that the Commerce Commission state in writing the reasons for its determinations.

In practice, this formalised clearance process has restricted the level of communication between merger parties and the Commerce Commission in the following ways:

- although the Commerce Commission will discuss areas of concern with potential merger parties, as soon as a formal application for clearance is lodged, it does not consider that further discussion of these issues is appropriate; and

- the Commerce Commission considers that the framing of an application is a matter solely for the applicant. This means that, unlike the ACCC, the Commerce Commission will not be involved in the formulation of any undertakings.[16]

In contrast, the informal process in Australia allows for extensive communications between the ACCC and merger parties, which commonly continue throughout the informal clearance process.

(c) Recommendation

In the Council's view, it is critical that any amendment in this area does not threaten the ability of merger parties to access Commissioners, to discuss issues of concern, and to develop solutions (including undertakings) which meet both the ACCC's competition concerns and the parties' commercial concerns. Although there are potential advantages in terms of transparency and precedent, which may be obtained through requiring written reasons to be given for informal clearance decisions, the Committee should be mindful of the consequences that have flown from the requirements in other jurisdictions to provide written reasons in all cases.

In the Council's view, the Act should be amended to require that the ACCC give written reasons in the following circumstances:

- where informal clearance is refused; and
- (in the context of the introduction of an independent review panel) where informal clearance is granted or a no action letter is provided subject to s87B undertakings or other conditions.

It should also be left open to the ACCC to publish reasons in other cases, at its discretion. This is likely to be helpful in mergers where, for example, market definition is contentious, imports are critical, or public benefits are determinative.

The objective of this proposed amendment is to provide valuable precedent in the most important cases while avoiding formalisation of the clearance process in general.

4.2 Mandatory pre-merger notification

The Committee has also asked the Council to consider whether overseas experience supports a view that the introduction of mandatory pre-merger notification would lead to inefficiency.

(a) Development of voluntary notification regime in Australia

Swanson Committee – 1977

Prior to the amendments of the Act in 1977, the Act provided for a regime of clearances and authorisations for mergers to be given by the TPC within strict time limits. The time limit for a TPC decision on authorisations was 30 days and the limit for authorisations was

[16] Submission by Grant David of Chapman Tripp to the Trade Practices Review Committee at p11

4 months. The Swanson Committee recommended that these time periods remain, but that there be provision for extensions of time in more complex matters.[17]

The 1977 Act amendments abolished the formal merger clearance process. This was at least partly as a result of the significant administrative problems posed by the backlog of many thousands of notifications received by the TPC.

The Second Reading Speech for the *Trade Practices Amendment Act 1977* stated:

"Experience has shown that the clearance procedure provided by the present law has involved the Trade Practices Commission very closely in the daily operations of Australian business…To continue the clearance procedure would perpetuate unnecessary interference by Government in the exercise of individual economic initiative."[18]

Green Paper - "Trade Practices Act Proposals for Change" – 1984

The Green Paper recommended that a regime of pre-merger notification be introduced, as a means of dealing with mergers that occurred without the TPC's knowledge or which were presented as an accomplished fact rather than as a proposal. The Green Paper was also concerned about the problems associated with enforcement, where it was effectively limited to actions for divestiture.[19]

This proposal was not adopted in the 1986 amendments to the Act.

Griffiths Committee - 1989

The Griffiths Committee found that:

- it was not convinced of the need for the introduction of a scheme of pre-merger notification as there was little evidence that the TPC would be unaware of major mergers and the existence of midnight mergers was not so prevalent as to pose a significant problem.
- a system of pre-merger notification would give rise to the following difficulties:
    (i) a substantially increased administrative burden for the TPC;
    (ii) the difficulty in determining an appropriate threshold test; and
    (iii) the risk of unduly delaying and interfering with the merger process.[20]

The Griffiths Committee also noted considerable opposition to the introduction of a system of pre-merger notification. However, the Griffiths Committee did consider that there would be benefits in a statutory recognition of the informal merger procedure in the Act.

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[17] Trade Practices Act Review Committee (the Swanson Committee) *Report to the Minister for Business & Consumer Affairs* AGPS August, 1976 at p53.

[18] Senator Durack, Second Reading Speech, *Trade Practices Amendment Bill 1977*, Senate Hansard, 31 May 1977

[19] See House of Representatives Standing Committee on Legal & Constitutional Affairs (the Griffiths Committee) *Mergers, takeovers and monopolies: profiting from competition?* AGPS May, 1989 at p48. The Green Paper made particular reference to the difficulties encountered in the Petersville/General Jones merger case in 1984.

[20] See Griffiths Committee *Mergers, takeovers and monopolies* at p51.

Cooney Committee - 1991

The Cooney Committee recommended that:

- it be obligatory for a notice to be given to the TPC where mergers or acquisitions "of a substantial nature" are proposed, with "of a substantial nature" being defined in the Act;
- the matters of which notice was to be given be limited to ensure that there was no undue burden on those required to comply.[21]

The Cooney Committee's basis for this conclusion was that the "TPC does not receive sufficient notice of impending mergers and at times encounters difficulty in giving them detailed and prompt consideration."[22] The Cooney Committee was also of the view that this proposal would impose a minimal administrative burden on the ACCC.

