



**SUBMISSION
TO THE
PRODUCTIVITY COMMISSION**

Inquiry into Broadcasting

August 1999

Executive Summary

This Submission from the Australian Competition and Consumer Commission (the Commission) is made to the Productivity Commission for its Inquiry into Broadcasting.

The Productivity Commission's *Issues Paper* indicates that the scope of the inquiry is most extensive. The Productivity Commission is to advise on courses of action to improve competition, efficiency and the interests of consumers in broadcasting services, and should focus on social, cultural and economic dimensions of the public interest. Under the Competition Principles Agreement, any legislation that restricts competition should be retained only if the benefits to the community as a whole outweigh the cost and if the objectives can only be met through restricting competition.

The Commission's submission addresses only those issues related to competition and the economic dimensions of public interest and ownership and control issues relevant under the provisions of the *Trade Practices Act 1974* (the TPA).

The Commission expresses no view on any of the various options canvassed in this paper for regulation of the broadcasting industry. However, the Commission is of the view that the industry should not in any way be exempted from the application of the TPA. It should apply to this industry equally as it applies to other industries reflecting the fundamental principle embodied in the Competition Principles Agreement of universal and uniformly applied rules of market conduct.

The Commission considers that all regulation that affects competition in broadcasting should be examined in the inquiry, not only the legislation referred to it for inquiry (ie, the *Broadcasting Services Act 1992*, the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, the *Radio Licence Fees Act 1964* and the *Television Licence Fees Act 1964*).

Digitalisation and convergence are creating many new competitive dynamics in broadcasting as well as other industries such as telecommunications and the print media. Digitalisation and the trend to full service networks providing bundles of distinct services are likely to provide significant economies of scale and scope and to increase opportunities for new entry. However, for the benefits to be fully realised, access to digital networks is shaping as a potentially major issue for content service providers. In certain circumstances, access to the content itself has important competitive consequences for infrastructure competition and the range of services available in Australia, particularly regional Australia. In the Commission's view, convergence requires that the Productivity Commission look beyond the narrow range of broadcasting legislation referred to above.

The Commission's submission considers a number of possible courses of action that might be undertaken as a consequence of the Productivity Commission's Inquiry. Each option operates on the assumption that the provisions of the TPA apply as they presently do. In brief, the options are:

- *Continue to apply the present regulatory arrangements in the broadcasting industry.* The difficulties associated with this approach include the inconsistent coverage of the current rules and their failure to be flexible in the face of changes in technology and in the media marketplace.
- *Extend the coverage of the cross-media ownership laws and other regulatory constraints to emerging services and service providers.* This approach similarly fails to address the lack of ongoing flexibility required for regulation of an evolving media sector. It is desirable that future development and opportunities are enhanced rather than inhibited by excessive regulation.
- *Apply the TPA in its present form and abolish any broadcasting specific regulation which restricts competition.* It is desirable that there be universal coverage of the TPA and that all industries are generally treated equally. However, there are problems with this approach. The merger provisions of the TPA would be unlikely to prevent concentration of media ownership which falls within different markets. Further, the TPA's focus is predominantly in the area of 'economic competition', rather than to the broader issues associated with the policy objectives of plurality and diversity.
- *Apply the TPA with a mandatory public interest test for (major) media acquisitions and improved mechanisms to deal with access requests.* Under this option, the TPA would continue to apply as it presently does. However, a media acquisition would be subject to additional scrutiny by the Commission and would be prohibited unless the parties demonstrated to the Commission that the acquisition was in the public interest. There would be a right of appeal to the Australian Competition Tribunal. It may also be necessary to strengthen the access provisions of the TPA to ensure that new entrants could obtain distribution of new information and entertainment-based services to households. Various problems arise under this option, including the difficulty of prescribing the relevant social criteria that are to be taken into account under the special public interest test. Another problem is the procedural complexities in coordinating the current authorisation process under the TPA (which examines public benefit) with an additional public interest test.
- *Refer media acquisitions to a specialised agency for a public benefit analysis.* Like the previous Option, this approach prohibits a (major) media acquisition (even if it meets the requirements of the TPA) unless the parties to the acquisition show that it is in the public interest, and requires prescription of public interest criteria. However, it delegates the task of applying such criteria to a specialised agency. A similar approach is presently applied to certain other acquisitions (eg, foreign acquisitions). Again, this Option gives rise to certain procedural complexities in coordinating the Commission's authorisation process with the specialised agency's public interest analysis.

In this submission, the Commission's application of the relevant provisions of the TPA are examined in detail, with particular emphasis on the criteria which the Commission uses to determine the relevant market, and the criteria which the Commission uses to determine public benefit in the course of its authorisation work.

The Commission would take the general view that any regulation which protects existing firms in the broadcasting industry from competition should be carefully examined to ensure that the benefits from such regulation are in the public interest and that if such benefits do exist, they are attainable only via restrictions on competition.

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ATTACHMENTS:

A: Summary of the *Trade Practices Act*, April 1999

B: The Commission's Merger Guidelines, revised July 1996

C: Market definition in media sectors

D: The authorisation process

E: Telecommunications access regime

1. Introduction

The Australian Competition and Consumer Commission (the Commission) is the independent statutory authority responsible for compliance with, and enforcement of, the *Trade Practices Act 1974* (the TPA), the statutory object of which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.¹

The Commission's stated objectives include to:

- secure compliance with the TPA by responding to complaints and inquiries and by observing market conduct and initiating action when required;
- foster competition, fair trading and protection for consumers by taking initiatives to overcome market problems; and
- inform the community at large about the TPA and its specific implications for business and consumers.

The Commission makes this Submission in response to an invitation by the Productivity Commission to assist with its Inquiry into the broadcasting industry. The Inquiry is aimed at determining the best course of action to improve competition, efficiency and the interests of consumers in broadcasting services.

A number of the issues raised in the Inquiry do not directly involve competition matters. The Commission's submission relates only to competition policy and seeks to outline the kinds of options which might be considered should there be changes in the *Broadcasting Services Act 1992*, *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, *Radio Licence Fees Act 1964* and the *Television Licence Fees Act 1964* (the 'legislation').

The Commission proposes that there be no changes to the TPA whatever course of action may be adopted as a result of the Inquiry, except to the extent that legislation may be drafted to allow for an additional public interest test that enables the Commission or other body to take account of broadcast specific competition concerns, and to the extent that additional access provisions may be needed to ensure competitive entry into broadcasting and related industries.

The Submission discusses a number of courses of action which the Commission considers are possible and discusses various competition and administrative issues raised in the context of these options. Each option operates on the assumption that the provisions of the TPA continue to apply as they presently do, reflecting the fundamental principle embodied in the Competition Principles Agreement of universal and uniformly applied rules of market conduct (a point that is discussed in more detail on pages 13-14).

¹ Section 2 of the TPA.

This Submission examines the current cross-media ownership rules, and the need for cross-media ownership regulation, the current foreign ownership restrictions and the other regulatory barriers to the entry of new competitors in broadcast and related markets. Given the public interest imperative of competition and the role that the merger provisions of the TPA play in determining the structure of industries, the application of these provisions is also discussed. The submission details the criteria which the Commission uses to determine the relevant market, and the criteria which the Commission uses to determine public benefit in the course of its authorisation work.

It should be noted that the Commission has responsibilities under legislation other than the TPA, including under Part 7 of the BSA which requires the Commission to report to the Australian Broadcasting Authority (the ABA) in terms of the merger and authorisation provisions in the TPA on the allocation of pay TV broadcasting licences to applicants. In addition, the ABA is required under s 96A of the BSA to consult with the Commission in monitoring cross-media ownership of pay TV licence holders.

Certain forms of media, particularly new and developing media outlets, fall outside the scope of the BSA. Magazines, narrowcast services, Internet and on-line services all fall outside the cross-media ownership provisions of the BSA. The lack of consistency of coverage is an important concern given the consensus to achieve a universally applied national competition policy.

2. The need for regulation

The *Issues Paper* inviting submissions to the Inquiry states that the legislation under review seeks to provide a regulatory environment that varies according to the degree of influence of certain services upon society and which facilitates the development of an efficient and competitive market that is responsive to audience needs and technological developments. It also seeks to protect certain social and cultural values.

It is generally considered that competition in the media is in the national interest, and that concentration of ownership can act against the Government's stated policy objectives of plurality, diversity and competition. In the Report of the Inquiry into the Ownership and Control of Newspapers in Victoria, the two major dangers associated with a concentration of ownership were considered to be 'first, loss of diversity in the expression of opinion, and second, the power of a very few men to influence the outlook and opinions of large numbers of people, and consequently the decisions made in society...'²

The goal of a healthy democracy is promoted by plurality, diversity and competition in the media and this goal should supersede any industrial or commercial goal of its participants. The public benefits that constitute and flow from plurality, diversity and competition in respect of media ownership may require that there be some form of media regulation. Market forces may

² Norris, the Hon. J G, *Report of the Inquiry into the Ownership and Control of Newspapers in Victoria*, Report to the Premier of Victoria, 15 September 1981, referred to in the Report from the House of Representatives Select Committee on the Print Media, *News and Fair Facts*, AGPS, March 1992, at p 192.

be insufficient to bring about the required plurality, diversity and competition in the media. For example, in the Report of the House of Representatives Select Committee into the Print Media (the 'Print Media Report') of March 1992, it was accepted that economic forces arising largely from economies of scale inherent in newspaper publishing, inexorably favour monopoly newspapers in a particular market segment, and group ownership of newspapers in separate markets.³

It should be noted at this point that the Print Media Report also recommended a change in the test for proscribing mergers from one of 'dominance' to one of a 'substantial lessening of competition'. The Print Media Report's followed similar recommendations in two other inquiries.⁴ A change in the merger test was subsequently made in 1992. This change is of considerable importance for the media. The Print Media Report acknowledged that the dominance test had failed to preserve a desirable level of competition in some sections of the print media.⁵ The Report further acknowledged that the significant expansion of broadcasting services and the introduction of cross-media ownership restrictions balanced in many ways the effects of concentration in print media, but did not justify further increases in newspaper concentration.⁶

If some form of regulation is needed, the question arises whether the policy objectives are achieved and sustained by the application of the current rules, or whether the institution of some other regime might be more suitable.

Regulatory models applied to the broadcasting industry have often been based on the assumption that there were substantial barriers to entry, most of which related in some way or another to scarcity of spectrum capacity. This has particularly been the case in Australia with regard to the regulation of free-to-air TV. Within the UHF and VHF bands reserved for television broadcasting, it has generally been accepted that there is only sufficient capacity in most areas for six wide-area channels.

However, despite there being room for one more channel and despite a number of proposals for a 'sixth channel' in capital cities, the sixth channel has only ever been filled on a temporary basis by community broadcasters. This decision has usually been based on considerations about the 'viability' of a fourth commercial free-to-air broadcaster. Indeed, until the BSA was enacted in 1992, 'viability' was a licence criteria which had been used anti-competitively to restrict entry. One consequence is that there has been no significant new free-to-air entry in capital city markets since the mid-1960s.

³ Report from the House of Representatives Select Committee on the Print Media, *News and Fair Facts*, AGPS, March 1992 at p xvi.

⁴ House of Representatives Standing Committee on Finance and Public Administration, *A Pocket Full of Change*, AGPS, Canberra, November 1991; Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions - Adequacy of Existing Legislative Controls*, AGPS, Canberra, December 1991.

⁵ Report from the House of Representatives Select Committee on the Print Media, *News and Fair Facts*, AGPS, March 1992, at p xxiii.

⁶ *Id.*

If there are substantial entry barriers in the newspaper market and in the free-to-air TV market, then an argument may exist on diversity grounds to enforce cross-media ownership restrictions. Further, it may be appropriate to impose social obligations on those who have been given access to scarce spectrum. Thus, regulation of content via quotas for children's programming, local content provisions and regulation of advertising on commercial free-to-air TV has sometimes been justified on some form of 'social obligations' grounds. Regulations regarding 'fairness' and 'editorial balance' have often been imposed on free-to-air TV broadcasters but not imposed on other media on the grounds that free-to-air broadcasters use a scarce public resource.

In the absence of scarcity of spectrum, it would seem therefore that barriers to entry of new free-to-air broadcasters would be low, concerns over concentration may be misplaced and the justification for much of the regulation would be diminished. The imminent arrival of digital free-to-air broadcasting and digitalisation generally are all removing capacity constraints as a major barrier to the entry of new suppliers. New suppliers will be able to supply a range of services, some of which may compete with free-to-air TV and radio. These issues are discussed in the next section.

A related issue also discussed is vertical integration. Until relatively recently, barriers to entry in broadcasting have been high. These barriers were essentially regulatory and spectrum capacity barriers and existed primarily at the distribution level.

It is unlikely that there are barriers to entry at an upstream production level. For example, there would appear to be no significant barriers to the creation of broadcast programming. Inputs into the creation of new intellectual property do not appear to be in short supply and there are numerous production companies which assemble and finance these inputs to create programming.

There are often vertical links between the producers of broadcast programming and the distributors of such programming. The distribution level is made up of the free-to-air television stations, the pay TV distributors and the radio broadcast stations. In Australia, the free-to-air TV broadcasters produce some of their own programming and purchase some from independent production companies. The major Australian pay TV distributors have ownership links to many of the channels which they distribute. In radio broadcasting, the distinction between production and distribution is blurred although radio stations generally have no ownership links to the major companies which produce sound recordings.

At the next vertical level are the domestic reception mechanisms which would include television and radio reception equipment and pay TV set top boxes and encryption devices.

It would seem that regulation of the broadcast industry would not be appropriate on competition grounds unless the barriers to entry at any one or more of the above levels were high. The most likely stage where barriers to entry would be high would seem to be at the distribution level, although as the broadcast signals switch to digital, set top box and encryption control may become an issue.

3. Broadcasting and convergence

The Productivity Commission's terms of reference require it to have '...due regard to the phenomenon of technological convergence to the extent that it may impact upon broadcasting markets'.

Technological convergence is largely brought about by digitalisation, whereby all electronic communications are increasingly being conducted as streams of the binary digits '0' and '1' rather than as analogue waveforms. As the Chief Executive of Cable & Wireless Optus, Mr Chris Anderson, notes:

*'...soon, every piece of information – voice, data, news, video, music, television, mail, weather and e-commerce – will be digital and most devices in the home or office will be able to read them.'*⁷

The Productivity Commission notes in its *Issues Paper* that technological advances are blurring the boundaries of what we normally associate with 'broadcasting'. A fundamental characteristic of broadcasting is that whatever is broadcast, it is broadcast on a passive 'point-to-multipoint' basis.

Digitalisation means that, on the delivery path to the home, 'point-to-multipoint' broadcasting services are increasingly being mingled with interactive 'point-to-point' services more characteristically associated with telephony and the Internet.

The ability to transmit both types of services down the same path and also be 'understood' by devices in the home or office has largely been made possible by agreement on the Internet Protocol (IP) which has standardised the procedures for transmitting digital signals over the Internet. As the Chief Executive of Telstra, Mr Ziggy Switkowski, has said:

*'...we will reach the point where virtually all communications products will be governed by the Internet protocol, where everything that moves will be digital signals, where voice communications are but a small part of a broader portfolio of digitised services...'*⁸

The convergence of 'point-to-multipoint' broadcasting services with 'point-to-point' telecommunications services into a more comprehensive electronic 'communications' service is changing the nature of broadcasting (and telecommunications) in a fundamental respect: a range of distinct services are increasingly being delivered over the one network ('full service networks').⁹ Further, these services are increasingly being marketed as bundled services, often with a discount if all services in the bundle are taken.

⁷ Cable & Wireless Optus first annual report, released 30 June 1999, referred to in *Sydney Morning Herald*, 1 July 1999, p 23.

⁸ 'CEO takes direct line on Net plans', the *Age*, 23 June 1999, pp C1 and C5.

⁹ For example, refer 'It's All in the CAN', *Australian Communications*, June 1999, pp 15-18.

Should digitalisation continue to create economic incentives for full service networks, access will increase in importance as a competition issue in broadcasting. In this respect, access has two concepts: access to distribution infrastructure and access to programming content. These concepts are discussed below.

(i) Access to distribution infrastructure

There are a potential number of digital delivery paths to the home or office: the traditional copper wire telephone network, the newer broadband hybrid fibre optic and coaxial (HFC) cable networks, satellite systems, terrestrial wireless networks using a variety of radiofrequency bands and the broadcasting spectrum reserved primarily for licensed television and radio broadcasters.

Once in the home or office, the appropriate customer premises equipment is required to make sense of all the digital bits and convert them back into an understandable format (video, audio or text) for the customer. To prevent free, fortuitous or unwanted reception, decoding of encrypted signals may be part of the process.

Because of its nature, pay TV broadcasting is encrypted to prevent free reception. Decoding is performed in decoder boxes (sometimes called set-top boxes or conditional access equipment) which are interfaced with the television set. Usually, proprietary decoding technology is used in these boxes.

Traditionally in Australia, broadcasters have provided their services free-to-air over the reserved broadcasting spectrum. Since the moratorium on pay TV was lifted in 1992, a number of pay TV broadcasters have commenced services using HFC cable networks and satellite systems (and, to a lesser extent, wireless MDS networks).

The capacity of the local loop based on copper wires is also being increased to an exponential extent through the use of advanced digital compression technologies known generically as DSL or digital subscriber loop. DSL will enable a great variety of data and video-based applications to be provided on copper wires in addition to traditional voice telephony services and offers an alternative means of providing entertainment services to customers on a more ubiquitous basis (as compared to HFC). The Commission mandated access to the local loop on 22 July 1999 enabling service providers to compete with Telstra in the provision of new services of this kind by deploying DSL technology.

It should be noted, however, that widespread deployment of DSL-based services will require considerable work by industry to establish the technical and operational rules under which such technologies can be used to ensure no undue disruption to other services which also use the copper wires. It is expected that this will mean DSL-based services are unlikely to be deployed widely until at least the latter part of 2000. In addition, some very high-bandwidth varieties of DSL that are particularly suited to high quality broadcast services are still some years away.

With the trend to full service networks, economies of scale and scope would be expected to increase. Should these economies be significant, it is likely that there would be fewer digital networks compared to the analogue world where each type of service was usually delivered over a discrete network. This may particularly be the case in respect of the high cost connections to individual homes or offices.

Ultimately, there may be only the one broadband connection to the home or office, with the infrastructure provider taking on a gatekeeper role in respect of all telecommunications (including broadcasting). In such circumstances, access to the digital distribution infrastructure (ie, delivery paths and customer premises equipment) would become critical to the commercial viability of a service provider. As the Chief Executive of Time Warner, Mr Jerry Levin, has been recently reported as saying ‘...content may be king, but distribution power is the power behind the throne’.¹⁰ This power resides in control of, or access to, the distribution infrastructure outlined above.

Access to distribution infrastructure has been an issue in telecommunications for a number of years. An access regime in Part XIC of the TPA deals with access issues in telecommunications (including broadcasting). An overview of the access regime is at **Attachment E**, together with an outline of the access regime’s one application to broadcasting: the draft decision by the ACCC to ‘declare’ the access regime as applying to the carriage of pay TV services over analogue cable networks.

It should be emphasised, however, that there is no automatic right of access. In certain circumstances only would access to digital distribution infrastructure be likely to be ‘declared’ in relation to broadcasting. This is true for telecommunications generally.

Obviously, automatic rights of access can create disincentives for investment in infrastructure, particularly if it is ‘leading-edge’ infrastructure designed to give a competitive advantage to the investor. The ACCC is required to take into account investment disincentives when considering access declarations.¹¹

On the other hand, the ACCC is required to have regard to whether access will promote competition in markets for carriage services and services supplied by means of carriage services.¹² Further, particular regard is to be had to the extent to which access would enable end-users to gain access to an increased range or choice of services.¹³

Competition is more likely to be an issue in those situations where there is vertical integration such that carriage and content provision is found in the one entity. In these situations, there are incentives for vertically integrated carriers to deny access to content providers who rely on access to their carriage services but who are competitors in downstream markets.

¹⁰ ‘The Battle for broadband control’, the *Financial Review*, 22 June 1999, p 64.

¹¹ Sections 152AB(2)(e) and 152AB(6)(c) of the TPA.

¹² Sections 152AB(2)(c) and 152AB(4) of the TPA.

¹³ Refer Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p 40.

A unique feature of telecommunications is that carriers who are competitive with each other inevitably must be able to access each others' networks to provide 'any-to-any connectivity'.¹⁴ 'Any-to-any connectivity' is a particular issue that the Commission must examine in deciding whether to declare a service for access.¹⁵

As explained in the Explanatory Memorandum to the legislation introducing the access regime, it is not intended that the regime impose access where existing market conditions already provide for the competitive supply of services. The ACCC notes that a number of telecommunications carriers are beginning to build distribution infrastructure in competition with the established carriers, Telstra and Cable & Wireless Optus.¹⁶

Furthermore, in relation to broadcasting, it is not expected that 'any-to-any connectivity' will necessarily be relevant because of the 'point-to-multipoint' or distributive nature of broadcasting. 'Any-to-any connectivity' is more relevant in respect of the 'point-to-point' telecommunications services such as telephony and the Internet.¹⁷

(ii) Access to programming content

By its nature, broadcasting relies on programming to broadcast. Content is king in the sense that there is little point in gaining access to distribution infrastructure if there is no content to distribute and compete with.

A particular current issue in pay TV is access to programming of sufficiently high quality to attract economically viable subscriber numbers. The industry in Australia developed largely on the basis of exclusive programming. For example, the AFL is currently only available on pay TV over the Optus Vision metropolitan cable networks and Austar's regional satellite and MDS networks (and its cable network in Darwin). It is not available on Foxtel's cable and satellite systems.

Exclusivity can be pro or anti-competitive depending on the circumstances. At the time, the ACCC took no action against program exclusivity primarily for the reason that competition was emerging on the basis of this industry structure.

However, that competition model appears to be failing. It appears that the main pay TV broadcasters cannot sustain competition on the basis of exclusive programming and delivery systems (unless, of course, one broadcaster gains by attrition exclusive control over most key programming and dominates the industry). Interestingly, Optus Vision announced on 16 June

¹⁴ By definition, telecommunications involves communication between two distant points (ie, 'communication from afar'). The very nature of telephony and the Internet requires 'any-to-any connectivity' (ie, the ability of end-users connected to one network to communicate with end-users connected to another network). Thus, to provide a viable service, a provider of telephony or Internet services must be able to establish a seamless web of interconnectivity across networks.

¹⁵ Sections 152AB(2)(d) and 152AB(8) of the TPA.

¹⁶ For example, refer 'New telcos put big players on hold', *Financial Review*, 5 July 1999, p 24.

¹⁷ Refer Explanatory Memorandum, *op. cit.*, p 41.

1999 that it had struck non-exclusive supply agreements with its movie studios. The studios may now supply their content to Foxtel provided Foxtel reciprocates.

With the apparent failure of competition based on exclusivity, the issue arises as to whether the continued grant and exercise of exclusive pay TV program rights may be used to hinder or foreclose competitive entry into the industry. The ACCC has considered the issue in terms of a possible breach of Part IV of the TPA. However, the issue is problematical given that exclusive programming is more or less split evenly between the main pay TV competitors at the present time.

In overseas jurisdictions such as the US and the UK, the issue of access to content by pay TV broadcasters has been dealt with through specific measures rather than the general application of competition law.

Apart from the potential effect of continued program exclusivity at the retail level of pay TV service provision, access to content may also be critical to competition in the supply of digital distribution infrastructure. Through its Part IV enforcement work, the ACCC has become aware of the critical importance of pay TV programming as a revenue stream to help fund the roll-out of broadband cable networks.

It was a critical factor in the ACCC's decision to oppose the merger of Australis and Foxtel in October 1997. It was a complex case involving the anti-competitive effects of a merger between two pay TV companies on competition in not only pay TV but also local telephony and broadband distribution infrastructure.

In its injunction proceedings before the Court, the ACCC argued that there are strong marketing links between pay TV and telephony such that the ability to bundle both services by the one supplier significantly improves the take-up rate for each service.

The Commission further argued that the revenue streams from pay TV and telephony (and potentially the then emerging Internet services), together with the associated economies of scope in providing bundled services over the same network, provided the necessary funding for the high-cost roll-out. Without the necessary revenue streams, it was argued that Optus Vision would be substantially hindered or prevented from fully servicing and maintaining its broadband cable network, making it likely that Optus Vision would have withdrawn from providing pay TV and local telephony services over its network in direct competition to services supplied over Telstra's networks.

Since that case, bundling has continued in economic importance.¹⁸ It has recently been reported that 60 per cent of Optus Vision's pay TV subscribers were also taking Cable & Wireless Optus' telephony or data services.¹⁹ The metropolitan cable pay TV broadcasters have bundled the five free-to-air channels (ABC, SBS, Seven, Nine and Ten) in their multi-channel pay TV service (the smaller channel capacities of satellite and MDS limit the ability of satellite and MDS broadcasters to carry free-to-air television feeds).

¹⁸ For example, refer 'Optus bundles up for business', *Business Review Weekly*, 25 June 1999, pp 30-32.

¹⁹ 'Optus secures new US film deal', *the Age*, 17 June 1999, p B1.

Importantly for infrastructure competition in regional areas, the economics of multiple revenue streams and the marketing strategies of bundling have underlaid digital broadband cable roll-outs and planned roll-outs by a number of operators or potential operators in regional Australia, including:

- Neighborhood Cable, which has a broadband network rolled past over 8 000 households in Mildura and which has plans for roll-outs in other regional centres;
- ACTEW, an electricity and water utility which has constructed a pilot network in Canberra and is currently conducting trials. Depending on the technical and economic success of the trial, ACTEW plans a Canberra-wide deployment commencing later this year; and
- NorthPower, an electricity utility which is in the final stages of developing a business case for a network in northern New South Wales.

A critical element in all their roll-outs is their bundling strategies and critical to their strategies is access to programming of sufficiently high quality to attract economically viable subscriber numbers.

In short, access to programming is one of the keys to infrastructure competition and competition in service provision (including broadcasting services) in regional areas of Australia.

(iii) Implications for broadcasting regulation

The convergence of broadcasting and telecommunications will accelerate in the next few years and firms currently operating in one sector will find considerable economies of scope emerging, enhancing their ability to move into other sectors. For example, digitalisation may give existing free-to-air broadcasters the opportunity to provide more than one signal which may then enable them to compete more effectively against multi-channel pay TV providers and information/data providers. Digitalisation may also provide sufficient spectrum to allow new entrants into broadcasting and information delivery markets.

Under such circumstances existing regulatory barriers to entry may have less relevance in ensuring competition and diversity in broadcasting and other media services than they had in the past while their maintenance may perhaps inhibit opportunities for firms to take advantage of various economies of scope which may develop.

It may be that in the absence of regulatory barriers to new entry, digitalisation will enable substantial new entry in broadcasting. Such new entry would not prevent governments from imposing regulation for social objectives as they saw fit. For example, governments could impose various content obligations while allowing entry. Potential entrants who were able to meet the social and cultural objectives of government broadcast policy would be free to enter the market. If the market is too small to support a large number of broadcasters who meet these objectives, some firms would leave the market. However, it may be that the new entrants could meet these objectives more efficiently than the incumbent firms. Removal of

the impediments to entry would allow the most efficient firms in the market to flourish while the existing restrictions may provide insufficient incentives for competition.

It may be that the removal of entry restrictions into broadcasting markets does not lead to any increase in the number of free-to-air TV networks in the longer term. However, the current regulatory regime protects incumbent firms rather than allowing competitive forces to determine which market players survive.

Digitalisation has the potential to considerably enhance entry opportunities and expand competition and consumer choice in broadcasting and related services if entrants are able to decide how best to use the spectrum available to them. Regulation of the types of activities which the spectrum can be used for may restrict the opportunities for the development of new products and services.

In a scenario where there was free entry into broadcasting and emerging information services markets, new players would take advantage of opportunities. Consequently, concerns regarding lack of diversity if the cross media restrictions were abandoned, and concerns regarding levels of foreign ownership would be diminished. Of course, the abolition of some regulations in the industry and the maintenance of others may lead to a situation where neither competition nor diversity were enhanced. Thus the maintenance of all existing regulation may be preferable to a situation where there are only changes to specific broadcast regulation such as cross media rules and regulatory barriers to entry are maintained.

As mentioned, digitalisation is leading to the convergence of broadcasting and telecommunications services into a more comprehensive 'communications' service. Where there is a trend towards full service networks with significant scale and scope economies, there is also likely to be a trend to fewer digital networks, with possibly only the one broadband connection to the home or office. In such circumstances, the broadband infrastructure provider would take on a gatekeeper role. Access to these 'gates' could therefore be critical to effective competition in emerging markets.

While an access regime exists in Part XIC of the TPA for declared telecommunications services (including broadcasting), it should be emphasised that specific criteria would need to be met for declaration and that issues of regulating nascent technologies and services would need to be addressed. Further, carriers or carriage service providers may apply for exemption of standard access obligations on the grounds that such an exemption would promote the long-term and substantial benefits to end-users of carriage services and services supplied by means of carriage services.

In the light of the above general comments on the competition issues which the Commission sees as relevant, this paper now develops a number of regulatory options.

Some proposals for change such as the abolition of the current restrictions on cross-media ownership might involve the institution of some new regulatory mechanisms such as public interest analysis by the Commission or some other body. This analysis would take account of the concerns of the public particularly in regard to those media of widest appeal and influence. This to a certain extent may supersede the functions of the present licensing regime. Some consideration might therefore need to be given in any review to the appropriateness of the

present licensing system set out in that Act. Further, the continuing emergence and convergence of new technologies may have an impact on the balance of influence in the media as a whole (eg, digitalisation is reducing the scarcity of channel capacity, thus contributing to the emergence of a greater number of services), adding to the need to reconsider the present licence categorisation of broadcasting services within the BSA.

4. Options

(i) Status quo

Option 1 Continue to apply the existing regulatory arrangements

It could be argued that there are inherent difficulties in continuing to apply the present regulatory regime. The current rules lack flexibility in achieving the Government's public interest objectives and may inhibit the development of new products and services which could be provided by firms in related sectors. Continuing advances in communications technology, the globalisation of markets, and the convergence of previously separate technologies (eg, telecommunications and the media) evidence the need to have some flexibility in the regulatory environment. Moreover, if legislation has to be changed fairly frequently to take account of changing circumstances in this industry, the legislation is particularly vulnerable to influence which may cause the public interest to be neglected.

(ii) Expand coverage of *Broadcasting Services Act*

Option 2 Define and extend the coverage of the cross-media ownership laws

One question which arises is how widely cross-media restrictions should be applied. Given that the aim of cross-media ownership restrictions is to encourage diversity in control of the more influential media, it would seem to be necessary to give a wider ambit to the coverage of media than the cross-media ownership rules presently envisage. As it happens, several important forms of media are not included for one reason or another. For example, magazines, which can command a wide and various readership and which can be no less influential than newspapers, are not covered by the cross-media ownership rules. Nor are Internet service providers, which are capable now of transmitting content analogous to that received through current media outlets. There are also no cross-media ownership restrictions applying to pay TV (although, under s96A of the BSA, the ABA is required to monitor cross-media ownership in consultation with the Commission). The rapid changes that are occurring, particularly in the electronic media, make it difficult to specify what should be included in any media-specific legislation.

Defining and extending the coverage of the present cross-media ownership laws to account for other forms of influential media not presently covered would appear to be only a temporary solution to the problems that arise from a lack of flexibility in the cross-media ownership rules. The cross-media ownership laws are likely to remain no less rigid, and the prospect of the rules not taking account of changing circumstances in the future still remains. They may also

still be vulnerable to political influence, and they may still be capable of evasion if they take a very specific form.

Another problem associated with Options 1 and 2 is that they both require some delineation of what is envisaged by the term 'media'. If specific definitions are chosen, there is the possibility that the rules may at some stage fail to cover certain areas, just as the present rules appear to be inconsistent in their coverage. On the other hand, by defining the term broadly, gaps in coverage may develop through which media providers may be able to avoid regulation.

There appears to be general recognition of the great dynamism and innovation in media, and in particular electronic media. It is an industry in constant transition. There is a trend towards convergence of technologies, services and enterprises in the media sector. It is therefore desirable that any review of broadcasting regulations seeks to ensure that the future development and exploitation of the many opportunities in the media are not foreclosed by an inappropriate regulatory environment.

(iii) Apply existing *Trade Practices Act*

Option 3 Apply the Trade Practices Act in its present form and abolish broadcast industry specific regulation.

This option would arguably remove any discontinuity of policy and duplication of function. Further, the TPA has the advantage of being a flexible and responsive piece of legislation. It also has the advantage of being a statute of general and universal application, consistent with the principles of a national competition policy.

One of the most important features of competition policy in Australia this decade has been its extension to cover every part of the product market. In 1991, all Australian Governments agreed that:

- no participant in the market should be able to engage in anti-competitive conduct against the public interest;
- as far as possible universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership;
- conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review, to demonstrate the nature and incidence of the public costs and benefits claimed.

These principles were fleshed out by the National Competition Policy Review Committee in 1993, and subsequently endorsed by the Commonwealth, States and Territories in subsequent agreements.²⁰ The principles were embodied in major changes to the TPA at Commonwealth level and complementary legislation at State and Territory level that came into effect in July

²⁰ The National Competition Policy Review, *National Competition Policy - Report to the Independent Committee of Inquiry*, AGPS, August 1993.

1996. As a result, the TPA now applies to public utilities, agricultural marketing boards, the professions, unincorporated businesses, the health sector and so on. It should be no surprise that the media is not exempt from the TPA. Apart from a small exception in relation to misleading statements reported in news publications (s65A), the TPA now applies in full to the media whether it be television, radio, newspapers, magazines, etc.

The TPA seems to be a particularly suitable piece of legislation to apply to this sector of the economy. It is based on very sound and enduring principles, is general in character and capable of adaptation to changing circumstances. As convergence occurs between industries, the TPA provides a set of principles that can respond to the fast evolution of the industries, and that are capable of adapting to changing market boundaries, new technology and globalisation.

However, there are problems with relying entirely on the provisions of the TPA to ensure that government's social as well as economic objectives are achieved. In the absence of cross-media ownership laws which at present preclude ownership of television and newspaper interests in the same licence area, the merger and acquisition provisions of the TPA may not prevent the consolidation of different media interests which fall within separate markets. For example, while the cross-media ownership rules may prevent a television operator from acquiring certain newspaper interests, it would appear *prima facie* that the TPA may be unable to prevent such an acquisition. An inability to prevent concentration of media interests may arguably limit diversity. Also, it may have adversely affect the opportunities for new entrants if cross-media ownership rules were removed while rules which limit new entry into broadcasting were maintained.

The reasons why the TPA may not always be a solution to issues of media diversity lies in an understanding of the TPA, the economic rationale behind the TPA, the principles established by the courts in applying the TPA and the approaches adopted by the Commission in enforcing the TPA. A summary of the TPA is contained at **Attachment A**. An outline of the TPA's rationale, the principles of application and the enforcement approaches of the Commission is contained in the Commission's *Merger Guidelines*, a copy of which is at **Attachment B**.²¹ At **Attachment C** may be found a discussion of market definition principles as they are applied to various media sectors, in particular the pay TV broadcasting sector.

The TPA is primarily concerned with the economic objective of promoting competition in markets for the ultimate benefit of consumers. In very general terms, the TPA achieves this by prohibiting conduct and mergers which are likely to 'substantially lessen competition in a market'. In relation to mergers, it must be a substantial market.

Market is the cornerstone for assessing anti-competitive effect. The courts have developed principles for defining markets. In very broad terms, if goods or services are considered to be close substitutes, they are considered to be in the same market. They are considered to be close substitutes if the price of one is increased and consumers substitute that one for a cheaper one. Thus, if there is anti-competitive collusion or a merger between all suppliers of

²¹ The *Merger Guidelines* were revised in July 1996. The Commission expects to release new revised Guidelines in the near future.

goods or services in the one market, it is likely that consumers will have no substitutes and be forced to pay 'monopoly' prices. It is stressed that this is a very general run-down of a complex area of law that is presented only for the purposes of the following discussion.

In examining anti-competitive conduct and mergers, the Commission's legal task is to examine each on a case-by-case basis at the time they occur. This is to allow the Commission not only to take account of the specific character of the transaction involved but also any changes in the industry at the time the conduct or merger is occurring.

In applying the TPA to competition in the media generally, it may often be the case that different media companies will be regarded as operating in separate markets following the application of market definition principles. Application of the TPA as it currently stands will not necessarily restrict cross-media ownership between two media companies operating in different media sectors (eg, electronic and print media) unless, for example, an acquisition of one media company substantially lessens competition in the market of another. It is arguable therefore that the TPA's concern with economic competition may be insufficient in fulfilling the social objectives of cross-media ownership restrictions.

An illustration of this is in the approach that the Commission would be likely to take if, say, a merger between a television operator and a newspaper publisher was proposed. Applying market definition principles, the answer to whether or not such an acquisition would be likely to substantially lessen competition is to ask whether the acquiring firm would be in a position to more easily increase its newspaper cover price or advertising rates. The answer is that this is unlikely. The capacity to raise newspaper prices is not made easier just because the owner of the newspaper happens to own a television station. It would be different if the acquiring firm owned another newspaper in the same market. In such circumstances, one of the major competitive constraints on prices could be removed.

Likewise, television and newspaper advertising may not compete for the most part. When the Commission looked at the possible bid for Fairfax several years ago by the Tourang Consortium (which included Consolidated Press Holdings), it made very extensive inquiries of advertisers, advertising agents and the newspaper, television and magazine industries to determine whether or not there was competition between them for advertising. The general answer was that there was little competition other than at the margin. The television station owner was seen as a new entrant into the newspaper industry and, as such, the newspaper industry was seen as competitively separate from television.

In another matter involving the issue of new free-to-air licences in Darwin and regional Western Australia, the Commission undertook extensive market analysis and concluded that newspaper and radio advertising did not generally compete with advertising on free-to-air TV.

However, given the changing nature of media markets, market definition issues will need to be looked at separately in each case to assess the degrees of competition between different types of media for advertising revenue. For example, technical convergence is reducing the distinctions between previously separate markets. On the other hand, new technology has brought with it new and different advertising markets that may now also need to be considered.

It might be argued that an acquisition of a newspaper by a television owner would reduce competition in the market for ideas. Whether this is true or not, it is unlikely in present circumstances to be relevant under the TPA which is concerned with ‘economic competition’. The media is not simply an industry producing consumer goods or services. Its broader influence on the ideas and information that permeate a society gives it a greater significance for the well-being of a democracy than any measurement of its economic influence can account for. There are therefore some reasons to argue that something more is needed to satisfy the broader concerns that are associated with acquisitions in the media.

(iv) **Apply *Trade Practices Act* with public interest test**

Option 4 Apply the Trade Practices Act with a mandatory public interest test for (major) media acquisitions

Under this Option, the provisions of the TPA would apply as they presently do to acquisitions in other industries. In addition, legislation would require that any media acquisition above a certain size be notified in advance to the Commission. It would be prohibited unless the parties to the acquisition show it to be not contrary to the public interest. There would be a right of appeal to the Australian Competition Tribunal.

Such a proposal would work as follows. Upon notification of a merger proposal, the Commission would apply its standard *Merger Guidelines*. If, after applying the guidelines, the Commission took the view that the merger would not lead to a substantial lessening of competition, the merger proposal would then be examined under a public interest test. Under such an arrangement the parties proposing the merger would be required to show that the proposal was not contrary to the public interest.

If the Commission considered that the proposed merger was likely to lead to a substantial lessening of competition, the Commission would inform the parties of its view and there would be no public interest considerations. The parties may then perhaps modify the merger to meet the concerns of the Commission.

If the parties were unable or unwilling to address the Commission’s concerns by modifying the proposal, the Commission would apply to the Federal Court for an injunction, penalties and/or divestiture.

It is also possible that the parties might apply for authorisation. The authorisation process is outlined at **Attachment D**. Essentially, the Commission can exempt mergers from the application of the prohibition on anti-competitive mergers (as well as exempting other conduct from the other prohibitions) if it is likely to result in such a benefit to the public that they should be allowed to take place. Once authorisation is granted, the merger becomes immune from the application of the TPA by other parties, including private litigants.

Under this Option, the Commission would examine any authorisation application and take into account the standard authorisation approach to ‘public benefit’ plus any new legislated ‘public interest’ criteria. A problem is that there is no obligation under the TPA that requires a party to apply for authorisation. Accordingly, if cross-media acquisitions are unlikely to breach the

TPA for the reasons discussed above, it is unlikely that parties would apply for authorisation and therefore issues of public benefit could not be considered.

A firm engaging in potentially anti-competitive conduct may decide not to use the authorisation process (and thus risk court action) by entering into undertakings with the Commission that resolve its concerns. The ability of the Commission to accept undertakings would not be affected by the adoption of this Option. However, firms could not avoid the broad public interest analysis through entering into undertakings with the Commission.

This Option operates on the basis that competition is a necessary but not sufficient condition for the satisfaction of the Government's stated policy objectives of plurality, diversity and competition. The Option would need to be reconciled with current law under which the Commission needs to apply to the Federal Court for injunction, divestiture or penalties if the Commission considers an acquisition would breach s50 (where the parties do not agree to modify or abandon the proposed acquisition).

The effect of this Option would be to prohibit (major) media acquisitions unless the Commission (or on appeal, the Tribunal) found it to be not contrary to the public interest. It should be noted that under this approach media acquisitions would be distinguished from other acquisitions in the economy which are only prohibited if they are anti-competitive. An approach similar to this applies in the United Kingdom where all significant newspaper mergers are referable to the Competition Commission (formerly the Monopolies and Mergers Commission), even if they are not anti-competitive.

There are weaknesses in this approach. The Commission's principal focus has been on questions concerning 'economic competition'. It might be thought that the body with this set of concerns is unsuitable for adjudicating upon questions involving broad judgements about social policy, diversity in the means of expression of ideas, and so on. It could similarly be argued that the Tribunal is unsuitable for adjudicating on appeals against Commission decisions made pursuant to this broader public interest analysis.

Another problem is that the public interest is not defined. Although the current authorisation process permits a wide interpretation of 'public benefit', it would seem essential that criteria are spelled out as far as possible in the TPA to guide the Commission (and the Tribunal). Legislation might specify a process for evaluation of the acquisition under the broader public interest test using such criteria as a requirement that the Commission account for the likely impact of an acquisition on editorial independence, the free expression of opinion, and the fair and accurate presentation of news.²² Consideration might also need to be given as to whether some wider market definition might be applied that took into account the relative influence of different types of media in determining whether a media acquisition is contrary to the public interest.

Thus, the Commission would apply a special public interest test that takes account of the broader (non-economic) social interests of the community. This public interest test would

²² See: Report from the House of Representatives Select Committee on the Print Media, *News and Fair Facts*, AGPS, March 1992, at p 235.

supplement the standard authorisation process which allows the Commission to exempt an acquisition from the application of the merger provisions when it is likely to result in a net public benefit.

By amending the TPA to introduce a further public interest test solely for media mergers, competition law would be treating one industry differently to others. This might appear to conflict with the goal of national competition policy to apply, as far as possible, universal and uniform rules of market conduct to all market participants regardless of the form of business ownership. However, the special treatment that this Option carries with it does not mean that the media is exempt in any way from the application of the TPA and it can be argued that there are special policy reasons for this special treatment. It is noted that the TPA already contains special provisions in the areas of telecommunications and liner shipping to deal with particular elements of those industries.

(v) Inquiry by public interest agency

Option 5	Refer media acquisitions to a specialised agency for a public interest analysis after application of the Trade Practices Act
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A different approach would be for legislation to require that any media merger or acquisition above a certain size be notified in advance to the Commission and be prohibited unless the parties to the acquisition show it to be in the public interest, where the public interest is determined by an independent agency which specialises in questions about media diversity. This shifts the function of the broader public interest analysis from the Commission to an agency that specialises in the media sector, although the burden of showing a merger is in the public interest still rests with the parties, just as in Option 4. This agency would apply the relevant public interest tests as discussed above to media mergers.

Under this approach, a media merger would face two hurdles. The first would be to satisfy the Commission that the merger is not anti-competitive under the TPA in its present form; the second would be the need to satisfy the agency concerned with media diversity that a merger in any case is not against the public interest. Such a procedure would operate on the basis that if the Commission considered that competition concerns could not be resolved (eg, by modification or authorisation), the merger would not be referred to the independent agency for a broader public interest analysis.

If the Commission took the view that the merger did not breach the TPA, then it would be analysed by the second agency under a public interest test. Given that competition is one of the essential public interest criteria of the Government, it might be necessary to coordinate the processes applied by the two agencies, for instance, by requiring the Commission to provide a report and/or recommendation on competition issues which would be considered by the agency in making its public interest analysis.

It may be more appropriate that an agency that specialises in media-related issues undertake the special public interest test, while the Commission remains the agency specialising in competition issues. Under this approach, there is scope for instituting a requirement that the

agency consider any authorisation determination by the Commission or any report/recommendation that the Commission may make in respect of the acquisition.²³ Coordination between the Commission and the specialised agency might minimise any delays in having two separate agencies scrutinise the acquisition.

Problems may arise from an administrative policy perspective. As mentioned before, administrative policy requires that there be merits review of (discretionary) Commonwealth decisions. Accordingly, an appeal procedure from the specialised agency (to the Australian Competition Tribunal) would need to be devised for any challenges to its decisions. Conceivably, a media acquisition might face delays and associated costs as appeals are heard in relation to an authorisation hearing as well as a hearing in respect of the broader public interest analysis.

5. Foreign ownership restrictions

The policy behind foreign ownership restrictions set out in the BSA is ‘to ensure that Australians have effective control of the more influential broadcasting services’ (s3(d)). This policy is given effect in various provisions. Section 57 provides that a foreign person is restricted from controlling a commercial television broadcasting licence and from having company interests in a commercial television broadcasting licensee that exceed 15 per cent. Foreign persons are restricted in aggregate from having company interests in a commercial television broadcasting licensee above 20 per cent. Further, not more than 20 per cent of the directors of a commercial television broadcasting licensee may be foreign persons (s58(1)). There are no foreign ownership limits in relation to commercial radio broadcasting licences. However, under s109, foreign persons are restricted to 20 per cent of any single pay TV broadcasting licence, and to 35 per cent in aggregate of pay TV broadcasting licences. These figures appear somewhat arbitrary and capable of evasion.

In addition to foreign ownership regulation of the media under the BSA, foreign ownership is also indirectly regulated under the *Foreign Acquisitions and Takeovers Act 1975*. Under this Act, the Treasurer can examine an acquisition or takeover where a foreign entity controls an Australian corporation. Control is deemed to be 15 per cent shareholding or control of 15 per cent of the voting power (or 40 per cent where two or more foreign persons hold an aggregate controlling interest). The Treasurer is given a discretionary power to approve foreign ownership proposals.

The Productivity Commission Inquiry should determine whether the restrictions on foreign media ownership are warranted. It would appear that Australia’s media is being shielded from the effects of global competition. The BSA and the *Foreign Acquisitions and Takeovers Act 1975* could be significant impediments to international competition, as they can be used to

²³ This might work in a way similar to the reporting requirement under s.93(7) of the BSA, under which a pay TV broadcasting licence must not be allocated if the Commission has reported that, in its opinion, the allocation of the licence to the applicant would, if Part IV of the TPA applied to the allocation of the licence, constitute a contravention of that Part of the Act. This provision is aimed at ensuring consistent application of competition policy across the industry.

block acquisitions of Australian media outlets by foreign media proprietors. As competition is reduced, so are the prospects of greater plurality and diversity in the media. In addition, discrimination against foreign media ownership appears to conflict with policies that allow and encourage international competition in other sectors.

Further, the fear that a foreign-owned media outlet may have undue influence on public opinion is, arguably, to conclude that there is insufficient competition in the Australian media. This returns the debate to the issue of increased competition in broadcasting and a review of entry barriers, especially regulatory barriers such as those which exist in the free-to-air TV market. The potential for increased competition in broadcasting should arguably undermine any undue influence of a foreign media proprietor.

The fact that there are no foreign ownership restrictions on commercial radio may indicate more than a certain arbitrariness in the regulations. It may be that radio is considered to have less influence than those sectors of broadcasting where foreign ownership restrictions apply. It may also be the case that the much greater degree of competition in the radio industry reduces the fears that foreign owners may have some degree of undue influence.

Restrictions on foreign ownership have been tied to the rules restricting cross-media ownership. Leaving the foreign ownership restrictions as they are whilst changing the cross-media ownership rules may undermine policy objectives. For example, if the cross-media ownership rules are abolished in favour of the application of the TPA while foreign ownership and entry restrictions are maintained, the outcome may be a more concentrated media sector as the few media proprietors that dominate the marketplace acquire different media outlets. These media outlets may be considered by the Commission to fall within separate markets after applying the market definition principles outlined previously. Thus, while economic concentration in any particular market will not necessarily increase, diversity in control of the more influential media services will decrease. That is, so long as there are constraints on international competition, the ability to influence through the media is greatly enhanced and concentrated in the hands of a few.

While acknowledging that there are good reasons for subjecting foreign acquisitions to a national interest test, several of the options put forward above propose the engagement of a broad public interest analysis (whether by the Commission or by a specialised agency) the purpose of which is to take account of the sorts of policy issues raised by ownership, foreign or otherwise. Therefore, the question of whether foreign media proprietors are more likely to offend against the public interest than local proprietors would be dealt with under this public interest test.

6. Other regulation

Under s53 of the BSA, restrictions have been placed on audience reach such that no free-to-air broadcaster may control licences serving more than 75% of the Australian population. This regulation would appear to have had the objective of limiting concentration in the free-to-air broadcast market. There may be some duplication of regulatory regimes given that s50 of the TPA is designed to block those mergers which substantially lessen competition. Of course, given the geographic dimension of the Commission's market definition, it may be that s50 of

the TPA would not prevent a free-to-air network from acquiring, via mergers, 100% audience reach.

However, it may be appropriate to remove the 75% limit and allow broadcasters to decide on the audience reach most appropriate for their operations, subject only to the s50 substantial lessening of competition test and an additional media-specific public interest test. Certainly, in terms of substantial lessening of competition, the 75% rule may be inappropriate if the free-to-air market was more contestable via the issuing of new licences subject only to new licensees meeting government social objectives such as local content rules.

The anti-siphoning arrangements established under the BSA should also be reviewed during the Productivity Commission's inquiry. The Commission is concerned that there may be significant anti-competitive effects of the list and that the public benefit may be less than what was expected when the legislation was enacted.

There may be strong social grounds for the maintenance of anti-competitive legislation and that is for the Inquiry to examine. However, the Commission is concerned that if the social objectives of the anti-siphoning rules are not being met, then, given their inherent anti-competitive nature, they should be amended to achieve these objectives or abolished.

The anti-siphoning rules effectively prevent a pay TV operator from acquiring pay TV broadcast rights to an event on the anti-siphoning list unless and until a free-to-air operator has acquired free-to-air rights. If the social objective of the legislation is to prevent the migration of major sporting rights exclusively to pay TV, this objective could be achieved via less anti-competitive mechanisms. A mechanism whereby pay TV operators were able to purchase pay TV rights to events on the anti-siphoning list independently of the purchase of free-to-air rights but were prevented from acquiring free-to-air rights would maintain the social objectives of the anti-siphoning list while reducing the anti-competitive consequences of the legislation.

It may also be appropriate to ensure that where rights are purchased, there is an incentive on the rights-holder to broadcast the event. The Commission notes in this respect that 'anti-hoarding' rules were introduced into the Parliament on 28 June 1999. Under the rules, free-to-air broadcasters and their regular program suppliers 'must offer' to the ABC or SBS for a nominal charge their live broadcast rights to designated events if they do not intend to facilitate live television coverage of these events.²⁴

7. Conclusions

The Commission has no expressed views on what policy options are preferable in terms of meeting social and economic objectives of broadcast legislation. However, it takes the general view that the TPA should be applied to all industries equally in line with the Competition Principles Agreement. The TPA plays an important role in protecting competition in the media sector. In this way it also makes an important contribution to diversity and plurality. A

²⁴ *Broadcasting Services Amendment Bill (No 1) 1999.*

key question for policy is whether this is sufficient. With respect to questions about cross-media ownership laws, the issues raised here do not directly involve competition matters. Accordingly the Commission has expressed no views in this area and mainly seeks to draw attention to the kinds of options which might be considered if there are to be changes in the nature of the cross-media ownership laws in the BSA.

Restrictions on foreign media ownership are tied to cross-media ownership rules, and any change in the cross-media ownership rules will need to be coordinated with a loosening of foreign ownership restrictions and a review of all regulation that restricts new entry into broadcast and related markets affected by convergence. Restrictions on foreign ownership have a direct impact on competition by constraining the competitive influence of foreign media owners in the Australian marketplace. Restrictions on entry, especially into free-to-air TV, protect incumbents from competition and limit opportunities for new media products to be supplied to consumers. Regulation governing access to bottleneck facilities is likely to be essential if the competitive benefits of new entry are to be achieved.

Attachment A

Summary of the Trade Practices Act

(refer ACCC publication, April 1999)

Summary of the Trade Practices Act 1974

Australian
Competition &
Consumer
Commission



Summary of the *Trade Practices Act 1974*

*— and additional responsibilities of the
Australian Competition and Consumer
Commission under other legislation*

April 1999



Commonwealth of Australia 1999

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publication is a plain language description of the provisions of
Trade Practices Act 1974 and other legislation under which the
Australian Competition and Consumer Commission has powers and
responsibilities. It is not intended to be used instead of the
Commission itself, which readers should consult for any use other
to gain a general understanding.

r publications dealing with specific aspects of the Trade
Practices Act are available from the offices listed at the back of this

welcome public requests for information but cannot provide
advice on particular matters. Staff are also available to speak
interested groups about trade practices issues.

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Legislation and institutions

The legislation

Trade Practices Act

The objective of the Trade Practices Act, as set out in the legislation, is to enhance the welfare of Australians through the promotion of competition and fair trading and providing for consumer protection. This summary of the Act deals mainly with the following major parts.

Part IIIA — third party access to nationally significant essential facilities.

Part IV — anti-competitive practices.

Part IVA — unconscionable conduct.

Part IVB — industry codes.

Part V

- Division 1 — unfair practices.
- Division 1A — product safety and information.
- Division 1AA — country of origin claims.
- Division 2 — conditions and warranties.
- Division 2A — actions against manufacturers/importers.

Part VA — product liability.

Part VII — authorisation and notification.

Part X — international liner cargo shipping.

Part XIB — a telecommunications-specific regime dealing with anti-competitive conduct.

- actions against manufacturers/importers — (Part V, Division 2A); and

- product liability (Part VA).

Remedies available in private actions are:

- damages;
- injunction (but not for mergers);
- divestiture (mergers only); and
- other orders.

In State and Territory lower courts these remedies are available subject to any limitations on the remedies a court may grant under State or Territory law.

Cases concerning implied conditions and warranties in contracts (Part V, Divisions 2 and 2A) are heard by the State or Territory Court which has the jurisdiction to deal with disputes under the relevant contract. The Federal Court may deal with these matters only if they are closely linked to other matters in which the Federal Court has jurisdiction, for example, unfair trading practices.

Transfer of cases between courts

Sections 86A and 86B of the Act, and the *Jurisdiction of Courts (Cross Vesting Act) 1987* (and mirror laws in each State and Territory), allow ready transfer of private actions (other than anti-competitive practices cases) between the Federal Court, State and Territory Supreme Courts and the Family Court. A party to an action may apply to have a case transferred to the court which is the most convenient and least costly forum and that court may exercise whatever jurisdiction is required to deal with the matter. This avoids unproductive and costly disputes about which court has jurisdiction and also disposes of competing proceedings in the same matter in different courts.

The Federal Court retains principal jurisdiction to deal with anti-competitive practices matters but these are occasionally raised in proceedings in a State or Territory Supreme Court. In any such case a party may apply for transfer of these issues to the Federal

Part XIC — a telecommunications-specific regime for regulated access to carriage services.

The Trade Practices Act itself applies generally to the business and commercial activities of:

- most corporations;
- sole traders or partnerships whose activities:
- cross State boundaries; or
- take place within a Territory; or
- are conducted by telephone or post, or use radio or television (Parts IVA and V only); and to the commercial activities of the Commonwealth.

However, the reach of Part IV extends to virtually all businesses, including unincorporated businesses and government trading activities, as a result of State/Territory application laws.

Each State and Territory has legislation which substantially mirrors the fair trading provisions of the Commonwealth legislation. As a result unincorporated traders which do not operate across State boundaries and which are, for constitutional reasons, not covered by the Act must nevertheless meet fair trading requirements.

Legal actions and court jurisdiction

Private actions

The Federal Court hears private actions relating to anti-competitive practices (Part IV).

Both the Federal Court and State and Territory Courts hear private actions dealing with:

- unfair trading practices (Parts IVA and V, Division 1);
- safety and information standards, bans and recalls (Part V, Division 1A);

Court. If the Commonwealth Attorney-General considers it appropriate in a particular case, transfer must take place to the Federal Court. In ss 45D, 45DA, 45DB, 45E or 45EA cases, proceedings can be taken only in the Federal Court.

Private representative proceedings

Where several individuals have each suffered injury, loss or damage as a result of similar conduct in breach of the Act, amendments in 1992 to the Federal Court of Australia Act permit a person to take a representative or class action in the Court on behalf of a group of seven or more such persons. Each identifiable member of the whole group must be notified of the proceeding and may choose to opt out of the action. Those who do not opt out will receive such share of any compensation granted as the Court may award to them but will not be able to bring their own individual actions.

This procedure has the advantage of efficiently resolving a large number of individual claims in one action and granting compensation to individuals who may not have been able to bring their own action. A defendant may also benefit by having to face only one action rather than several.

Actions brought by the ACCC

The ACCC can bring civil proceedings in the Federal Court in restrictive trade practices matters seeking:

- monetary penalties;
- injunctions (including for mergers);
- divestiture of acquired assets (mergers only); and
- various other orders.

The ACCC may seek fines and orders (such as injunctions or orders for remedial advertising) through criminal prosecutions in the Federal Court for breaches of the unfair trading practices provisions other than misleading or deceptive conduct (s. 52) and unconscionable conduct provisions (ss 51AA, 51AB and 51AC), for which only civil actions may be taken.

The ACCC may prosecute in the Federal Court for breaches of the criminal provisions relating to safety and information standards and bans and may seek injunctions and other orders.

The ACCC may also bring representative actions (s. 87(1B)), after instituting successful criminal or civil proceedings for breaches of the provisions of Parts IVA, IVB, V and VA of the Act, seeking compensation for persons identified as having suffered, or likely to suffer, loss or damage as a result of the breach and who would otherwise have had to bring action of their own.

The ACCC may not bring actions, representative or otherwise, for consumers in contract disputes involving implied conditions and warranties (Part V, Divisions 2 and 2A) or for anyone suffering loss or damage from a breach of Part IV.

Time limits

The ACCC may seek a monetary penalty for contraventions of Part IV up to six years from the date of the contravention.

Other actions brought by the ACCC (or private actions) concerning contraventions of Parts IV, IVA (s. 51AC), IVB, V (Divisions 1 and 1A only) and VA (ss 51AA and 51AB) are generally subject to a time limit of three years from the time the cause of action arose (usually when loss is first suffered).

For unconscionable conduct in contravention of other provisions of Part IVA (ss 51AA, 51AB), action may be commenced at any time within two years of the day on which the cause of action arose.

The institutions

Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission is a statutory authority responsible for ensuring compliance with Parts IV, IVA, IVB, V and VA of the Trade Practices Act, State and Territory application legislation and the provisions of the Conduct Code and for administering the Prices Surveillance Act.

The Department of the Treasury has portfolio responsibility for the ACCC. The Minister for Financial Services and Regulation is responsible for policy regarding anti-competitive practices and pricing issues. The ACCC liaises with the Treasury on anti-competitive practices and prices matters. Treasury, with input as necessary from the ACCC, consults with the States and Territories on competition policy.

The ACCC reports to the Minister for Financial Services and Regulation on consumer protection issues and liaises with the States and Territories on consumer protection through the Fair Trading Office's Advisory Committee.

The ACCC is the only nationally operating agency dealing generally with competition matters and the only agency with responsibility for enforcement of the Trade Practices Act and the State/Territory application legislation.

In fair trading and consumer protection its role complements that of State and Territory consumer affairs agencies, which administer the mirror legislation of their jurisdictions, and the Consumer Affairs Division of the Treasury.

In relation to Part X of the Act — International Liner Cargo Shipping — the ACCC liaises with the Minister for Employment, Workplace Relations and Small Business. The Department of Employment, Workplace Relations and Small Business is responsible for policy advice to the Minister, registration of agreements, designation of shipper bodies and representing the Minister in shipper-conference negotiations.

The ACCC also has responsibilities under other Acts (see Other responsibilities, p. 65).

The ACCC comprises a Chairperson, a Deputy Chairperson, and a number of full-time Commissioners and part-time Associate Commissioners.

Appointments to the ACCC involve participation by Commonwealth, State and Territory Governments.

The ACCC's objectives are to:

- improve competition and efficiency in markets;
- foster adherence to fair trading practices in well-informed markets;

- promote competitive pricing wherever possible and to restrain price rises in markets where competition is less than effective;
- inform the community at large about the Trade Practices Act and the Prices Surveillance Act and their specific implications for business and consumers; and
- use resources efficiently and effectively.

Trade practices work

Under the Trade Practices Act the ACCC's work largely flows from:

- marketplace information, including complaints and inquiries about possible breaches of the Act;
- examination of merger proposals;
- applications for authorisation (including merger proposals), notifications;
- determinations and consideration of undertakings under Part IIIA; and
- inquiries made on the ACCC's own initiative.

On enforcement, when it has discretion on whether or not to act, the ACCC gives priority to matters where:

- there appears to be blatant disregard for the law;
- the matter particularly affects disadvantaged consumers;
- there appears to be substantial damage to competition;
- there is significant public detriment;
- successful enforcement, by litigation or other means, would have a significant deterrent or educational effect; or
- an important new issue is involved, e.g. one arising from economic or technological change.

Prices surveillance work

The Prices Surveillance Act (s. 17(1)) gives the ACCC three pricing functions:

- to vet the proposed price rises of any business organisation placed under prices surveillance;
- to hold inquiries into pricing practices and related matters and to report the findings to the responsible Commonwealth Minister; and
- to monitor prices, costs and profits of an industry or business and to report the results to the Minister.

National Competition Council

The National Competition Council consists of a President and up to four other Councillors.

Its function is to make recommendations to Government on access declarations under Part IIIA of the Trade Practices Act and prices oversight of State/Territory Government businesses.

Australian Competition Tribunal

The Australian Competition Tribunal deals with applications for review of decisions made by the ACCC on authorisations and notifications. It may also make declarations relating to offshore mergers.

The Tribunal consists of a President, who must be a Federal Court judge, and members who are appointed because of their knowledge of, or experience in industry, commerce, economics, law or public administration.

The Tribunal also hears appeals from decisions of the Minister or NCC in access matters.

The Trade Practices Act 1974

Part IIIA

Part IV

Part IVA

Part IVB

Part V

Part VA

Part VII

Part X

Part XIB

Part XIC

Part IIIA — the access regime

Part IIIA of the Trade Practices Act establishes a legislative regime to facilitate third party access to the services of certain essential facilities of national significance such as electricity grids or natural gas pipelines. Its object is to encourage competition in related markets.

Access to essential services involves either an application to the National Competition Council to have the service 'declared', or the giving of undertakings to the Commission.

The Council may recommend declaration of a service if it is satisfied that:

- access to the service would promote competition;
- that it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance;
- access would not cause undue risk to health or safety;
- access is not already the subject of an effective regime; and
- access would not be against the public interest.

The Council's recommendation is considered by the designated Minister, who decides whether or not to declare the service. (Where a facility is owned or operated by a State or Territory Government which is a party to the Competition Principles Agreement, the designated Minister is the responsible State/Territory Minister. Otherwise the designated Minister will be the responsible Commonwealth Minister.)

Ministers' decisions are subject to appeal to the Australian Competition Tribunal.

The owner or operator of a facility can offer an undertaking to the ACCC about the terms and conditions on which it will provide third

party access. If the ACCC accepts such an undertaking the services provided by the facility cannot be declared by the NCC.

Once a service is declared, parties are free to negotiate terms and conditions of access — including by arbitration. (Agreements reached by private arbitration can be enforced if, subject to a public interest test, they are registered with the ACCC.)

If it is not possible to reach agreement, the parties can notify the ACCC of a dispute and the ACCC can make a determination setting the terms and conditions of access. Such determinations can be appealed to the Australian Competition Tribunal.

Part IV — Anti-competitive practices

Prohibitions

Broadly speaking, Part IV of the Act prohibits the following anti-competitive trade practices:

- anti-competitive agreements and exclusionary provisions, including primary or secondary boycotts (s. 45);
- misuse of market power (s. 46);
- exclusive dealing (s. 47);
- resale price maintenance (ss 48, 96–100); and
- mergers which would have the effect or likely effect of substantially lessening competition in a substantial market (ss 50, 50A).

In some situations the prohibition is subject to a competition test. Most conduct can be exempted from legal proceedings by the processes of authorisation or notification (see p. 55).

Anti-competitive agreements — ss 45–45EA

Sections 45 to 45EA deal with a variety of proscribed agreements.

- Agreements which involve, for example, market sharing or which restrict the supply of goods are prohibited **if they have the purpose or effect of substantially lessening competition** in a market in which the businesses operate.
- **Agreements that contain an exclusionary provision.** Sometimes referred to as a 'primary boycott', these are agreements between persons in competition with each other which exclude or limit dealings with a particular supplier or

- preventing the entry of a person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market (s. 46(1)).

Sub-section 46(1A) makes it clear that references in s. 46 to a competitor or person include references not only to a particular competitor or person but both to competitors or persons generally and to a particular class of competitors or persons.

Whether or not a business is regarded as having a substantial degree of market power depends on the circumstances in each case. The Court will take into account the extent to which the activities of the business in its market are constrained by the conduct of its competitors or potential competitors, or by the behaviour of those to whom it supplies or those who supply it (s. 46(3)).

Although there may be no direct evidence that the business used its market power for any proscribed purposes, the Court may infer the necessary purpose from its conduct, the conduct of other persons or businesses, or from other relevant circumstances (s. 46(7)). The purpose of a director, employee or agent of a corporation is deemed to be the purpose of the corporation (s. 84).

While s. 46 prohibits the misuse of substantial market power it does not prohibit the mere acquisition or possession of such power. The ACCC does not have the power to authorise conduct which contravenes or is likely to contravene s. 46.

Trans-Tasman competition laws

The introduction on 1 July 1990 of s. 46A of the Trade Practices Act extended the misuse of market power provisions of the Act to markets in New Zealand and Australia.

Complementary legislation was enacted in New Zealand — s. 36A of the Commerce Act.

As a result provisions against misuse of market power extend to companies involved in trans-Tasman trade, whether based in Australia or New Zealand and irrespective of where the conduct takes place. The Federal Court may sit in New Zealand and the equivalent New Zealand Court may sit in Australia to deal with any action under these provisions.

customer or a particular class of suppliers or customers (s. 45(2)). 'Exclusionary provision' is defined in s. 4D.

- **Agreements that fix prices (s. 45A).** This includes agreements which purport to 'recommend' prices but which in reality fix prices by agreement. Some joint ventures and collective buying groups are excluded from this prohibition.

- **Secondary boycotts (ss 45D-45E).** The Act prohibits action by one person in concert with a second person (where 'a person' can be an individual, corporation or trade union) which hinders or prevents a third person from:

- supplying goods or services to a business;
- acquiring goods or services from a business;
- engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Where the first and second person engage in the conduct in concert with one another and are members of the same organisation of employees, then that organisation is taken to have engaged in the secondary boycott conduct as well (s. 45DC).

Section 45DD allows employees to engage in secondary boycott action of which the dominant purpose substantially relates to their pay or employment conditions.

Section 45E generally prohibits a person from making an agreement with a union for the purpose of preventing or hindering trade between that person and a target person, where the person is accustomed to or under an obligation to supply goods or services to the third person. The giving of effect to such an agreement is proscribed by s. 45EA.

Consumer boycotts are not caught by the secondary boycott provisions.

Misuse of market power — s. 46

A business that has a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of:

- eliminating or substantially damaging a competitor;

Exclusive dealing — s. 47

Section 47 prohibits anti-competitive exclusive dealing which has the purpose or effect of substantially lessening competition in a relevant market. Broadly speaking, exclusive dealing involves one person which trades with another imposing restrictions on the other's freedom to choose with whom, or in what, it deals.

It is prohibited to supply goods or services **on condition** that the purchaser:

- will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier (**s. 47(2)(d)**); or
- will not resupply, or will resupply only to a limited extent, goods to particular persons or a particular class of persons or in a particular place or places (**s. 47(2)(f)**).

A **supplier** may not refuse to supply goods or services because the intending **purchaser** will not comply with these conditions (**s. 47(3)**). It is likewise prohibited for a purchaser to impose such conditions on a supplier of goods or services (**s. 47(4)**).

One form of exclusive dealing prohibited by the Act is 'third line forcing', which involves the supply of goods or services on condition that the purchaser acquire goods or services from a particular third party or a refusal to supply because the purchaser will not agree to that condition.

Exclusive dealing arrangements (including third line forcing) may be protected from challenge through the notification process. (The notification process for third line forcing differs from that for other exclusive dealing conduct.) Protection for third line forcing is also available through authorisation (see section on Exemptions p. 28).

Resale price maintenance — ss 48, 96-100

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale. This type of conduct, known as resale price maintenance, involves a supplier:

- agreeing with a reseller that the latter will not advertise or sell below a specified price (**s. 96(3)(e)**);
- setting a minimum price at which resellers should advertise, display or offer their goods for sale or for the resupply of services (**s. 96(3)(a)**);
- inducing resellers not to discount, for example by giving special deals to resellers who agree not to (**s. 96(3)(b)**);
- taking or threatening to take action against a reseller to force the reseller to sell the goods or resupply services at or above the minimum specified price, for example by refusing to continue supplying them (**s. 96(3)(d), (e)**); or
- indicating a price that is taken by the reseller as a price below which the reseller should not resell (**s. 96(3)(f)**).

A supplier may recommend a resale price for goods or resupply price for services, provided that the document setting out the suggested price makes it clear that it is a **recommended** price only and that the supplier takes no action to influence the reseller not to sell or resupply below that price (**s. 97**). Suppliers may specify a **maximum** price for resellers without infringing the resale price maintenance prohibition.

Section 98(2) permits a supplier to withhold supplies of goods to a person who, within the preceding 12 months, sold goods or resupplied services obtained from the supplier at less than their cost in order to promote business or to attract persons likely to purchase other goods or services. (Selling particular goods or resupplying services below acquisition cost for these purposes is known as 'loss leader selling'.)

The exemption relating to loss leader selling does not apply to a genuine seasonal clearance sale of goods or services which were not

acquired for the purpose of being sold at that particular sale, nor does it apply where the sale took place with the consent of the supplier (s. 98(3)).

Mergers or acquisitions — ss 50, 50A

Section 50 generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

Section 50(1) prohibits a **corporation** from directly or indirectly acquiring shares in the capital of a body corporate or assets of a person if the acquisition would have the effect or likely effect of substantially lessening competition in such a market.

Section 50(2) prohibits a **person** from directly or indirectly acquiring shares in the capital of a corporation or assets of a corporation if the acquisition would have the effect or likely effect of substantially lessening competition in such a market.

The following (non-exhaustive) list of factors must be taken into account in the evaluation of the effect or likely effect of particular acquisitions (s. 50(3)):

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;

- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

Parties to mergers at risk of breaching the Act may apply to the ACCC for authorisation (see section on Authorisation p. 55).

Acquisitions that occur outside Australia

Section 50A deals with certain acquisitions occurring outside Australia that would substantially lessen competition in a market within Australia.

Section 50A(1) applies where, among other things, an acquisition occurring outside Australia results in the acquiring person obtaining a controlling interest in a corporation or corporations in Australia.

If an acquisition is not covered by s. 50 and is covered by s. 50A, the ACCC, the Minister or any other person can apply for a declaration by the Australian Competition Tribunal that an acquisition producing a substantial lessening of competition has occurred and that it has no resulting public benefit which would justify it. Such an application must be made within 12 months of the acquisition (s. 50A(3)).

If a declaration to this effect is made, the relevant business has up to six months (which may be extended to a maximum of 12 months) in which to cease carrying on business in the relevant market (s. 50A(6)).

In its consideration of matters under s. 50A, the Tribunal is required to take account of the same criteria as apply to ACCC determinations for authorisation under s. 50.

Statutory exemptions — s. 51

Statutory exemption from certain prohibitions is available under the Trade Practices Act, within participating jurisdictions, for:

- conduct that is specifically authorised or approved by a Commonwealth or State Act, or a Territory law, or any regulation under any such Act, which expressly refers to the

Trade Practices Act: statutory exemptions are limited for a period of two years from the date of the regulations coming into operation or two years from the date of the action: the ACCC is required under s. 171 of the Act to report annually to Parliament on the use and effect of these exceptions;

- mergers and acquisitions under ss 50 and 50AA (if made by Commonwealth Act); or
- conduct that arises from:
 - industrial agreements relating to conditions of employment, etc;
 - a provision of a contract for the sale of a business or shares in a corporation solely for the protection of the purchaser in respect of the goodwill of the business;
 - compliance with Standards Association of Australia (Standards Australia) standards;
 - partnership agreements between individuals;
 - export agreements (if full particulars are notified to the ACCC within 14 days of being made);
 - consumer boycotts; and
 - certain arrangements relating to patents, copyrights, trade marks or designs.

Exemptions under s. 172(2)

Section 172(2) provides for exemption of:

- conduct of a kind exempted from the application of the Act by regulation, for example some primary product marketing agreements (s. 172);
- where regulations under the Act so prescribe, a contract or proposed contract between the Government of Australia and the government of another country; and
- similarly prescribed conduct in the course of a business carried on by the Commonwealth or a prescribed Commonwealth authority.

Penalties and remedies for Part IV breaches

Various penalties and remedies are available in the Federal Court for breach of the provisions of Part IV of the Act.

These are:

- monetary penalties of up to \$10 million for companies (with the exception of ss 45D, 45DB, 45E and 45EA, for which penalties of up to \$750 000 apply (s. 76));
- monetary penalties of up to \$500 000 for individuals (with the exception of ss 45DA, 45DB, 45E and 45EA for which no monetary penalties apply) (s. 76);
- injunctions (s. 80);
- damages (s. 82);
- divestiture of shares or assets illegally acquired or a declaration that a share transaction is void in the case of a prohibited merger (s. 81);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
 - specific performance;
 - rescission and variation of contracts;
 - damages; and
 - provision of repairs and spare parts (s. 87).

The ACCC has the power to seek monetary penalties, injunctions or divestiture.

Individuals and corporations may, through a private action, seek:

- injunction (except in the case of a merger prohibited by s. 50);

- damages or one of the ancillary orders available under s. 87; and
- divestiture in relation to a merger (s. 81(1)).

The Federal Court has the power to enforce undertakings concerning conduct given by a person to the ACCC (s. 87B).

A defence based on Part IV may be raised in a Supreme Court proceeding, for example, to a term of a contract.

Any person or the Minister may seek a declaration from the Court about the operation of the Act and in relation to conduct or proposed conduct. The ACCC and the Minister are entitled to intervene in any such proceedings.

Section 83 provides that if in a proceeding it is proved that a person has contravened a provision of Part IV, IVA or V of the Act, a finding of fact made by a Court may be used as *prima facie* evidence in subsequent related proceedings by a person for compensation.

Part IVA — Unconscionable conduct

The Trade Practices Act prohibits unconscionable conduct in both **commercial dealings** (s. 51AA and s. 51AC) and in **consumer transactions** (s. 51AB).

Commercial transactions

Section 51AA

Section 51AA provides that a corporation must not, in trade or commerce, engage in conduct that is *unconscionable within the meaning of the unwritten law* of the Australian States and Territories — that is, the general non-statutory or common law as it has evolved through decisions of the courts. ‘Unconscionability’ is accordingly not defined in the Act.