The proposal was not adopted.

(b) US Experience

Notification to the Federal Trade Commission (***FTC***) is mandatory under the Hart-Scott-Rodino Antitrust Improvements Act 1976 (***HSR Act***) provided that certain threshold requirements are met. In most cases, these require that:

- either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce;
- one party has worldwide sales or assets of US$10 million or more and the other has worldwide sales or assets of US$100 million or more;
- as a result of the acquisition, the acquirer will hold assets or voting securities with an aggregate total value of US$50 million; and
- no exemptions apply.

Considerable concern has been expressed, both from the private sector and the FTC, about the inefficiency of the US merger review process, both in terms of the burden which is placed on parties and the duration of many merger review transactions, particularly when the FTC issues Requests for Additional Information and Other Documentary Material ("Second Requests").

This concern is reflected in the fact that the FTC has introduced new procedures for the appeal of Requests for Additional Information which became effective on 1 February 2001, and now require that a senior agency official be designated for the review, upon petition, of a Second Request to determine whether it is "unreasonably cumulative, unduly burdensome, or cumulative, or whether the petitioner has substantially complied with the request".

However, the American Bar Association (***ABA***) has commented that:

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[21] See Senate Standing Committee on Legal & Constitutional Affairs (the Cooney Committee) *Mergers, monopolies & acquisitions* AGPS December, 1991 at p67.

[22] See Cooney Committee *Mergers* at p67.

"Obtaining 'substantial compliance' with …a second request can take months and require the expenditure of hundreds of thousands – or millions – of dollars. While these burdens are visited on only a relatively small number of transactions each year…the burdens imposed on the unfortunate parties are quite significant."[23]

More recently, the ABA has commented that:

"Delays in the clearance process lead to the agencies issuing some Second Requests solely because of lack of time to review preliminary proposed transactions and the parties refiling HSR notifications to avoid such Second Requests."[24]

(c) European experience

In Europe, parties are required to formally notify the EC Commission of all proposed mergers that fall above the threshold. The EC Merger Regulation (***ECMR***) provides that notification must be given of all mergers where:

- the aggregate worldwide turnover of the parties exceeds €5 billion;
- the Community-wide turnover of at least 2 parties exceeds €250 million; unless
- each of the parties achieves more than 2/3 of its aggregate Community–wide turnover in one and the same Member State.

The ECMR also covers market concentrations that have a significant impact in at least 3 member states, where:

- the aggregate world-wide turnover of the parties exceeds €2.5 billion; and
- in at least 3 Member States, the aggregate turnover of all the parties exceeds €100 million; and
- in at least 3 Member States mentioned immediately above, the turnover of each of at least 2 parties exceeds €2.5 million; and
- the Community-wide turnover of at least 2 parties exceeds €100 million; unless
- each of the parties achieves more than 2/3 of its aggregate Community–wide turnover in one and the same Member State.

Turnover is deemed to be the amount derived from the sale of products or the provision of services (excluding turnover taxes), in the preceding financial year. Notification must be given not more than 1 week after the conclusion of an agreement, the announcement of a public bid or the acquisition of a controlling interest. The EC Commission can grant extensions but can also impose fines for late notification, incorrect information or no notification.

In 2001 the ECMR was the subject of a Green Paper produced by the EC Commission.[25] The Green Paper generated a considerable number of responses[26] concerning the efficacy of the ECMR, which can be summarised as follows:

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[23] ABA's Guidance for Federal Merger Investigations and Complying with "Second Requests", December 2000, http://www.abanet.org/antitrust/mergerguidelines.pdf

[24] ABA Submission to the Federal Trade Commission in relation to the merger review process, 6 August 2002

- the thresholds set out in the ECMR worked well and only a small number of respondents to the Green Paper suggested any modification of these thresholds;
- the extension of the ECMR to matters which cover 3 or more Member States has not been as effective as it could have been, with only 20% of eligible matters being notified to the Commission. However, it was noted that there is an increase in these filings;
- the completion of the required documentation for notification can be onerous, with a high level of detail and analysis required about the parties, the affected industry and market/s and the impact of the proposal;
- determinations from the EC Commission can be time consuming. An initial determination must be made within 1 month of notification and, if the EC Commission has broader concerns, it can commence a second-stage investigation which can take up to 4 months. There has been complaint that this process takes too long, and there have been a number of *simplifications* of the ECMR procedures over the years to deal with this perennial problem; and
- the thresholds are in many instances still too high to catch all mergers with cross-border effects, and this has been the subject of comment by the EC Commission to the Council of Ministers.

The European approach is administratively driven and, as a consequence, it suffers from the main failing of such an approach: a *bureaucratisation* of the process.