Section 51AA does not apply to situations covered by s. 51AB or 51AC.

The term **unconscionable conduct** has come to refer to circumstances which have the following elements:

- one party to a transaction suffered from a **special disability or disadvantage**, in dealing with the other party; and
- the disability was sufficiently evident to the stronger party; and
- the stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.

Section 51AC

Section 51AC specifically prohibits one business dealing unconscionably with another in the supply or acquisition of goods or services.

The provision does not apply to conduct prior to 1 July 1998, to transactions greater than \$1 million, or to transactions in which the business subject to the conduct (target business) is a listed public company.

Although the Act does not define 'unconscionable conduct', s. 51AC does include a non-exhaustive list of factors which may be taken into account by the Court. Expressed briefly, these are:

- the relative bargaining strengths of the parties;
- whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests;
- whether the target business could understand any documentation used;
- the use of any undue influence, pressure or unfair tactics by the stronger party;
- how much the target business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to **another** supplier;
- the terms and circumstances in which the weaker party could have engaged in a similar transaction with another party;
- the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other businesses;
- the requirements of any applicable industry code (or of any other code if the target business acted in the reasonable belief that the stronger party would comply with it);
- the extent to which the stronger party unreasonably failed to disclose:
 - any **intended** conduct that might affect the interests of the target business; or
 - any risks to the target business arising from that conduct which the stronger party should have foreseen would not be apparent to the target business;
- the extent to which the stronger business was willing to negotiate with the target business the terms of any supply contract; and
- the extent to which each party acted in good faith.

Consumer transactions — s. 51AB

Section 51AB prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily acquired by consumers for their personal, domestic or household use but not for resupply or use in trade or commerce.

In such a transaction the stronger party may not take advantage of its position by behaving in an unfair or unreasonable manner.

Although the Act does not define 'unconscionable conduct', s. 51AB does include a non-exhaustive list of factors which may be taken into account by the Court. These are:

- relative bargaining strengths of the parties;
- whether the consumer understood any documentation used;
- the use of undue influence or pressure, or unfair tactics;
- the imposition of conditions not reasonably necessary to protect the supplier's legitimate interests; and
- how much the consumer would have had to pay, and under what circumstances, to buy equivalent goods or services from **another** supplier.

Remedies

Individuals and the ACCC can bring civil actions in the Federal Court for unconscionable conduct seeking monetary compensation, rescission or variation of a contract, refund, or specific performance of a contract. Damages under s. 82 are available as a remedy for unconscionable conduct only for breaches of s. 51AC, but other equivalent orders can be made by the Court under s. 87(2)(d)).

Actions under Part IVA can also be brought in State or Territory Courts of competent jurisdiction, and the extent of remedies available depends on the particular court's jurisdiction.

While actions for damages regarding contravention of s. 51AC may be commenced within **three years** of the date on which the cause of action arose, actions for damages regarding other contraventions of Part IVA, or for compensatory orders under s. 87, must be commenced within **two years**.

Part IVB — Industry codes

Section 51AD prohibits contraventions by corporations of applicable industry codes of practice.

For the purposes of this section, an applicable code is one which is mandatory for the industry in question or a voluntary industry code that binds the corporation.

Such codes must be declared, either as mandatory or voluntary, by regulations under **s. 51AE**.

For voluntary codes the regulations may specify the method by which a corporation agrees to be bound and the method by which it ceases to be bound.

Franchising is specifically defined as an industry for the purposes of Part IVB. Similarly, franchisors and franchisees are declared to be participants in the franchising industry, even if they are also participants in another industry.

Penalties and remedies

The Act provides a range of penalties and remedies if an applicable industry code is contravened.

These are:

- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (**s. 80**);
- corrective advertising (**s. 80A**);
- damages (**s. 82**);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
 - specific performance;
 - rescission and variation of contracts;
 - damages; and
 - provision of repairs and spare parts (**s. 87**).

Part V — Fair trading

Part V of the Act contains a range of provisions aimed at protecting consumers and corporations that qualify as consumers (see p. 44 for definition of consumer).

The ACCC has responsibility for unfair practices (Division 1).

The ACCC has responsibility for product safety and information standards and banning orders (Division 1A). Product safety policy and product recalls are the responsibility of the Consumer Affairs Division of the Treasury.

The Australian Securities and Investments Commission has primary responsibility for consumer protection in the financial services area.

Protection is also afforded through:

- conditions and warranties in consumer transactions (Division 2); and
- actions against manufacturers and importers (Division 2A).

Unfair practices — ss 52–65A

Division 1 of Part V generally imposes strict liability.

General prohibitions — s. 52

Misleading or deceptive conduct

Section 52 is a very broad provision. It prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case.

Generally, sellers are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material

information may in some circumstances be a breach of the Act. The duty to disclose can arise even where there is no particular relationship between the parties — such as trustee and beneficiary or principal and agent.

Only civil proceedings can be brought for breach of s. 52.

Specific prohibitions — ss 51A, 53–65A

Misleading representations about the future supply and use of goods and services

Section 51A prohibits the making of representations about the happening of any future event without reasonable grounds. A business is deemed not to have had reasonable grounds for making a prediction unless it can produce evidence to the contrary.

False or misleading representations

Section 53 specifically prohibits false claims about:

- the standard, quality, value, grade, composition, style, model or history of goods or services (s. 53(a), s. 53(aa));
- whether goods are new (s. 53(b));
- the agreement of a particular person to acquire the goods (s. 53(bb));
- the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services (s. 53(c));
- the sponsorship, approval or affiliation of a corporation (s. 53(d));
- the price of goods or services, for example that it is less than a competitor's price (s. 53(e));
- the availability of repair facilities or spare parts (s. 53(ea));
- the place of origin of goods (s. 53(eb));
- a buyer's need for goods or services (s. 53(f)); and
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (s. 53(g)).

False representations in relation to land

Section 53A prohibits a business from making false or misleading representations or using misleading or offensive conduct in relation to the sale of land, for example about sponsorship or price.

Misleading conduct in relation to employment

Section 53B prohibits a business from engaging in conduct likely to mislead people seeking employment about the availability, nature, terms or conditions, or any other matter relating to the employment.

Not specifying the full cash price

Section 53C requires corporations to specify the full cash price when it advertises part of the price of goods or services, for example the deposit or the terms of repayment.

Falsely offering prizes

Section 54 prohibits corporations from offering gifts, prizes or other free items in connection with the supply of goods or services if it does not intend to provide them as offered.

Misleading the public as to the nature or characteristics of goods and services

Section 55 prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Section 55A prohibits a corporation from engaging in conduct which is liable to mislead the public about the nature, the characteristics, the suitability for their purpose or the quantity of any services.

Bait advertising

Under s. 56 goods or services must not be advertised at a specified (not necessarily a 'special') price if the seller is or should reasonably have been aware that it would not be able to supply reasonable quantities at that price for a reasonable period. What is 'reasonable' will depend on the particular circumstances, including the market in which the goods are sold and the nature of the advertisement.

Referral selling

Section 57 prohibits the sales technique of inducing consumers to buy goods or services by offering them a rebate, commission or some other benefit in return for suggesting potential customers' or assisting in any way in selling the goods to other consumers if the inducement is contingent on an event occurring after the sale is made.

Accepting payment without intending to supply

Section 58 prohibits a corporation from accepting payment for goods or services where it does not intend to supply them or intends to supply goods or services materially different from those paid for.

It may also be a breach if there are reasonable grounds, of which the corporation was (or should be) aware when accepting payment, that it would not be able to supply.

Making false or misleading statements about work-at-home schemes

Section 59 prohibits false or misleading representations about the profits and practicability of home-operated businesses, for example an activity that requires performance of work at or from home or a scheme that requires investment of money and associated work by the investor.

Harassment or coercion

Section 60 prohibits the use of physical force, undue harassment or coercion by a corporation (or its servants or agents) in relation to the supply of goods or services to a consumer, or payment by a consumer for goods or services.

Pyramid selling

Section 61 prohibits the promotion of, or participation in, pyramid selling schemes in which a person makes a payment to a corporation with the prospect of receiving payments for the introduction of other participants to the scheme.

Sending unsolicited debit or credit cards

Section 63A makes it unlawful to send unsolicited debit or credit cards, or cards which can be used for both purposes, to any person.

Unsolicited goods or services

Section 64 prohibits a corporation from demanding payment for unsolicited goods or services unless it has a reasonable basis for believing it has a right to payment. The prohibition includes demanding payment for:

- unsolicited advertising; and
- unsolicited directory entries.

Section 65 provides that a person receiving unsolicited goods will not be liable for any loss or damage that occurs to the goods other than wilful or unlawful damage he or she causes.

If the recipient gives written notice that the goods were unsolicited and specifies where they are held, the supplier has one month to collect them. After that the goods become the property of the recipient. If no such notice is given, the supplier has three months from receipt of the unsolicited goods in which to recover the goods from the recipient before losing right of ownership (s. 65(3), (4), (5)).

Defences and exemptions

A defendant can be excused liability in a criminal prosecution (for fines) for contravention of Part V if it can be shown:

- the contravention was due to a reasonable mistake; or
- the defendant relied on information supplied by another person (but not an employee or an agent of the business); or
- the reason for the alleged contravention was:
 - the action or failure of another person (but not a director, employee or agent of the defendant);
 - an accident; or
 - some other matter beyond the defendant's control; and
- the defendant took reasonable care and precautions to avoid the contravention (s. 85).

State of mind

In proceedings against a corporation, the state of mind of its directors, servants and agents can be attributed to the corporation. A person's 'state of mind' includes knowledge, intention, opinion, belief or purpose. For the person's state of mind to be so attributed, the conduct in question must be within the scope of his or her actual or apparent authority (s. 84).

News reporting

A publisher of a newspaper or the owner of a radio or television station will not be liable for misleading or deceptive conduct, or misleading representations in the course of news reporting or otherwise providing information (s. 65A).

The exemption does not apply to representations in an advertisement or which relate to the supply or promotion of goods or services by the media outlet.

Penalties and remedies

The Act provides a range of penalties and remedies for breaches of the unfair practices provisions of Part V.

These are:

- monetary penalties of up to \$200 000 for companies and up to \$40 000 for individuals (s. 79);
- injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken (s. 80);
- damages (s. 82);
- corrective advertising (s. 80A);
- ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:
 - specific performance;
 - rescission and variation of contracts;
 - damages; and
 - provision of repairs and spare parts (s. 87).

The particular courts which may deal with private actions are referred to in the section Legal actions and court jurisdiction p. 9.

The ACCC, the Minister or any other person can ask the court for an injunction (s. 80(1)).

The ACCC or the Minister can apply for an order requiring a person who has breached one of these provisions to publish corrective advertising or disclose information to the public (s. 80A).

Section 83 provides that if in a proceeding it is proved that a person has contravened a provision of Part IV, IVA, IVB or V of the Act, a finding of fact made by a court may be used as *prima facie* evidence in subsequent related proceedings by a person for compensation.

Part V, Division 1A — Product safety and product information

Sections 65B–65T in Division 1A of Part V are designed to ensure that:

- certain goods meet particular standards; and
- dangerous goods are not sold or can be quickly withdrawn from sale.

The Commission is responsible for enforcement of ss 65C and 65D, which relate to goods not complying with standards or bans, and for the conduct of conferences to review proposed and emergency bans or proposed compulsory recalls of consumer products (ss 65J, 65K, 65M and 65N).

The Consumer Affairs Division of the Treasury is responsible for the other sections, which relate to recalls and warning notices.

Compulsory consumer product standards

Compulsory consumer product standards for a particular good may be made by regulation or declared by the Minister for Financial Services and Regulation by a notice in the Commonwealth Gazette (ss 65C, 65D and 65E). Corporations are prohibited from supplying goods:

- that do not conform with a compulsory consumer product safety standard;
- for which there is in force a notice declaring the goods to be unsafe; or
- which are subject to a notice imposing a permanent ban (s. 65C(1)).

There are two types of compulsory consumer product standard.

- Safety standards require goods to comply with particular performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging rules, e.g. to display warning labels on the flammability of children's nightwear (s. 65C(2)).

- Information standards require prescribed information to be given to consumers when they purchase specified goods, e.g. labelling garments or household fabrics to indicate the most suitable method of cleaning (s. 65D).

A corporation may not export goods that do not comply with a compulsory product safety standard without the Minister's approval (s. 65C(3)).

Unsafe goods and bans

Goods that may cause injury to any person can be declared unsafe by the Minister, by notice in the Commonwealth Gazette (s. 65C(5)).

The supply of goods which have been declared unsafe is banned for 18 months following the declaration. The banning order may then be renewed for a further 18 months, be allowed to expire unless revoked before the end of the period (s. 65C(6)), or made permanent (s. 65C(7)).

Before goods are declared unsafe or a permanent ban is brought into effect, suppliers of the goods — manufacturers, retailers, and others — may request a conference with the Commission concerning the order (s. 65J).

After the conference the Commission will make recommendations to the Minister which will be taken into account when the final form of the order is being decided (s. 65K). The whole process must be completed promptly.

Warning notices

The Minister can issue public warning notices stating that the safety aspects of particular goods are under investigation and/or warning of possible risks involved in using them (s. 65B(1)).

Once any announced investigation is completed, and provided banning and/or compulsory recall action has not been taken, the Minister is required to publish a further notice advising of the outcome of the investigation. Any proposed further action in respect of the goods may also be announced (s. 65B(2)).

Voluntary product recalls

A supplier who voluntarily decides to recall unsafe goods (i.e. not as a response to a compulsory product recall order), is required to notify the Minister of the details, in writing, within two days of taking the action (s. 65R).

Compulsory product recalls

The Minister also has the power to order suppliers to recall consumer goods that have safety-related defects (s. 65P).

The power applies to consumer goods which:

- do not comply with a compulsory product safety standard prescribed under the Act;
- are banned goods; or
- are goods which may cause injury to any person; and
- where the supplier has not taken satisfactory action to prevent them causing injury, for example by recalling the goods.

In these circumstances the Minister can issue an order requiring the supplier to:

- take action to recall the goods within the period specified in the notice; and/or
- disclose to the public the nature and circumstances of the defect and procedures for the disposal of the goods; and/or
- inform the public that the goods will be repaired or replaced or the price refunded, as the supplier thinks appropriate (s. 65J).

Emergency orders

If it appears to the Minister that certain goods create an imminent risk of death, serious illness or severe injury, an emergency order can immediately be made implementing one of the following without a prior conference (s. 65L):

- a banning order; or
- an order for product recall, disclosure of defect and disposal, repair, replacement or refund of price.

When an emergency banning order is made, a conference may be held after it comes into effect (s. 65M).

No subsequent conferences are available if the emergency order is for product recall, repair or replacement.

Conferences on bans and recalls

Before a compulsory recall order comes into effect (except for emergency recalls) all suppliers of the goods have the opportunity to request a conference with the ACCC to discuss the order. The request must be made within 10 days, or longer if the ACCC permits, and the conference must be held within 14 days.

As soon as practicable after the conference the ACCC is required to recommend to the Minister whether the notice should be made final, whether any modifications should be made to the proposed order, or whether the notice should be withdrawn.

A record of proceedings at the conference, including documents and particulars of the recommendations, are placed on the ACCC's public register (s. 65K). There is some provision for confidentiality to be granted if a company's secret formula or process is involved.

Penalties and remedies

The same remedies apply for breaches of the safety provisions as for unfair business practices.

These are:

- monetary penalties of up to \$200 000 for companies and \$40 000 for individuals (s. 79);
- injunctions (s. 80);
- damages (s. 82); and
- corrective advertising (s. 80A).

Ancillary orders of various kinds in favour of persons who have suffered loss or damage because of the conduct, including:

- specific performance;
- rescission and variation of contracts;
- damages; and
- provision of repairs and spare parts (s. 87).

The ACCC can seek penalties or injunction if a supplier is found to have supplied goods that:

- do not comply with a compulsory standard; or
- are the subject of a banning order.

Any person who has suffered loss or damage as a result of a failure to comply with a standard or banning order or with a compulsory recall order can seek, by way of a private action, damages, injunction or other court order.

Depending on the amount of damages involved, individuals can seek remedies through a lower court, e.g. State, Territory, or small claims tribunal, as a result of the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*.

Part V, Division 1AA

Country of origin claims

Division 1AA sets out in some detail tests which must be met to ensure that claims about the country of origin of goods do not breach ss 52 or 53(eb) of the Act.

The tests are for three types of country of origin representation:

- general country of origin claims;
- 'Produce of'/'Product of' claims; and
- the use of a prescribed logo.

General country of origin claims (s. 65AB)

This provision covers such broadly expressed claims as 'Made in Australia', 'Australian made', 'Manufactured in Australia', and 'Processed in Australia' and 'Assembled in Australia' (and similar expressions referring to other countries).

Goods must pass two tests to qualify for the general country of origin defence. They must be **substantially transformed** in the country that is the subject of the representation and **50 per cent or more of the cost of production or manufacture** of the goods must be incurred in relation to processes that occurred in that country.

Substantial transformation

Substantial transformation in a country is defined under s. 65AE as goods undergoing:

... a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change.

Cost of production/manufacture

The method of calculating the cost of production or manufacture of goods is set out in Subdivision B (ss 65AG to 65AM) of Division 1AA. The subdivision considers three broad categories of eligible costs:

- expenditure on materials incurred by the producer/manufacture in the production or manufacture of the goods;
- expenditure on labour incurred by the producer/manufacture, that relates to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods; and
- expenditure on overheads incurred by the producer/manufacture, that relates to the production or manufacture of the goods and can reasonably be allocated to the production or manufacture of the goods.

Regulations may prescribe (for all three categories) particular costs that are not allowable and may prescribe the manner of working out costs in each category. (No such regulations had been made at time of publication.)

Exceptions

There are two exceptions to the general country of origin test. One is use of the term 'product of' and similar constructions, see below. The other is a provision for Parliament to make regulations for prescribed logo representations, see below.

The 'Produce of'/'Product of' test (s. 65AC)

Section 65AC sets out a higher threshold for representations employing the terms 'Produce of', 'Product of' and variations on the word 'produce'.

It requires that each significant ingredient or component of the goods in question must come from the country of the representation and all, or virtually all, of the production or manufacturing processes associated with the goods must occur within that country.

The question of 'significant ingredient' or 'significant component' is not necessarily related to the percentage that the ingredient or component makes up of the goods in question.

The use of a prescribed logo (s. 65AD)

Section 65AD provides for the use of a logo, or logos, to indicate the country of origin of goods.

Subsection 65AD(2) gives Parliament the power to make regulations that prescribe a percentage of manufacturing or production costs in the range 51 per cent to 100 per cent to qualify for the use of a prescribed logo.

If a corporation makes a representation as to the country of origin of goods by means of a prescribed logo, the goods must pass both the substantial transformation test and meet the prescribed percentage of production or manufacturing costs that apply for that logo.

No regulations had been made prescribing a logo for use under s. 65AD at the time of publication.

Part V, Divisions 2, 2A — Conditions and warranties in consumer transactions

Rights against sellers

Definition of a consumer

Division 2 protects consumers when they acquire goods or services. It implies various conditions and warranties into the transaction whether this is a contract for sale, exchange, lease, hire or hire purchase of goods or the supply of services.

A consumer, who can be either an individual or a business, is someone who acquires:

- goods or services of a type normally bought for personal or household use, whatever their cost; or
- any other type of goods or services costing \$40 000 or less; or
- a commercial road vehicle or trailer of any cost that is used mainly to transport goods on public roads

provided that the goods are not acquired solely for reselling or for using up or transforming commercially to produce, repair or treat other goods (s. 4B).

The statutory warranties do not cover:

- insurance contracts;
- transport or storage of commercial goods; or
- professional services provided by architects or engineers (s. 74).

Trade Practices Act

The conditions

The Act implies the following conditions into contracts.

- The supplier must be able to give the consumer clear title to the goods, including any bought at auction (s. 69).
- The goods must be of **merchantable quality**. This means that they must meet a basic level of quality and performance that would be reasonable to expect of the particular goods, having regard to their price and the manner in which they are described (ss 71(1), 66(2)).
- The goods must be **fit for their purpose**. This means they must be suitable for any particular purpose the consumer made known to the supplier when negotiating or arranging to purchase the goods, or a purpose which is obvious from the circumstances in which the sale took place (s. 71(2)).
- Goods that are supplied by **description or sample** must correspond with the description or sample (ss 70, 72).

The warranties

The Act implies the following warranties in contracts.

- The consumer is entitled to enjoy quiet possession of the goods (s. 69).
- The consumer is entitled to own the goods outright (s. 69).
- Services must be carried out with due care and skill (s. 74(1)).
- Services (except those provided professionally by architects and engineers) and any materials associated with them must be fit for the purpose for which they are supplied. That is, they should achieve the result that the consumer made known to the supplier, unless the consumer did not rely, or it was unreasonable to rely, on the supplier's skill and judgment (s. 74(2)).

Excluding conditions and warranties

A seller may not exclude, restrict or modify the statutory conditions and warranties. Any term of a contract which attempts to do so will be void (s. 68).

A corporation risks prosecution if it states or implies that its liability is limited in any way. Any attempt to do so, e.g. by stating or implying that no refunds will be given under any circumstances, is in breach of s. 53(g), which prohibits the making of false or misleading representations about a consumer's rights.

Limited liability

If goods or services are not of a type normally bought for domestic, household or personal use, a supplier may sometimes be able to limit its liability to:

- replacement of the goods or the supply of equivalent goods;
- repair of the goods;
- payment of the cost of replacing the goods or of acquiring equivalent goods;
- payment of the cost of having the goods repaired; or in the case of services:
- re-performance of the services; or
- payment of the cost of having the services supplied again.

Liability of credit providers

A credit provider who regularly arranges finance for a supplier's customers, i.e. is 'linked' to the supplier, may be liable jointly with the supplier to compensate a consumer in the event of misrepresentation, breach of contract, failure of consideration or breach of a condition or warranty by the supplier (s. 73(1)).

A consumer who buys goods that breach any of the statutory conditions and warranties, using a credit provider who is independent of the seller, may claim only against the supplier (s. 73(2)).

Remedies

The ACCC cannot bring an action for breach of any of the statutory conditions or warranties.

A consumer may bring a private action for damages in any Court or Tribunal of competent jurisdiction against a supplier who, for example supplies goods that are not of merchantable quality, or are not fit for their purpose.

Damages can include:

- the cost of repair of goods (including any necessary freight costs); or
- performing the services again.

In some circumstances the Court may award compensation for any consequential loss or damage, for example if a defect in an appliance causes damage to a consumer's home.

For breach of a condition (not a warranty) a consumer has the right to return the goods to the seller and obtain a refund of the purchase price.

To obtain a refund, a consumer should:

- return the goods within a reasonable time;
- not dispose of, lose, or destroy the goods;
- not allow the goods to become unmerchantable through failing to take reasonable care to preserve them; and
- not damage the goods by using them in an abnormal way (s. 75A).

Rights against manufacturers or importers

Division 2A provides rights against manufacturers or against importers if the manufacturer has no place of business in Australia. These are similar to the rights provided in Division 2 against sellers.

The rights apply only to goods that are ordinarily acquired for personal, domestic or household use (s. 74A(2)).

Liability

A consumer — or a person who has acquired or derived title to the goods from a consumer (e.g. as a gift or buying second hand) — may bring an action for damages against a manufacturer or importer if:

- the goods are not reasonably fit for a purpose which was made known before the supply of the goods or for a purpose for which the goods are commonly supplied (s. 74B);
- the goods do not correspond to the description on which the purchase was based (s. 74C);
- the goods are not of merchantable quality (s. 74D); or
- the goods supplied by reference to a sample do not correspond with the sample (s. 74E).

A manufacturer will not be liable to pay damages if the goods do not comply with the condition or warranty because of some fault that occurred after the goods left its control.

A manufacturer or importer supplying goods direct or through sellers will be liable to pay damages to a consumer (or a person who has acquired or derived title from a consumer) if:

- it fails to ensure that there is a reasonable supply of parts and repair facilities (unless the consumer is told when goods are bought that repair facilities or parts would not be available, or that there is a time limit on their availability) (s. 74F);

- the goods do not comply with its own express warranty or conditions — these include written warranties, other claims made about the goods in promotional and technical material or by the manufacturer's staff or agents, and promises about the provision of services or availability of supplies (s. 74G).

A manufacturer may be liable to indemnify a seller who has had to compensate a consumer for a breach of one of the conditions or warranties in Division 2 (s. 74H). This liability applies to:

- goods ordinarily acquired for personal, domestic or household use; and
- other goods costing \$40 000 or less.

Limited liability

A manufacturer's liability for goods which are not of a personal, domestic or household nature is limited to:

- the cost of replacing the goods;
- having the goods repaired; or
- obtaining equivalent goods (s. 74I).

Excluding conditions and warranties

A manufacturer may not exclude, restrict or modify a consumer's rights or remedies under Division 2A (s. 74K) except in the limited circumstances covered by s. 74L. Any term of a contract, such as a manufacturer's guarantee, which attempts to do this will be void.

A corporation may not, without risk of prosecution, imply or state that its liability is limited. Any attempt to do so is in breach of s. 53(g), which prohibits making false or misleading representations about a consumer's rights.

Remedies

Consumers may bring an action for damages against manufacturers and importers for breach of any of ss 74B–74G.

Damages can be:

- the cost of repair of goods (including any necessary freight costs); or

- performing the services again.

In some circumstances the Court may award compensation for any consequential loss or damage, for example if a defect in an appliance causes damage to a consumer's home.

Time limits

Actions must be brought within **three** years of the date the consumer became aware of the fault or damage occurring, and in any event, within **10** years of the date on which the goods were first supplied (s. 74J).

Part VA — Liability of manufacturers and importers for defective goods

Part VA of the Act came into force on 9 July 1992. It does not alter any of the rights and obligations arising under the law which existed before its enactment. However, it does give individuals additional rights and imposes new obligations on manufacturers.

A person who is injured, or whose property is damaged, by a defective product will have a right to compensation against the manufacturer of the product.

Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances (s. 75AC).

Rights and obligations

A claimant does not have to prove negligence, but does have to prove that on the balance of probabilities the product supplied by the manufacturer or importer was defective and that the defect caused a loss.

The provisions of Part VA cannot be restricted, excluded or modified by contract (s. 75AP).

The manufacturer is primarily liable for damages caused by defective goods. However, the term 'manufacturer' has an extended meaning including (s. 75AB):

- the corporation that actually made the goods;
- a corporation that holds itself out to be the manufacturer;
- a corporation that sells 'home brand' goods manufactured for it under licence;
- a corporation that permits someone to promote the goods as the corporation's;
- a corporation that imports the goods; or
- a corporation that produced or manufactured raw material or component parts.

Where the manufacturer is unknown to the claimant, a retailer or other supplier of the goods may be considered by Part VA to be the manufacturer. In such circumstances the potential claimant is required to send a written request to the supplier(s) of the allegedly defective goods requesting the manufacturer's identity or the name of the person who provided the goods to that supplier (s. 75AJ).

'Supplier' could mean the retailer, wholesaler or any other intermediate supplier known to the claimant. A written notice may be served on any or all of these.

After 30 days, if the potential claimant cannot identify the manufacturer, action may be taken against any supplier who did not respond to the request as though it were the manufacturer.

The rights and obligations previously conferred by the Act remain undisturbed. This means that manufacturers and importers may become liable for damages caused by goods in one of two ways:

- where the goods are not of merchantable quality, through the operation of Part V, Division 2A; and
- where the safety of the goods is not what persons are entitled to expect and the manufacturer cannot be identified, through the operation of Part VA.

Business and employment relationships

Part VA is not intended to create rights of a commercial nature. A loss arising out of a business relationship between the injured person and the potential claimant is specifically excluded from its operation (s. 75AE).

Similarly, loss caused by work-related injuries is excluded, as existing workers' compensation systems provide for this. Losses regulated by international agreement are also excluded (s. 75AI).

Manufacturers' defences

Manufacturers may not be liable for defects which occurred later in the distribution chain or as a result of unforeseeable misuse by the injured party or other users. If, however, an injury resulted from a defect such as unsafe product packaging or packaging with inadequate warnings they could be found liable.

A manufacturer will not be liable to compensate a claimant for defective goods if it can prove one of the following defences:

- the defect did not exist when the product left its control;
- the only reason the product was defective was because it complied with a mandatory standard;
- detection of the defect would not have been possible when the manufacturer supplied the product given the state of scientific or technical knowledge at the time (known as 'development risks' or 'state of the art' defence); or
- in the case of a manufacturer of component parts, the defect was the fault (e.g. careless assembly, use of an unsuitable component, or incorrect or inadequate instructions) of the ultimate manufacturer, not the component manufacturer (s. 75AK).

Mandatory standard

Where a manufacturer successfully argues a defence of compliance with an Australian mandatory standard, the Commonwealth and not the manufacturer is liable to compensate the claimant. The manufacturer must, however, as soon as possible after raising the defence serve notice on the Commonwealth (s. 75AL).

Liability of manufacturers

Manufacturers of defective goods are liable both individually and collectively to a claimant for the same loss. A claimant may sue the party which will best be able to pay compensation and is not required to take separate action against each party that is liable to make compensation (s. 75AM).

Contributory acts or omissions to reduce compensation

In cases where loss is due to both a defect in a product and a culpable act or omission of a person who uses the product, the manufacturer's liability will be reduced by the Court by an amount which it thinks represents the person's contribution to the loss (s. 75AM).

Time limits

A claimant must begin an action within **three** years of the time of becoming aware of (or ought to have become aware of), the loss, the defect and the identity of the manufacturer of the defective goods (s. 75AO(1)).

Actions to recover damages must be begun within 10 years of the time the allegedly defective product (i.e. the one that caused the loss, not merely one of that type) was first supplied by the manufacturer (s. 75AO(2)). This is known as the 'repose period', and it begins to run from the time when the alleged defective good was first supplied by the manufacturer.

Representative actions

The ACCC may take legal proceedings against a manufacturer for defective goods on behalf of one or more persons who have suffered loss, providing those persons give written consent for the ACCC to act on their behalf (s. 75AQ).

Other remedies

Part VA does not limit, exclude or otherwise affect a claimant's pre-existing rights under Commonwealth, State or Territory law for claiming remedies for losses. In other words, it does not prohibit a person from taking action under tort, contracts or statutory law for losses resulting from defective goods (s. 75AR).

Part VII — Authorisation and notification

Under the authorisation and notification provisions the ACCC has power to grant immunity from legal proceedings for some arrangements or conduct that might otherwise breach the anti-competitive practices provisions of the Act.

It is necessary to make formal application to the Commission. Application for authorisation can only be made by a party to the arrangement or a party engaging in the conduct in question.

Authorisation — ss 88–91

Authorisation is available for:

- anti-competitive agreements;
- primary boycotts;
- price agreements;
- secondary boycotts;
- anti-competitive exclusive dealing arrangements;
- exclusive dealing involving third line forcing;
- resale price maintenance; and
- mergers leading to a substantial lessening of competition in a market;

but **not** for:

- misuse of market power.

The ACCC's statutory function in considering an application for authorisation is to apply one of two tests, depending on the conduct in question.

- For agreements that may **substantially lessen competition**, the applicant must satisfy the ACCC that the agreement results in a benefit to the public that outweighs any anti-competitive effect.
- For primary and secondary boycotts, third line forcing, resale price maintenance and mergers, the applicant must satisfy the ACCC that the conduct results in a **benefit to the public such that it should be allowed to occur**.

Except for mergers, the ACCC must publish a draft determination and provide the opportunity for a conference of interested parties, before making a final decision whether to grant authorisation.

The immunity conferred by authorisation operates only from the time the ACCC grants final authorisation.

The ACCC is required to keep a public register of all documents relating to an authorisation decision. The only exception is commercially sensitive material for which confidentiality may be granted (s. 89).

Review of an authorisation determination by the ACCC may be sought by applying to the Australian Competition Tribunal (s. 101).

The Tribunal is required to determine appeals from the ACCC in merger authorisation cases within 60 days (s. 102(1A)). However, this time limit does not apply if the matter is especially complex or other special circumstances arise (s. 102(1B)).

(For details of the authorisation procedure, see the ACCC's *Guide to authorisations and notifications*.)

Merger authorisations — ss 50, 50A

Authorisation applications for mergers are covered by additional specific legislative requirements.

The ACCC must make a decision on such applications within 30 days of receiving them (plus any time taken by the applicant to provide additional information sought by the ACCC). The Act provides for the ACCC to extend the period to 45 days in complex matters.

Authorisation is deemed to be granted if the ACCC does not make a decision within whichever time frame applies.

Trade Practices Act

In deciding whether to grant the authorisation the ACCC will consider **all potential public benefits from the proposed merger**. It is specifically required by the Act to regard as a public benefit:

- a **significant increase in the real value of exports; or**
- **significant import substitution.**

It must also take into account all relevant matters that relate to the international competitiveness of Australian industry.

Notification — ss 93-93A

Exclusive dealing conduct (except for third line forcing) gains immediate and automatic immunity from legal proceedings under the Act when notification of it is given to the ACCC. Immunity for third line forcing comes into force at the end of the prescribed period from the time the ACCC receives the notice.

For third line forcing notifications lodged on or before 30 June 1996 the prescribed period is 21 days. After that the prescribed period will be 14 days.

That immunity remains unless revoked by the ACCC. It cannot be revoked unless the ACCC finds that:

- the conduct (other than for third line forcing) substantially lessens competition within the meaning of s. 47 of the Act; and
- any public benefit flowing from the conduct is outweighed by the lessening of competition.

In the case of third line forcing, immunity cannot be revoked unless the ACCC finds that the public benefit from the conduct does not outweigh the public detriment from the conduct.

It should be noted that for third line forcing notifications, the immunity will not commence at the end of the prescribed period if the Commission issues a draft revocation notice during the prescribed period. In such a case immunity will only commence when the Commission decides **not** to issue a final revocation notice. If immunity has commenced at the expiry of the prescribed time it

is open to the Commission to review the conduct and issue a draft revocation notice at a later time as with other notifications.

If the Commission wants to revoke a notice it must first issue a draft notice saying so and give the party an opportunity to respond to it. Once the Commission issues a final notice of revocation the conduct will no longer be protected after 31 days or from such later date as the Commission may specify.

Notification procedures

Before revoking a notification the ACCC must give interested parties the opportunity to call a conference. Application for a review of a decision on notification is made to the Tribunal (s. 101A).

For both authorisation and notification procedures the ACCC is required to keep a public register of all related documents. Copies of this information are available for inspection at ACCC offices in each capital city. However, commercially sensitive material for which confidentiality has been granted by the ACCC is not available for public inspection.

Fees

Under Trade Practices Regulations fees are payable on lodgment of applications for authorisation and notifications. At time of publication the fees were as follows.

- Application for merger authorisations s. 88(9) — \$15 000
- Authorisation applications other than under s. 88(9) — \$7500
- Additional related authorisation applications — \$1500
- Notifications (other than for third line forcing) — \$2500
 - additional related notifications — \$500
- Third line forcing notifications by a proprietary company or individual — \$100
- Third line forcing notifications in any other case — \$1000
 - additional related notifications — \$200

Part X — International liner cargo shipping

Broadly, Part X of the Act deals with limited exemptions from the provisions of Part IV for international liner cargo shipping conferences. (A conference is an unincorporated association of two or more ocean carriers carrying on two or more businesses each of which includes the provision of liner cargo shipping services.)

The exemptions apply to conference agreements registered with the Registrar of Liner Shipping in the Department of Workplace Relations and Small Business.

They apply only to certain specified practices which might otherwise breach:

- s. 45 — anti-competitive agreements; or
- s. 47 — anti-competitive exclusive dealing (other than third line forcing).

There are no exemptions from s. 45D (secondary boycotts), s. 46 (misuse of market power), or s. 50 (mergers and acquisitions).

The ACCC may examine complaints from parties adversely affected by shipping conference agreements and by the conduct of conference lines and non-conference lines having substantial market power.

The Minister may reduce or remove the exemptions given to conferences under the Act or accept undertakings from shipping lines. Breaches of such undertakings can be investigated by the ACCC.

The Minister may request the Australian Competition Tribunal to inquire and report on the question of whether a non-conference ocean carrier has a substantial degree of market power in the provision of outward liner cargo shipping services.

Non-conference ocean carriers found by the Tribunal to have a substantial degree of market power on a trade route are required to negotiate with certain designated shipper bodies.

Parts XIB and XIC — Telecommunications

Legislation in March 1997 provided a role for the ACCC in, amongst other things, regulating access within, and enforcing competitive safeguards in, the Australian telecommunications industry. The legislation included telecommunications specific amendments to the Trade Practices Act, provision for transitional arrangements from the previous regulatory regime existing under the *Telecommunications Act 1991*, a revised *Telecommunications Act 1997* and amendments to the *Radiocommunications Act 1992*. (See Other responsibilities, p. 68 for an outline of ACCC responsibilities under the Telecommunications and Radiocommunications Acts.)

The broad policy intention of the legislation was to establish, from 1 July 1997, open market access is to both telecommunications infrastructure and service provision. (Technical regulation and licensing are within the jurisdiction of the Australian Communications Authority (ACA).)

Amendments to the Trade Practices Act introduced two new Parts, one dealing with anti-competitive conduct in the telecommunications industry (Part XIB), and the other setting out the rules and procedures for guaranteeing access to network services, for the purposes of interconnectivity and interoperability between carriers and service providers (Part XIC). These apply **in addition** to the parts of the Act which regulate restrictive trade practices and unfair practices in general.

Part XIB — Anti-competitive conduct

Part XIB is a telecommunications specific regime which aims primarily to prevent carriers and carriage service providers with a substantial degree of market power in a telecommunications market from engaging in anti-competitive conduct.

Carriers and carriage service providers are prohibited from engaging in anti-competitive conduct as defined in the Part. This is

known as the 'competition rule'. Anti-competitive conduct is defined in two ways in Part XIB.

- First, a carrier or carriage service provider with substantial market power (in a telecommunications market) engages in anti-competitive conduct if it takes advantage of that power with the effect or likely effect of substantially lessening competition in that or any other telecommunications market.
- Second, a carrier or carriage service provider is taken to engage in anti-competitive conduct if it engages in conduct relating to a telecommunications market which contravenes most of the general restrictive trade practices provisions in Part IV of the Act.