(d) New Zealand Experience

Although pre-merger notification in New Zealand is now voluntary, there was a mandatory pre-merger notification scheme in place between 1986 and 1990. Mandatory pre-merger notification was removed in 1990 following a review of the Commerce Act by the Ministry of Commerce, which made a formal report to Government in 1989.[27] This review resulted in the Commerce Law Reform Bill, which saw the mandatory pre-notification regime retained, but the asset thresholds increased.

When this Bill was referred to the Commerce and Marketing Select Committee however, a number of submissions were made about instances where proposals having no possible competition implications had to be notified, while others raising real concerns did not. This imposed significant cost on the merging firm, both directly and in terms of opportunity costs. It was also submitted that mandatory pre-merger notification was tying up many of the Commerce Commission's resources and reducing its ability to enforce restrictive trade practices prohibitions. As a result, the Select Committee amended the Bill to replace the mandatory clearance regime with the current voluntary one.

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[25] See EC *Green Paper on the review of Council Regulation (EEC) No4064/89* December 2001.

[26] See EC *Green Paper on the review of Council Regulation (EEC) No4064/89 – Summary of the replies received* December 2001.

[27] Reports and Decisions, Review of the Commerce Act 1986, Competition Policy and Business Law Division, Ministry of Commerce, Wellington, August 1989

(e) Conclusion

In the Council's view, overseas experience is mixed, suggesting that compulsory notification may be justified only for substantial mergers above fixed thresholds, but even then with significant administrative inefficiencies. There is no demonstrable need for compulsory pre-merger notification in Australia. All significant mergers are notified informally, and there has been only one example of a "midnight merger" (Pioneer International) in breach of Section 50 since the test was changed in 1992.

4.3 Monitoring Efficiencies

The Committee has also asked the Council to consider how the ACCC could be satisfied in an informal clearance application that public benefits would be available and, if they involved efficiencies, whether the ACCC should be required to subsequently check that those efficiencies have materialised.

(a) How could the ACCC be satisfied that efficiencies would be available?

Authorisation decisions provide some guidance as to the manner in which the ACCC and the Tribunal have quantified public benefits, including efficiencies.

In *QIW*, one of the public benefits considered by the Tribunal was the cost savings resulting from "the rationalisation and combination of activities; and volume related savings from spreading overheads and from achieving better terms of supply for merchandise, advertising, transport and freight". The Tribunal commented that:

"These cost savings represent a saving of real resources and thus are a contribution to economic efficiency and consumer welfare".

Economic evidence was adduced to satisfy the Tribunal that these cost savings would be achieved. In the Council's view, there is no reason why the same sort of economic evidence could not be presented to the ACCC in the course of the informal clearance process.

(b) How could these efficiencies be monitored?

The Committee has asked the Council to consider whether, if the ACCC were able to grant informal clearance on the basis of efficiencies, it would be necessary for the ACCC to subsequently check that those efficiencies had materialised. In the Council's view, while s87B undertakings could be used to ensure implementation of measures foreshadowed by the parties to deliver efficiency gains, beyond this, it is not necessary for the ACCC to monitor economic efficiencies.

Where an authorisation is granted in relation to a merger on the grounds of public benefit, there is no scope for the authorisation to be withdrawn, and the transaction reversed, in the event that the claimed benefits do not eventuate. *BHP v Trade Practices Tribunal* indicates that once an authorisation has been granted, and a transaction completed, 'neither the Commission or the Tribunal has any power to approve or otherwise deal with an acquisition of shares which has already been made'.[28] The Court stated that:

[28] [1980] 47 FLR 384 at 399

"Having regard to the commercial considerations which arise in relation to mergers which often involve considerations affecting business and employees, requiring speedy resolution, it is not self-evident that the legislature would have wished an action on an authorisation to lack the protection of section 88(9) pending possible or actual review."[29]

The Court held that as s88(9) of the Act provided protection against the operation of s50 'while such an authorisation remains in force', not 'while the authorisation remains in force and the time for any appeal has expired or, if there be an appeal, such appeal has been disposed of' – there is no need to imply such words into the section.

In the Council's view, the ACCC has the expertise required to analyse economic evidence and make an evaluation of the public benefits (including efficiencies) likely to flow from a transaction. Economic efficiencies, like other factors that must be considered by the ACCC in relation to proposed mergers, must be assessed on the best information available to the ACCC at the time of implementation of the merger. The ACCC is not able to second guess other factors by conducting post-merger reviews and requiring mergers to be reversed if the ACCC's expectations are not met. Merger efficiencies should be treated in the same manner.

By way of example, a merger may be cleared by the ACCC under the current informal clearance process on the basis of the ACCC's assessment of import competition. If, after the merger has been completed, imports cease as a result of adverse exchange rate movements, the merger will stand even though the merged entity will have greater market power than was anticipated. The behaviour of the merged entity will remain subject to s46. However, if the ACCC is to maintain credibility, the merger itself will not be subject to the threat of post-merger reversal by the ACCC as a result of the change in these market circumstances which were not foreseen by the ACCC.

4.4 Independent review panel

The Council considers that the introduction of an independent review panel would impose a discipline on the ACCC's informal clearance process in the same way as an appeals process. In effect, it would reduce the potential for the ACCC to use s87B to extract undertakings which have little to do with the competition issues arising from the merger.

The independent review panel could be constituted as a division of the Tribunal, with additional members and rules which provide for a speedy and informal review of informal clearance decisions. The more formal procedures currently applying to the Tribunal need not be affected by the addition of a new "mergers division". The Council would propose that the current members of the Tribunal be members of the "mergers division" with additional members drawn from the ranks of judges, lawyers and economists involved with merger regulation on a day to day basis.

An analogy can be drawn with the Takeovers Panel. Until March 2000, decisions by ASIC on takeover matters were commonly referred to the AAT, for review "de novo". Those matters were dealt with expeditiously but there is no doubt that the reconstituted Takeovers

[29] [1980] 47 FLR 384 at 389

Panel, with its new procedures, is a far more efficient and effective organ for this particular purpose.

4.5 Powers and procedures of the independent review panel

When considering approval powers and procedures for an independent review panel to review informal clearance decisions, it is useful to consider the following contextual matters:

- Any review must occur "pre-merger" and, if necessary, the matter must be remitted to the ACCC, with guidance, for re-consideration. All of this would occur pre-merger.
- The benefits of the informal clearance process – speed, cost, informality, and relative certainty should be preserved in any review process.
- Private parties do not presently have any right to seek injunctions under s50 to prevent mergers proceeding. The informal clearance process is undertaken by the ACCC. The ACCC is the only party entitled to apply for an injunction. Therefore, it would be entirely consistent with the current legislative regime for a right of review of informal clearance decisions to be available only to applicants and not competitors or other interested parties. However, private parties are to be consulted by the ACCC and could be consulted by the independent review panel in the informal clearance process.
- Private parties presently have rights to seek declarations, damages and orders for divestiture in relation to mergers which contravene section 50 but which have or are likely to proceed following an informal clearance. Those rights would continue. In addition, as the informal clearance process would be formalised to the extent that the outcome would necessarily be a "decision" of the ACCC, judicial review of those decisions could be available to private parties with standing. However, it is difficult to contemplate what additional benefit a right of judicial review of such decisions would provide to private parties who are already entitled to a range of remedies, including divestiture orders.

In this context, the Council suggests that an independent review panel be established as a division of the Tribunal and that the review process be established by making the following amendments to the Act:

1. The procedural framework for the review panel could be similar to that applying to the Takeovers Panel under Part 3 of the Australian Securities & Investments Commission regulations.
2. The informal clearance procedure must be recognised under the Trade Practices Act. The objective would be to minimise changes to the current informal process. This could be achieved by making the following amendments to the Act:
    - prescribing a form of application for clearance by the ACCC. (This form would be minimal and include the parties to the transaction, a description of the shares or assets to be acquired and contact details of the applicant.

No fee should be payable. A form is necessary to distinguish applications from "courtesy" notifications.);

- prescribing modes of response by the ACCC to clearance applications, each constituting a decision, which could include:
  - an affirmative statement of clearance (Whilst the ACCC rarely gives a clearance in this form, the Council believes that the ACCC could publish a decision in this form in respect of many non-contentious mergers, and the amendments should accommodate this possibility.);
  - a no action letter;
  - either of the above, subject to undertakings under s87B or other conditions;
  - a statement that the ACCC has concluded that the proposal contravenes s50;
  - no (other) decision within 3 months of the application (The Council suggests that such inaction be deemed to be a refusal.).
- requiring that the ACCC give reasons within 7 days after any decision which is:
  - a clearance or no action letter subject to s87B undertakings or other conditions;
  - a conclusion that the merger proposal contravenes s50;
  - no decision within 3 months of the application; or
  - any other decision for which the applicant requests reasons (Whilst this may not be necessary for the Review, it is consistent with the Council's earlier recommendation.);
- not prescribing any other procedural requirements for applications.

3. Establish a right of review by the independent review panel of informal clearance decisions "de novo", as per Trade Practices Act s101:
   - the applicant would be entitled to apply for review of any decision within 7 days after receipt of reasons;
   - review by the independent review panel would not be available to any other person;
   - the independent review panel would be entitled to request production of any document from the ACCC or the applicant;
   - rules for the conduct of the review (including timing) would be established by the independent review panel (this is consistent with the Takeovers Panel);

- the independent review panel would be empowered to review informal clearance decisions and, where appropriate, provide guidance to the ACCC and remit them to the ACCC for re-consideration.

4. If the informal clearance process is "formalised" to the extent suggested, the decisions of the ACCC could be regarded as administrative rather than prosecutorial.
5. Decisions of the ACCC and the independent review panel would remain subject to rights of judicial review and appeal perhaps restricting possible orders on applications by private parties to exclude stays, injunctions and orders reversing a merger, for consistency with the current regime. Third party actions, including actions for divestiture, would remain, as would the authorisation process.