On identifying conduct in breach of the competition rule the ACCC is empowered to seek an injunction and also issue a competition notice which states that the carrier or service provider has contravened or is contravening the rule. The competition notice is *prima facie* evidence of the matters in the notice and if the carrier or carriage service provider continues the conduct the ACCC can seek Federal Court orders for various remedies and pecuniary penalty. Once a notice has been issued, private parties may seek injunctions or other orders for breaches of the competition rule.

Guidelines

The ACCC must have regard to guidelines (which it is required to produce) when exercising its discretion whether or not to issue a competition notice.

Exemption orders

Carriers and service providers can apply to the ACCC for exemption from the anti-competitive conduct provisions in Part XIB. (Such exemption orders do not apply to breaches of the general restrictive trade practices provision in Part IV).

Tariff filing directions

In some circumstances carriers or carriage service providers are required to provide information to the ACCC about charges they make for telecommunications goods and services.

Record keeping rules

The ACCC can also make rules specifying the manner in which specified carriers or service providers must keep and retain certain records.

Penalties

The Federal Court may impose on corporations the following maximum penalties for contraventions:

- of the competition rule, \$10 million for each contravention and \$1 million for each day it continued;
- of a tariff filing direction, \$10 million for each contravention;
- of a record-keeping rule, \$250 000 for each contravention.

For individuals the maximum penalties are \$50 000 for each contravention of a record-keeping rule and \$500 000 for each of any other contraventions.

Part XIC — Access

Part XIC establishes an industry-specific regime for regulated access to carriage services, and reflects policy interests in promoting any-to-any connectivity and reliance on commercial resolution of access issues as far as possible.

Access to telecommunications services under Part XIC is achieved through the declaration of eligible services by the ACCC, either in consultation with an appointed industry self regulatory body made up of carriers and carriage service providers, or by the Commission through declaring access services itself after a public inquiry. (The industry body is known as the Telecommunications Access Forum.)

Carriers and carriage service providers can give undertakings on access and/or register agreements, thereby enabling the ACCC to exercise arbitration powers in respect of access disputes. (Other publications dealing in detail with Parts XIB and XIC are available from ACCC offices.)

Miscellaneous important provisions

Enforcement of undertakings — s. 87B

Section 87B provides for enforcement in the Court of written undertakings accepted by the ACCC in the exercise of its powers (other than in relation to Part X).

Where the ACCC believes that a term of such an undertaking has been breached it may apply to the Court for:

- an order directing compliance; and/or
- an order to pay the Commonwealth up to the amount of any financial benefit that can be reasonably attributed, directly or indirectly, to the breach; and/or
- any order the Court considers appropriate to compensate a third party for loss or damage resulting from the breach; and/or
- any other order the Court considers appropriate.

Powers to obtain information — s. 155

Section 155 confers powers on the ACCC to obtain information, documents and evidence when investigating possible contraventions of the Act and in some of its adjudication work. The section also applies to ACCC investigations under Part X of the Act.

Section 155(1) provides that where the ACCC, the Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence about a matter that constitutes, or may constitute a contravention of the Act, or is relevant to a decision under s. 93(3), a member of the ACCC may issue a Notice requiring the person:

- to furnish information in writing within a specified time and in a specified manner (s. 155(1)(a));

- to produce documents specified in the Notice to the ACCC or to a person specified in the Notice (s. 155(1)(b)); and
- to appear before the ACCC at a time and place specified in the Notice to give evidence, either orally or in writing, and produce documents (s. 155(1)(c)).

Section 155(2) empowers a member of the ACCC to authorise in writing a staff member to enter premises and to inspect any documents in the possession of, or under the control of, a person the ACCC, the Chairperson or Deputy Chairperson has reason to believe has engaged, or is engaging, in conduct which constitutes or may constitute a breach of the Act and to make copies of or take extracts from those documents.

Section 155(3) provides that s. 155(1)(c) evidence may be taken on oath or affirmation.

Section 155(5) imposes a legal obligation on a person to comply with a Notice and s. 155(6A) makes non-compliance an offence punishable by a fine or imprisonment.

Section 155(6) provides that a person in charge of premises which an authorised officer enters pursuant to s. 155(2) must provide all reasonable facilities and assistance for the effective exercise of those powers.

Section 155(7) provides expressly that a person is not excused from furnishing information or producing or permitting the inspection of a document on the grounds that the information or document may tend to incriminate him/her.

Section 159 provides that a person appearing before the ACCC to give evidence or produce documents is not excused from answering a question or producing a document on the grounds that the answer to the question or the document may tend to incriminate him/her.

Other responsibilities

Prices Surveillance Act 1983

The *Prices Surveillance Act 1983* enables the ACCC, where the Government declares products or services, to examine prices with the objectives of promoting competitive pricing wherever possible and restraining price rises in markets where competition is less than effective.

The Act relates to goods or services that are supplied in Australia for a price. Supply is defined broadly but explicitly covers situations where goods are sold, leased or exchanged, and where services are provided, granted or conferred.

The law does not deal with contracts of service, i.e. employment contracts where a task is performed in exchange for a wage or salary (s. 3).

The Act can be applied to the business activities of Commonwealth, State and Territory authorities, trading, financial and foreign corporations, and people or firms supplying goods or services within the ACT or across State or Territory boundaries (ss 4 and 5).

In certain circumstances the Act will permit price oversight of State and Territory Government businesses.

Price surveillance will be possible where the State and Territory concerned has agreed or where the National Competition Council has, on the request of an Australian Government, recommended declaration of the authority and the Commonwealth Minister has consulted the appropriate Minister of the State or Territory concerned. The Council can not recommend declaration if the government business is already subject to effective prices oversight.

Price monitoring of State and Territory businesses will be permitted only with the agreement of the State or Territory concerned.

Broadcasting Services Act 1992

Section 96A(1) of the *Broadcasting Services Act 1992* requires the Australian Broadcasting Authority (ABA), in conjunction with the ACCC, to monitor the cross-media ownership of the holders of subscription television broadcasting licences allocated under s. 96 in the context of the objects of the Broadcasting Services Act.

Sub-section 97(1) of the Broadcasting Services Act provides that, before a subscription television broadcasting licence is allocated, the Australian Broadcasting Authority must request the ACCC to provide a report. Sub-section 97(2) says:

- (2) The report is to advise whether, in the opinion of the ACCC, the allocation of the licence to the applicant:
 - a) would constitute a contravention of section 50 of the Trade Practices Act if the allocation of the licence were the acquisition by the applicant of an asset of a body corporate; and
 - b) would not be authorised under section 88 of that Act if the applicant had applied for such an authorisation.

Telecommunications Act 1997

The *Telecommunications Act 1997* delegates a number of specific functions and powers to the Commission in addition to those of the other bodies involved in regulating the industry — the Australian Communications Authority (ACA) and the Telecommunications Industry Ombudsman (TIO).

The Commission's main functions under the Telecommunications Act relate to telecommunications competition matters coming within that legislation. Various provisions of the Telecommunications Act give the ACCC a role wider than it has under the Trade Practices Act.

Briefly, the ACCC's functions and powers under the Telecommunications Act are as follows.

International Rules of Conduct

Part 20 of the Telecommunications Act provides a mechanism by which the Government can deal with what is termed 'unacceptable conduct' engaged in by international operators, through empowering the Minister to make *Rules of Conduct* administered by the Commission, directed at regulating carriers and carriage service providers in their dealings with international telecommunications operators.

Directions to the ACA on number portability and the numbering plan

In administering the Numbering Plan under Part 22 of the Telecommunications Act, the ACA cannot include rules about number portability unless directed to do so by the Commission. Any rules the ACA puts in the Plan regarding number portability must be consistent with any directions by the Commission.

ACCC directions in regard to electronic addressing

Division 3 of Part 22 of the Telecommunications Act provides for the regulation of electronic addressing by empowering the ACA to determine that a specified person or association is the **declared manager of electronic addressing** in relation to a specified kind of listed carriage service.

The ACA must not make such a determination unless either directed to do so by the ACCC or it is of the opinion that the person or association is not managing electronic addressing in accordance with generally accepted principles and standards.

ACCC directions on technical standards

Part 21 of the Telecommunications Act establishes a scheme whereby the ACA may make a technical standard relating to the interconnection of facilities, but must not do so unless directed to by the ACCC. The ACCC must not give such direction unless it is necessary to promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services; or to reduce or eliminate the likelihood of hindrance to the provision of access to declared services.

ACCC consultation on facility installation permits

Before making a decision to issue, or to refuse to issue, a permit authorising a carrier to carry out the installation of one or more facilities (a 'facility installation permit' under Schedule 3 of the Telecommunications Act) the ACA must consult the ACCC.

ACCC advice on industry codes of conduct and standards

Part 6 of the Telecommunications Act provides for industry self regulation of a wide range of telecommunications activities by means of industry developed codes of conduct which may be registered by the ACA. Before the ACA registers an industry code it must be satisfied that the Commission has been consulted about the development of the code, and it must not declare or vary an industry standard before it has consulted with the Commission.

ACCC consultation on service provider rules

Part 4 of the Telecommunications Act, which sets out definitions of carriage service providers and content service providers, establishes a regime enabling the ACA to make written determinations, in addition to specific rules found in Schedule 2 of that Act, setting out rules that apply to service providers in relation to the supply of either or both of specified carriage or content services. However, before making a service provider determination in relation to carriage or content services, the ACA must consult the ACCC.

ACCC consultation on pre-selection

Under Part 17 of the Telecommunications Act the ACA may require certain carriers and carriage service providers to provide pre-selection in favour of carriage service providers. Pre-selection must include over-ride dial codes for selecting alternative carriage service providers on a call-by-call basis. Before making a determination requiring a carrier or carriage service provider to provide pre-selection the ACA must consult the ACCC.

ACCC arbitration responsibilities under the Telecommunications Act

Under various provisions in the Telecommunications Act the Commission may become involved in the arbitration of disputes in relation to the following matters:

- (a) the provision of carrier access to:
 - supplementary facilities, telecommunications transmission towers, transmission tower sites, eligible underground facilities;
 - certain information relating to the operation of telecommunications networks (i.e. network information, information databases, network planning information, quality of service information);
 - certain operator services to end-users of standard telephone services; and
 - directory assistance services to end-users of standard telephone services.
- (b) the provision of number portability in compliance with the numbering plan administered by the ACA;
- (c) the provision of pre-selection in favour of specified carriage service providers;
- (d) the provision of access to facilities for the purpose of emergency call services;
- (e) the supply of a specified carriage service for the use of the Department of Defence or the Defence force.

Australian Postal Corporation Act 1989

The *Australian Postal Corporation Act 1989* at sub-section 32B(1) provides for the provision of regulations which allow the ACCC to inquire into any dispute as to the amount of postal rate reduction given by Australia Post to bulk mailers interconnecting or attempting to interconnect to the Australian Postal System. The ACCC, after the dispute hearing process, is required to make a recommendation to the Minister for Communications and the Arts.

Certification Trade Marks

Under the *Trade Marks Act 1995*, the ACCC has responsibilities in relation to the approval of Certification Trade Marks. The ACCC's role involves assessing and approving rules for the use of Certification Trade Marks, including:

- considering the competence of an applicant for a Certification Trade Mark (or any approved certifier) to certify that goods or services bearing the Certification Trade Mark comply with the rules governing the use of the Trade Mark. The rules set out the qualities and standards to be met by goods or services bearing the Trade Mark; and
- examining the rules to ensure they are not in themselves anti-competitive or misleading or deceptive. (It is a matter for the Registrar to determine if any use of a Trade Mark is misleading or deceptive.)

ACCC regulatory responsibilities under the National Gas Code

Under the National Third Party Access Code For Natural Gas Pipeline Systems the ACCC has important functions in the regulation of some 15 majors gas transmission pipelines and two distribution networks.

All States/Territories other than Western Australia have nominated the ACCC as transmission regulator. At present the code is not fully operational in Queensland and Victoria.

Other responsibilities

Within 90 days of the National Code coming into force in a particular jurisdiction, the Service Providers of each covered pipeline in that jurisdiction are obliged to offer access arrangements to the Regulator for their respective systems. The Regulator has six months to consider the proposed access arrangements, during which time it must seek submissions, issue a draft determination, consult with interested parties on the draft, then issue a final determination.

In considering whether to approve a proposed access arrangement, the Regulator must assess it against the minimum requirements set out in the code. These include that the proposed access arrangement must contain policy statements covering the following:

- the services being offered;
- the reference tariff(s) for those services and associated terms and conditions;
- capacity management and trading;
- extensions/expansions;
- queuing; and
- a review date.

The Regulator has a significant ongoing monitoring and enforcement role. Areas requiring monitoring include:

- compliance with the ring fencing arrangements and assessments as to whether they are appropriate given any changes in market circumstance;
- potential breaches of the hindering access prohibition;
- whether target rates of return have been achieved;
- whether proposed costs are incurred;
- whether proposed demand projections are accurate; and
- the effectiveness of incentive mechanisms.

Related party contracts entered into by Service Providers are unenforceable unless they have been approved by the Regulator. This involves a process of public consultation, including a draft determination, consideration of submissions and a final determination.

The Regulator also has a significant ongoing role in dispute resolution. Dispute resolution is limited to disputes over access to spare or developable capacity, where negotiations have broken down. The Regulator determines whether there is a dispute or not. The Regulator can arbitrate and make determinations about access to capacity. The code sets out detailed principles the Arbitrator is to take into account in making any arbitration determination and also restrictions upon determinations.

Financial services markets

The *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, which commenced 1 July 1998, implemented a new consumer protection regime for the financial services sector.

Under this legislation a newly created Australian Securities and Investments Commission (ASIC), was given primary responsibility for consumer protection and market integrity in this sector.

ASIC has responsibility for consumer protection matters involving:

- facilities for taking money on deposit — made available in the course of conducting a banking business;
- securities;
- futures contracts;
- contracts of insurance;
- retirement savings accounts; and
- superannuation interests.

The ACCC retains responsibility for consumer protection matters involving foreign exchange contracts and credit — and for enforcement of the competition provisions of the Trade Practices Act in the whole of the financial services sector.

The ACCC and ASIC signed a cooperation agreement in July 1998.

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Attachment B

Merger Guidelines

(refer ACCC publication, July 1996)



Australian
Competition &
Consumer
Commission

Merger Guidelines

A guide to the Commission's administration
of the merger provisions (ss 50, 50A) of the
Trade Practices Act



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1. Introduction

1.1 The Australian Competition and Consumer Commission (the Commission) was established under the *Competition Policy Reform Act 1995* (the CPR Act), which came into operation on 6 November 1995. The Commission was formed from a merger of the Trade Practices Commission and the Prices Surveillance Authority; taking over the functions of those two bodies as well as additional functions established under the CPR Act.

1.2 The Commission is an independent statutory authority consisting of a Chairman and Deputy Chairman together with a number of full time, part time and ex-officio members.

1.3 It administers Part IIIA (access to essential services, in respect of undertakings and determinations), Part IV (anti competitive practices), Part IVA (unconscionable conduct), Part V (unfair trading practices), Part VA (product liability) and Part VII (authorisations and notifications in respect of restrictive trade practices), of the *Trade Practices Act 1974* (the Act) and the *Prices Surveillance Act 1983*.

1.4 The object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection (s. 2).

1.5 The merger and acquisition provisions of the Act fall within the provisions of Part IV. Section 50 prohibits acquisitions which would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia, in a state or in a territory. The authorisation provisions in Part VII of the Act provide a mechanism for the Commission, or the Australian Competition Tribunal (the Tribunal) on review, to exempt mergers from the application of Part IV where they would result, or be likely to result, in such a benefit to the public that they should be allowed to take place.

1.6 These guidelines update the Commission's 1992 draft guidelines, which were published in anticipation of the amendment of ss. 50 and 50A to take effect from 21 January 1993. Prior to that amendment the Act prohibited acquisitions as a result of which a corporation would be, or would be likely to be, in a position to dominate a market, or where such a position would be substantially strengthened.

1.7 The guidelines outline the Commission's policy for the administration and enforcement of those provisions of the Act that deal with mergers and include an outline of the factors relevant to the Commission's consideration of a merger matter, including the authorisation (or exemption) process and the use of enforceable undertakings.

1.8 The guidelines are designed to provide guidance for the business community and their advisers as well as the public generally. The guidelines cannot provide a prescriptive response to any particular merger. They provide a guide to the way in which the Commission approaches the consideration of mergers and acquisitions and the types of information which are relevant to that consideration. Analysis of any particular merger requires consideration of the specific market characteristics and their interaction.

1.9 The guidelines do not have any legal basis in determining breaches of the Act, as final determination of the issues is a matter for the courts. The guidelines state the Commission's current views and procedures in relation to its administration of the Act, including the determination of applications for authorisation.

1.10 The vast majority of mergers do not raise competition concerns. Of the 100–150 mergers which have been formally investigated by the Commission each year since the introduction of the new test, it has objected to fewer than five per cent. In some cases mergers which the Commission has initially objected to have been resolved by divestiture and/or the provision of undertakings which address the competition concerns. Three mergers have proceeded to litigation under the current test.¹ There have been seven applications for authorisation of mergers under the current test², three of which were denied, three were granted and one was withdrawn. One decision was confirmed on review by the Tribunal and one is currently subject to review.

1.11 If the Commission considers that an acquisition contravenes s. 50 of the Act and the parties do not agree to modify or abandon the acquisition, it can apply to the Federal Court for an injunction, divestiture or penalties. Only the Commission can apply for an injunction in relation to merger matters. Other persons can apply for a declaration and divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damages as a result of a merger which breaches s. 50 can apply for damages.

1.12 If the Commission considers that an acquisition of shares outside Australia would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia and that the acquisition would not result in such a benefit to the public that it should be disregarded, it can apply to the Tribunal for a declaration to that effect (s. 50A). The Minister or any other person can also make such an application. If the Tribunal makes such a declaration, the relevant corporation must cease to carry on business in the relevant market.

¹ *Trade Practices Commission v. Rank Commercial Limited & Ors.* (1994), ATPR, 41-331: the Commission obtained an interim injunction to restrain the acquisition and the merger parties subsequently abandoned the proposal. *Australian Competition and Consumer Commission v The Adelaide Steamship Company Limited & Ors* (1996) ATPR 41-462: the Commission was unsuccessful in its application for an interim injunction to restrain the acquisition of the Sydney port tugboat operations of Brambles by Adsteam and Howard Smith. The Commission subsequently discontinued the proceedings as divestiture was unlikely to be a satisfactory remedy. *Australian Competition and Consumer Commission v Wattyl (Australia) Pty Limited & Ors* (1996) unreported: the Commission sought an interim injunction to restrain the acquisition by Wattyl of the Courtaulds architectural and decorative paint business, Taubmans. The merger parties gave undertakings to the Court not to proceed with the proposal prior to the determination of the matter. The parties subsequently sought authorisation, which was denied, and have now applied for review to the Australian Competition Tribunal.

² *CSR Ltd, Mackay Sugar Cooperative Association Ltd, E D & F Man Australia Pty Ltd & Newco* (1993), ATPR 50-138; *Dauids Ltd* (1995), ATPR 50-185; *Silver Top Taxi Service Ltd* (1995), ATPR 50-209; *Dauids Ltd* (1996), ATPR 50-224; *DuPont (Australia) Ltd, Ticor Ltd, Howson Algraphy (Australia) Pty Ltd, Ticor Chemical Company Pty Ltd* (1996), unreported; *Wattyl (Australia) Pty Ltd, Courtaulds (Australia) Pty Ltd, Taubmans Industries Ltd & Pinchin Johnson (Australia) Pty Ltd* (1996), unreported. An application by Foodland Associated Ltd in 1993 was withdrawn.

1.13 The Commission has the power to make determinations in relation to applications for authorisation of acquisitions which would otherwise be subject to s. 50 or s. 50A. The Tribunal has the power to review determinations made by the Commission, where an application for review is made by an interested party.

2. Relevant provisions of the Act

2.1 The provisions of the Act relevant to mergers include:

- mergers and acquisitions — s. 50;
- extraterritorial operation — s. 5(1);
- overseas share acquisitions — s. 50A;
- anti-competitive agreements — s. 45;
- definition of acquisition of shares or assets — s. 4(4);
- market definition — s. 4E;
- lessening of competition includes preventing or hindering — s. 4G;
- power to grant authorisations — s. 88;
- determination of an application for authorisation — s. 90;
- application to Australian Competition Tribunal for Review — s. 101;
- injunctions — s. 80;
- divestiture and setting aside acquisitions — s. 81;
- pecuniary penalty — s. 76;
- enforceable undertakings — s. 87B.

2.2 In some cases the relevant provisions of the Act are summarised for ease of reading. The Act is a complex piece of legislation and while the Commission believes such summaries are accurate the nature of the Act requires the actual provisions to be consulted other than in straightforward cases.

2.3 As from 21 January 1993, s. 50(1)–(2) of the Act provides:

- (1) A corporation must not directly or indirectly:
 - (a) acquire shares in the capital of a body corporate; or
 - (b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

- (2) A person must not directly or indirectly:
 - (a) acquire shares in the capital of a corporation; or
 - (b) acquire any assets of a corporation;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

2.4 As from 21 January 1993, s. 50A(1) of the Act provides:

- (1) Where a person acquires, outside Australia, otherwise than by reason of the application of paragraph (8)(b), a controlling interest (the 'first controlling interest') in any body corporate and,

by reason, but not necessarily by reason only, of the application of paragraph (8)(b) in relation to the first controlling interest, obtains a controlling interest ('the second controlling interest') in a corporation or each of 2 or more corporations, the Tribunal may, on the application of the Minister, the Commission or any other person, if the Tribunal is satisfied that -

(a) the person's obtaining of the second controlling interest would have the effect, or be likely to have the effect, of substantially lessening competition in a market; and

(b) the person's obtaining of the second controlling interest would not, in all the circumstances, result, or be likely to result, in such a benefit to the public that the obtaining should be disregarded for the purposes of this section.

make a declaration accordingly.

Section 50A(8)(b) deals with the definition of 'controlling interest' (see paragraph 3.32 below).

2.5 Section 45(7) removes the application of s. 45 to a contract, arrangement or understanding insofar as it provides, directly or indirectly, for the acquisition of any shares in a body corporate or any assets of a person.

2.6 The Act applies to both direct and indirect acquisitions. Section 4(1) makes it clear that 'acquire' is not limited to acquisition by way of purchase but also includes exchange, lease, hire or hire-purchase.

2.7 Section 4(4) makes it clear that joint acquisitions and acquisitions of equitable as well as legal interests are acquisitions subject to s. 50³; but that in the case of assets, an acquisition by way of a charge and an acquisition in the ordinary course of business are not acquisitions to which s. 50 applies.

2.8 Section 4G provides:

For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

2.9 Section 4E of the Act provides:

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.

2.10 Sections 50 and 50A only relate to substantial markets for goods and services in Australia, a State or in a Territory (ss. 50(6) and 50A(9)).

2.11 The terms 'substantial lessening of competition', 'market' and 'substantial market' are discussed in section 5 below.

2.12 Under s. 88(9) of the Act the Commission may, upon application, grant authorisation to acquire shares in the capital of a body corporate or assets of a person and

³ In *Trade Practices Commission v Arnotts Ltd* (1990), ATPR 41-002, creation of an option over shares was found to create an equitable interest in those shares and therefore constituted an acquisition subject to s. 50.

while such authorisation remains in force s. 50 does not prevent the person from making such an acquisition in accordance with the authorisation. The Commission may also, upon application, grant an authorisation to acquire a controlling interest in a body corporate within the meaning of s. 50A and while such an authorisation remains in force s. 50A does not, to the extent specified in the authorisation, apply in relation to the acquisition of that controlling interest.

2.13 Under s. 90(9) the Commission shall not make a determination granting an authorisation in respect of a proposed acquisition unless:

It is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

2.14 Under s. 101(1), the applicant for authorisation or any other person dissatisfied with the Commission's determination, who the Tribunal is satisfied has sufficient interest, can apply to the Tribunal for a review of the Commission's determination.

2.15 The subject of authorisation is discussed in Section 6 below.

2.16 Under s. 87B, the Commission may accept a written undertaking in connection with a matter in relation to which it has a power or function under the Act except Part X. If the undertaking is breached the Commission may seek orders from the Court directing compliance with the undertaking, the giving up of any financial benefit gained from the breach, compensation for any other loss or damage as a result of the breach or any other appropriate orders.

2.17 The Commission has published a guideline on its general administration of s. 87B.⁴ Although the guideline does not specifically deal with the use of enforceable undertakings in relation to mergers, many of the general principles apply. The use of enforceable undertakings in relation to mergers is discussed in section 7 below.

2.18 Under s. 80, only the Commission may seek injunctive relief from the Federal Court to prevent an acquisition from proceeding. Other persons may institute declaration proceedings in respect of an acquisition (s. 163A) but the right to seek an injunction has been expressly limited by Parliament to the Commission (s. 80(1A)).

2.19 Under s. 80(2) where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application. Where the Commission makes an application seeking an injunction, the Court shall not require the applicant, or any other person, to give an undertaking as to damages as a condition of granting an interim injunction.

2.20 Under s. 81 (1), the Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding under the Act found, that a person has contravened s. 50 of the Act, give directions to secure disposal of all or any of the shares or assets acquired in contravention of s. 50. Under s. 81(1A), the Court may declare such

⁴ Trade Practices Commission (1995), *Section 87B of the Trade Practices Act: A guideline on the Trade Practices Commission's use of enforceable undertakings*, August 1995.

an acquisition void where it finds that the vendor was involved in the contravention. S. 81(1C) provides for the Court to accept as an alternative an undertaking from the person to dispose of other shares or assets owned by the person. S. 81(1B) deals with the divestiture of controlling interests acquired in contravention of s. 50A. An application under s. 81(1), (1A) or (1B) may be made at any time within three years after the date on which the contravention occurred.

2.21 In certain circumstances, as provided for in s. 76(1) of the Act, the Court may impose a penalty for a breach of s. 50 of up to \$500 000 for an individual and \$10 million for a corporation.

3. Acquisitions subject to the Act

Crown carrying on business and unincorporated organisations

3.1 Prior to the CPR Act, by virtue of the limitations imposed by Australia's Commonwealth Constitution, the Act was limited in its application. Conduct that amounted to primary contraventions of the Act was basically limited to conduct by corporations. However, some sections of the Act extended liability for primary contraventions to non corporate persons. Section 50 (2) of the Act prohibited an individual from acquiring shares or assets of a corporation where such an acquisition was likely to result in a substantial lessening of competition in a substantial market.

3.2 The CPR Act, in conjunction with corresponding legislation that each State Government has agreed to pass, extends the reach of the Act to certain areas or types of conduct that were previously outside the reach of the Act. The CPR Act passed through the Commonwealth Parliament on 30 June 1995 and received Royal Assent on 20 July 1995.

3.3 The practical results of the amendments to the Act in relation to the administration of mergers are as follows.

- The shield of the Crown in the right of the States and Territories will be abolished in so far as the States or Territories are carrying on business (clause 76 of the CPR Act).
- Section 51(1) of the Act, which provides for exceptions from Part IV of the Act for conduct that is excepted by laws of the Commonwealth, States or Territories, is amended, inter alia, so that exceptions from s. 50 and s. 50A may only be made by laws of the Commonwealth. As with all 'new' exceptions under s. 51, the Commonwealth law must specify the excepted acquisition and specifically authorise it (clause 13 of the CPR Act). It must be noted that if there are any current exceptions made by the Commonwealth, State or Territory laws, the effect of these laws are preserved for a transitional period of three years (to 19 August 1998) (clause 29 of the CPR Act).
- Acquisitions by non corporate persons will be subject to the Act whether or not the target of the acquisition is incorporated. This is pursuant to clause 23 of the CPR Act which inserts Part XIA, 'The Competition Code', in the Act. Each Australian State and Territory Government is, with the Commonwealth Government, a party to the Conduct Code Agreement. Clause 5 of the Conduct Code Agreement states that each State and Territory that is a party will put for the consideration of their legislatures, legislation implementing 'The Competition Code'.

3.4 In any situations discussed in paragraph 3.3 above, where the Commission must make inquiries into an acquisition or proposed acquisition, the process will be the same as that referred to in section 4 below.

3.5 Amendments to s. 51(1) of the Act, introduced by the CPR Act, follow the timetable below:

- the amendments to s. 51(1) came into force 28 days after the day the CPR Act received Royal Assent (i.e. 17 August 1995);
- as discussed above, exemptions pursuant to s 51(1) of the Act that were in place prior to 19 August 1994 will be subject to sunset clauses and transparency arrangements;
- where there is Commonwealth, State or Territory law made pursuant to s. 51(1) of the Act that does not meet the transparency requirements of the amended section, that conduct will be protected for three years after Royal Assent;
- those laws that do meet the transparency requirements will continue to be exempt from Part IV of the Act; and
- contracts entered into before 19 August 1994 that were outside the scope of Part IV of the Act will be 'grandfathered' so that any anti competitive conduct pursuant to these contracts will not be subject to the Act. However, any variations to such contracts will be subject to the Act.

3.6 The State and Territory legislation implementing 'The Competition Code' must be enacted within 12 months after the day the CPR Act received Royal Assent (i.e. 19 July 1996), in order for the States and Territories to receive the entire financial benefits envisaged by the National Competition Policy package. Pecuniary penalties will not apply to conduct subject to competition law for the first time for a further 12 months (i.e. a total of two years after the day the CPR Act received Royal Assent (i.e. 19 July 1997)). However pecuniary penalties do not apply to activities of the Crown.

Deregulating industries

3.7 In recent years State, Territory and Commonwealth governments have initiated various pro-competitive reforms, involving horizontal and vertical disaggregation of government owned monopolies, corporatisation or privatisation and the removal of various restrictions on the operation of free markets, e.g. compulsory acquisition of crops by agricultural marketing boards and restrictions on the geographic distribution of dairy products. These initiatives have been given further impetus by the Competition Principles Agreement, whereby all governments agreed to a systematic review of all legislation restricting competition. These initiatives have a number of implications for merger policy administration.

3.8 Deregulation may have a significant impact on market boundaries. For example, the removal of restrictions on the geographic movement of products will result in market boundaries being determined by fundamental conditions of supply and demand rather than artificial regulatory restrictions. Similarly, changes in the licensing arrangements for financial institutions may result in greater supply side substitution and broader product markets.

3.9 Deregulation may also have a significant impact on barriers to import competition or new entry. Import quotas and tariffs restrict the supply elasticity of imports and the import parity price at which import competition constrains domestic prices. Government licensing often directly limits the number of potential participants in a market, e.g. broadcasting markets. Liberalisation or abolition of these requirements can ease or remove barriers to entry and any competition concerns relating to acquisitions in these markets.

3.10 Privatisation of government assets will in future generally be subject to the Act. The Commission will scrutinise proposed acquisitions by private sector competitors, suppliers or customers which could potentially result in a substantial lessening of competition in a substantial market. Where assets are being disaggregated to promote competitive markets, the Commission will want to ensure that this intent is not undermined through acquisition by horizontally or vertically related parties where this would have the effect of substantially lessening competition in a relevant market.

3.11 Subsequent to the privatisation and disaggregation of assets, both horizontal and vertical, the Commission will scrutinise any proposed mergers and acquisitions to ensure that the pro-competitive effects of disaggregation are not undone. Where statutory monopolies are removed in vertically related markets, e.g. grain storage and trading, the Commission will be concerned to ensure that any proposed vertical mergers between incumbents do not have the effect of preventing or hindering the development of competition in relevant markets (s. 4G, see paragraph 2.20).

3.12 Where governments are planning to remove restrictions on the supply of particular products, the Commission will scrutinise proposed acquisitions which might seek to pre-empt the competitive effects of such deregulation. For example, the merger of two dairy product manufacturers who do not currently compete in the same geographic market may nevertheless have the effect of preventing or hindering competition in broader geographic markets post deregulation.

Overseas acquisitions

3.13 Section 50 applies to conduct, the relevant conduct being the acquisition of shares or assets. To the extent that the acquisition (the conduct) occurs in Australia, then the Act applies without any extraterritorial scope. To the extent that the acquisition occurs outside Australia, the Act may apply depending on its extraterritorial scope. The Commission has taken the view that the acquisition occurs (as opposed to the agreement or transaction) where the property is situated. This is an unsettled area of the law.

3.14 In summary, the Act applies to the following acquisitions.

- (a) Acquisitions of property within Australia. This includes acquisitions of:
 - shares in Australian companies, wherever the transaction is entered into, as the shares are domestically situated;
 - domestic businesses;
 - local intellectual property such as trade marks; and

- local plant and equipment.

(These acquisitions are covered by virtue of s. 50)

- (b) Acquisitions of property wherever situated if the acquirer is:

- incorporated in Australia;
- carries on business in Australia;
- an Australian citizen; or
- ordinarily resident here.

(These acquisitions are covered by virtue of s. 50 and s. 5(1))

- (c) If (a) and (b) above do not apply, acquisitions of a controlling interest (presumably shares in almost all cases) in a body corporate where that body corporate has a controlling interest in a corporation.

(These acquisitions are covered by virtue of s. 50A)

3.15 Section 5(1) of the Act extends Parts IV, IVA and V to the engaging in conduct outside Australia by corporations incorporated in, or carrying on business within, Australia or by Australian citizens or persons ordinarily resident within Australia. Accordingly, as stated in paragraph 3.14 (b) above, if a foreign corporation carries on business within Australia, or an individual, who is not an Australian citizen, carries on business in Australia or is resident in Australia, their acquisition activities inside or outside of Australia are subject to the Act where they are likely to substantially lessen competition in a substantial market in Australia. Similarly, an acquisition of an unincorporated business by an Australian corporation, foreign corporation or an individual or an unincorporated business trading within Australia (these latter two by virtue of the enactment of the CPR Act) will be within the jurisdiction of s. 50 of the Act.

3.16 There have been a number of Court decisions about the term 'carrying on business within Australia'. It may apply to a foreign corporation that carries on business in Australia by way of an agent or a wholly owned Australian subsidiary. This is particularly the case where the degree of involvement by the foreign corporation in the direction of the business of the subsidiary is such as to go beyond a passive shareholding, or for example, where the Australian subsidiary has been set up to run its business as part of the worldwide organisation of the foreign corporation. It has also been held that the acquisition of, and licensing of, intellectual property rights within Australia by a foreign corporation is likely to constitute carrying on business in Australia.⁵

3.17 There are also foreign acquisitions in which the acquirer may not be considered as carrying on business within Australia. Prior to 1986 the Act did not extend to regulating this conduct. The 1986 amendments to the Act that led to the enactment of Section 50A extend the Act's jurisdiction to apply to these acquisitions.

⁵ *Amalgamated Wireless (Australia) Ltd. v. McDonnell Douglas Corporation* (1987), 77 ALR 537; and *Tycoon Holdings Ltd. v. Tencor Jetco Inc* (1992), ATPR 41-183. See also *TPC v The Gillette Company (No.1)* (1993) 45 FCR 366 and *TPC v The Gillette Company* (1993) ATPR 41-278.

3.18 Paragraph 2.4 above sets out the elements of Section 50A. The main differences between Section 50A and Section 50 are as follows.

- Section 50A applies to the overseas acquisition by a person of a controlling interest (defined in s. 50A(8) — see paragraph 3.32 below) in a body corporate, who by reason of that acquisition obtains a controlling interest in a corporation (e.g. a domestic trading company or foreign company registered in Australia); whereas s. 50 may not apply as the acquisition has occurred overseas and s. 5(1) may not operate as the acquirer may not be a body corporate incorporated or carrying on business in Australia or be an Australian citizen or be a person ordinarily resident here.
- Section 50A and s. 50 are procedurally different. s. 50A requires an application by the Minister, the Commission or a person to the Tribunal for a declaration (on grounds discussed below) with a statutory sanction (s. 50A(6)); whereas breaches of s. 50 are determined in and by the Federal Court.
- The factors for the assessment of acquisitions or proposed acquisitions under s. 50 and s. 50A are different. In an application to the Tribunal pursuant to s. 50A, the Tribunal shall assess whether the obtaining of the controlling interest will substantially lessen competition in a substantial market and will also assess whether it will not result in such a benefit to the public that it should be disregarded for the purposes of the section. In effect, the Tribunal refers to the test in s. 50 as well as that set out in s. 88 and 90 of the Act (by way of sub s. 50A (1A) and (1B)); whereas under s. 50, the Commission and the Federal Court do not consider the issue of benefit to the public unless the parties to the acquisition apply to the Commission for authorisation.

3.19 The effect of a declaration is that, by the end of six months from the date of the declaration, the corporation or corporations in which the person has the controlling interest, shall not carry on business in Australia. Contravention of the declaration opens the corporation or corporations to all the remedies available under the Act.

Partial shareholdings

3.20 When the s. 50 test was amended from 'dominance' to 'substantial lessening of competition', the provisions dealing with related or associated corporations were removed. Section 50 now applies to any acquisition of shares which would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market. Paragraph 13 of the Explanatory Memorandum states that:

Under the new merger test, it is the effect on competition which is important, rather than the particular position of the acquiring firm. In determining whether competition is likely to be lessened, inter-firm relationships which are likely to exist after the merger may of course be a relevant consideration.

3.21 Under the dominance test, the Commission needed to consider the question of control or influence, but under the new test there is no such requirement. The issue to be examined is simply the effect of the acquisition on competition. While questions of

control or influence will be important, anti-competitive effects may arise from shareholdings which do not necessarily confer such control or even influence.

3.22 The following are some of the potential anti-competitive effects of shareholdings below a level delivering control⁶:

- horizontal acquisitions may reduce competitive zeal between rivals and increase the motivation and capacity to coordinate firm conduct;
- acquisitions in one market by parties who are rivals in another market may facilitate coordinated conduct in the second (or third) market;
- vertical acquisitions may result in foreclosure of rival suppliers;
- horizontal and vertical acquisitions may provide access to commercially sensitive information in relation to competitors; and
- horizontal and vertical mergers may block potentially pro-competitive mergers and rationalisation.

3.23 If a firm has a significant shareholding in a rival firm, it may be less inclined to compete head to head with that firm, since to do so would result in a transfer of revenue between commonly held assets and would likely reduce overall profitability. Coordinated conduct, to maximise joint profits, becomes more attractive. Where the incentives lie in particular circumstances depends on the relative value of the assets as well as the percentage shareholding. The extent to which coordination can succeed depends on features of the product market (see paragraph 5.156 below) and the degree of influence which one firm has on the conduct of the other. Partial shareholdings and directorships may encourage coordination by reducing the incentives for 'cheating', making departures from agreed behaviour harder to conceal and facilitating the exchange of information between firms.

3.24 Two parties who compete in one market may acquire shares in a company or participate in a joint venture in another market. This may facilitate coordinated conduct in the first market. Furthermore, while the third party might not compete in the first market, it is possible that all three might compete in a third market, for example in the acquisition of inputs. For example, free-to-air television channels jointly participating in the provision of subscription television (which may or may not be in the same market), but which do compete for the acquisition of programming.

3.25 Acquisition of shares in a supplier may provide an incentive to favour that supplier over others, boosting the profitability of that shareholding, which may in turn foreclose rivals opportunities to sell to the acquirer. Acquisition of shares in a customer might induce that customer to buy from the acquirer, whose votes might be used against management, foreclosing sales opportunities from rival suppliers.

3.26 Firms may be able to gain access to commercially sensitive information about their rivals through either horizontal or vertical acquisitions. Debt holders may also have

⁶ See Areeda and Turner, *Anti-Trust Law*, Volume 5, at pp.318–319.

access to significant information. Information such as costs, revenues, bids, contracts, forward supply estimates, marketing campaigns and new product plans etc. may be available. The level of information available will depend on the nature and level of the shareholding. If the shareholding is sufficient to secure a position on the board of directors, more information is likely to be available.

3.27 A shareholding of over ten per cent in a company is sufficient to block compulsory acquisition of all the shares by another party. This in turn may allow the minority shareholder to prevent rationalisation of two weak rivals and the creation of a more competitive firm.

3.28 Acquisition by one company of a controlling interest in another company may permit two firms to effectively operate as a single entity, with the ability to maximise joint profits. While a majority shareholding would ensure control, much lower shareholdings might also be sufficient.

3.29 It is not possible to proscribe a level of shareholdings which would or could deliver control over a company. However, when considering any particular acquisition, factors which need to be taken into account when considering whether a shareholding is sufficient to deliver control of a company include:

- the ownership distribution of the remaining shares and securities, including ordinary and preference shares and any special shares;
- the distribution of voting rights, including any special voting rights;
- whether other shareholders are active or passive participants at company meetings;
- any restrictive covenants or special benefits attaching to shares;
- any pre-emption rights in relation to the sale of shares or assets;
- any other contracts or arrangements between the parties;
- the rights and influence of any significant debt holders;
- the composition of the board of directors; and
- the company's Articles of Association.

3.30 The framework for competition analysis set out in Section 5 below is relevant for all share acquisitions, whether or not they deliver control of the target firm. Unless the parties compete in the same market or in vertically related markets, competition concerns are unlikely to arise. Similarly, if the combined market share of the companies is small, or if there is strong import competition or low entry barriers, competition concerns are unlikely to arise. However, where share acquisitions do not deliver control, additional consideration must be given to inter-company relationships and the types of competition concerns discussed above.

3.31 Section 50A of the Act, which deals with acquisitions outside Australia (see paragraphs 2.4 and 3.13–3.19 above), only applies to acquisitions which deliver a controlling interest in a body corporate and thereby result in the acquirer obtaining a

controlling interest in a corporation (e.g. a domestic trading company or the holding company of such a company).

3.32 Section 50A(8) in essence defines a 'controlling interest' to require that a corporation becomes, directly or indirectly, a subsidiary of the acquirer. Section 4A in turn provides that a corporation will be a subsidiary of another body corporate where: it controls the composition of its board of directors; is in a position to cast more than 50 per cent of the maximum number of votes that can be cast at a general meeting; or holds more than 50 per cent of the issued share capital (excluding limited participation shares).

3.33 The Commission may, under section 50, also consider the collective effect of shareholdings that are acquired incrementally over a period of time. In particular, the Corporations Law permits acquisitions beyond 20 per cent (the normal takeover threshold), of up to three per cent every six months without triggering the requirement for a full takeover offer. The initial acquisition may not raise substantial competition concerns, and each incremental acquisition may not give rise to a substantial lessening of competition in its own right. However, collectively the acquisitions may give rise to competition concerns and may eventually deliver control of the target company. The Commission considers that the Act may apply to such creeping acquisitions.

3.34 Partial share acquisitions may also occur through one party buying out another party in a joint venture arrangement. The framework for analysis of the competitive effects of mergers in general is equally applicable to joint venture buy-outs. However, additional factors need to be taken into account; in particular, the structure of the joint venture and the changes to that structure brought about by the acquisition. For example, if a joint venture is set up by downstream market participants as a monopoly supplier of inputs (the parties to the joint venture continuing to compete in the downstream market), it may be organised simply on a cost sharing basis in order to benefit from economies of scale; or it may be established as a profit maximising public company. In the first case, a buyout by one party of the other parties may result in monopoly pricing; but in the second case the company is already likely to be exploiting any monopoly power.

4. Notification and Commission consideration of proposed mergers

4.1 There is no formal requirement that parties to a proposed acquisition must advise the Commission prior to entering into an agreement to effect an acquisition (unless the parties seek to formally apply to the Commission for authorisation — this is discussed in section 6 below). However, the Commission is commonly advised of such proposals.

4.2 In addition to parties to a proposed acquisition approaching the Commission, the Commission is, on occasions advised by other regulators of proposed acquisitions. Regulators such as the Foreign Investment Review Board, The Australian Stock Exchange, The Australian Securities Commission, the Australian Broadcasting Authority and Austel all provide the Commission with invaluable information and assistance with its inquiries. (The Commission also, from time to time, receives complaints by market participants about an acquisition).

4.3 Similarly, subject to restrictions to which various regulators are subject about the exchange of information, the Commission also liaises with, and seeks assistance from overseas regulators such as the Commerce Commission in New Zealand, the Department of Justice and the Federal Trade Commission in the United States, the Bureau of Competition Policy in Canada and the Monopolies and Mergers Commission in the UK. In particular, due to Australia's closer economic relations with New Zealand the Commission often liaises with the Commerce Commission.

Informal consideration of mergers

4.4 The Commission encourages parties to approach the Commission, on an informal basis, as soon as there is a real likelihood that a proposed acquisition may proceed, and certainly well before the completion of an acquisition.

4.5 Parties may approach the Commission either on a confidential basis or on the basis that the proposed acquisition is in the public domain.

4.6 If the requirements of the parties are that the proposed acquisition is confidential, the Commission is unlikely to be in a position to provide the parties with its finalised view about the acquisition. The Commission's position is that it requires the views of market participants prior to providing a final response to parties whether it considers that a proposed acquisition of shares or assets may or may not contravene the Act.

4.7 The range of responses to a confidential proposal that parties can expect from the Commission include the following:

- the Commission considers that the proposed acquisition would substantially lessen competition and requests the parties not to proceed;
- the Commission has some concerns in relation to the proposed acquisition (which will be set out), but does not propose to oppose the acquisition prior to making market inquiries;

- in the absence of market inquiries the Commission does not propose to express an opinion, but does not intend to oppose the acquisition at this point in time.

4.8 The Commission is concerned to ensure that it does not give inappropriate comfort to the parties and then, upon undertaking market inquiries, come to the view that the merger would be likely to substantially lessen competition. This will be of particular concern to the Commission for proposals which affect markets in which it has little, or little recent, experience.

4.9 Whether or not parties approach the Commission on a confidential basis, the Commission encourages the parties to lodge a written submission setting out the following:

- background information about the parties;
- the structure of the market, including any relevant information about other major market participants; and
- an analysis of the proposed acquisition in terms of the factors referred to in section 50 (3) of the Act.

Section 5 below discusses in more detail the factors and information relevant to the Commission's consideration of a proposed acquisition.

4.10 As stated in paragraph 4.6 above, the Commission will not give its finalised view to parties to a proposed acquisition without making market inquiries. The type of market inquiries the Commission may wish to undertake include consulting with:

- competitors;
- suppliers;
- customers;
- industry associations;
- government agencies and departments;
- overseas agencies;
- consumer groups; and
- trade unions.

Section 5 below sets out the type of information that may be sought by the Commission from the abovementioned persons in order to delineate the boundaries of the market and to consider the factors under s. 50(3) which determine whether the acquisition has the effect, or is likely to have the effect, of substantially lessening competition.

4.11 The length of time it will take the Commission to provide its response following an informal approach will vary depending on the particular circumstances of a matter. The Commission will be responsive to the commercial time frame of the parties. At the confidential stage, that is where the Commission is unable to make market inquiries, an informal response should be available within two to three weeks. In those cases where it

is appropriate to undertake market inquiries, a general guide to the time frame for a Commission decision is:

- in matters that the Commission is satisfied do not breach the merger thresholds, the Commission may inform the parties within 10 to 15 days that it does not propose to take any action at that time;
- in matters which do appear to breach the merger thresholds, the Commission will usually require about a month to make market inquiries and consider the matter;
- in those few major cases which raise very substantial issues and the Commission is likely to have a problem with, the Commission may take six to eight weeks to fully consider the matter.

4.12 The Commission is concerned that it has sufficient time in which to make inquiries and give proper consideration to each matter. As stated in paragraph 4.4 above, the Commission encourages parties to a proposed acquisition to approach the Commission before the completion of the acquisition. There are certain circumstances in which the Commission believes it is quite important for it to be advised of a proposed acquisition.

(a) Where a person proposes an acquisition by way of a takeover announcement (and Part C Statement), advising the Commission prior to the announcement gives the Commission the opportunity to prepare itself to undertake market inquiries immediately upon the announcement. Further, if there may be an issue under s. 50, the parties may wish to approach the Commission with appropriate undertakings aimed at allaying any likely Commission concern. An example of such a situation was Davids Ltd's (Davids) Part C takeover offer for Independent Holdings Ltd (IHL), where IHL held more than 30 per cent in Davids only competitor, Composite Buyers Ltd (CBL), in the Victorian and New South Wales grocery wholesaling market. Davids agreed to divest the shares if the Commission formed the view that the interest which it would acquire in CBL would be anti-competitive. In that way Davids was free to proceed with its offer for IHL without the threat of Commission intervention (the issue of undertakings is referred to further in section 7 below). The Commission ultimately did not oppose that acquisition.

(b) Similarly, where a person proposes an acquisition by way of a takeover scheme (and Part A Statement), the Commission is of the view that being advised prior to the registration of the offer and Part A Statement is more likely to facilitate the Commission's inquiries in such a way as to have least impact on the offer process. One issue the Commission suggests should be considered, and on which it would encourage consultation, is the question of whether the offer should be conditional on the Commission's indicating that it would not oppose the proposed acquisition. In appropriate cases, the Commission may seek an undertaking from the offeror that such a condition not be waived without reasonable notice to the Commission.

4.13 If the Commission concludes that a proposed acquisition would, or would be likely to have the effect of substantially lessening competition, the Commission will advise the parties of its view. The parties may then take the following action:

- abandon the proposal;
- modify the proposal to address any of the likely anti-competitive consequences, either informally or formally by way of undertakings pursuant to s. 87B of the Act (s. 87B of the Act will be discussed further in section 7 below);
- apply for authorisation if the acquirer considers it may be able to establish that the proposal would result in a net public benefit (see section 6 below);
- take their own risk and seek to complete the acquisition; or
- seek a declaration that the proposed acquisition does not contravene the Act.

The Commission's responses to anti-competitive acquisitions

Injunctions

4.14 As stated in paragraph 2.18 above, the Commission, pursuant to s. 80 of the Act, is able to seek a permanent injunction to restrain an anti-competitive merger. A private litigant cannot seek an injunction to restrain a proposed acquisition.

4.15 The Commission will, when it is of the view that a proposed acquisition is likely to substantially lessen competition, seek an informal undertaking, or an undertaking pursuant to s. 87B of the Act, from the parties not to proceed (the issue of undertakings will be discussed further in section 7 below). If the parties do not give that undertaking the Commission will seek to stop the acquisition proceeding. The Commission does not consider that it is normally appropriate for it, in carrying out its statutory functions, to allow the acquisition to proceed and later seek divestiture. The Commission considers that its responsibility is to protect the public interest in competition and the interest of consumers generally by seeking to prevent acquisitions which, in its view, will substantially lessen competition. Ultimately, the question of whether an acquisition will in fact substantially lessen competition or not is a matter for the Court.

4.16 The Commission can, if it believes that a proposed acquisition would substantially lessen competition, seek an interim injunction from the Federal Court to stop the proposed acquisition going ahead, prior to a final hearing. The Commission sometimes seeks an urgent ex-parte injunction, to hold the status quo for a few days, prior to a full interim injunction hearing.

4.17 Where the Commission has sought an interim injunction, the matter proceeds to a final hearing in the usual way. If the Commission is successful at the final hearing the Court may grant a permanent injunction.

4.18 At the interlocutory stage, the Court must assess whether there is a serious issue to be tried and, if so, whether the balance of convenience lies in favour of stopping the acquisition pending the final hearing. There is rarely little real debate that there is a serious issue for the Court to determine.

4.19 The Commission recognises that determining where the balance of convenience lies in a particular case will be a difficult matter for the Court to determine, and it will often be further complicated by the proffering of undertakings by the potential acquirer designed to address specific competition concerns.

4.20 The Commission considers that the public interest and the interests of consumers in the protection of competition reflected in s. 50 (and s. 80 — the injunction power) should rank ahead of the private interests of the parties. In the *Rank* case, the Full Court stated:

There is, however, a public interest in preventing an impairment of FAL's [the target company] competitiveness if such an impairment is seen to be a possible consequence of an acquisition of shares, undertaken in anticipation of a further proposed acquisition, where there is a serious question to be tried about the lawfulness of both acquisitions.⁷

4.21 In some cases it may be appropriate for the Commission to seek an ex-parte (i.e. without notice to the other party) interim injunction. The Commission will do so where it considers that:

- notice to the parties may enable them to take some step to defeat the effectiveness of any injunction granted; or
- where the urgency of the situation requires it.

4.22 An ex-parte injunction is usually sought by the Commission after it has requested the parties to provide an undertaking not to proceed with the proposed acquisition and that undertaking has not been given. In these circumstances the Commission will seek an ex-parte injunction if it considers that notice to the parties will give them an opportunity to proceed with, or put in train, their proposal prior to an injunction being granted or where formal notice is not feasible (in such cases informal notice may be given).

4.23 Typically, once an ex-parte injunction is granted a full interim injunction hearing at which all parties are represented will be scheduled within days or weeks.

Pecuniary penalties

4.24 As stated in paragraph 2.21 above, s. 76(1) of the Act states that the Court may impose a penalty for a breach of s. 50 of up to \$500 000 for an individual and \$10 million for a corporation. The Commission has instituted penalty proceedings in respect of a merger in the past and will consider the option of such proceedings in the future in appropriate circumstances.

Divestiture

4.25 If the Commission is of the view that an acquisition that has been completed has substantially lessened competition in a substantial market, the Commission may apply to the Federal Court for an order pursuant to s. 81 of the Act that the acquirer dispose of the shares or assets acquired in contravention of the Act or may apply to the Court for a

⁷ *Rank* op.cit. at 42,391.

declaration that the acquisition is void (resulting in the vendor refunding the consideration for the acquisition).

The Public Register

4.26 Following a recommendation of the Griffiths Committee⁸, the Commission has established a public register of all mergers considered by it.

4.27 That register does not include confidential or other sensitive information, but would otherwise include brief details of a proposed merger (including the names of the acquirer and target), a product description and brief reasons for the Commission's response to that acquisition.

⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs (1989), *Mergers, takeovers and monopolies: Profiting from Competition?*, AGPS, Canberra.

5. Assessing the competitive effects of a merger⁹

5.1 The role of sections 50 and 50A is to contribute to the maintenance of competitive markets in Australia. A breach of section 50 occurs or relief under s. 50A is available where a merger would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market for goods or services in Australia, in a State or in a Territory.

5.2 This section explains the approach which the Commission proposes to adopt in assessing the likely competitive effects of a merger.

5.3 To determine whether any particular acquisition breaches s. 50 or is eligible for relief under s. 50A requires an assessment of the following matters:

- what is the relevant market;
- is that market substantial; and
- will the acquisition be likely to substantially lessen competition?

However, the three elements are interrelated. Identification of the relevant market is an integral part of the evaluation of the competitive effects of a merger; and only when the relevant market has been delineated, can its substantiality be determined.

Substantial lessening of competition

5.4 Competition is a process of rivalry between firms, where each market participant is constrained in its price and output decisions by the activity of other market participants. In *QCMA* the Tribunal quoted with approval the report of the U.S. Attorney-General's National Committee to Study the Antitrust Laws:

The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants in the field, would keep this power in check by offering or threatening to offer effective inducements ...¹⁰

5.5 The Tribunal went on to state:

In our view effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers and customers.

⁹ All references to the 'merged firm' should be read as applying equally to the acquiring firm and the target firm in cases of partial share acquisitions.

¹⁰ United States Attorney-General's National Committee to Study the Antitrust Laws (1955), Report, p.320; quoted in *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40-012, at 17,245.

Competition is a process rather than a situation. Nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

- (i) the number and size distribution of independent sellers, especially the degree of market concentration;
- (ii) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
- (iii) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
- (iv) the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
- (v) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.¹¹

5.6 Competition is inhibited where the structure of the market gives rise to market power. Market power is the ability of a firm or firms profitably to divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time.¹² Dawson J. in *QWI* quoted approvingly the Kaysen and Turner definition of market power:

A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.¹³

Firms with market power have discretion over their price and output decisions; competitive firms are compelled to perform by the discipline of the market.

5.7 Section 50 differs from the other prohibitions contained in Part IV of the Act, because it regulates market *structure*, to *prevent* the creation of or an increase in market power and consequent anti-competitive *conduct*, rather than directly regulating that conduct.

5.8 The conduct which is prevented by s. 50 may be unlawful, involving breaches of other sections of Part IV, or it may be lawful conduct which would nevertheless be anti-competitive, resulting in less efficient markets and consumer detriment. The first category would include conduct such as price fixing and predatory pricing; the latter would include conduct such as tacit price coordination or unilateral price rises.

5.9 The Cooney Committee, whose inquiry recommended the change of test in s. 50, took the view that the best way to protect against misuse of market power is to prevent it being created in the first place. It quoted Treasury's submission that:

¹¹ *QCMA*, op.cit., at 17, 246.

¹² Or any other aspect of the competitive process or its performance outcomes.

¹³ Kaysen and Turner (1959), *Antitrust Policy*, p.75; *Queensland Wire Industries Pty. Ltd. v. The Broken Hill Proprietary Company Limited & Anor* (1989) ATPR 40-925, at 50,015.

The potential anti-competitive effects, which may be difficult and costly to detect and act against under current arrangements, may better be avoided by preventing mergers than by applying other sections of the TPA (and other legislation).¹⁴

5.10 The Attorney-General's second reading speech at the time of the amendments to s. 50 reiterated the preventive nature of merger regulation:

Merger regulation is an important element of any law aiming to preserve levels of competition. Mergers can lessen competition, potentially providing increased scope for price rises or collusive behaviour and lessening dynamic factors such as the rate of innovation. These possible detriments provide the rationale for government intervention in the area of mergers.¹⁵

5.11 Market power may be exercised either unilaterally by a single firm, or coordinated among firms. The unilateral exercise of market power does not depend on the cooperation of other market participants. A firm with unilateral market power can assume that its rivals will behave competitively in response to market prices, but nevertheless their capacity to defeat a price rise is limited. By contrast, the coordinated exercise of market power depends on the cooperative or accommodating actions of other market participants.

5.12 Under the previous 'dominance' test, the major goal of merger enforcement was to inhibit the acquisition or expansion of unilateral market power by a firm which would be in a position to dominate a market.

5.13 However, not all mergers increasing unilateral market power would have been prohibited by the test. In particular, markets for differentiated products will generally permit the exercise of some degree of unilateral market power by firms which are not dominant, but which have a large market share and strong brand loyalty. Mergers which facilitate a significant increase in the exercise of such market power would be considered to 'substantially lessen competition'.

5.14 In addition, mergers which are likely to facilitate the exercise of coordinated market power through explicit or tacit collusion, conscious parallelism or learned behaviour, would also be considered to 'substantially lessen competition'.

5.15 The primary reason for being concerned about mergers, especially between competitors, is that they increase the likelihood that the merged firm would have greater scope to set prices above the competitive level, or otherwise distort competitive outcomes, either alone or in coordination with other firms selling the same product. However, it is well recognised that mergers can also yield significant benefits. These sometimes take a traditional form — internal efficiencies such as economies of scale or scope or transactions savings through vertical integration — but it is also recognised that mergers are an important aspect of the overall 'market for corporate control', in which outsiders who believe they are able to improve the efficiency of a firm are prepared to bid above current market values. Hence, a blanket prohibition against mergers, even mergers

¹⁴ Senate Standing Committee on Legal and Constitutional Affairs (1991), *op.cit.*, p.39.

¹⁵ Hansard, Tuesday 3 November 1992, p.2406.

between competitors, would be inappropriate. Only those mergers which would have the effect, or be likely to have the effect, of *substantially* lessening competition are prohibited.

5.16 The word substantial has been the subject of differing interpretations in different contexts and in relation to other sections of the Act. It has sometimes been interpreted as meaning 'real or of substance' and sometimes as 'large or weighty'. In relation to s. 47 of the Act, Smithers J. stated in *Dandy Power*:

To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition. I prefer not to substitute other adverbs for 'substantially'. 'Substantially' is a word the meaning of which in the circumstances in which it is applied must, to some extent, be of uncertain incidence and a matter of judgement. There is no precise scale by which to measure what is substantial. I think in the context, particularly the penalty and other remedies for contraventions of the Act, and the nature of trade which is the subject of the Act, the word is used in a sense importing a greater rather than a less degree of lessening. Accordingly in my opinion competition in a market is substantially lessened if the extent of competition in the market which has been lost, is seen by those competent to judge to be a substantial lessening of competition. Has competitive trading in the market been substantially interfered with? It is then that the public as such will suffer ...

Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to the circumstances, be a substantial lessening of competition in a market.¹⁶

5.17 The Explanatory Memorandum states that:

The term 'substantial lessening of competition' is used widely through the Principal Act. It is here intended to mean an effect on competition which is real or of substance, not one which must be large or weighty.¹⁷

This was clarified by the government during the Bill's passage through the Senate:

In signifying its intention that that word as now proposed to be used in s. 50 should bear the meaning 'real or of substance', the Government intends that the test should apply to effects on competition which are not merely discernible but which are material in a relative sense in the impact they may have upon effective competition in the market place.¹⁸

5.18 Hence, the threshold in s. 50 would appear to be a relative one, either qualitative or quantitative. Where there is a reasonable likelihood that prices in the relevant product market will be maintained at a significantly greater level than they would be in the

¹⁶ *Dandy Power Equipment Pty. Ltd. v. Mercury Marine Pty. Ltd.* (1982), ATPR 40-315, at 43,887-43,888.

¹⁷ Trade Practices Legislation Amendment Bill 1992: Explanatory Memorandum, para.12, p.4.

¹⁸ Hansard, 10 December 1992, p.4776.

absence of the merger, or where competitive outcomes would be otherwise distorted, the Commission will consider there to be a substantial lessening of competition.

5.19 Increased exposure to global markets is placing pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive. Mergers may be one means of achieving such efficiencies. Section 50 is concerned with the lessening of competition in a market, not with the competitiveness of individual firms. However, an acquisition which increases the competitiveness of the merged firm may also increase (or not substantially lessen) competition in a market.¹⁹ While efficiencies generally arise as a question of public benefit, which falls for consideration under authorisation (see section 6), they are relevant in a s. 50 context to the extent that they impact on the level of competition in a market.

5.20 The analysis of efficiencies in a s. 50 context must be integrated within the framework of competition analysis, rather than being considered as a 'trade-off' with competition effects, as might be done in an authorisation context (see section 6 below). The relevant question is the effect or likely effect of the merger on firms' abilities and incentives to compete in the relevant market, including any effect flowing from efficiencies:

The weight and significance accorded to different types of efficiencies should be a function of their magnitude and probability, the degree to which they likely will enable the merged firm not only to be a better competitor but to enhance (or not lessen) competition and thus benefit consumers, and the delay with which these consumer benefits are to be realized.²⁰

5.21 In considering whether a merger is likely to substantially lessen competition, the Commission will not simply compare the pre- and post-merger scenarios. Section 4G defines a lessening of competition to include preventing or hindering competition. In some circumstances, it may be that without the merger, competition would be likely to increase in the relevant market and that the merger will prevent or reduce the potential increase in competition. Hence, for example, in a market where entry is difficult, a merger which forestalls entry to the market may be considered to substantially lessen competition. Alternatively, a merger may replace an unstable oligopolistic coordination of prices with a single firm's market power. Although prices may be no higher after the merger than before, there is no longer the possibility that price coordination will break down and competition break out between the merged firms. This too could be considered a substantial lessening of competition.

5.22 The preceding discussion has centred on the exercise of market power and potential lessening of competition on the supply side of the market. However, it is also possible for market power to be exercised in an analogous way on the demand side of the market. Where firms have market power on the demand side of the market they may be in

¹⁹ Alternatively, an acquisition may increase the competitiveness of the acquiring firm but diminish the level of competition in the market.

²⁰ 'Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace' Volume 1, A Report by the Federal Trade Commission Staff, Antitrust & Trade Regulation Report, Vol.70 No.1765, Special Supplement, June 6 1996, p.S-36.

a position to impose a significant price decrease, or other deterioration in terms, on sellers, depressing output below its competitive level.

5.23 In many industries the exercise of such market power is not possible, even by a large buyer, because supply will be highly price elastic; either because unit costs are constant or declining over a large output range and/or because the product is traded internationally and domestic supply can be readily diverted to export markets. Firms will rapidly remove resources from the (domestic) market in response to any attempt to depress price below its competitive level.

5.24 However, there are significant exceptions to this. In particular, many primary industries, which utilise scarce resources, are characterised by less than perfectly elastic supply, reflecting diminishing returns from scarce resources. One of the few merger cases to reach the courts, *Australian Meat Holdings*, involved the creation of a dominant position in the acquisition of fat cattle in North Queensland.²¹ Similarly, labour intensive industries, particularly where workers have limited alternative employment opportunities, such as clothing manufacture, are often characterised by less than perfectly elastic supply. In some industries, while long run supply may be highly price elastic, short run supply is often not; and if long run adjustments take an extended period, there may be the opportunity and incentive for considerable competitive damage to occur.

The analysis of substantial lessening of competition

5.25 In evaluating whether a merger is likely to have the effect of substantially lessening competition in a substantial market, section 50(3) requires regard to be had to a non-exhaustive list of 'merger factors':

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market, or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.

²¹ *Trade Practices Commission v. Australian Meat Holdings* (1988), ATPR 40-876; and *Australian Meat Holdings Pty Ltd v. Trade Practices Commission* (1989), ATPR 40-932.

5.26 The Explanatory Memorandum to the Trade Practices Legislation Amendment Bill 1992 makes it clear that the list of factors in s. 50(3) is non-exhaustive and that some of the factors are interrelated:

This is not an exhaustive list, and some of the factors are interrelated ... In considering a proposed acquisition, regard is to be had to the factors specified in the list, but of course there may be other factors that would need to be taken into account in any particular case, and the weight to be given to any factor, whether included in the list or otherwise found to be relevant, has to be determined in the context of the facts of the case.²²

5.27 In analysing the likely effect of a merger or acquisition, the Commission has organised the statutory factors into a five stage evaluation process. The process is designed to give clear signals to the business community, wherever possible, as to the Commission's likely attitude to potential mergers; and to minimise the costs of compliance, data collection and analysis for both the parties to a merger and the Commission. This process is represented diagrammatically in Figure 1.

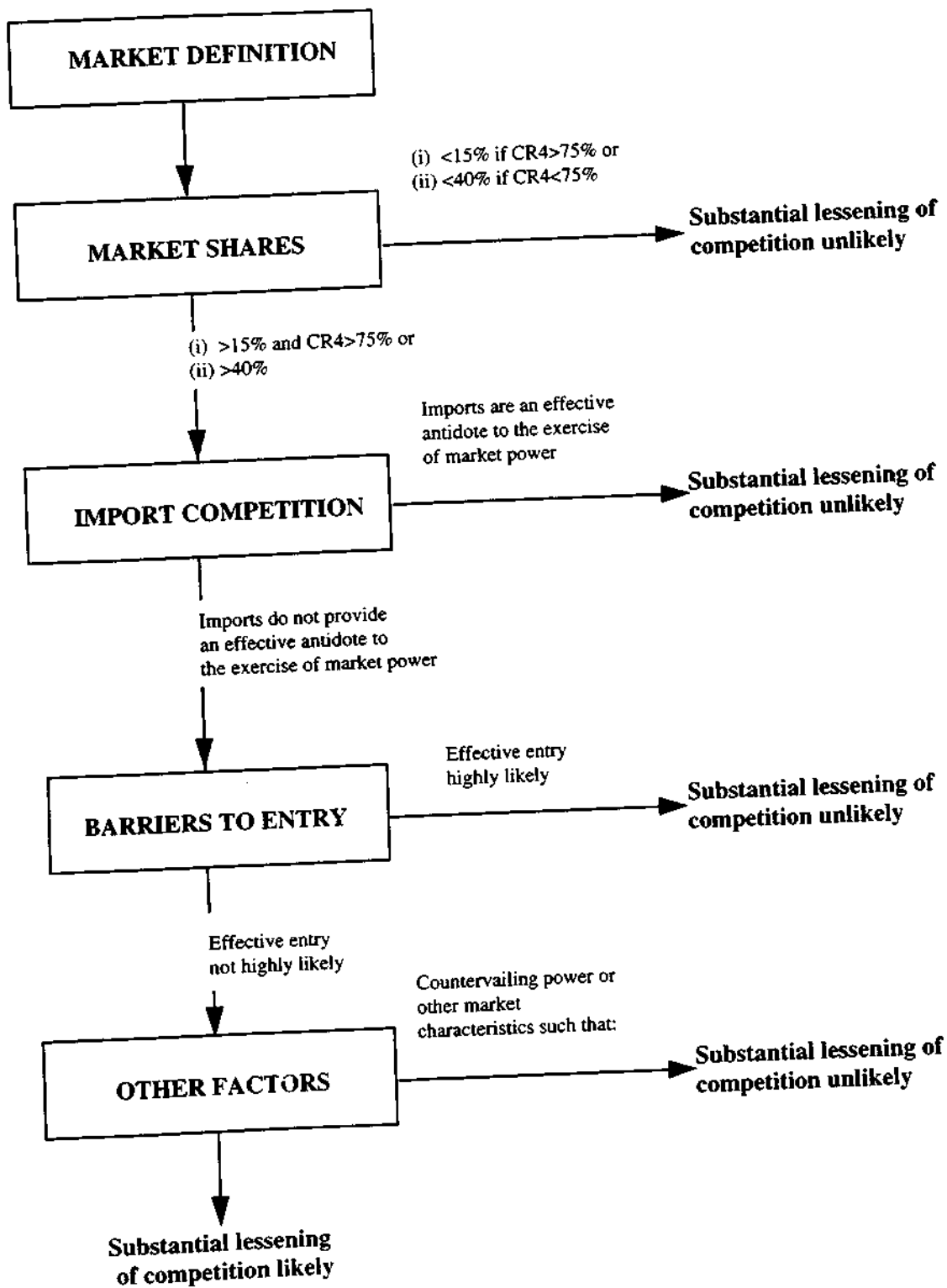
5.28 The first step is to define the relevant market, in its product, functional, geographic and time dimensions. This is a necessary prerequisite for the calculation of market shares and identification of other market characteristics, such as the height of barriers to entry. The Commission's approach to market definition is discussed in paragraphs 5.36–5.78 below. If the market is not considered to be substantial, the Commission will take no further action.

5.29 Subsequent stages require the collection and analysis of increasingly complex data. At each stage, 'safe harbours' indicate mergers and acquisitions which are unlikely to be of concern to the Commission. However, parties cannot conclude without reference to the Commission whether or not an acquisition will be opposed. For example, the calculation of market shares hinges on the identification of the relevant market, which is often an issue of contention and the Commission will not necessarily accept the parties' market definition. Where mergers exceed the concentration thresholds, the Commission will undertake its own analysis of the effectiveness of import competition and the height of barriers to entry, which may not accord with submissions put forward by the parties.

5.30 If the market is considered to be substantial, the Commission will next consider market concentration. Concentration measures are used as a screening device to eliminate the need for detailed market studies where a merger is unlikely to give rise to any competitive concerns. The Commission has established concentration thresholds below which it is considered unlikely that a merger would give rise to a substantial lessening of competition. The basis for these thresholds is discussed further in paragraphs 5.84–5.96 below. However, acquisitions resulting in concentration levels above the thresholds are not considered to give rise automatically to a substantial lessening of competition. Rather the thresholds establish the need for further qualitative evaluation of market conditions.

²² Explanatory Memorandum, *op.cit.*, para.15, p.5.

Figure 1: The assessment of substantial lessening of competition



5.31 If the merger is not within the 'safe harbour' established by the concentration thresholds, the Commission will first consider the level and nature of import competition. The Commission's concern will be to establish whether imports provide or are likely to provide a competitive discipline on the merged firm which is greater than would be indicated by their market share; and in particular whether import competition will be adequate to prevent the exercise of domestic market power. The Commission's approach to this evaluation is discussed in paragraphs 5.97–5.107.

5.32 If import competition is not considered to impose an effective competitive discipline on the merged firm, the Commission will then go on to consider whether it is likely that new entrants will establish themselves in the market on a sufficient scale within a reasonable period of time to inhibit the exercise of market power by the merging firm. Barriers to entry are discussed further in paragraphs 5.108–5.121.

5.33 If effective entry is not considered a likely outcome, the Commission will then consider other indicators of market structure and conduct which impinge on the likely competitive impact of a merger. These factors are discussed in paragraphs 5.122–5.166. These factors may have a positive or negative impact on the likely competitive effect of a merger. The Commission will consider the interaction of all relevant factors in reaching a conclusion on whether a merger is likely to substantially lessen competition.

5.34 The Commission will only conclude that a merger or acquisition will result, or be likely to result, in a substantial lessening of competition in a substantial market after consideration of all the statutory merger factors and any other relevant issues.

5.35 If the Commission concludes that a merger or acquisition is likely to substantially lessen competition, it will consider any actions which might be taken to alleviate the expected impact of the merger, and whether such actions can be covered by effective enforceable undertakings. Where parties consider there may be significant public benefits arising from the merger, they may wish to apply for authorisation. Sections 6 and 7 below discuss authorisation and enforceable undertakings in greater detail.

Market definition

5.36 The Act requires that the assessment of substantial lessening of competition be related to a market. Delineation of the relevant market also helps to focus the analysis of competition effects.

5.37 Section 4E provides that the term market 'includes a market for those goods and services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services'. Merger factor (f) also requires the Commission to consider the extent to which substitutes are available in the market or are likely to be available in the market.

5.38 Section 4E was introduced following a recommendation of the Swanson Committee that the definition of market should:

... require that, in the determination of a 'market' for particular purposes, regard shall be had to substitute products which have a reasonable interchangeability of use and which have high cross-

elasticity of demand, i.e. where a small decrease in the price of a particular product would cause a significant quantum of demand for a similar product to switch to the product in question.²³

5.39 In addition to demand side substitutability, the Tribunal and the courts have established the need to consider supply side substitutability, where the same production and distribution facilities can be used to produce and sell two or more products. In *AMH*, Wilcox J. stated:

A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand and supply side. The ideal definition of the market must take into account substitution possibilities in both consumption and production.²⁴

In *QWI*, Dawson J. stated in the High Court:

In setting the limits of a market the emphasis has historically been placed upon what is referred to as the 'demand side', but more recently the 'supply side' has also come to be regarded as significant. The basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or the demand for a product may be substituted for another, an important consideration in any definition of the market.²⁵

5.40 A market involves four dimensions:

- product;
- geographic;
- functional; and
- time.

5.41 The merged firm is the starting point for delineating the relevant market. In this way, the market which is identified is that which assists in the analysis of the likely competitive effects of the merger.²⁶ A different market may be relevant for the analysis of a different merger or different conduct. For example, in the *Ansett* merger case, the relevant market was found to be an Australian car rental market; whereas in the *Budget* case, concerning exclusive contracts for rental booths, the relevant market was found to be a market for rental car services at Auckland Airport.²⁷

5.42 Market definition is the process of identifying the sellers and buyers which effectively constrain the price and output decisions of the merged firm. It is an integral

²³ Trade Practices Act Review Committee (1976), *Report to the Minister for Business and Consumer Affairs*, p.17, para. 4.22.

²⁴ *AMH* (1988), op.cit., at 49,480.

²⁵ *QWI*, op.cit., at 50,014.

²⁶ Neville R. Norman and Philip L. Williams (1983), 'The Analysis of Market and Competition under the Trade Practices Act', *Australian Business Law Review*, December, pp.396-420.

²⁷ *Trade Practices Commission v. Ansett Transport Industries (Operations) Pty. Ltd.* (1978), ATPR 40-071; *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd.* (1988), 2 NZBLC 99-110; Maureen Brunt (1990), 'Market Definition Issues in Australian and New Zealand Trade Practices Litigation', *Australian Business Law Review*, April, p.125.

part of competition analysis. An appropriate definition of the market is the critical underpinning for the evaluation of 'substantial lessening of competition', the calculation of concentration ratios and the evaluation of import competition and barriers to entry.

5.43 In *QWI*, Mason C. J. and Wilson J. said:

In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated.²⁸

This approach was adopted by the Full Federal Court in *AMH*, where Pincus J. stated:

... the process of identification of the relevant market must be carried out keeping in mind the object of doing so; in the instant case that is to determine whether the appellant was at the relevant time in a position to dominate the market, or was by the acquisition placed in such a position.