5. Exclusionary provisions

As the Committee is aware, the High Court heard the appeal in *South Sydney* on 6 August 2002. It is clear from reading the transcript that the outcome of the case is uncertain, both as to whether the purpose of a provision is to be ascertained objectively or subjectively and as to whether the High Court will accept that in order for a provision to be an exclusionary one, the provision must target a particular person or class of persons. Accordingly, we repeat our submission that s4D of the Act should be amended to clarify this last point. Further, we submit that the Committee should recommend that s45 be amended to insert a new s45(10) as follows:

"For the purpose of this section and section 4D, the purpose of a provision of a contract arrangement or understanding or proposed contract, arrangement or understanding is the subjective purpose of the parties to the contract arrangement or understanding or proposed contract, arrangement or understanding in including the provision in the contract arrangement or understanding or proposed contract, arrangement or understanding."

6. Penalties

6.1 Ill-gotten gain

The Council is of the view that the amount of any ill-gotten gain should certainly be a relevant factor in the determination of penalties under the Act.

(a) Current position

Calculation of pecuniary penalties in the Australian Courts is currently guided by the "French factors", which were set out in *TPC v CSR Ltd*,[30] and which include the amount of loss or damage caused, but not the amount of any ill-gotten gain. Although in relation to some breaches of the Act, these amounts will be co-extensive, this will not always be the case.

[30] (1991) ATPR 41-076

The issue of ill-gotten gain was specifically addressed in *ACCC v Roche Vitamins Australia Pty Ltd*,[31] where the Court was presented with agreed submissions as to penalties, but sought additional submissions in relation to how much better off each respondent was as a result of its contraventions, and what additional amount of the market was paid to each respondent as a result of its contraventions.

However, the respondents were not able, on the basis of their accounting practices and records, to answer these questions precisely, although they did supply documents and information which enabled inferences on these issues to be drawn and the Court ultimately decided that it was appropriate to impose the agreed penalties.

(b) US experience

In considering the possibility of introducing an amendment to the Act which would provide for a specific remedy for ill-gotten gain, the Council is conscious of a number of concerns that have arisen in the United States, where the Federal Trade Commission is able to seek a disgorgement remedy. These concerns, many of which were set out in a recent submission by the American Bar Association (***ABA***) to the Federal Trade Commission,[32] should be taken into account in determining whether to recommend any amendments to allow for recovery of any ill-gotten gain.

The ABA pointed out that the remedy was vulnerable to abuse and increased the Commission's bargaining power in settlement negotiations. This was exacerbated by the uncertain nature of this remedy, which made it difficult for a defendant to predict the size or effect of a disgorgement remedy

The ABA also submitted that, in practice, the differentiation between legitimate and illegitimate profits required to implement this remedy introduced complexity and delay into proceedings. In the Australian context, this was also seen, as indicated above, in *ACCC v Roche*, where the parties were unable, on the basis of their accounting records, to accurately quantify the profits obtained by virtue of the contravention when asked to do so by the Court.

Additionally, the ABA expressed concern about the fact that in practice, the disgorgement remedy could result in double liability for the defendant and double recoveries for a private plaintiff. It recommended that disgorgement actions by the FTC should be consolidated, so that they are considered by the same judge, and appropriate portions of the disgorgement remedy can be apportioned to the private applicants to avoid duplication of liability and recovery.

(c) Recommendations

As discussed above, the amount of any ill-gotten gain can be and is already being taken into account by the Federal Court in their calculation of penalties. The Council does not consider that simply introducing a new remedy into the Act would be an efficient way to

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[31] (2001) ATPR 41-809

[32] American Bar Association, Submission to the Federal Trade Commission's Request for Comment on Remedial Use of Disgorgement, 11 March 2002, http://www.abanet.org/antitrust/disgorge.pdf

formalise this practice, as it would not address the issues of double recovery, difficulty of calculation or vulnerability to abuse, which have been experienced in the US.

Rather, the Council considers that it should be left to the Courts to weigh both the "French factors" and the amount of any ill-gotten gain, as the Court did in *ACCC v Roche*.

In the Council's view, the most effective way to ensure that sufficient focus is given to the amount of any ill-gotten gain would be to amend s76(1) such that it would relevantly read as follows:

"The Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered <u>or any gain obtained by or on behalf of the person as a result of the act or omission</u>, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct."

This proposed amendment has the advantage of leaving the ultimate discretion in the hands of the Courts, so that problematic issues, like the potential for double recovery and the complexity of calculating the penalty, can be dealt with on a case by case basis.

7. Authorisation

The Committee has also asked the Council to provide a view on how to resolve the apparent inconsistency referred to in the article by Rhonda Smith and Tim Grimwade, *"Authorisation: Some Issues"* (1997) 25 ABLR 351 in relation to only allowing direct access to the Tribunal for mergers and not other conduct.

7.1 Inconsistency with the Act 1974

The Smith and Grimwade article suggests that, as there is an inconsistency with general competition policy, the notion of direct access to the Tribunal would be inconsistent with Australian competition policy.