The linking together of the process of definition of the market and its object implies some flexibility in the former.²⁹

5.44 Substitutability may be thought of in terms of a price elevation test: what would be the response on the demand side and the supply side to a small percentage increase in the price of the merged firm's product? As the Tribunal commented in *QCMA*:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them.... Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices....

It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: if the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?³⁰

5.45 Where the relevant market should be delineated is a question of degree. The Tribunal stated in *Tooth & Tooheys*:

... all competition or substitution does not cease at the outer boundaries of the market; the economy as a whole is a network of substitution possibilities in consumption and production; competition is a matter of degree.³¹

In *QIW* (1993), Spender J. stated:

Indirectly, the retail pricing and product policies of the major chainstores, because they act as an ultimate constraint on the pricing policy of independent retailers, also act as a constraint on the prices Davids and QIW can charge independent retailers without threatening their continued viability. However, the relevant inquiry is whether the existence of these restraints acts as such a

²⁸ *QWI*, op.cit., at 50,008.

²⁹ *AMH* (1989), op.cit. at 50,104.

³⁰ *QCMA*, op.cit., at 17,247.

³¹ *Re Tooth & Co. Ltd.; in re Tooheys Ltd.* (1979), ATPR 40-113, at 18,196-18,197.

significant check on the power of Davids and QIW that it is correct to say that they are in close competition with the independent retailers and the chainstores retail outlets. In my view, this is not the case. The restraints operating here are of an ultimate nature only, and in this sense restraints exist on the power of all monopolies.³²

Spender J.'s approach was confirmed by the Full Federal Court on appeal, with reference to the Tribunal's statements in *QCMA* and *Tooth & Tooheys*.³³

5.46 The process of market definition can be viewed as establishing that area of product, functional and geographic space within which a hypothetical current and future³⁴ profit maximising monopolist would impose a small but significant and non-transitory increase in price (SSNIP) above the level that would prevail absent the merger³⁵. More generally, the market can be defined as the smallest area over which a hypothetical monopolist (or monopsonist) could exercise a significant degree of market power. This would only be possible if all sources and potential sources³⁶ of close substitutes for the merged firm's products have been included in the definition of the market.

5.47 The process of establishing the market boundaries starts with the product, geographic and functional area of supply covered by the merged firm. It is then extended in its product, geographic and functional dimensions to include all those sources, and potential sources, of close substitutes which would otherwise make it non profit-maximising for the hypothetical monopolist to impose a SSNIP or otherwise exercise a significant degree of market power. If consumers would switch their demand to close substitutes and/or firms would switch their production to supply the customers of the merged firm, it will not be profit maximising for the hypothetical monopolist to impose a SSNIP and the relevant market needs to be expanded to include these sources of substitute products.

³² *QIW Retailers Ltd v Davids Holdings Pty Ltd & Ors; Attorney-General of the Commonwealth v Davids Holdings Pty Limited & Anor* (1993), ATPR, at 41,142.

³³ *Davids Ltd* (1994) ATPR 41-304, at 42,087.

³⁴ That is, not subject to the threat of entry.

³⁵ This is the standard used in the US and Canadian merger guidelines, except that the latter only refers to a present monopolist, which would appear to incorporate potential entrants into the market. The appropriate base price for such a test has been the subject of some debate. The *Cellophane* case (*United States v. E.I. DuPont De Nemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)) indicated the dangers of using current prices as the base price for market definition where that price reflects limit pricing by a monopolist to the point where cross elasticities are relatively high. Where current prices reflect market power which would be likely to be undermined by new entry or the breakdown of coordinated pricing absent a proposed merger between the incumbent and the entrant or between the two coordinating firms, using current prices to define a broad market could result in the conclusion that the merger would not substantially lessen competition. However, in other merger cases, such an approach could result in excluding a firm's closest rival and takeover target from the market. By using the likely future price absent the merger as the relevant base price, the market is defined in a way which is relevant to the conduct at issue, by identifying and including the closest substitutes to the merging firms product(s).

³⁶ Including production and distribution capacity which could rapidly switch to supplying the relevant product, but not including new entrants.

5.48 Of course history is unlikely to have provided us with such an experiment, and data is unlikely to be available on all the relevant cross-elasticities of demand and supply, to establish precise market boundaries according to the above definition of the relevant market. However, the Commission considers this to be the appropriate analytical framework within which to make the necessary judgements in analysing the qualitative data and information it will necessarily have to rely on. In particular, the question of price competition is seen to be critical; if a product or supplier does not place any effective constraint on the price which the merged firm could charge for its product, the two products or suppliers will not be considered to be in the same market.

5.49 Note that it is the collective effect of substitution which determines what is in or out of the relevant market. A number of substitution possibilities, each of which is insufficient alone to defeat a SSNIP, may collectively have that effect.

5.50 The price elevation test does not require that all products included in the market should have the same price. Within a market, there can be product differentiation. The relevant question is the degree of constraint imposed on the price and output decisions of the merged firm. As Wilcox J. stated in *AMH*:

The existence of price differentials between different products, reflecting differences in quality or other characteristics of the products, does not by itself place the products in different markets. The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or the supply side in response to a change in relative price.³⁷

5.51 In order to establish the relevant market for a proposed merger, the Commission is concerned to establish the potential sources of competitive, that is close, substitutes for the product(s) of the merging parties. Following the practice of the Tribunal and the Australian courts, the Commission will consider substitution possibilities on both the demand and supply side when identifying the competitive constraints which delineate the relevant market.

5.52 On the demand side, the Commission will examine which goods or services consumers consider to be close substitutes for the merged firm's product and which geographic sources of supply they consider to be substitutable. If cross-price elasticity of demand is high, such that in the event of a significant price rise, or equivalent exercise of market power, by the merged firm, consumers would switch to purchasing these alternatives to the extent of defeating such a price rise, these products and sources of supply will be included in the relevant market.

5.53 On the supply side, the Commission will consider which suppliers could, without significant investment, switch their production and/or distribution facilities to supply a substitute product to that supplied by the merged firm, or switch from supplying another geographic area to that supplied by the merged firm. If cross-price elasticity of supply is high, such that in the event of a significant price rise, or equivalent exercise of market power, by the merged firm, these suppliers would switch their supply to the extent of defeating the price rise, these suppliers will be included in the relevant market.

³⁷ *AMH* (1988), op.cit, at 49,480.

5.54 Market entry is distinguished from supply side substitution by the requirement for significant investment in production, distribution or promotion. For example, producers of T-shirts and shoes may be able to readily switch production and distribution facilities from supplying one size of garment or shoe to supplying another size. On the other hand, while a cannery could physically switch from the production of dog food to the production of canned peaches, the firm may need to make a significant investment in promoting the product for it to gain market acceptance.

5.55 When considering substitution possibilities, it is sometimes necessary to consider a chain of substitution possibilities creating 'ripple effects', or the 'linking principle'.³⁸ If A and B are substitutable and B and C are substitutable, should A and C be considered to be part of the same market? This question arises most frequently in relation to geographic market definition, but may also arise in relation to product market definition, particularly markets for differentiated goods and services. The argument has received a mixed reception from the courts. It was rejected in *TNT*³⁹ but found favour in *Ansett*⁴⁰.

5.56 The Commission considers that the relevance of ripple effects depends on whether they constrain the price and output decisions of the merged firm. This in turn will depend on the degree of substitutability between different products or locations. For example, many retail markets are characterised by a continuum of geographic substitution across metropolitan areas, although stores at either extremity of the market are not in direct competition. If a significant price increase in one suburb would be defeated by customers shopping in neighbouring suburbs, where prices are in turn constrained by prices in the next suburbs, and this effect continues across the metropolitan area, the latter will be the relevant geographic market. By contrast, many wholesale markets are characterised by distribution over broadly state-based regions, with limited overlapping substitution at the edges. Such a limited overlap will not generally be sufficient to expand the relevant geographic market, since transport costs mean that substitution would be insufficient to render unprofitable a significant price increase in one state.

5.57 Market definition and/or the effect of a merger in such a product or geographic spectrum will also depend on the relative location of the parties in that spectrum. Where firms are adjacently located in the spectrum, the relevant market may be a narrow one and competition concerns are more likely to arise. Identification of sub-markets may also be a useful tool of competition analysis in this context (see paragraphs 5.73–5.75 below).

5.58 Delineation of the relevant **product** market (or markets) requires identification of the bundle of goods and services supplied by the merged firm and sources, or potential sources, of substitute products. Starting with the product (or products) supplied by the merged firm, each product market is gradually expanded to incorporate those firms which

³⁸ Brunt (1990), op.cit., pp.104–105; S. G. Corones and Neville Norman (1994), 'Markets, Competition and Market Power', ATPR 2–555.

³⁹ *Trade Practices Commission v TNT Management Pty Ltd* (1985), ATPR 40–512.

⁴⁰ *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978), ATPR 40–071.

supply, or would supply, a closely substitutable product in the event of a significant price rise, or equivalent exercise of market power, by the merged firm.

5.59 In establishing the relevant product dimension of the market, the Commission will have regard to the following types of information.

- End use of the product and potential substitutes.
- Physical and technical characteristics of the product and potential substitutes.
- Costs of switching purchases between the product and potential substitutes.
- Views and past behaviour of buyers regarding the likelihood of substitution between products.
- Costs of switching production and distribution systems from another product line to a product which is closely substitutable with the relevant product.
- Views, business records and past behaviour of suppliers regarding the impact of price and marketing decisions by the suppliers of potential substitute products on their own pricing and marketing decisions.
- Relative price levels and price movements of the product compared to potential substitutes.⁴¹

5.60 Delineation of the relevant **geographic** market (or markets) involves the identification of the area or areas over which the merged firm and its rivals currently supply, or could supply, the relevant product and to which consumers can practically turn. Starting with the geographic area (or areas) supplied by the merged firm, each geographic market is gradually expanded to incorporate sources of supply to which consumers would turn and firms which supply, or would supply, the relevant product into that area in the event of a significant price rise, or equivalent exercise of market power, by the merged firm.

5.61 In establishing the relevant geographic dimension of the market, the Commission will have regard to the following types of information.

- The convenience to customers of accessing alternative sources of supply.
- The costs of switching to alternative sources of supply.
- Views and past behaviour of buyers regarding the likelihood of switching between geographic sources of supply.
- The costs of transportation or access to the alternative sources of supply.

⁴¹ Note that proportional price movements do not necessarily indicate that two products are in the same market; price movements may be correlated due to the use of a common input, which may bear no relation to the degree of substitutability between the products. However, a lack of correlation will generally indicate that two products are poor substitutes and should not be included in the same market. See Prices Surveillance Authority (1995), *Using Econometrics in Market Definition and Market Power Assessment*, Discussion Paper No.7. Evidence regarding the pass-through of unique cost increases and their effect on demand will provide a useful indication of a firm or firms ability to impose a SSNIP.

- The perishability of the product.
- Any regulatory or other practical constraints on suppliers selling to the customers of the merging firms.
- The costs of extending or switching production and distribution systems to supply the customers of the merging firms.
- Views, business records and past behaviour of suppliers regarding the impact of price and marketing decisions in one geographic area on supply from another geographic area.
- The relative price levels and price movements of different geographic sources of supply.⁴²

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 (but 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.

5.63 Delineation of the relevant **functional** market requires identification of the functional level(s) at which the merged firm will operate and close substitution possibilities, either product and/or geographic, at another functional level (not *between* functional levels) which would constrain the merged firm from imposing a significant increase in price, or equivalent exercise of market power.

5.64 In relation to product substitution, this primarily involves consideration of the extent to which vertically integrated suppliers constrain the price and output decisions of non-integrated suppliers. If the merged firm supplies an input A to downstream producers of B, and competition between those producers of B and integrated producers of A and B is sufficient to constrain the price and output decisions of the merged firm in relation to product A, the integrated suppliers will be included in the relevant market; either by defining the market to include both A and B, or by including the output of both integrated and non-integrated firms in a market for A. It is a necessary but not sufficient condition that the integrated suppliers operate in the same downstream product and geographic market(s) as the non-integrated customers of the merged firm. In *QIW* (1993), Spender J, confirmed by the Full Federal Court, found that even if independent retailers competed in the same retail market(s) as the chainstores, a merged Davids-QIW would retain a small but significant degree of pricing discretion.⁴³ In *QIW* (1995) the Tribunal defined a market for the distribution of groceries to the public, incorporating both wholesale and retail functions.⁴⁴ However, the Tribunal rejected the submission that independent

⁴² See footnote 40 and *AMH* (1988), op.cit., at 49,492–49,493.

⁴³ *QIW* (1993), op.cit., at 41,142–41,143; and *Davids* (1994), op.cit., at 42,088–42,089.

⁴⁴ *Re Queensland Independent Wholesalers Ltd.* (1995) ATPR 41–438.

wholesalers were de facto vertically integrated with their independent retail customers and in the context of significant market transactions between the two considered it appropriate to define a wholesale functional sub-market, where terms and conditions contained a discretionary element and were subject to particularly close competition between independent wholesalers.

5.65 In relation to geographic substitution, it is also necessary to consider whether the geographic markets in which the customers of the merged firm supply their output are broader than the geographic area in which the merged firm operates; and the extent to which downstream suppliers from different geographic areas constrain the upstream pricing of the merged firm. If the merged firm supplies an input A to downstream producers of B over a geographic area C, and competition between producers of B in area C and producers of B in area D is sufficient to constrain the price and output decisions of the merged firm in relation to the supply of product A in area C, the suppliers of A and B in area D will be included in the relevant market.

5.66 In establishing the relevant functional market, the Commission will have regard to the types of information listed in paragraphs 5.59 and 5.61 above, to establish the relevant product and geographic market in which the customers of the merged firm operate. Where that product or geographic market incorporates sources of substitution and competitive restraint which have not already been incorporated in the product and geographic market identified in relation to the merged firm, the Commission will consider the following types of information to determine whether those constraints are sufficient to prevent the merged firm significantly increasing price, or an equivalent exercise of market power:

- The proportion of customers' costs represented by the merged firm's product;
- The gross margin of the merged firm in proportion to the total price charged to its customers;
- Views, business records and past behaviour of suppliers regarding the impact of prices and marketing decisions by the downstream rivals of its customers on their own pricing and marketing decisions;
- The relative price levels and price movements of the merged firm and the downstream rivals of its customers.⁴⁵

5.67 The time dimension of the market refers to the period over which substitution possibilities should be considered. In *Tooth & Tooheys*, the Tribunal stated:

It is plain that the longer the period allowed for likely customer and supplier adjustments to economic incentives, the wider the market delineated. In our judgement, given the policy objectives of the legislation, it serves no useful purpose to focus attention upon a short-run transitory situation. We consider we should be basically concerned with substitution possibilities in the longer run.⁴⁶

⁴⁵ See footnote 40.

⁴⁶ *Tooth & Tooheys* (1979), op.cit., at 18,196.

The Commission will consider substitution possibilities over the longer term, but still in the foreseeable future, that will effectively constrain the exercise of significant market power by the merged firm.

5.68 The Commission recognises that competition and substitution are dynamic processes:

... effective competition is fully compatible with the existence of strictly 'limited monopolies' resting upon some short run advantage or upon distinctive characteristics of product (including location). Where there is effective competition, it is the ongoing substitution process that ensures that any achievement of market power will be transitory.⁴⁷

5.69 Thus, for example, the New Zealand Court of Appeal confirmed a New Zealand High Court decision that there was a New Zealand album market rather than a separate market for each album.⁴⁸ Richardson J. stated:

Viewed in relation to product and time the single album definition of market ignores commercial realities. It focuses on short run phenomena. It presents a snapshot rather than a moving picture of continuing commercial activity. ... The emphasis on product differentiation arises precisely because there is a range of products competing for the consumer's attention. And the movement of albums in and out of the charts and their constantly shifting positions are clear evidence of the manner in which, and the extent to which substitution takes place.⁴⁹

5.70 Planned deregulation may change the relevant product and geographic market boundaries in some industries (see paragraph 3.8). Whether or not the Commission defines the relevant market according to current substitution possibilities will depend on the timing and certainty of deregulation, the extent to which current price and output decisions are constrained by future substitution possibilities, and the extent of anti-competitive detriment that is likely to occur prior to deregulation.

5.71 Where substitution requires significant new investment by producers or consumers, these sources of competition will not be included in the relevant market, but will be considered under market entry.

5.72 Significant excess capacity in an industry may result in geographic movements of product that would not be sustainable in an equilibrium situation. Where such effects are likely to be transitory, the Commission does not consider them to be a relevant basis to determine the geographic market.

5.73 In some cases it may be useful to identify sub-markets. In Australia sub-markets are used to refer to segments of markets which are characterised by some discontinuity in substitution possibilities or special characteristics. In *Tooth & Tooheys*, the Tribunal stated:

Within the bounds of the market, substitution possibilities may be more or less intense, and more or less immediate: the field of substitution is not necessarily homogeneous but may contain within it

⁴⁷ Brunt (1990), op.cit., p.96.

⁴⁸ *Tru Tone Ltd v. Festival Records Retail Marketing Ltd.* (1988), 2 NZBLC 99-113 and 99-135.

⁴⁹ *Tru Tone Ltd.*, op.cit., 99-135 at 103,293.

sub-markets wherein competition is especially close or especially immediate. There may be, too, certain key sub-markets such that their competitive relationships have a wider effect upon the functioning of the market as a whole. In these matters we have found that the identification of sub-markets may be rather helpful in clarifying how competition works.⁵⁰

5.74 Sub-markets are used as a tool to analyse the functioning of the market as a whole, but not as a legal standard of liability.⁵¹ In *Tooth & Tooheys*, licensing restrictions within the Sydney and Newcastle areas had a significant impact on competition in the broader NSW market. For a merger to breach s. 50, there must be a substantial lessening of competition in the market as a whole; although its effects may be primarily or entirely felt in particular sub-market(s).

5.75 Sub-markets may be used to identify groups of customers with differing tastes or substitution possibilities (both product and geographic), who therefore have different price elasticities of demand; or to identify groups of consumers with different levels of countervailing power. Although each group of consumers buys in the same product and geographic market, if supply side substitution by rivals is insufficient and there is no arbitrage between groups of customers, the merged firm will be able to price discriminate between groups of customers. For example, cans can be substituted for glass containers to varying degrees by different users; and anchor tenants in shopping centres have some countervailing power in relation to landlords, where most specialty tenants do not. Hence, the competitive impact of a merger may be felt disproportionately by different groups of consumers. The identification of sub-markets is a tool in the analysis of these competitive effects.

5.76 The identification of the precise market boundaries may be difficult on the basis of available evidence regarding substitution possibilities. It is only critical to delineate the market precisely to the extent that is necessary to determine the competitive effect of a merger.

5.77 While most mergers will involve the identification of markets where there is actual trade in goods or services, this is not necessarily the case. In *QWI*, Deane J. stated:

The most that can be said is that 'market' should, in the context of the Act be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes.⁵²

and:

... a market can exist if there be the potential for close competition even though none in fact exists. A market will continue to exist even though dealings in it be temporarily dormant or suspended. Indeed, for the purposes of the Act, a market may exist for existing goods at a particular level if there exists a demand for (and a potential for competition between traders in) such goods at that level, notwithstanding that there is no supplier of, nor trade in, those goods at a given time —

⁵⁰ *Tooth & Tooheys*, op.cit., at 18,197.

⁵¹ Brunt (1990), op.cit., p.117; *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1992) ATPR 41-159.

⁵² *QWI*, op.cit., at 50,012.

because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other.⁵³

Dawson J stated:

... the existence or non-existence of sales of a product cannot conclude whether a market exists or not. It must be sufficient to constitute a market that there is a product for exchange, regardless of whether exchange or negotiation for exchange has actually taken place.⁵⁴

For example, a proposed acquisition may involve the prevention of trade and competition in an intermediate product by forestalling entry.

5.78 In some cases mergers may occur between firms which are involved in the development or production of new products where no trade currently exists. Such a merger may have a substantial effect on potential competition.

Substantial market

5.79 Section 50 only applies to acquisitions in a substantial market. This qualification was introduced into the Act to remove de minimis matters from scrutiny.

5.80 The courts have not considered the meaning of the word substantial in relation to market. In other contexts, the courts have sometimes interpreted substantial to mean real or of substance and sometimes to mean large, weighty or big. Thus, 'substantial' can be used in either a relative or absolute sense.

5.81 In any particular case, it will be a matter of judgement whether a market is considered to be 'substantial'. The Commission will take account of both quantitative and qualitative issues.

5.82 While a market may be small relative to the national economy, it may be substantial in the context of a state or regional economy.

5.83 Furthermore, whether or not a market is considered substantial will depend on the pervasiveness of the prices and outputs determined in that market. Thus, for example, a product which is an essential but small ingredient in the production of one or more other products with large markets, may be considered to be substantial in this sense.

Market concentration

5.84 Merger factor (c) requires the Commission to consider the level of concentration in the market. Market concentration refers to the number and size of participants in the market. A concentrated market is a necessary but not sufficient condition to enable the exercise of market power. If the relevant market is properly defined, a firm or firms will not normally be able to exercise market power in the absence of a significant market share.

⁵³ *QWI*, op.cit., at 50,013.

⁵⁴ *QWI*, op.cit., at 50,015.

5.85 A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged firm and/or increasing the scope for coordinated conduct among remaining competitors.

5.86 The unilateral exercise of market power requires that a firm has sufficient control of a market, such that it can profitably 'give less and charge more' without being threatened by competing suppliers. For undifferentiated products, this normally requires that a firm control a substantial portion of capacity. The larger the percentage of total market supply which a firm accounts for, the less severely it must restrict its own output in order to procure a given price increase and the more likely such conduct is to be profitable. For differentiated products, brand loyalty and related factors may further inhibit smaller rivals from successfully preventing the unilateral exercise of market power. Market shares will generally be a good indicator of consumer preferences and brand loyalty for the firms' products; hence the greater the market share of the merged firm, the more potential switching between differentiated products will have been internalised within the firm.⁵⁵

5.87 A reduction in the number of firms operating in a market increases the scope for coordinated conduct, including both overt and tacit collusion. It becomes easier to reach agreement on the terms of coordination, to signal intentions to other market participants and to monitor behaviour. More even market shares may increase the commonality of interest between market participants in some circumstances. In other situations, the creation of one firm with a large market share may increase the likelihood of price leadership.

5.88 Furthermore, where market structure has been highly concentrated and market shares have been stable for a long period of time, this will tend to suggest that there are barriers to the entry of new market participants, which might otherwise undermine and constrain the exercise of market power.

5.89 Since market shares are often more readily available than other information, they are a relatively low cost means of screening out many mergers which are not likely to result in a substantial lessening of competition. The Commission has adopted concentration thresholds below which it is unlikely to intervene in a proposed merger. The thresholds have been established on the basis of the Commission's historical experience of mergers and knowledge of current market structures.

5.90 If the merger will result in a post-merger combined market share of the four (or fewer) largest firms (CR4)⁵⁶ of 75 per cent or more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition. In any event, if the merged firm will supply 40 per cent or more of the market, the Commission will want to give the merger further

⁵⁵ See R. D. Willig (1991), 'Merger Analysis, Industrial Organization Theory, and Merger Guidelines', Brookings Papers: Microeconomics.

⁵⁶ Note that the 'four firm concentration ratio' is applied to the relevant market, not the industry as traditionally calculated by the Australian Bureau of Statistics.

consideration. The twofold thresholds reflect concerns with the potential exercise of both coordinated market power and unilateral market power.⁵⁷

5.91 Below these thresholds, the Commission is unlikely to take any further interest in a merger. However, it must be emphasised that the calculation of market shares is critically dependent on market definition. Parties should be aware that the Commission will not necessarily accept their identification of the relevant market. The Commission will also want to consider the vertical independence of remaining rivals in a market before determining that a merger is unlikely to lessen competition (see paragraph 5.141 below).

5.92 A further relevant consideration is the extent of the increase in concentration. In many situations, acquisition of a small market player, resulting in a small increase in concentration, will have little effect on competition. However, in some instances, a small increase in concentration may involve the removal of a market participant who has played a significant role in maintaining a competitive market, e.g. by undermining attempts to coordinate market conduct. In other circumstances, a small acquisition may form part of a pattern of creeping acquisitions, which have a significant cumulative effect on competition. Vertical mergers may involve no increase in concentration, but may enable the extension of market power into a vertically related market (see paragraph 5.142 below).

5.93 Market shares may be calculated with reference to capacity, sales volumes or sales values. Each conveys different information regarding the likely impact of a merger on competition. The Commission will place greatest weight on data which best reflects firms' future competitive significance. Capacity figures may be particularly useful as an indicator of market power in markets for undifferentiated products.⁵⁸ However, sales figures provide a better indication of firms' actual position in the market, which may reflect their access to distribution networks or the value of brand loyalty. The dollar value of sales is a particularly useful indicator of competitive strength in markets characterised by product differentiation and brand loyalty.

5.94 Imports should be included in the calculation of market shares and concentration ratios. Where a company is both an importer and a local manufacturer, the two types of supply should be treated as a single market share.

⁵⁷ These thresholds have been set at a more generous level than those in other jurisdictions with a similar merger law. For example, the Canadian Director of Investigation and Research, Competition Act, *Merger Enforcement Guidelines* (1991) employ a CR4 threshold of 65 per cent, with the merged firm's market share at 10 per cent, and a single firm market share of 35 per cent. The United States Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* (1992) employ the Herfindahl-Hirschman Index (HHI) instead of the CR4, but would examine mergers where the post-merger CR4 was below 75 per cent; and the single firm market share threshold is 35 per cent. The New Zealand Commerce Commission's draft guidelines employ a 40 per cent market share threshold under a dominance test.

⁵⁸ Capacity can also be a useful measure of concentration in some markets for differentiated products. The Commission has indicated that in considering the acquisition of radio stations, it will attach particular significance to the number of licences held by the merged firm in relation to the total number of licences available in the market, because of the volatility of individual audience and revenue shares. See *Market definition and competition issues in commercial broadcast radio*, June 1994.

5.95 Post-merger market shares and concentration can generally only be computed on the basis of historic sales patterns, which may not be reflective of likely future patterns after the merger. There may, for example, be substantial new capacity coming on stream in a manufacturing product market, there may be new licences about to be issued in a broadcasting market, or some firms may be running out of reserves in a primary product market. More generally, business customers are often reluctant to become dependent on a single supplier and may shift their custom if two suppliers merge. The Commission will consider any arguments which suggest that future market shares are likely to be significantly different from historic shares.

5.96 If the proposed merger does not fall within the 'safe harbours' established by the concentration criteria, the Commission will need to give close consideration to other merger factors to determine whether or not the merger is likely to result in a substantial lessening of competition.

Import competition

5.97 Merger factor (a) requires the Commission to consider the actual and potential level of import competition in the market. In an open economy such as Australia, the importance of giving special consideration to the role of actual and potential import competition in considering the likely effect of a merger on competition is widely recognised. The last decade has seen the gradual reduction of import tariffs and dismantling of quantitative constraints on imports which previously protected much of manufacturing industry. Currently only the textile, clothing and footwear and the motor vehicle industries retain substantial tariff protection.

5.98 If import competition, or the potential for import competition, is an effective check on the exercise of domestic market power, it is unlikely that the Commission will intervene in a merger. However, the assessment of actual and potential import competition needs to be undertaken with care.

5.99 As discussed at paragraph 5.62 above, the Commission will generally define the relevant geographic market to be Australia or a part of Australia and initially to treat the market share of imports as indicative of their competitive role in that market. The Commission will then take account of arguments that the market share of imports is not indicative of their competitive role.

5.100 The Commission recognises that in some markets, market shares may understate the competitive constraint provided by imports, because of the potential to expand the supply of imports rapidly in response to higher prices. This will often be true in commodity markets.

5.101 However, it is also relevant to consider the price at which import supply becomes elastic. If that price is significantly higher than a competitive market price, there will still be scope for the merged firm to exercise market power by limit pricing to the import parity price. For example, the import parity price may be inflated by tariffs or transport costs; or a competitive domestic price may be the export parity price. However, in some markets imports may constrain domestic prices at levels below those which would deliver a normal rate of return.

5.102 In other cases market shares will overstate the likely role of imports in constraining the conduct of the merged firm. The fact that imports have established a small market share does not necessarily imply that they could expand in response to the exercise of market power by the merged firm. For example, imports may occupy a particular market niche, while the costs of importing may prohibit 'mass market' competition. In some markets, 'buy Australian' policies may reserve a significant percentage of sales for domestic suppliers. In other instances, imports may be sporadic to overcome shortages in domestic supply but would be considered a poor substitute for domestic supply on a regular basis. In some markets, there is limited importing by wholesalers or retailers, but expansion may require significant investment in distribution facilities.

5.103 The Commission will also take account of licensing arrangements in relation to imports. For example, if domestic suppliers control the bulk of imports through exclusive licences, there will be little scope for independent import competition. Alternatively, if exclusive rights are held by independent importers, it will be necessary to consider whether rights to competitive products are held by a range of importers or aggregated by a few, and hence their likely behaviour post-merger.

5.104 The Commission has not objected to any merger where comparable and competitive imports have held a sustained market share of 10 per cent or more for at least three years, and as an indicative guideline is unlikely to do so. Recent examples of mergers which the Commission has not opposed in concentrated markets on the basis of effective import competition are KAAL/Comalco (aluminium sheet and foil), Alcan/Comalco (aluminium extrusions), Consolidated Alloys/Radiant (lead sheeting), GNB/Australian Battery Company (automotive and industrial batteries). However, it would still be prudent in such cases for the merging parties to advise the Commission of their plans given the necessarily qualitative nature of such an assessment.

5.105 In considering the role of imports, the Commission may require the following types of information.

- Information that domestic suppliers are consistently inhibited in their pricing by the pricing of actual or potential import supplies.
- The extent to which imports are independent of domestic suppliers or the extent to which they are brought in under the licence of the merging firms and/or other domestic suppliers.
- Whether existing import supply routes could accommodate a significant expansion of supply, without the need to invest in sunk costs of distribution, advertising and promotion.
- The extent to which imports are closely substitutable for the products of the merging firms from the perspective of their customers, without the need for supply substitution by the overseas producers.
- Tariff levels and non-tariff barriers to trade.

- Changes to tariff levels and other forms of protection which are likely to occur over the next two or three years.
- Information that overseas corporations have concrete plans to enter the Australian market.
- Data on the impact of exchange rate changes on the viability and market share of imports.
- Information about the availability and potential availability and influence of imports in different parts of Australia.
- Practical difficulties in importing versus local supply in relation to the nature of the product and its demand, e.g. perishability (both physical and fashion related), the importance of rapid supply response and the costs of holding inventories.

5.106 In some markets, import competition may impose a constraint on the merged firm via a downstream market. This is a parallel issue to the question of functional market definition discussed in paragraphs 5.63–5.66 above. If the merged firms' customers are closely constrained in their ability to pass on input price increases by effective import competition, the merged firm may not be able to significantly increase its prices. Similar information will be relevant here to that listed in paragraph 5.66 above in relation to functional market definition.

5.107 Where a merger raises competition concerns on the demand side of a market, exports can play a similar role in constraining the market power of buyers to the role played by imports in constraining the market power of suppliers. If the merged firm buys from producers in an export industry it will not be able to depress domestic prices below competitive levels if this would result in supply switching to export markets and the merger would be unlikely to substantially lessen competition. For example, the Commission did not object to the acquisition of Affinity Metals by Simsmetal, both major acquirers of domestic aluminium scrap, where there are also export markets.

Barriers to entry

5.108 Merger factor (b) requires the Commission to consider the height of barriers to entry to the market. Even where a merger breaches the concentration thresholds and import competition is not effective, if the market is characterised by low barriers to new entry, incumbent firms are likely to be constrained by the threat of potential competition to behave in a manner consistent with competitive market outcomes. However, if there are significant barriers to the entry of new suppliers into the market, an increase in concentration to levels above the Commission's thresholds, in the absence of significant import competition, is likely to give rise to a substantial lessening of competition.

5.109 Barriers to entry can be any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms. They may consist of sunk costs; legal or regulatory barriers; access to scarce resources enjoyed by incumbent firms; economies of scale and scope; product differentiation and brand loyalty; and the threat of retaliatory action by incumbents.

5.110 Sunk costs are costs which are unrecoverable on exit, creating a risk from entry; their extent depends on factors such as capital specificity, whether there are developed markets in rental of equipment and requirements for investment in advertising and promotion.

5.111 Legal and regulatory barriers such as licensing requirements, planning or environmental controls, may directly limit the number of competitors in a market, or may add to the sunk costs of entry, through specific capital requirements.

5.112 Scarce resources may consist of physical resources such as mineral deposits or intellectual resources such as patents.

5.113 Economies of scale and scope, both plant and multi-plant, may inhibit entry depending on expected post-entry prices, which in turn will depend on factors such as the minimum efficient scale of entry, cost penalties associated with sub-optimal plant utilisation, price elasticity of demand and market growth.

5.114 Product differentiation and brand loyalty may affect both the level and elasticity of demand faced by a new entrant compared to an incumbent firm and add to the sunk cost requirements of entry in the form of advertising and promotion costs.

5.115 The threat of retaliatory action by incumbents is unlikely to exist independent of other barriers to entry which put the incumbent firms at an advantage to potential entrants and make it unlikely that repeated attempts at entry would occur.

5.116 The 'height' of barriers to entry indicates the extent to which incumbents can raise the market price above its competitive level without attracting entry. It is not necessary for a merger to increase barriers to entry for it to be anti-competitive; only that where other factors suggest that the merger is likely to substantially lessen competition significant barriers to entry exist, providing incumbents with discretion in pricing and other conduct. If the merger also increases barriers to entry, the anti-competitive effects are likely to be more severe.

5.117 In considering the height of barriers to entry, the Commission will have regard to the following types of information.

- Sunk costs in both production capacity, accessing shelf space, advertising and promotion.
- Any regulatory restrictions on entry, such as licensing requirements.
- Any requirements for scarce inputs.
- The extent of brand loyalty enjoyed by incumbents.
- Minimum efficient scale of operation.
- Cost penalties for operating at sub-optimal capacity.
- Price elasticity of demand.
- Market growth or decline.
- Potential response of incumbents to new entry.

5.118 Dr Brunt has provided the following useful test of what constitutes a significant barrier to entry for trade practices purposes:

The essential test for whether or not there is a significant barrier to entry can be expressed simply enough: it is whether the threat of entry of whatever kind will constrain incumbents to behave competitively. It follows that neither initial entry nor eventual established supply must necessarily be of the full-line variety. Leading firms can be constrained by a collection of more specialised rivals. Firms may enter at one scale or one product-range and grow to another. However we cannot speak of easy entry if the only viable entry is that which occurs at the fringe of the market in competition with that fraction of the incumbents' business that has high marginal costs; or if the only viable entry is of the fringe products that fail to attack the incumbents' core business. There must be, in Richard Schmalensee's phrase, 'real pressure on established firms' profits'.⁵⁹

5.119 The Commission considers that effective entry is that which is likely to have a market impact within a two year period; either by deterring or defeating the attempted exercise of significant market power by the merged firm. In some markets the threat of entry is sufficient to constrain firm conduct. In others, actual entry will be required. The latter would require entry on a sufficient scale and which offered a product sufficiently attractive to consumers to be effective.

5.120 When the market impact of actual or potential entry on the merged firm's conduct occurs is likely to vary with the nature of the goods or services supplied. For example, where purchases are one-off, such as building services, actual entry may be required before there is any impact on current conduct, since high prices today are unlikely to deter tomorrow's customers; but for goods which are subject to repeat purchases and significant consumer loyalty, potential entry is more likely to have an impact on current conduct, which has the potential to lose customers in the future. Product life can also be important. Consumers may choose to extend the life of their existing durable goods rather than buy new ones if the price is too high; in such markets, entry need not occur as swiftly to be effective. In markets characterised by bidding for large scale contracts, a potential entrant may be able to exert pressure on incumbent firms conduct by submitting bids in advance of physical entry; if successful, those contracts could then provide the springboard for entry, e.g. an international firm considering entry into the Australian market or a firm operating in one state considering the extension of its operations inter-state.

5.121 The Commission will have particular regard to evidence of the past success or failure of new entrants to establish themselves as mainstream competitors in the relevant market. Historical evidence of high prices and profits being maintained for long periods without encouraging new corporations to enter the market, or historical evidence of firms entering, failing and leaving the market, will suggest there are barriers to successful effective entry to the relevant market. Also relevant will be evidence of concrete plans by major corporations, either domestic or overseas, to launch a major entry into the market. However, if the historical record is one of failed entry, the Commission will need to be convinced that these plans are likely to meet with more success than past entrants.

⁵⁹ Professor Maureen Brunt (1992), 'Australian & New Zealand Competition Law and Policy', 19th Fordham Conference on International Antitrust Law and Policy.

Countervailing power

5.122 Merger factor (d) requires the Commission to consider the degree of countervailing power in the market. Countervailing power exists where a supplier (buyer) faces a buyer (supplier) with market power or a credible threat of vertical integration or direct importing. In such cases, the ability of the merged firm to increase (decrease) prices may be constrained and the likelihood of a substantial lessening of competition diminished.

5.123 The Commission does not consider that countervailing power is synonymous with small numbers of buyers (suppliers). As discussed above in paragraph 5.84, market concentration is a necessary but not sufficient condition for market power. Furthermore, as discussed in paragraph 5.23, the ability of buyers to depress prices below competitive levels tends to be inhibited by elastic supply conditions in many markets. However, as noted in paragraph 5.156 below, large infrequent purchases, such as long term contracts with major customers, may tend to undermine attempts at coordinated conduct.

5.124 If pre-merger prices are distorted from competitive levels by market power on the opposite side of the market, a merger may actually move prices closer to competitive levels and increase market efficiency. For example, a merger of buyers in a market may create countervailing power which can push prices down closer to competitive levels. If those firms face broader competition in their downstream market(s), the benefits are likely to be passed through to final consumers. Even if the buyers have downstream market power, moving input costs closer to competitive prices may result in somewhat lower downstream prices.

5.125 Alternatively, if, for example, market power on the demand side of a market had simply kept pre-merger prices at competitive levels, because of supply elasticity, a merger on the supply side of the market may or may not be able to increase prices. If both customers and the merged firm have market power post-merger, prices will be determined under conditions of bilateral monopoly, in which the relative bargaining power of each side will determine the outcome. If there are fewer suppliers than buyers post-merger, no significant restraint from imports and high barriers to entry, it is likely that post-merger prices will be higher than pre-merger prices. If, on the other hand, customers have a credible threat of vertical integration, could facilitate entry by long term vertical contracts or could directly import competitive supplies, post-merger prices may still be maintained at competitive levels.

5.126 If there are customers (suppliers) of the merged firm who possess effective countervailing power, the Commission will consider what proportion of the merged firm's total customer base, in both numbers and revenue terms, has such countervailing power; the likely effect of the merger on prices for different groups of customers; and whether any likely increase (decrease) in prices is sufficient to constitute a substantial lessening of competition.

Availability of substitutes

5.127 Merger factor (f) requires the Commission to consider the extent to which substitutes are available in the market or are likely to be available in the market. Demand

and supply side substitution, in terms of cross-price elasticity, underpins the identification of the relevant market, which was discussed in paragraphs 5.36–5.78 above.

5.128 However, when considering the *extent* to which substitutes are available, it is also relevant to consider their own-price elasticity of supply. This is essentially a function of the relative capacity of market participants post-merger, the shape of firms' cost curves and the costs of capacity expansion.

5.129 For example, many distribution services tend to be characterised by high fixed costs and low variable costs over a large range of output, which can promote intense rivalry even between a small number of players. In other industries, costs rise sharply when full capacity is approached. If the merged firm has the majority of capacity, the ability of remaining firms to inhibit price increases is likely to be limited. However, the costs of capacity expansion also need to be considered, which can sometimes differ markedly from the costs of new entry.

5.130 Mergers often occur in industries with excess capacity. While excess capacity may be promoting competitive pricing pre-merger, the Commission will wish to consider the longer term effects of the merger on prices. This will depend on demand trends and planned post-merger rationalisation. Excess capacity may be a short lived phenomenon, either because demand is increasing or because the merged firm will retire excess capacity. If, on the other hand, the merged firm retains significant excess capacity, this in turn may inhibit competitive pricing by remaining rivals, expansion or new entry. Arguments regarding the efficiency benefits of rationalisation are primarily relevant in the context of applications for authorisation (see Section 6).

Vigorous and effective competitor

5.131 Merger factor (h) requires the Commission to consider the likelihood that the merger would result in the removal from the market of a vigorous and effective competitor. This factor focuses on the actual conduct of the target firm pre-merger and likely future conduct with and without the merger. The more significant the conduct of the target firm for the level of competition in the market, the greater the likely competitive effect of the acquisition.

5.132 If the target firm has been a particularly competitive or innovative influence in the market, the Commission will have particular concerns regarding the likely competitive effect of the merger. In some markets, the 'maverick' behaviour of particular firms, even small firms, serves to undermine attempts to coordinate the exercise of market power. These firms tend to deliver benefits to consumers beyond their own immediate supply, by forcing other market participants to deliver better and cheaper products. The Commission would be particularly concerned if such firms were the target of mergers.

5.133 In some instances, a merger which breaches the concentration thresholds may create a more vigorous competitor in the market place. For example, a merger between two smaller companies may create a more efficient combined firm which is then able to compete more effectively with larger rivals. The Commission would need to be satisfied that such a merger would either increase or not substantially lessen competition in the market and that this effect would be sustained and not just a temporary struggle to

establish future market dominance and/or one which is likely to be replaced by oligopolistic coordination, higher prices and potentially the erosion of efficiencies.

5.134 In other circumstances, it may be argued that the target firm's assets would exit the industry absent the acquisition and hence the merger will have no anti-competitive effect. The Commission has discussed its approach to 'failing firms' in greater detail in a discussion paper issued jointly with the New Zealand Commerce Commission.⁶⁰ Briefly, the Commission will need to be convinced that the firm cannot be successfully reorganised and there is no other viable buyer for the business, and no likelihood of such a buyer emerging, such that the firm's resources are likely to exit the market absent the merger and so cease to represent an actual or potential constraint on the market.

5.135 If the target firm is considered to be failing, the Commission will consider the likely effect of the acquisition on competition compared to the effect of the target's assets exiting the market. Under the latter circumstances, the distribution of the target's customer base among the remaining market participants would be determined by market forces, whereas an acquisition would tend to deliver those customers to the acquiring firm. If the competitive strength of remaining participants is evenly matched, the level of competition in the market may be better served by allowing the firm to fail. However, the loss of capacity will tend to reduce competitive pressures in the market. Depending on the effect of the acquisition on the relative strength of remaining participants, retaining the failed firm's capacity in the market may still be pro-competitive. Acquisition by a smaller player may result in more evenly matched rivals and an increased level of competition in the market. If the acquirer is the only other participant in the market, the acquisition is unlikely to have any effect on the level of competition.

5.136 Arguments regarding any claimed public benefits that may arise from an acquisition can be considered in the context of an application for authorisation (see section 6). The claimed benefits may include retention of technical or productive assets, avoidance of social dislocation and unemployment or the achievement of resource savings through rationalisation and economies of scale (to the extent that these impact on the likely competitive outcomes they may also be relevant to s. 50 considerations).

Vertical integration

5.137 Merger factor (i) requires the Commission to consider the nature and extent of vertical integration in the market. Vertical relations between firms can range from spot transactions, through long term contracts and licensing arrangements, to common vertical ownership. References to vertical integration in this section cover all forms of vertical relationships.

5.138 The form of vertical relationships can reflect efficiency considerations, such as minimisation of transactions costs or prevention of free riding, but may also have

⁶⁰ *Acquisitions and the failing firm argument*, A joint discussion paper by the Australian Trade Practices Commission and the New Zealand Commerce Commission, October 1993.

implications for competition. In *Queensland Wire Industries*, Mason C. J. and Wilson J. said:

It is true enough that vertical integration sometimes accompanies a substantial degree of market power, but its presence does not necessarily mean that a substantial degree of power exists.⁶¹

5.139 Vertical relationships may affect the likely competitive impact of a horizontal merger; and vertical mergers may affect the degree of horizontal competition. The Commission will be concerned to examine both of these effects.

5.140 Vertical relationships and vertical mergers will raise concerns only if there is a concentrated industrial structure at one or more of the related or integrated stages of production or distribution. If all stages fall within the 'safe harbours' established for horizontal mergers, the Commission is unlikely to take any further interest in the merger. Only if the merged firm breaches the concentration thresholds, there is an absence of effective import competition and there are high barriers to entry will any of the detrimental effects to competition discussed below be likely to occur.

5.141 However, when considering the level of concentration, it is also necessary to consider whether rivals are vertically independent of the merged firm. For example, in the *Rank* case, the Commission considered that the acquisition of Foodland, the only independent grocery wholesaler in Western Australia, by Coles Myer Ltd. (CML), a vertically integrated grocery retailer, under a Deed of Cooperation between Rank and CML would have the effect of substantially lessening competition in retail grocery markets, in which CML competed with the subsidiary retailers and customers of Foodland.⁶² In other circumstances, a horizontal merger may apparently not breach the concentration thresholds, but if the remaining rivals in the market must obtain essential inputs from a market in which the merged party has market power, the merger may still substantially lessen competition.

5.142 In certain circumstances, vertical integration by a firm with market power at one stage of production or distribution can enable an extension of market power and reduction of competition to occur in a vertically related market. This may involve foreclosure of supply or customers to rivals in the vertically related market. Alternatively, vertical integration may pre-empt the development of competition at one vertical level where a vertically integrated incumbent can effect discriminatory access to an essential input; or where the vertically integrated owner of the essential input gains access to commercially sensitive information regarding the downstream activities of its rivals.

5.143 Vertical acquisitions may also target potential entrants into upstream or downstream markets, forestalling the development of competition.

5.144 Where vertical integration closes off independent sources of supply or outlets for distribution, barriers to entry may be raised because new entrants will be required to enter at all stages of production and/or distribution.

⁶¹ *QWI*, op.cit., at 50,009.

⁶² *Rank*, op.cit.

5.145 Vertical integration may also enable a firm with market power to increase monopoly profits through price discrimination. As Mason C. J. and Wilson J. observed in *Queensland Wire Industries*:

... vertical integration may help a monopolist distinguish between customers whose demand is less and more elastic. Where consumers are able to trade amongst themselves, the monopolist cannot discriminate. By integrating vertically it may be possible for a monopolist to prevent this inter-trading. For example, power companies usually own distribution systems. This enables them to discriminate in pricing between residential and commercial users. Therefore, although vertical integration does not by itself mean that a firm has a substantial degree of market power, it may well be the means by which the firm capitalises on that market power.⁶³

5.146 Where all firms are vertically integrated, this may facilitate greater coordination of their activities. For example, ownership of retail outlets or retail price maintenance may enable better coordination and enforcement of upstream prices, through the greater visibility of downstream prices.

5.147 Where a firm with market power is subject to downstream price regulation, upstream vertical integration may enable the circumvention of price controls through transfer pricing of inputs.

5.148 In summary, when considering the competition effects of vertical relationships and vertical mergers, the Commission will consider the following types of information.

- Whether the merged firm has market power in any market which could be leveraged into a vertically related market.
- Whether the target firm would have been a likely entrant into a vertically related market.
- Whether the merged firm will control access to an essential facility.
- Whether vertical integration is likely to facilitate the evasion of access or downstream price regulation.
- Whether vertical integration is likely to facilitate price discrimination.
- Whether vertical integration is likely to facilitate price coordination.
- The extent to which horizontal rivals are vertically independent.

5.149 Potential efficiency gains from vertical mergers can be considered in the context of authorisation (see Section 6 below).

Dynamic characteristics of the market

5.150 Merger factor (g) requires the Commission to consider the dynamic characteristics of the market, including growth, innovation and product differentiation. This factor cuts across most of the other merger factors and has already been discussed to some extent.

⁶³ *QWI*, op.cit., at 50,009–50,010.

5.151 Whether a market is growing or declining can have significant implications for the potential erosion of market power over time. Markets which are growing rapidly are more likely to see new entry and the erosion of market shares over time. Markets which are characterised by rapid product innovation may see market leaders rapidly replaced. However, in some differentiated product markets, first mover advantages and brand loyalty can resist such advances. Historical information on changing market shares will be informative here.

5.152 Regulatory or technological changes may change market boundaries or lower barriers to imports or new entry in the foreseeable future (see paragraphs 3.8 and 3.9). For example, deregulation may remove geographic restrictions on distribution; remove import quotas or reduce tariffs; or increase the number of potential entrants through the removal of restrictive licensing requirements. New technology may increase supply side substitution between products; facilitate global distribution of services; or facilitate new small scale entry into a market.

5.153 A merger may involve the acquisition of technology, intellectual and industrial property and/or research and development facilities, which may in turn affect the competitive dynamics of the relevant market. For example, the acquisition of a fledgling entrant with a new product and/or technology by an incumbent firm may prevent or hinder the injection of new competition into the market. By contrast, a merger may combine complementary technologies in such a way as to create a stronger competitor and enhance competition in the market. Whether or not competition is enhanced, there may still be efficiency gains which could be considered in the context of an application for authorisation (see section 6).

Other factors

5.154 The list of merger factors in s. 50(3) is not exclusive and particular mergers may involve other factors which impinge on the likely competitive outcome of the merger. It is not possible in this guideline to foresee every possible factor which may be of relevance in particular market circumstances.

Coordinated conduct

5.155 One factor which is of general relevance is the extent to which the market is characterised by conditions conducive to coordinated conduct. While the exercise of unilateral market power does not require accommodating action by remaining firms in a market, the exercise of coordinated market power does. This does not necessarily involve collusion of the kind covered by s. 45 but may simply involve signalling or conscious parallelism. Features of the market which impinge on the likely rewards from coordination, the likelihood of reaching an agreement, and the ability of the parties to detect and punish deviations from the agreement, are all relevant to the likelihood of such conduct occurring and being successful in the future.

5.156 Some of the factors affecting the likelihood of coordinated conduct are:

- a small number of firms increases the likelihood that firms will recognise mutual benefits from cooperation, and makes it easier to reach an agreement and detect cheating;
- the absence of potential entrants or fringe competitors makes it less likely that coordinated conduct will be undermined;
- inelastic demand increases firms returns from coordination vs competition;
- product homogeneity makes it easier to reach an agreement and easier to detect deviations;
- firm homogeneity, similarity of cost and other conditions, e.g. vertical integration, product lines or production capacity, affecting the interests of rivals makes it easier to reach an agreement;
- posted prices or open bids, i.e. transparency of prices, make monitoring an agreement easier;
- vertical relationships may enable price signalling or price monitoring downstream;
- size and frequency of purchases affects firms incentives to cooperate or compete; and
- industry associations and fora may facilitate the flow of information on prices and outputs between market participants and/or may facilitate them reaching an agreement.

5.157 If a merger increases the likelihood of coordination it is likely to substantially lessen competition. Both horizontal and vertical mergers may have this effect. For example, mergers can increase the level of concentration in a market; they may remove a maverick competitor who has destabilised past attempts at market coordination; they may create rivals with a greater commonality of interest; or they may increase the visibility of pricing through downstream integration. In other circumstances, a merger which disrupts market conditions, e.g. by reducing the costs of the merged firm or eliminating a technology disadvantage, may disturb the terms of coordination and may make such coordination less likely.

5.158 When considering the likelihood of future coordination, the Commission will also consider any existing relationships between firms and the past history of market conduct, whether it has been characterised by price fixing, parallel pricing or vigorous price competition and how such conduct is likely to be affected by the merger.

Efficiencies

5.159 As discussed in paragraphs 5.19–5.20, although s. 50 is concerned with the level of competition in markets and not the competitiveness of individual firms, and while efficiencies are more generally relevant in the context of authorisation, the extent to which any efficiency enhancing aspects of a merger may impact on the competitiveness of markets is relevant in the context of s. 50.

5.160 Where a merger enhances the efficiency of the merged firm, for example by achieving economies of scale or effectively combining research and development facilities, it may have the effect of creating a new or enhanced competitive constraint on the unilateral conduct of other firms in the market or it may undermine the conditions for coordinated conduct. Pecuniary benefits, such as lower input prices due to enhanced bargaining power, may also be relevant in a s. 50 context.

5.161 If efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, the merger may not substantially lessen competition.

5.162 While recognising that precise quantification of such efficiencies is not generally possible, the Commission will require strong and credible evidence that such efficiencies are likely to accrue and that the claimed benefits for competition are likely to follow.

Prices and profit margins

5.163 Merger factor (e) requires the Commission to consider the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins. This factor brings together all the other factors discussed above to determine whether the merger will have the effect, or be likely to have the effect, of substantially lessening competition in a market. If the merger facilitates sustained increases in prices or profit margins above competitive levels, this will be indicative of an increase in market power and a reduction in competition. However, it is not necessary for the merged firm to take advantage of its pricing discretion for competition to be damaged; it may simply opt for a quiet life or may use its pricing discretion to protect inefficient operations rather than to accrue excess profits.

5.164 Sustained price increases above competitive levels are the most obvious and visible manifestation of market power and a substantial lessening of competition. In some instances a merger may not increase prices but rather prevent prices falling to competitive levels by, for example, forestalling entry. Market power can also be exercised in other ways, e.g. conditions of access to an essential facility or reductions in product quality. Alternatively, the merger may result in cost reductions which accrue as increased profits rather than being passed through to consumers in lower prices. The merged firm sends out no price signals to rivals or potential rivals, who might otherwise increase production in response to price increases by the merged firm; while the merged firm increases its resources to discipline maverick pricing or attempts at market entry.

5.165 Where an acquisition involves a joint venture buyout, it will be necessary to consider the price and other incentives operating on the joint venture before and after the buyout. For example, if the joint venture was previously operating on a profit maximising basis there may be no effect on prices from the buyout. However, if it was previously operating on a cost sharing basis, the buyout may significantly change incentives. A joint venture buyout by a vertically related firm may also create the potential to leverage market power from one stage to another (see paragraphs 5.142–5.145 above).

5.166 Where the merged firm's prices are regulated, the Commission will give particular attention to non-price aspects of competition. For example, if a vertically integrated firm

owns an essential facility for its downstream rivals, but conditions of access are regulated, the Commission will consider whether the access regime is fully capable of insulating downstream rivals from the effects of upstream market power. Where final outputs are price regulated, the Commission will consider the potential for reductions in non-price competition, such as quality and product innovation. Furthermore, access regimes and price regulation may not be a permanent feature of the market and it will be appropriate to consider the likelihood of future changes to the regulatory environment and the impact of the proposed merger in the absence of such regulation.

6. Authorisation

6.1 Authorisation is the process of granting immunity, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene ss. 50 or 50A of the Act.⁶⁴

6.2 Once authorisation is granted in relation to an acquisition, neither the Commission, the Minister, nor third parties can take action under the Act to overturn the acquisition. The immunity only runs, however, once authorisation is granted and for the period authorisation is granted.

6.3 Applications for authorisation are considered initially by the Commission. Its determinations can be reviewed by the Tribunal, on application by an interested party.

6.4 Authorisation may be granted conditionally and/or may be granted subject to statutory undertakings provided by the applicant.

6.5 Parties proposing a merger should be aware that they can not seek authorisation for an acquisition which has already occurred and, except in certain circumstances, this may also apply from the date upon which they enter into a contract for the acquisition. Subsections 50(4) and (5) provide that where a contract has been entered into for the acquisition of shares or assets, providing that the contract is subject to the granting of authorisation and the person applied for the granting of authorisation within a period of 14 days after the contract was entered into, the acquisition shall not be regarded as having taken place until the application is disposed of or the contract ceases to be subject to the condition.

6.6 The Commission cannot initiate the process. The acquirer must lodge the application. While the Commission may suggest an authorisation application should be lodged, the decision on whether or not to do so ultimately lies with the parties.

6.7 The Commission has a period of 30 days to consider an application (s. 90(11)(a)). This may be extended to 45 days for complex matters (s. 90(11A)). It may also be extended by Commission requests for information from the applicant (s. 90(11)(b)) or with the agreement of the applicant (s. 90(12)). The Commission endeavours to deal with applications for authorisation as expeditiously as possible, subject to meeting its statutory obligations. If the Commission has not made a determination in the relevant period, the authorisation is deemed to have been granted.

6.8 The authorisation process is a public process, in which any interested party may make a submission, submissions are open for inspection on a public register, and there may be provision for a conference of interested parties. There is, however, provision for maintaining confidentiality of commercially sensitive information or otherwise where it appears desirable to the Commission to grant confidentiality.

⁶⁴ Note that for acquisitions subject to s. 50A, the Tribunal considers both competition and public benefit issues, regardless of whether they are considering an application for a declaration or an application for review of a Commission determination (see paragraphs 2.4 and 3.18).

The statutory test

6.9 Section 90(9) provides that the Commission shall not grant authorisation

unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

6.10 Section 90(9A) provides that in determining what amounts to a benefit to the public:

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;
 - (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

6.11 The onus is on the applicant to satisfy the test.⁶⁵

Application for authorisation

6.12 An application must be lodged on the appropriate statutory form at an office of the Commission during business hours, accompanied by the relevant application fee(s).

6.13 The application should set out in detail particulars of the proposed acquisition. It should be accompanied by a comprehensive submission setting out the benefit to the public expected to flow from the acquisition and commenting on any possible anti-competitive or other detriments that may result from the acquisition.

6.14 A copy of the application and submissions will be placed on the public register. Section 89(5A) provides that confidential information may be excluded from the register. Any claim for confidentiality should be clearly marked. If the Commission refuses a claim for confidentiality, the relevant submission or document, or part of a submission or document, will be returned to the applicant.

6.15 Section 90(11) provides for the Commission to issue a notice requesting additional information relevant to the Commission's consideration of the application. Such a notice has the effect of extending the 30 day period (or 45 days in complex matters) during which the Commission must make a determination, by the number of days the applicant takes to provide the information. This response, and any further submissions, will be placed on the public register, subject to confidentiality claims.

6.16 Whether the Commission issues a formal request for information or not will depend on the circumstances of the particular case. For example, if the Commission feels that it needs additional information to test some aspect of an application it may request additional information; in other cases where the Commission feels that an application is

⁶⁵ *QCMA*, op.cit., at 17,244; and *Re John Dee (Export) Pty Ltd & Ors.* (1989), ATPR 40-938, at 50,206.

not particularly well supported in some respect rather than issue a formal request for information it may simply advise the applicants of that assessment and then leave it up to the applicants (who bear the onus of making their case) to address that aspect if they wish. In other cases the Commission may receive submissions from interested parties challenging some aspect of an application; rather than issue a formal request for information the Commission may simply bring the interested parties submission to the attention of the applicants and leave it to them to decide how or whether they address the issues raised.

6.17 In complex matters, the Commission encourages parties to give it some advance notice on a confidential basis of a pending application for authorisation. This may obviate or minimise the need for additional information requests and extensions of the 30 day period.

Consideration of the application

6.18 In considering an application for authorisation, the Commission seeks the views of a wide range of parties who may have an interest in the matter including:

- suppliers;
- customers;
- importers.
- competitors; and
- other potential acquirers.

6.19 Parties are invited to make written submissions, which will be placed on the public register, subject to confidentiality claims. The Commission may also undertake market inquiries to gain a better understanding of the relevant market(s) and the likely effect of the proposed acquisition.

6.20 The Commission will also seek the views of government departments and others who may have expertise in the matter. Such parties may be asked for written comments and/or may be interviewed by the Commission. The Commission may also engage relevant experts to provide consultant reports on particular aspects of the application.

6.21 Because of the limited time frame in which the Commission must consider an authorisation application, the Commission is generally only able to give interested parties minimal time for comment — normally only a week. However, subject to statutory time constraints, interested parties are also welcome to comment on supplementary submissions which may be received after the initial application.

6.22 All non-confidential submissions and reports will be placed on the public register. The public register is located in Canberra but, depending on the likely interest in a matter, additional copies of the applications and submissions may also be located in appropriate regional offices.

Conferences

6.23 There is no statutory requirement to hold a pre-decision conference in relation to merger authorisation applications. However, in some cases the Commission receives an application for authorisation of an acquisition in conjunction with another application for authorisation, e.g. of a contract, arrangement or understanding. The Commission is required to call a pre-decision conference in relation to the latter at the request of interested parties. If the two (or more) applications both relate to the same joint venture proposal, the Commission is required to consider the two proposals together in the same time frame (s. 90(15)). The Commission will issue a single draft determination, hold a pre-decision conference if required and issue a single final determination.

6.24 In relation to other merger authorisations, the Commission will not generally issue a draft determination. Although the time frame for consideration of merger applications is very short, in appropriate cases the Commission may hold an informal discussion with relevant interested parties. The Commission may find such meetings helpful in its exploration of the issues. A set of meeting procedures will be provided to those invited to attend.

6.25 If such a meeting is held the Commission will be represented by the Commissioner(s) primarily responsible for consideration of the application. Also attending would be the applicant, normally the target, and parties who the Commission wishes to hear on the particular matter. A record of the meeting will be placed on the public register.

6.26 Prior to any such meeting the Commission may prepare a set of issues that it wishes to be addressed at the meeting, which would be sent to invited parties and the applicant a few days before the meeting.

6.27 Again because of the time constraints with such applications, meetings and other discussions may need to be conducted at a fairly early stage. If the application provides sufficient information and where a meeting of interested parties is considered desirable it may be called at the end of the second week or the beginning of the third week from when the application was lodged.

The evaluation of public benefit/detriment

6.28 The Commission shall only grant authorisation if it is satisfied in all the circumstances that the acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

6.29 In making its evaluation, the Commission adopts the approach set out by the former Trade Practices Tribunal (now the Australian Competition Tribunal) of comparing the position that would apply in the future were the proposed acquisition not given effect,

with the position in the future which would arise if the proposed acquisition were given effect.⁶⁶ This requires an integrated analysis of both public benefit and public detriment.⁶⁷

6.30 Public benefit is not defined by the Act, except to the extent that it requires that significant increases in exports or import replacement be considered as public benefits and that the Commission take account of all relevant matters relating to international competitiveness (see paragraph 6.10 above). However, the Tribunal has suggested in *QCMA* that the term should be given its widest possible meaning:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁶⁸

6.31 The Tribunal also stated in *QCMA* that the relevant public benefit is a net or overall benefit after any detriment to the public resulting or likely to result from the proposed acquisition:

We accept that the statute calls upon us to adopt a balance-sheet approach: we must balance the likely benefits and detriments flowing from the acquisition.⁶⁹

6.32 The notion of public detriment falling for consideration under 'all the circumstances' is wider than the notion of anti-competitive effect, but the latter will be a primary consideration. The Tribunal stated in *QCMA*:

We accept that the notion of detriment falling for consideration under 'all the circumstances' is wider than the notion of anti-competitive effect. But at the same time, given the policy of the Act and the subject-matter under consideration, the most important of those potential detriments will normally be the anti-competitive effects.⁷⁰

6.33 In assessing the benefit to the public of the proposed acquisition, it is appropriate to start with an assessment of the competitive impact of the proposed acquisition. In *QCMA*, the Tribunal gave the following reasons:

- (1) A merger may positively enhance the competitive process and thus give rise to a substantial benefit. ...
- (2) But the benefits claimed may not mention competition. ... Nevertheless, our appraisal of all the listed claims must depend upon our appreciation of the competitive functioning of the industry, with and without merger. ...
- (3) A claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process. ...

⁶⁶ *Tooth & Tooheys*, op.cit., at 18,186–18,187; *Re Media Council of Australia (No.2)* (1987), ATPR 40–774, at 48,419; *John Dee*, op.cit., at 50,206.

⁶⁷ In *QCMA* the Tribunal rejected the alternative approach of first evaluating public benefit and only considering detriments if the former was established. As discussed in paragraph 6.33, the Tribunal considered it was not possible to evaluate public benefit without also considering competitive effects.

⁶⁸ *QCMA*, op.cit., at 17,242.

⁶⁹ *QCMA*, op.cit., at 17,243.

⁷⁰ *QCMA*, op.cit., at 17,243.

(4) ... the substantiality of benefits needs to be measured against likely anti-competitive effects (and other detriments).

(5) Quite generally, the Tribunal's role is seen as forming one of the means of achieving the policy objective of the Act, namely the preservation and promotion of useful competition.⁷¹

In *BHP/Koppers*, the Tribunal made the following statement:

... the delineation of the relevant markets is but a first and preliminary step to enable the identification of relevant elements of market structure and associated processes of competition. Such analysis of competition enables not only the identification of any anti-competitive detriment as required by the test imposed by the Act, it also facilitates the exploration of the role that is played by the relevant conduct, the subject of the Koppers' application, in achieving the claimed benefits to the public ...⁷²

6.34 It is not necessary or appropriate to express a view as to whether the proposed acquisition would breach s. 50 of the Act in the absence of authorisation.⁷³ However, the framework of analysis used for s. 50 is still an appropriate one for the evaluation of competitive effects in relation to applications for authorisation.

6.35 Applicants should refer to section 5 of these guidelines for a description of how the Commission applies that framework and the types of information which are required. However, applications for authorisation should include at least the following information.

- The volume and value of Australian sales supplied by the merging entities for each of the major goods and services supplied.
- Details of the merged firm's major competitors, both domestic and importers, including the nature of the goods and services in which they compete.
- Estimates of market shares, preferably on the basis of both sales volumes and values as well as capacity. Imports should be included in the calculation of market shares; where a firm supplies both imports and local production, these should be treated as a single market share.
- Information on the extent and nature of import competition in the market; this should include information on the nature of import distribution systems and the capacity for significant expansion.
- Information on the problems facing new market entrants, the history of market entry and exit and any known plans for future entry.
- Details of the merging firms major input suppliers and customers; including details of long term contracts and any countervailing power.
- Details of the parties cost structures and ability to increase output and how these will be affected by the proposed merger.

⁷¹ *QCMA*, op.cit., at 17,244–17,245.

⁷² *Review of TPC notice: BHP/Koppers purchasing agreement* (1981), ATPR 40–203, at 42,828.

⁷³ *QCMA*, op.cit., at 17, 241.

- Information on competitive behaviour and price determination in the relevant market(s), including how the merging firms set their prices.
- Information on the extent of vertical integration in the market.
- Information on market growth, innovation, regulatory changes and product differentiation.
- Any other information likely to be relevant to the Commission's deliberations.

6.36 In considering applications for authorisation, it is relevant for the Commission to consider how any reduction in competition may affect ultimate consumers. In *Rural Traders* (1979), the Tribunal considered it relevant in assessing the public benefit of a proposal for Wesfarmers (a distributor of farm fertiliser) to acquire control of CSBP (a manufacturer of fertiliser) that notwithstanding the impact on competition at the distributor level there was likely to be no detrimental impact on fertiliser prices to farmers.⁷⁴

6.37 The phrase 'not otherwise available' previously formed part of the public benefit test. This is no longer an absolute requirement. Nevertheless, there must be a nexus between the claimed public benefits and the proposed merger. Furthermore, the Commission considers that it is still relevant to consider whether the benefit may be available otherwise than by the proposed merger when comparing the situation which is likely to prevail with and without the merger. If a benefit may be otherwise available, it is likely to receive less weight in the Commission's analysis.

6.38 Following the broad interpretation of potential public benefits adopted by the Tribunal, the Commission has generally identified the following matters which could constitute public benefits:

- economic development, e.g. in natural resources, through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;
- assistance to efficient small businesses, such as 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;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- promotion of equitable dealings in the market;

⁷⁴ *Re Rural Traders Co-operative (WA) Ltd. & Ors.* (1979), ATPR 40-110.

- 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;
- steps to protect the environment.⁷⁵

6.39 However, as emphasised by the Tribunal, public benefits in the form of increased efficiency and better resource usage, resulting in lower unit costs are most important in the consideration of applications for the authorisation of mergers. Efficiencies may take many forms, e.g. economies of scale and scope, more efficient technology resulting in reduced input and/or energy costs or the combining of complementary research and development facilities. In *Dauids* (1995) and *Dauids* (1996), the Commission accepted that significant resource savings from rationalisation, including warehousing and distribution facilities, advertising and generic product ranges, in grocery wholesaling amounted to significant public benefits.⁷⁶

6.40 Pecuniary savings from increased bargaining power which merely result in a transfer of wealth rather than any real resource savings for the community may not be considered by the Commission to constitute substantial public benefits in themselves.⁷⁷ For example, in *Wattyl* the Commission considered that some of the claimed efficiencies relating to raw material and advertising costs constituted pecuniary benefits and were therefore not considered to be substantial public benefits in their own right.⁷⁸ However, where such cost savings arise from the creation of countervailing power they may move the market outcome closer to a competitive one, a relevant consideration under both s. 50 (see paragraph 5.124) and authorisation.

6.41 However, other types of public benefit may also be relevant in considering the authorisation of mergers. In *DuPont*, the Commission accepted that significant environmental benefits, in the form of reduced carbon, nitrous oxide and greenhouse gas emissions, were likely to flow from the joint venture's upgrading of the Gladstone sodium cyanide plant.⁷⁹

6.42 The concept of a benefit to the public is not limited to a benefit to consumers, a benefit to a private party which is of value to the community generally is a public benefit. The Tribunal stated in *Rural Traders*:

Before a benefit (or detriment) can properly be regarded as a benefit (or detriment) to the public for the purposes of the assessment of public benefit required by sec. 90(9), it must be seen as a benefit (or detriment) to the community generally. This does not mean that private benefit or private detriment are necessarily irrelevant. Injury to an individual can itself, in many circumstances,

⁷⁵ *ACI Operations Pty Ltd* (1991), ATPR, 50–108, at 56,067.

⁷⁶ *Dauids* (1995) op.cit; *Dauids* (1996), op.cit.

⁷⁷ Federal Trade Commission, op.cit., p.s–36.

⁷⁸ *Wattyl*, op.cit.

⁷⁹ *DuPont*, op.cit.

constitute a detriment to the community generally. Injustice to an individual will commonly do so. The encouragement or enabling of an individual to pursue legitimate ends or to attain legitimate rewards may well be beneficial to the community generally. When a benefit or a detriment to a particular individual or segment of the public is pressed as a relevant benefit or detriment to the public for the purposes of sec. 90(9), the Tribunal must assess whether the benefit or detriment to the individual or group can properly be so categorised. That assessment will ordinarily involve the consideration of whether the community generally has an interest in the individual or group being so benefited or disadvantaged and whether the benefit or detriment involves detriment or benefit to other individuals or groups.⁸⁰

In *QCMA* the Tribunal stated:

... it is clear that it could be possible to argue in some cases that a benefit to the members or employees of the corporations involved served some acknowledged end of public policy even though no immediate or direct benefit to others was demonstrable.⁸¹

6.43 For example, a merger may result in economies of scale or other resource savings which may not be immediately available to consumers in lower prices. However, the community at large has an interest in resource savings, releasing those resources for use elsewhere. In *DuPont* the Commission accepted that improvements in the efficiency of sodium cyanide production resulting in resource savings, such as electricity and capital, constituted a public benefit, although consumers were unlikely to benefit from lower prices.⁸²

6.44 However, the interests of the public as purchasers, consumers or users are relevant.⁸³ Lower prices for consumers and lower input costs for business, with potential ramifications for international competitiveness, are considered by the Commission to constitute public benefits. In *Howard Smith*, the Tribunal stated:

If a merger is likely to result in the achievement of economies and a considerable cost saving in the cost of supplying a good or service this might well constitute a substantial benefit to the public, even though the cost saving is not passed on to the consumers in the form of lower prices. Nevertheless, if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the Tribunal, because the benefits are not being spread widely among the members of the community.⁸⁴

6.45 Furthermore, when comparing the situation that is likely to prevail with and without the proposed merger, it is critical to consider the likely durability of the claimed public benefits:

The present writer would agree with the proposition that there must be public benefit in saving resources but would advance a third view, that it is not the immediate distribution of benefits that is important but their durability. If a merger, for example, gives rise to rationalization economies and higher profits that are not 'passed on to the consumer', one needs to ask why this is so. It may well

⁸⁰ *Rural Traders*, op.cit., at 18,123.

⁸¹ *QCMA*, op.cit., at 17,242.

⁸² *DuPont*, op.cit.

⁸³ *QCMA*, op.cit., at 17,242.

⁸⁴ *Howard Smith*, op.cit., at 17,334.

reflect enhanced market power which would need to enter the benefit-cost equation; and there may well be a question of whether the lack of competitive pressure will allow productivity gains to be lost — 'benefit' to be dissipated — in slackness and rent-seeking activities.⁸⁵

6.46 The Act specifically requires the Commission to consider export enhancement and import replacement as public benefits and to take account of international competitiveness (see paragraph 6.10 above). The Explanatory Memorandum to the 1992 amendments states that:

63. The value of exports is the value of goods and services which are produced in Australia and sold overseas, and the real value is the dollar value of those goods and services, discounted to account for changes in the level of Australian prices. The word 'significant' is not intended to be interpreted in a relative sense. The effect on exports of any single merger is likely to be insignificant when assessed against the value of all Australian exports. Rather, the word 'significant' should be interpreted in an absolute sense, and is intended to mean increases which, when viewed in isolation, are not insignificant or ephemeral.

64. A substitution of domestic products for imported goods occurs when consumers alter their consumption to choose goods produced in Australia, where previously they had chosen goods produced outside Australia. This factor looks at the overall balance of choices made by individual consumers. If the total level of consumption of an Australian product rises at the expense of consumption of foreign-produced goods, and this change is attributable to the merger, the merger may be said to have produced a substitution of domestic products for imported goods. As with the real value of exports, the word 'significant' should be interpreted in an absolute sense to mean not insignificant or not ephemeral.

65. In determining public benefit for the purposes of S. 90(9A) the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry. Changes in international competitiveness may be attributed to a wide range of matters, which it is impossible to list exhaustively, but could include matters such as changes in the quality of inputs, improvements in technology, or better work practices. The range is qualified by the requirement that the matters looked at be 'relevant', which indicates that they should be attributable to the merger in question. It is not required that the improvement in international competitiveness be in the industry in which the merger occurs.

6.47 In *DuPont* the Commission accepted that increasing the capacity of the Gladstone sodium cyanide plant would result in either increased exports, import replacement or both, which would constitute a benefit to the public.⁸⁶

6.48 In *QCMA* the Tribunal stated that:

We are to be concerned with probable effects rather than with possible or speculative effects. Yet we accept the view that the probabilities with which we are concerned are commercial or economic likelihoods which may not be susceptible of formal proof. We are required to look into the future but we can be concerned only with the foreseeable future as it appears on the basis of evidence and argument relating to the particular application.⁸⁷

⁸⁵ Maureen Brunt (1994), 'The Australian Antitrust Law After 20 Years — A Stocktake', *Review of Industrial Organisation*, Vol.9, No.5, p.508.

⁸⁶ *DuPont*, op.cit., p.49.

⁸⁷ *QCMA*, op.cit., at 17,243.

6.49 Applications for authorisation should clearly set out the claimed public benefits, how they relate to the proposed merger, their likely magnitude and timing. It is often difficult to measure public benefits in precise quantitative terms. Nevertheless, general statements about possible or likely benefits will not be given much weight unless supported by factual material.⁸⁸

Decision of the Commission

6.50 Normally in making a decision the Commission issues a determination setting out the full particulars of the application and submissions thereon, and providing a comprehensive evaluation of the arguments for and against authorisation. However, with the time constraints on merger applications the Commission may give reasons for reaching its decision without such a comprehensive evaluation of all submissions received.

6.51 The Commission can grant authorisation subject to conditions (s. 91(3)). The Commission may consider it appropriate in particular cases to grant authorisation subject to conditions which ensure that the claimed public benefit is likely to eventuate or to lessen any detriment that might result from the acquisition. Conditions may include a requirement that the applicant provide relevant undertakings. Such undertakings are now enforceable at law (see section 7 below).

6.52 The Commission and the Tribunal have made determinations subject to conditions and accepted undertakings in relation to numerous applications for authorisation of a proposed acquisition. For example, in the application by Davids to acquire CBL, in which the Tribunal confirmed the Commission's authorisation of Davids to acquire the only other major independent wholesaler in Victoria and NSW, authorisation was conditional on Davids being able to cast at least 50 per cent of votes at a general meeting of CBL.⁸⁹ The Commission imposed this condition in order to ensure that the claimed public benefits would be reasonably likely to accrue.