The article expresses this inconsistency as follows: the ACCC is able to grant authorisations in respect of anti-competitive conduct that may have sufficient public benefits despite contravening the Act. The article explains that in circumstances where a person, with sufficient interest, is dissatisfied with a determination by the ACCC, that person may apply to the Tribunal for a review of the ACCC's determination. The article notes that the inconsistency would lie where parties seeking authorisation for a merger may go directly to the Tribunal, however, parties seeking authorisation for horizontal, vertical or joint venture arrangements, would still need to first apply to the ACCC for authorisation.

These inconsistencies, it is suggested, will create uncertainty in the business community. The notion that direct access to the Tribunal creates uncertainty, undermines the claim by supporters of the direct access regime, as those supporters actually claim that direct access will *resolve* uncertainty.

Another issue regarding inconsistency is that of undertakings. The article suggests that there will be inconsistency if undertakings are accepted with respect to access and other matters but not in relation to mergers that are dealt with directly by the Tribunal, as there would be no ability for the Tribunal to accept undertakings as the ACCC is currently able.

Finally, the article suggests that the inability of the Tribunal to accept undertakings might limit the ability and flexibility of the Tribunal to address the balance between public benefit and anti-competitive detriment in authorisation applications. In the Council's view, this is not an argument which should prevent authorisation by direct application to the Tribunal. There appears to be no reason why the Tribunal could not grant an authorisation on condition that specific undertakings were given to the ACCC.

7.2 The need for direct access

In preparing its initial submission, the Council considered the possibility of extending the direct approach to the Tribunal to encompass other arrangements. In principle, the Council agrees that authorisation direct to the Tribunal should be available for all collaborative arrangements between competitors that are akin to a merger, however, this is difficult to draft.

(a) Timing

Supporters in favour of direct access to the Tribunal in respect of mergers acknowledge that the procedure, if implemented, would be vastly different from the authorisation procedure for other horizontal, vertical or joint venture arrangements. The reason for this is simple: the very nature of mergers dictates the necessity of a different approach. Mergers need to be dealt with expeditiously and in a manner that minimises the element of uncertainty for the parties involved.

The fact that the Act provides strict time limits for merger authorisations, yet it does not impose time limits in respect of authorisations for other conduct, is a strong indication that mergers require a very specific approach. The real issue is, of course, speed and the importance of timeliness in respect of mergers that is evident in the Act itself. S90(11)(a) of the Act provides that the ACCC has a period of 30 days to consider a merger application which may be extended to 45 days under section 90(11A) if the matter is particularly complex. This time limit may also be extended if the ACCC requests information from the applicant (s90(11)(b)), or if the applicant agrees to an extension (s90(12)). The Tribunal has 60 days to conduct a review and this period may also be extended if the matter is particularly complex (s102).

(b) Other urgent matters

While speed is clearly the issue that is most important with respect to merger authorisations, it is certainly arguable that the requirement for speedy authorisation for other forms of conduct may be equally as important and urgent. In this respect, it is suggested that, under very particular and extreme circumstances, applicants seeking authorisation for other forms of anti-competitive conduct and agreements, may also have the option of going straight to the Tribunal and bypassing the ACCC stage. The availability of such an option for other forms of anti-competitive conduct would not indicate that mergers should be considered as requiring any less 'special treatment', but it would indicate an acknowledgement that there are potentially other circumstances that may deserve to be considered with tremendous speed due to the very nature of the relevant conduct. This form of option would be appropriate for parties who may want the Tribunal to review a determination by the ACCC. Bypassing the ACCC stage would provide parties with a much faster outcome, a fallout effect of course would also be greater certainty.

(c) Fear of third party appeal

Another issue that gives great weight to the argument for direct access is the fear of a third party appeal to the Tribunal. This can cause concern for merger applicants (and indeed applicants involved in other important transactions not covered by s50 of the Act) and may discourage them in some cases, from applying to the ACCC in the first place. Direct access to the Tribunal would effectively eliminate this concern and provide far greater certainty for merger applicants, all the while giving greater clarity to the merger authorisation process itself.

(d) Conclusions

It is believed that the prospect of a majority of applicants going direct to the Tribunal is remote. If it was felt necessary to limit or discourage direct application, perhaps some fee arrangement might be introduced to deter an onslaught of applicants seeking merely to avoid the standard procedures.

A practical issue that will need to be addressed is the mechanism by which the Tribunal could be provided with sufficient resources and support. The Council agrees with the recommendation made by Robert McComas in his supplementary submission to this Committee, that if ACCC staff were to provide this support, it would be necessary to implement a system whereby when they were assisting with a Tribunal authorisation, ACCC staff would work under the supervision of the Tribunal, and follow its procedures.[33] Such a mechanism is necessary to ensure that in practice, Tribunal matters do not become burdened with the same time consuming procedures which have created the need for direct access to the Tribunal in the first place.

Ultimately, it is the requirement for speed and certainty (finality) that is the overriding concern in respect of merger authorisations (and other appropriate conduct) and direct access to the Tribunal is the most efficient way of achieving this desired and necessary outcome.

8. Governance

The ACCC is charged with carrying out a range of many differing roles and functions. Given the range and nature of these roles and powers, including the inherent tension between some of them (eg enforcement and adjudicatory roles), it is hardly surprising that the way in which the ACCC manages these differing roles is attracting close attention.

The Council is of the view that the Committee should take this opportunity to re-visit the structure of the ACCC and its processes to see whether they are adequate given the

[33] W Robert McComas, Consultant, Clayton Utz, Supplementary Submission to the Committee of Enquiry, at p13

ACCC's present position. The key governance issues for consideration include transparency, demarcation of roles, accountability and review mechanisms.

8.1 Possible scope for re-structuring

Arguments have been made for separating the functions of the ACCC into separate bodies, for example, along the lines of investigation and enforcement, however at this stage, the Council does not support this option, and considers that this would give rise to other issues and problems of its own.

In the Council's view, the opportunity should first be taken to explore the possibility of developing the ACCC's governance arrangements in a way that will make them more transparent and introduce clearer demarcation and accountability in critical areas such as the exercise of investigative and enforcement powers.

8.2 United States position

By way of comparison, prominent US regulatory bodies such as the FTC and the SEC have clearer differentiation between staff work and ACCC decision-making and some internal quasi-judicial review steps. Refer for example to the following statement from an article headed '*SEC Chief to Shift Role*" in the New York Times on 17 July 2002.

"Mr Pitt and the other commissioners are not involved in the day-to-day handling of enforcement proceedings, which are left to career officials. But the commissioners do play crucial roles in authorising investigations and in ultimately deciding whether the agency should bring or close a case."

More transparency in the way that functions are handled within the ACCC, and about the decision-making and review framework, could assist in reducing concerns about the way in which the ACCC exercises its powers.

8.3 EC Position

The EC have recently issued a Green Paper on Merger Reform and called for public comment. One of the issues that has arisen in response to this Green Paper is that of due process. In its summary of the responses received, the EC has stated:

"Criticism focuses particularly on the fact that decisions in merger cases are taken by the same body (the Commission) that carries out the fact-finding investigation."[34]

The Commission also notes that most submissions have called for changes to the role of the hearing officer, to enhance his or her independence, and some go so far as to call for the elevation of the position to what would effectively be a new instance of appeal.[35] In addition, the Commission notes that many submissions propose changes that attempt to reconcile what is seen as an inherent conflict between the Commission's role as investigator and decision maker, with many stressing the importance of a "fresh pair of

[34] Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("Merger Review"), Summary of Replies Received, at para 190

[35] See n12 above, at para 197

eyes" to critically review the merits of the investigators' conclusions throughout the proceedings.[36]

Clearly, many of the governance issues that the ACCC are currently facing are also being addressed by the EC.

8.4 Recommended reform

In the Council's view, the concerns that have been expressed in relation to the governance of the ACCC would be best met through the Committee recommending an amendment to the Act which would require the ACCC to issue a set of internal guidelines along the lines suggested by the Committee in relation to its processes of investigation and decision making. This amendment could be based on s75AV, which required that the ACCC implement GST price exploitation guidelines.

These internal governance guidelines should ensure that there is a clear differentiation between:

(a) 'staff work', that is, the investigatory functions carried out by the staff of the ACCC; and

(b) the decision making role of the ACCC, carried out by the Commissioners on recommendation from the staff.

An important element of these guidelines should be a clarification of the role of the Executive Committee.

The Committee could recommend that the effectiveness of the guidelines and the ACCC's adherence to them be reviewed in 2-3 years time. If, at that time, the view was that this approach had not achieved the degree of detachment and accountability currently sought by some, then some of the more intrusive suggestions may have to be revisited.

However, the Council considers that the two roles of 'staff work' and enforcement should not be totally isolated from each other. Indeed, key efficiencies would be lost if the Commissioners ceased to be at all involved in overseeing the investigatory functions of the ACCC through receiving reports, approving further work and where appropriate speaking to the parties where requested.

In addition, the Council considers that a senior ACCC officer should be appointed as an individual point of informal review. Historically, members of the Council have used the CEO of the ACCC for this purpose, and it may be that the CEO would be an appropriate person to appoint as the review officer. The review officer would serve as a point of contact for parties who have concerns about the conduct of the ACCC in carrying out either its investigative or decision making functions. Parties could approach the review officer and ask him or her to look into particular conduct on the part of the ACCC and report back to the requesting party.

As a result, the review officer would become a focal point of information about areas of concern in relation to the ACCC's conduct. Accordingly, it may also be appropriate for him

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[36] See n12 above, at para 199

or her to supplement the internal governance guidelines if additional issues of concern arise in relation to the ACCC's conduct.

9. Section 155 Notices

The Committee has also made a further inquiry in relation to the Council's recommendation that to exercise its power to enter premises and inspect and copy documents, the ACCC should be required to have a Federal Court Judge issue a warrant of entry, on the grounds that he or she is satisfied that the documents are in danger of imminent destruction or concealment.