6.53 If the Commission grants authorisation for an acquisition, the authorisation comes into effect on a date specified by the Commission, not being a date before the expiry of the period for review by the Tribunal (see below). If an application for review is made, the authorisation will not come into effect before the Tribunal has granted authorisation or the application for review has been withdrawn.

6.54 If the Commission is not satisfied in all the circumstances that the acquisition would result, or be likely to result, in such a benefit to the public that it should be allowed to take place, the Commission may refuse authorisation or alternatively, in refusing authorisation, indicate to the applicant how the application could be constructed to change the balance of detriment and public benefit so that authorisation may be granted.

⁸⁸ *Howard Smith Industries and Adelaide Steamship Industries* (1977), ATPR 40-023.

⁸⁹ *Davids* (1995) op.cit.; *QIW* (1995) op.cit.

Australian Competition Tribunal

6.55 An application for review of the Commission's decision may be made to the Tribunal (the reviewing body).

6.56 An application for review may be made by the applicant for authorisation or by any person who the Tribunal is satisfied has a sufficient interest in the matter.

6.57 The application for review must be lodged within 21 days of the Commission's determination or within such shorter time as the Tribunal directs.

6.58 A review by the Tribunal is a rehearing of the application for authorisation on the basis of the material placed before it, which may include new material not presented to the Commission.⁹⁰ It is not a review of the Commission's decision in the sense of ruling on alleged errors in the Commission's findings or procedures. The Tribunal will reach its own conclusions on whether authorisation should be granted and if so subject to what conditions.

6.59 The Tribunal has a period of 60 days to conduct a review, which may be extended if the Tribunal considers that the matter cannot be dealt with properly in that period because of the complexity of the matter or other special circumstances (s. 102).

Date of effect

6.60 If the Commission grants authorisation and no application for review of the Commission's determination has been made within the period allowed (see paragraph 6.57), the Commission's authorisation will come into effect at the end of that period (s. 91(1A)(a)).

6.61 If an application for review is made to the Tribunal, authorisation will come into effect:

- (a) on the day on which the Tribunal makes a determination on the review and grants authorisation; or
- (b) where the application for review is withdrawn, on the day on which the application is withdrawn (s. 91(1A)(b) and (c)).

⁹⁰ *QCCA*, op.cit., at 17,226–17,227; *Tooth & Tooheys*, op.cit., at 18,183; *Rural Traders*, op.cit., at 18,122–18,123.

7. Enforceable undertakings

7.1 As stated in paragraph 2.16, s. 87B allows the Commission to accept written undertakings in connection with matters where it has a power or function under the Act (other than Part X).

7.2 Undertakings pursuant to s. 87B are one of the tools available under the Act to further its goals of improved competition and efficiency in markets. Undertakings pursuant to s. 87B are a flexible alternative to simply opposing an acquisition where the Commission believes that the acquisition is likely to substantially lessen competition.

7.3 To date the Commission has accepted undertakings pursuant to s. 87B of the Act from parties to an acquisition for either of two purposes:

- to ensure that an acquisition is not completed until the Commission has had the opportunity to conduct the appropriate market inquiries; or
- to resolve matters where the proposed acquisition is, in the Commission's view, likely to contravene the Act.

7.4 An example of an undertaking in the former category arose in the Davids-IHL acquisition. In that case the Commission accepted an undertaking from Davids to divest IHL's shareholding in CBL if the Commission reached the view that Davids acquisition of those shares would breach s. 50. Davids was successful in its takeover offer for IHL and as the Commission subsequently authorised the Davids acquisition of CBL, the Commission did not require Davids to divest its interest in CBL.

7.6 Where, as noted in the latter category referred to above, following its inquiries into a proposed acquisition, the Commission forms the view that a proposed acquisition is likely to substantially lessen competition in breach of s. 50, it will provide the parties with reasons for that view. If the parties consider that undertakings could be offered to reduce or eliminate the stated concerns, they may choose to offer to the Commission undertakings aimed at restructuring the proposal in such a way as to address the competition concerns.

7.7 In these circumstances, the offer of such an undertaking designed to address the competition concerns is a matter for strategic decision by the parties to the acquisition, and presumably will be considered along with other options open to the parties, for example challenging the Commission in Court, seeking authorisation, revising the proposal without undertakings, or even abandoning the proposal. It is not the policy or practice of the Commission to demand such undertakings.

7.8 The Commission is likely to look most favourably on proposed undertakings which are able to address structural issues in the relevant market(s). Structural solutions provide an ongoing basis for the operation of competitive markets. The regulatory costs are one-off rather than a permanent burden. For example, divestiture of particular divisions of the merged company may remove competitive concerns from the merger, while leaving the merger an attractive proposition for the parties. The Commission accepted undertakings in the Village-Austereo merger which resulted in the divestiture of certain capital city radio stations, in order to maintain competition in those markets. In

the Sigma-QDL acquisition, the Commission accepted an undertaking from Sigma that if it obtained control of QDL, it would move to sell QDL's business in Victoria, in order to maintain competition in that State.

7.9 Another example is the Ampol/Caltex merger. After examining the proposed merger of Caltex and Ampol, the Commission reached the conclusion that it would have the effect of substantially lessening competition in various petroleum markets. The increase in concentration and elimination of vertical imbalance between the parties, in addition to other market factors conducive to coordinated conduct, at a time when the industry was approaching full capacity utilisation, and in an industry with substantial barriers to importing and entry, would be likely to have the effect of squeezing independent distributors and retailers out of the industry, reducing competition and increasing prices and profits. The parties to the proposed merger offered and the Commission accepted, undertakings which provided a structural underpinning for independent operators to continue to play a competitive role in petrol markets, undermining any attempts to coordinate pricing between the majors. The undertakings provided for the sale of import, storage and retail sites which were surplus following the merger to independent distributors and retailers, with guaranteed supply of petrol at a competitive price during a transition phase.

7.10 The Commission is not likely to favour behavioural undertakings, such as price, output, quality and/or service guarantees and obligations. Such undertakings may well interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes. The duration of such undertakings is also highly problematic.

7.11 In addition, such undertakings have substantial regulatory difficulties. They are extremely difficult to make certain and workable in detail, particularly in the short time frames in which mergers are considered, they require continuing monitoring, and where breaches are detected they are often dependent on enforcement after the event. There is also likely to be substantial associated costs to the Commission of compliance and enforcement.

7.12 A vertical merger often involves the integration of a party in a competitive market with a party which has a natural monopoly, for example a gas pipeline. This will usually raise concerns about access, access pricing and protection of confidential information. In some cases the Commission's concerns may be able to be addressed by way of quasi-structural undertakings like ring fencing and access undertakings.⁹¹ In other cases there may be existing regulation designed to address vertical integration concerns with respect to essential facilities⁹². However, it should be well understood that the Commission will

⁹¹ There has recently been a greater use of the consent decrees or undertakings approach to vertical mergers in the United States. See *United States v AT & T Corp* 59 Fed. Reg. 44,158; *United States v MCI Communications* 59 Fed. Reg. 33,009; *United States v Tele-Communications, Inc* 59 Fed. Reg. 24,723; *Martin Marietta Corp.* 59 Fed. Reg. 17,379.

⁹² The ACCC has published guidelines on the new access regime: *Access Regime — a guide to Part IIIA of the Trade Practices Act*, November 1995.

view any such option sceptically as a set of undertakings are never capable of replacing the operation of a competitive market. The Hilmer Report recommended vertical separation of natural monopolies from competitive or potentially competitive activities in conjunction with an access regime.⁹³

7.13 For example, in 1995 the Commission rejected undertakings proposed by GrainCorp and the Australian Wheat Board in relation to a proposal to enter into a joint venture to buy and sell NSW grain in the domestic market. The Commission considered that the proposal would be likely to substantially lessen competition in the NSW markets for the storage and handling of grain and for grain trading. Following widespread industry consultation, the Commission concluded that the proposed undertakings did not address issues of access, including internal transfer pricing, availability of capacity, preferential reservation of capacity and priority of access; they did not provide a satisfactory framework for preventing the flow of commercially sensitive information between the parties; and there was no mechanism for monitoring, arbitrating and enforcing the undertakings. The Commission concluded that there was little real prospect that the structural concerns could be satisfactorily resolved by behavioural undertakings.

7.14 When considering applications for authorisation of a proposed merger, the Commission may consider proposed undertakings which address the balance between public benefit and detriment, particularly the anti-competitive detriment. Again the Commission prefers structural remedies, but where these are not feasible, it may consider proposals for behavioural undertakings, taking account of the regulatory costs in balancing the likely public benefit and detriment.

7.15 In one authorisation case, *Dauids* (1995), the applicant sought to support its application by the provision of certain behavioural undertakings. In that case the Commission did accept certain undertakings from *Dauids* in the course of its consideration of the authorisation application. *Dauids*, in its application had undertaken to pass on a proportion of the cost savings to its customers and to provide other guarantees, including dispute resolution facilities, to its customers. The Commission accepted these undertakings.⁹⁴ On review⁹⁵ (the application for review was lodged by QIW) *Dauids* withdrew its offer of undertakings and the then Trade Practices Tribunal granted authorisation without such undertakings.⁹⁶

7.16 The Commission has also issued separate general guidelines on s. 87B, which are relevant to s. 87B undertakings in the mergers context. For example, those guidelines note that the Commission will not accept such an undertaking where the parties in the undertaking seek:

⁹³ Report by the Independent Committee of Inquiry (1993), *National Competition Policy*, AGPS, Canberra.

⁹⁴ *Dauids* (1995), op.cit.

⁹⁵ *QIW* (1995), op.cit.

⁹⁶ *Dauids* subsequently acquired QIW (which had by then acquired CBL) and unilaterally entered into undertakings in substantively the same terms as those previously offered to the Commission, with the exception of the guaranteed pass through of a proportion of the cost savings.

- to deny liability;
- to impose any terms or obligations on the Commission;
- a specific requirement that the Commission will not in future institute proceedings in the particular matter;
- a statement that the undertaking is not an admission in relation to action by third parties such as employees; or
- terms purporting to set up defences for possible non-compliance.

Procedural issues⁹⁷

Scope

7.17 The scope of a s. 87B undertaking is potentially wider and the terms more flexible than a Court imposed remedy. For example, the Court may be reluctant to make other orders requiring ongoing monitoring and supervision by the Court, whereas the Commission does have the resources and functions of an administrative agency and may be prepared to accept undertakings with an ongoing obligation.

7.18 The scope of s. 87B undertakings that the Commission is likely to accept in the mergers context will be determined by the Commission's assessment of the anti-competitive effects of the merger. The test will be whether the arrangements envisaged by the proposed undertakings will address the reduction in competition. The focus is not necessarily on the assets to be acquired and this may mean that the Commission may accept an undertaking which is not directly related to the assets to be acquired where that is considered necessary to address the reduction to competition.

Parties

7.19 The question of which bodies corporate, or persons, should be parties to a proposed s. 87B undertaking is an important one. The Commission will need to be satisfied that the parties to the undertakings are the relevant legal entities capable of performing the specified obligations. However, it may not be necessary to have all relevant legal entities sign the undertaking, particularly where a relevant parent company undertakes to cause or procure its relevant subsidiaries to do what is required. In some mergers, all principal parties to the merger may be prepared to give undertakings, and therefore few issues will arise as to the power of particular companies to deliver on their undertakings. This will not be the case in all mergers. For example, where there is a hostile takeover, the target will presumably not agree to providing undertakings to the Commission, while the acquirer may be agreeable. This will be a significant issue if the assets that are proposed to be divested are those of the target. In the event that the acquirer in a takeover is not completely successful (that is, it does not acquire all the shares) the anti-competitive consequences may arise, but the acquirer may have

⁹⁷Much of the following discussion on procedural issues relevant to s. 87B undertakings draws on the article by Tonking and Castle 'Mergers: The Use and Utility of Undertakings' (1993) 1TPLJ 37, and the article by Walker and Woodward 'The Ampol/Caltex Australia Merger: Trade Practices Issues' (1996) 4TPLJ 21.

limitations on its ability to divest certain assets of the target because of minority shareholder interests. Ultimately, the parties proposing the undertakings will need to satisfy the Commission that they are able to perform their relevant obligations.

Consultation and third party interests

7.20 In most, if not all cases, the Commission will want to consult with relevant market participants before accepting a substantive s. 87B undertaking. While the Commission will usually have already undertaken extensive consultation through its market inquiries process, this consultation may not be sufficient to address all issues relevant to a decision to accept a proposed undertaking or not. Once having formed the view that an acquisition would be or is likely to be anti-competitive, and having received the offer of undertakings, the Commission will need to undertake a separate assessment of the impact of the proposed undertakings. This will almost always require further consultation with market place participants.

7.21 The Commission will need to assess the competitive significance of the undertakings, and at the same time inform itself as to the necessary requirements to make the undertakings practically workable. The Commission will also want to assess the impact of the proposal on third parties, which is discussed further below.

7.22 To undertake this process of consultation, the substance of the undertaking proposal, if not all the mechanics of its timing and implementation, may need to be disclosed.

7.23 The Commission may also need to assess the impact of third party rights and interests. Any merger will achieve some measure of structural change in a market and, therefore, any merger will be likely to impact on firms and consumers who are not a party to the transaction. In its simplest terms, if a merger is anti-competitive it will have a direct impact on those parties dealing with the merged firm, whether in terms of increased prices or reduced service or quality. If a merger reduces competition in a market, it may benefit rivals through lower competitive pressure and higher prices.

7.24 Just as any anti-competitive merger will have an impact on third parties, so too will any undertaking designed to address the anti-competitive consequences of such a merger. Where the merger is likely to be anti-competitive, the provision of undertakings to address that is likely to favour customers, but may remove the benefits that rival firms may have anticipated through the reduction in competition.

7.25 An assessment of these 'third party' interests is in effect subsumed within the general assessment of the competition effects of a merger and the capacity of the proposed undertakings to address those effects.

7.26 However, there may be other more specialised third party interests which need to be considered by the Commission and the merger parties. For example, merger parties who are proposing s. 87B undertakings will need to consider their own obligations to third parties, for example, whether the undertakings are consistent with existing contractual obligations with another party or whether the performance of the undertakings may give rise to some claim against the merger parties.

7.27 Generally, it would not be appropriate for the Commission to conduct this assessment of the rights and obligations as between the merger parties and other third parties. Generally that will be a matter for the merger parties. However in some cases, where the presence of third party rights may give rise to a challenge to the s. 87B undertakings or the undertakings being rendered impossible to comply with, it may be necessary for the proposed s. 87B undertakings to make specific provision for those rights, for example, by way of indemnification of the affected third party. This is likely to arise only in rare cases.

Certainty

7.28 It is important to note that the resolution of a merger matter through s. 87B undertakings is not like a contractual bargain which is based on a mutual ongoing business relationship between the parties. In the event of a subsequent dispute over the effect of the undertakings, particularly where there is some deficiency from the Commission's point of view, there may be little scope or incentive for renegotiation. Therefore the terms of the undertakings need to be sufficiently detailed to ensure certainty and enforceability; and also capable of dealing with changing circumstances. Accordingly, it may take some time to resolve all points of detail, and merger parties must be prepared (in appropriate cases) to allow time for this.

Publication and confidentiality

7.29 The Commission will insist that the general terms of any s. 87B undertaking accepted are made public. In almost all cases, this would mean the publication of the actual provisions of the s. 87B undertaking, by placing a copy of the undertaking on a public register.

7.30 However, the Commission is prepared to consider requests for confidentiality of certain information, for example the timing of any divestiture arrangement, or the arrangements in the event of the failure to divest, particularly where the disclosure of that information would undermine the effectiveness of the undertakings.

Monitoring and Commission information requirements

7.31 In order to ensure that s. 87B undertakings are complied with and to assist the Commission in monitoring that compliance, the Commission has as a standard practice, sought the inclusion of provisions in undertakings which require relevant information to be made available to the Commission:

- periodically; for example, a periodic audit of compliance with the undertaking;
- in specified circumstances; for example, where there is an event of default, information relating to that default, such as the reasons for it; or
- upon the Commission's request.

Variation and review of Commission decisions

7.32 A party to a s. 87B undertaking may seek to have it varied with the Commission's consent: s. 87B(2). If the Commission does not consent it may be open to the party

requesting the variation to seek judicial review of the Commission's decision⁹⁸. The Commission's refusal to consent may also be a matter the Court may take into account in the exercise of its discretion to grant remedies for failure to comply with an undertaking in any action taken by the Commission to enforce the undertakings: s. 87B(4).

7.33 To avoid such disputes, it is preferable to include an express mechanism for consultation and review in the undertakings in the event that there are any relevant changes in market circumstances. Such circumstances should be specified by agreement. The Commission is unlikely to accept any automatic variation of an undertaking without its prior approval or bind itself to a pre-agreed variation.

7.34 As noted above, there is implicit in the legislation a general mechanism for overview of s. 87B undertakings as the Court retains the ultimate discretion as to whether to grant any remedy sought by the Commission in the event of non-compliance with the undertakings.

Section 87B undertakings and authorisation

7.35 The Commission is able to accept undertakings in connection with an application for authorisation of a merger. The Commission is also able to grant authorisation subject to certain conditions. However, where those conditions are of an ongoing nature, or are to be performed after the date of the merger, it is not clear what remedy, if any, there would be available to the Commission in the event of non-compliance.⁹⁹ In these circumstances, any condition the compliance with which falls due after the merger is effected should be reflected in a s. 87B undertaking.

7.36 At the same time, where there is an application to the Australian Competition Tribunal for review of a Commission determination, it is important that the Tribunal be seized of the entire matter. There is some doubt as to the position of s. 87B undertakings accepted by the Commission on a review by the Tribunal. In the *Davids / CBL* matter,¹⁰⁰ the Tribunal held that undertakings given in the authorisation context did not have any separate operation from the Commission's determination, and that on review only so much of the undertakings as the Tribunal considered to be appropriate would have any effect.¹⁰¹ However, to avoid any doubt the Commission will as a standard practice ensure that the provision of any s. 87B undertakings as are considered appropriate in the authorisation context will form part of the conditions of the authorisation and be expressly subject to the outcome of any Tribunal review.

Enforcement

7.37 In the event of non-compliance with a s. 87B undertaking, the Commission may make an application to the Court for an order under sub-section (4), and the Court may, if

⁹⁸See Tonking and Castle, *op cit* at 46.

⁹⁹ See *Broken Hill Pty Ltd v Trade Practices Tribunal* (1980) 31 ALR 401.

¹⁰⁰ *Re: Queensland Independent Wholesalers Limited* (1995) ATPR 41–438 at 40,914.

¹⁰¹ *Ibid*, at 40,929.

it is satisfied that the party to the undertaking has breached a term of the undertaking, make all or any of the following orders:

- (a) an order directing the person to comply with that term of the undertaking;
- (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and
- (d) any other order that the Court considers appropriate.

Market definition principles applied to media sectors

General market definition principles are discussed in the *Merger Guidelines*. Turning now to how these general principles might be applied to determine what might constitute the relevant markets in media, it is useful to revisit the Report from the House of Representatives Select Committee into the Print Media where this question was discussed. In the Trade Practices Commission's Submission to the Select Committee in September 1991, the Commission noted that market place inquiries, particularly of major advertisers, tended to indicate that whilst there was some competition between print and electronic media for advertising of certain products, that competition was limited, and that there are substantial core markets for print and electronic markets separately.

In its submission to the Select Committee, the Commission noted that its inquiries up to that time in a number of print media mergers revealed that in the advertising market, television or radio advertising was no significant substitute for newspaper classified advertising particularly of real estate.²⁵ The Commission accepted that in terms of the provision of news and information there was some substitutability between print and electronic media, and that for advertising of certain particular products there was substitutability, but that print and electronic media nonetheless constituted core and separate markets (it should be noted that if there are future mergers these issues would be automatically reviewed).

Apart from the substitution aspects the Commission also needs to make an assessment of the geographical boundaries of a market. For instance, in the 1987 *News Ltd/Herald and Weekly Times* merger the Commission found that there were distinct print media markets which were effectively confined to particular metropolitan areas. For example, it did not consider that Brisbane's *Courier Mail* competed with the Melbourne *Sun*. In each of Brisbane and Adelaide, however, the Commission did take the view that the aggregation of the metropolitan newspapers in those two cities resulted in market dominance. Similarly, in 1990, the Commission considered that the acquisition by WA Newspapers of the Perth *Daily News* would result in dominance in the metropolitan newspaper market in Perth.

In examination of market definition issues in electronic media, the Commission has considered the consumption patterns of consumers.

Broadcasting competes with other types of media such as cinema, newspapers, magazines, video games and the Internet. However, the Commission has not taken the view that broadcasting and these other forms of media are sufficiently substitutable from the perspective of consumers to be considered to be part of the same market. Broadcasting often has an immediacy which is not found in many competing types of media and consequently, consumers

²⁵ With respect to commercial radio broadcasting, note that the Trade Practices Commission published a paper, 'Market definition and competition issues in commercial broadcast radio' (June 1994, AGPS, Canberra), discussing the Commission's thinking on competition issues and particularly issues of market definition relating to commercial radio.

find that broadcasting has fewer substitutes than some other media. For example, live sporting broadcasts and live broadcast news reports cannot be substituted easily by other forms of media, although internet provision of some of these services may soon begin to be some substitute in terms of immediacy (while not providing some of the other attributes of broadcasting).

Pay television as a market

The delineation of the market will of course always be dependent on the circumstances of a particular case. The Commission is required to be flexible in its task of defining the market in sectors that are new and emerging, such as pay TV. The pay TV sector is illustrative of the difficulties encountered in defining a market in an environment which is extremely dynamic, and where there are regulatory constraints on its development.

Media-specific legislation has the problem of being inflexible in the face of a dynamic market. Pay TV in Australia is not only relatively new, but it is also subject to rapid changes in delivery technology. For example, the onset of intense competition between the two licensed telecommunications companies, Telstra and Optus Vision, had the direct effect of accelerating duplicated broadband cable roll-outs to residential homes, with the capability of delivering significantly more pay TV channels to subscribers in a quicker time frame than was originally envisaged when Part 7 of the BSA was drafted.

Part 7 of the BSA regulates pay TV. However, until 1 July 1997, its regulations discriminated between pay TV delivered by satellite and pay TV delivered by other means such as cable or MDS. Underlying the policy behind the drafting of Part 7 was a view that satellite would be the primary means of pay TV delivery in the early years. There was a concern that the means of delivery should not be controlled or dominated by one operator. Accordingly, there were specific ownership and control limitations applying to satellite delivery which did not apply in relation to other delivery means. Further, there were limits on the number of satellite services each satellite operator could transmit. With the rapid acceleration of cable roll-out, these restrictions on the number of satellite channels delivered meant that the satellite operators could not compete on a level basis with MDS and cable, which had no legislated restrictions on the number of channels.

The issue of market definition with regard to pay TV arose in 1996 when the Commission investigated a proposed merger between Foxtel and Australis. The Commission took the view that all retail pay TV services are part of the one part irrespective of the delivery means.

As an entertainment and news service, the closest potential substitutes for pay TV would appear to be free-to-air television, home video rentals, cinema and the internet. The Commission did not consider that cinema, radio, newspapers or magazines were close enough substitutes to be part of the same retail market in which pay TV services are supplied. The out of home experience of going to the cinema make it an imperfect substitute for in-home pay TV. Radio does not have the essential visual element of pay TV and at this time the internet does not provide entertainment services which would make it an effective substitute for pay TV.

Free-to-air television and home video rental both offer entertainment to the home and may be considered the closest possible substitutes for pay TV. Video rental is not considered to be a close enough substitute to pay TV for a number of reasons. First, it does not provide the range of entertainment services available on pay TV. Video rental may substitute for the movie channels of pay TV to some degree but it is less convenient and requires a trip from the home to purchase the product. Further, film companies release movies to pay TV and video at different times such that the product available on pay TV is not a direct substitute for video. Video rental is also unable to substitute for many of the many 'perishable' products of pay TV such as up to date news broadcasts and live sports programming. Preliminary market evidence also indicated that pay TV was not affecting video rental revenues.

The closest substitute to pay TV is likely to be free-to-air TV. However, the Commission has taken the view that pay TV is not in the same market as free-to-air TV. It took this view from a number of reasons.

Pay TV services are multi-channel services providing a large range of specific interest programming. Free-to-air broadcasters are limited to a single-channel service and consequently compete at the margin for the viewers time but in no way provide an equivalent service.

Subscribers to pay TV pay fees to receive the service despite there being television available via free-to-air operations. Pay TV providers must provide services unavailable on free-to-air. Important elements of the differentiation of pay TV services are the wider range of viewing choices and the availability of these choices at almost any time. Pay TV subscribers are willing to pay to be able to receive cartoons or news or movies or sport at any time they wish not at specific prescribed times as occurs on free-to-air TV.

The economics of pay TV consequently differs from that of free-to-air TV. Pay TV operators receive the majority of their revenue from subscribers. Therefore they are willing to provide programming of relatively low general interest if such programming has high levels of appeal to a minority. For example, a pay TV channel devoted to golf may be of high interest to a small number of subscribers but if those subscribers are willing to pay a relatively high price for such a service, a pay TV operator will supply. By bundling groups of channels which have differing appeal, pay TV operators will maximise their subscription base.

Free-to-air operators earn revenue from selling advertising. Generally, advertising revenues are maximised if the free-to-air operator maximises its audience. Thus the free-to-air operators will provide programming which appeals to the widest possible audience at any given time. Consequently, the types of programming offered by pay TV and free-to-air TV differ. This differentiation would become stronger as the number of specialist pay TV channels increases.

In mature overseas pay TV markets, overseas regulators have reached similar conclusions on market definition. The European Commission has concluded that pay TV constitutes a product market separate from free-to-air since pay TV is mainly financed by subscribers while free-to-air relies on advertising, and that the conditions of competition are accordingly different for the two types of television.

In the US, both the Federal Communications Commission (FCC) and the Federal Trade Commission have concluded that there is a separate pay TV market. The FCC cited empirical studies which concluded that the availability of a number of single free-to-air channels in a geographic market is insufficient to constrain the market power of multi-channel pay TV service providers.

The restrictions on new free-to-air licences in Australia have influenced the extent of substitutability between pay TV and free-to-air. In the absence of government-imposed licensing restrictions on new free-to-air stations, it is likely that the free-to-air market would have developed characteristics which make it a closer substitute for pay TV.

It is likely that the Commission would re-examine its market definition once digital television is introduced. Digitalisation has the potential to lead to multi-channel free-to-air TV such that each operator owned a number of channels and consequently it may become a much closer substitute for pay TV.

In its examination of the *Australis/Foxtel* merger proposal, the Commission took the view that free-to-air TV would not provide a sufficient constraint on the merged company exercising market power and this view influenced the Commission's decision to oppose the merger.

The Commission recognises that intramedia competition may be significant in many instances. Newspapers, magazines, radio, free-to-air TV, pay TV, video rental, video games and the Internet may all compete for the consumer's in home entertainment and leisure time. In some instances competition between different forms of media may be intense. For example, it is probable that the demise of evening newspapers in many cities is related very closely to the expansion of evening news and current affairs programs on television.

However, the Commission's primary concern in market definition is usually related to whether a merger between two firms would enable the merged entity to have market power sufficient for it to increase price unconstrained by competition. While magazines and video games for example, may compete for a consumer's leisure time, econometric studies would be unlikely to show that if a merger between two magazine publishers led to increased market power, the exercise of that power via price increases would be constrained by competition from video games producers.

Consequently, the Commission has tended to take a narrower view of markets given that an important focus of its analysis is market power and the ability of firms with such power to take advantage of it in non-competitive ways.

Market definition for the purpose of measuring media influence would involve significantly different approaches to those taken by the Commission. The Commission recognises that broader approaches to market definition may be appropriate under such circumstances.

The authorisation process

The authorisation provisions in Part VII of the TPA provide a mechanism for the Commission, or the Tribunal on review, to exempt mergers from the application of Part IV where they would result, or be likely to result, in such a benefit to the public that they should be allowed to take place. The Commission has the power to make determinations in relation to applications for authorisation of acquisitions which would otherwise be subject to s.50 or s.50A.

The Tribunal has the power to review determinations made by the Commission, where an application for review is made by an interested party. A review by the Tribunal is a rehearing of the application for authorisation on the basis of the material placed before it, which may include new material not presented to the Commission.²⁶ It is not a review of the Commission's decision in the sense of ruling on alleged errors in the Commission's findings or procedures. The Tribunal will reach its own conclusions on whether authorisation should be granted and if so subject to what conditions.

Once authorisation is granted in relation to an acquisition, neither the Commission, the Minister, nor third parties can take action under the TPA to overturn the acquisition. The immunity only runs, however, once authorisation is granted and for the period for which authorisation is granted. The Commission cannot initiate the process. The acquirer must lodge the application. While the Commission may suggest an authorisation application should be lodged, the decision on whether or not to do so ultimately lies with the parties.

The Commission has a period of 30 days to consider an application. This may be extended to 45 days for complex matters. It may also be extended by Commission requests for information from the applicant or with the agreement of the applicant. The Commission endeavours to deal with applications for authorisation as expeditiously as possible, subject to meeting its statutory obligations. If the Commission has not made a determination in the relevant period, the authorisation is deemed to have been granted.

The authorisation process is a public process, in which any interested party may make a submission. Submissions are open for inspection on a public register, and there may be provision for a conference of interested parties. There is, however, provision for maintaining confidentiality of commercially sensitive information or otherwise where it appears desirable to the Commission to grant confidentiality.

²⁶ *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* ('QCMA', 1976), ATPR 40-012, at 17,226-17,227; *Re Tooth & Co Ltd and re Tooheys Ltd* ('Tooth & Tooheys', 1979), ATPR 40-113, at 18,183; *Re Rural Traders Co-operative (WA) Ltd & Ors* (1979), ATPR 40-110, at 18,122-18,123.

Section 90(9) provides that the Commission shall not grant authorisation unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place. The onus is on the applicant to satisfy the test.²⁷

The Evaluation of Public Benefit/Detriment

In making its evaluation, the Commission adopts the approach set out by the former Trade Practices Tribunal (now the Australian Competition Tribunal) of comparing the position that would apply in the future were the proposed acquisition not given effect, with the position in the future which would arise if the proposed acquisition were given effect.²⁸ This requires an integrated analysis of both public benefit and public detriment.

Public benefit is not defined by the TPA, except to the extent that it requires that significant increases in exports or import replacement be considered as public benefits and that the Commission take account of all relevant matters relating to international competitiveness (s.90(9A)). However, the Tribunal has suggested in *QCMA* that the term should be given its widest possible meaning:

‘...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.’²⁹

Following the broad interpretation of potential public benefits adopted by the Tribunal, the Commission has generally identified the following matters which could constitute public benefits:

- economic development, eg. in natural resources, through encouragement of exploration, research and capital investment;
- fostering business efficiency, especially where this results in improved international competitiveness;
- industrial rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;
- expansion of employment or prevention of unemployment in efficient industries and employment growth in particular regions;
- industrial harmony;

²⁷ *QCMA*, *op.cit.*, at 17,244; *Re John Dee (Export) Pty Ltd & Ors.* (1989), ATPR 40-938, at 50,206.

²⁸ *Tooth & Tooheys*, *op.cit.*, at 18,186-18,187; *Re Media Council of Australia (No.2)* (1987), ATPR 40-774, at 48,419; *John Dee*, *op.cit.*, at 50,206.

²⁹ *QCMA*, *op.cit.*, at 17,242.

- assistance to efficient small businesses, such as 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;
- supply of better information to consumers and businesses to permit informed choices in their dealings;
- 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;
- steps to protect the environment.³⁰

However, as emphasised by the Tribunal, public benefits in the form of increased efficiency and better resource usage, resulting in lower unit costs are most important in the consideration of applications for the authorisation of mergers. Efficiencies may take many forms, eg. economies of scale and scope, more efficient technology resulting in reduced input and/or energy costs or the combining of complementary research and development facilities.

The concept of a benefit to the public is not limited to a benefit to consumers. A benefit to a private party which is of value to the community generally is a public benefit.³¹ For example, a merger may result in economies of scale or other resource savings which may not be immediately available to consumers in lower prices. The community at large has an interest in resource savings, releasing those resources for use elsewhere.

However, the interests of the public as purchasers, consumers or users are relevant.³² Lower prices for consumers and lower input costs for business, with potential ramifications for international competitiveness, are considered by the Commission to constitute public benefits. Furthermore, when comparing the situation that is likely to prevail with and without the proposed merger, it is critical to consider the likely durability of the claimed public benefits: it is not the immediate distribution of benefits that is important but their durability.³³

³⁰ *Re ACI Operations Pty Ltd* (1991), ATPR 50-108, at 56,067.

³¹ *Re Rural Traders Co-operative (WA) Ltd & Ors* (1979), ATPR 40-110, at 18,123.

³² *QCMA, op.cit.*, at 17,242.

³³ Brunt M, 'The Australian Antitrust Law After 20 Years - A Stocktake', *Review of Industrial Organisation*, (1994) Vol.9, No.5, p 508.

The Commission can grant authorisation subject to conditions (s.91(3)). The Commission may consider it appropriate in particular cases to grant authorisation subject to conditions which ensure that the claimed public benefit is likely to eventuate or to lessen any detriment that might result from the acquisition. Conditions may include a requirement that the applicant provide relevant undertakings. Such undertakings are now enforceable at law (s.87B).

Telecommunications access regime
(Part XIC of the *Trade Practices Act*)

Part XIC of the TPA establishes a telecommunications-specific regime for access to carriage services. The regime reflects, inter alia, a policy concern, stated in the Second Reading Speech to the *Trade Practices Amendment (Telecommunications) Bill 1996*, that there is scope for incumbent operators to engage in anticompetitive conduct because competitors in downstream markets depend on access to the carriage services controlled by them.

The regime provides for the ACCC to declare carriage services and services which facilitate the supply of carriage services (ie, 'eligible services'). There is no general right of access to eligible services. The rights and obligations under Part XIC only apply in respect of those services which are 'declared' by the ACCC.

The ACCC makes its declaration decisions within the context of the primary object of Part XIC, which is to promote the long-term interests of end-users. Section 152AB provides that, in determining whether end-users' long-term interests will be promoted, the ACCC must consider the objectives of:

- promoting competition in markets for carriage services and services supplied by means of carriage services;
- achieving any-to-any connectivity for carriage services involving communication between end-users; and
- encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.

Once a service is declared, carriers and carriage service providers who provide the service either to themselves or to other persons are, unless otherwise exempt, required to comply with standard access obligations in relation to the service. In essence, the carrier or carriage service provider (ie, the access provider) is obliged to supply the service on such terms and conditions as are agreed with a service provider seeking access (ie, the access seeker).

The emphasis of Part XIC is on encouraging access providers and access seekers to negotiate access themselves without recourse to regulatory intervention. In this regard, Part XIC provides for the industry to establish an access code and for access providers to give access undertakings to the ACCC setting out the terms and conditions of access.

Where, however, there is no agreement, the ACCC can conduct an arbitration upon request from one of the parties.

Application to broadcasting carriage services

The access regime in Part XIC of the TPA came into effect on 1 July 1997. Transitional arrangements in the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (the 'Transitional Provisions Act') provided for certain 'foundation' access rights in the old *Telecommunications Act 1991* to be carried over into the new access regime. This was achieved by requiring the ACCC to deem certain services as declared services subject to the standard access obligations. On 30 June 1997, the ACCC deemed a number of services in its *Deeming of Telecommunications Services Statement*.

In addition, it was stated in the Second Reading Speech to the *Trade Practices Amendment (Telecommunications) Bill 1996* that:

'...the ACCC is required to declare a carriage service to bring within this access regime the supply of broadcasting services over cable networks. This fulfils our election commitment to remove the exemption for pay television carriage from the access regime given by the previous Government.'

Section 39(5) of the Transitional Provisions Act requires the ACCC to deem as a declared service a service that is:

'...necessary for the purposes of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users.'

Importantly for broadcasting purposes, s152AR(8) of Part XIC requires access providers supplying active declared services by means of conditional access customer equipment (such as set-top boxes used for the supply of pay TV) to supply those services when requested, and to also supply any services necessary to enable the service provider to supply carriage or content services by means of the conditional access customer equipment.

The Explanatory Memorandum in respect of s152AR(8) includes possible examples of necessary services:

access to a subscriber management system which manages the services that customers are authorised to receive via conditional access customer equipment;

provision of necessary technical information about the conditional access system; or

access to, or information about, 'smart cards' used to control access by customers and/or billing.

The ACCC included a broadcasting access service in its *Deeming of Telecommunications Services Statement* of 30 June 1997 in the following terms:

‘An analogue service necessary for the purposes of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996. This is an access service that provides a basic carriage and distribution access function together with other functions as requested’.

The precise wording of the service description allows access seekers to choose which services are covered by the declaration. Because of this, concerns were raised with the ACCC about the validity of the declaration.

The ACCC considers that the existing service declaration is valid. However, in order to provide certainty, the ACCC commenced inquiries into whether to declare ‘analogue-specific pay TV carriage services’ and ‘technology-neutral pay TV carriage services’ (eg, encompassing both analogue and digital services).

On 3 June 1999, the ACCC announced its draft decision to only declare analogue pay TV services carried over cable. Unlike the original ‘deemed’ declaration, this draft declaration was made on the basis of the long-term interests of end-users. In particular, the ACCC is of the view that declaration should promote competition in the supply of diverse programming to pay TV subscribers.

The ACCC anticipates that declaration would assist suppliers of niche pay TV services, such as foreign language and special interest channels, to gain direct access to customers. While other delivery technologies besides broadband cable exist (such as satellite), they seem less attractive options to customers when cable is available as an alternative. The ACCC was concerned that owners of broadband cable networks such as Cable & Wireless Optus and Telstra could have incentives to block access to niche pay TV operators in situations where the niche services would compete with the carriers’ fully or partly owned downstream pay TV operations (Optus Vision and Foxtel respectively).

The ACCC has not yet reached a decision on whether to declare a technology-neutral service which would cover digital services. However, at this stage, the ACCC’s preliminary view is that it would be too early to tell whether declaration may become desirable, given the early stage of the deployment of digital technology to deliver broadcasting services.