9.1 Power in s155(2)

The power conferred on the ACCC under s155(2) is merely to enter premises to inspect and copy or take extracts of documents, where the ACCC has reason to believe that a person has engaged in conduct that constitutes, or may constitute, a breach of the Act. The Committee has asked the Council to consider the submission made by Telstra, that competition authorities in New Zealand, Canada, the US and the UK are required to obtain judicial approval to exercise similar powers.

9.2 New Zealand

In New Zealand, the power conferred on the Commerce Commission under s98A of the Commerce Act is somewhat different than the power conferred by s155(2) of the Act. Section 98A of the Commerce Act authorises the Commerce Commission to search premises under a warrant, for the purpose of ascertaining whether a person has engaged in, or is engaging in conduct that contravenes the Commerce Act.

A judge or registrar may issue such a warrant under s98A(2) where he or she is satisfied that there are reasonable grounds to believe that a search is necessary to ascertain whether a person has contravened the Commerce Act.

9.3 Canada

Section 15(1) of the Competition Act requires the Director of Investigation and Research (***Director***) to obtain a warrant to enter and search premises and copy or seize documents. Such a warrant may be issued by a judge where he or she is satisfied that:

- an offence has been or is about to be committed; and
- there are, on the premises, documents that will provide evidence with respect to that offence.

However, pursuant to s15(7), the Director may enter and search premises and copy or seize documents without a warrant, if there are reasonable grounds to believe the two elements set out above, and it would not be practical to obtain a warrant due to exigent circumstances, that is, because the delay necessary to do so would result in the loss or destruction of evidence.

9.4 US

Section 6 of the Federal Trade Commission Act (***FTC Act***) relevantly permits the FTC to investigate the organisation, business, conduct, practices and management of any person, partnership or corporation. Section 9 of the FTC Act further authorises the FTC to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation". If a party fails to comply with a subpoena, the FTC may seek enforcement of that subpoena in any district court within the jurisdiction of the investigation.

In *FTC v American Tobacco Co* (US Sup Ct 1924) 264 US 298, the Supreme Court considered the scope of the powers conferred by s6 and s9 of the FTC Act. It held that these powers do not confer on the FTC unlimited and unrestricted powers to examine and inspect the books and records of a corporation under investigation, and the right to copy from them, without some basis of fact to establish a charge of wrong-doing. The Court held that if the legislation purported to do so, there would be a serious question of its constitutionality under the Fourth Amendment, which provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

9.5 UK

Under the *Competition Act 1998 (UK)* (***Competition Act***), there are two methods for entering premises.

(a) Power to enter premises without a warrant

Section 27 of the *Competition Act* allows an investigating officer, who is authorised by the Director to do so, to enter premises in connection with an investigation, where they have given the occupant a written notice which gives at least 2 working days' notice, indicates the subject matter and purpose of the investigation and indicates the nature of alleged offences. However, such notice is not necessary where the Director has a reasonable suspicion that the premises are occupied by a party to an agreement under investigation, or an undertaking whose conduct is being investigated, or if the investigating officer has taken all steps reasonably practicable to give notice, but has not been able to do so.[37] Where the power to enter is exercised without notice, the investigating officer must still produce evidence of his or her authorisation, and a document setting out the subject matter and purpose of the investigation and the nature of the alleged offences.[38]

Where an investigating officer exercises this power to enter premises, he or she may (among other things):

- require any person on the premises to produce and explain any document relating to the investigation; or

[37] Section 27(3), *Competition Act 1998* (UK)

[38] Section 27(4), *Competition Act 1998* (UK)

- take copies of, or extracts from any document which is produced.

(b) Power to enter premises with a warrant

Alternatively, the Director may apply to a court for a warrant allowing them to enter and search the premises, using such force as is reasonably necessary, and do a number of other things, including taking possession of documents. Section 28 of the *Competition Act* sets out the circumstances in which a judge may issue such a warrant, including where the judge is satisfied that:

- there are reasonable grounds for suspecting that there are documents on the premises, production of which has already been required, but which have not been produced; or
- which, if they were required to be produced would be concealed, removed, tampered with or destroyed.

9.6 Conclusion

The legislation in New Zealand, Canada, the US and the UK confers on the regulator, powers of entry which are different to, and in many instances, broader than those conferred on the ACCC under s155(2). As a result, it is not possible to draw a direct parallel between these overseas provisions and our law.

However, what is clear from a consideration of the position in each of these jurisdictions is that in each of them, regardless of whether the legislation confers on the regulator a full search power or a more limited entry power, the Courts play some supervisory role in relation to the exercise of these powers by the regulator. The relevant Canadian provision is perhaps closest to s155(2). Accordingly, it is interesting that the regulator is required to obtain a warrant to exercise this power, except in exigent circumstances.

The Council is of the view that consideration of the position in other jurisdictions affirms that there is a role for the Courts in the exercise by the ACCC of the power to enter premises and inspect and copy documents. To exercise this power under s155(2), the ACCC should be required to have a Federal Court Judge issue a warrant of entry, on the grounds that he or she is satisfied that the documents are in danger of imminent destruction or concealment.