
SUBMISSION TO THE TRADE PRACTICES ACT REVIEW COMMITTEE

by

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Executive Summary

This submission relates to Term of Reference 1(a) and is limited to a consideration of the merger provisions of the *Trade Practices Act* ('TPA'). In particular, it relates to whether the current merger laws 'inappropriately impede the ability of Australian industry to compete locally and internationally'.

It is submitted that:

- the current merger provisions should be retained, so that all mergers resulting in a substantial lessening of competition will be prohibited unless granted authorisation; and
- the ACCC be required to maintain a 'Mergers Public Register' briefly detailing their assessment of non-confidential mergers. This would replace the existing 'voluntary' Register kept by the ACCC.

Introduction

The current merger law prohibits mergers which substantially lessen competition while providing a facility for the authorisation of such mergers where a public benefit, outweighing the detriment associated with the substantial lessening of competition, can be demonstrated. In addition, provision is made for the giving of enforceable undertakings by merging parties to address any anti-competitive concerns that may have been identified by the ACCC.

This regulation of mergers is consistent with the purpose of the TPA - that is, to enhance the welfare of Australians through the promotion of competition – and should be retained. It would be contrary to the public interest to un-do the advances we have made in competition law regulation by reverting to the dominance test that existed a decade ago.

Reasons for retaining the Substantial Lessening of Competition test

There are three reasons for retaining the current substantial lessening of competition test for mergers:

1. This test is the one most aligned with the object of the Act.
2. A merger law that preserves competition is good.
3. Authorisation is possible where sufficient public benefit can be demonstrated.

1. SLC test is the one most aligned with the object of the Act

This test is the one most aligned with the object of the Act, namely, preserving and promoting competition (section 2 of the TPA defines the Act's object as to 'enhance the welfare of Australians through the promotion of competition ...'). If this is what the Act promotes then it follows that conduct *substantially* lessening competition should be prohibited. On the other hand, a test that prohibits mergers only when they create or enhance market dominance is contrary to these goals because it necessarily permits mergers which substantially lessen competition. This, it is submitted, would reduce, rather than 'enhance', the 'welfare' of Australians.

Furthermore, this test is used in other sections of the Act (ss 45 and 47) and therefore currently reflects a consistent approach to the assessment of anti-competitive conduct.

2. A merger law that preserves competition is good

The promotion and preservation of competition is, it is submitted, a legitimate and desirable purpose for which our national trade practices law should aspire. Competition, in general, enhances the welfare of Australians by driving down prices, increasing consumer choice and providing an incentive for research, development and quality control.

It is often argued, by business groups in particular, that despite the benefits to be derived from competition domestically, a more lenient test – one that permits the creation of ‘national champions’ - is required in order for Australian business to compete effectively in the global market. This ‘*need*’ to create ‘national champions’ has been argued *ad nauseam* by business groups without much in the way of evidence to support their claim that domestic dominance is required for Australian industry to be internationally competitive. On the other hand, considerable evidence has been advanced to support the alternate view; that is, that international competitiveness is best achieved by the existence of fiercely competitive domestic rivals.

One striking example of how fierce domestic competition has led to international success is in the higher education market. The Australian market comprises 38 universities in operating in conditions of near perfect-competition. Despite the fierce competition and rivalry that exists for domestic and international placements, Australian universities are among the most successful in the world at attracting international fee paying students. This is a good example of Professor Michael Porter’s claim that vigorous domestic competitors create firms that are better able to compete internationally:

‘Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry. It is often argued that domestic competition is wasteful, because it leads to duplication of effort and prevents firms from gaining economies of scale. The right solution is seen as nurturing one or two firms who become “national champions,” with the scale and strength to compete against foreign rivals or, alternatively, to promote inter-firm cooperation. Some also take the related view that domestic rivalry is unimportant in global industries.

A look at the successful industries in the ten nations we studied casts grave doubts on this viewpoint. **Nations with leading world positions often have a number of strong local rivals, even in small countries** such as Switzerland and Sweden. ... Nowhere is the extent of domestic rivalry greater than in Japan ...

These examples belie the simple notion that world leadership grows out of one or two firms who reap economies of scale in the home market. In global competition, successful firms compete vigorously at home and pressure each other to improve and innovate. ... We found, in contrast, few “national champions,” or firms with virtually unrivalled domestic positions, that were internationally competitive. Instead, most were uncompetitive though often heavily subsidized and protected. ... [118] ...

In a closed economy, monopoly is profitable. In global competition, monopolies or cartels will lose to firms from more competitive environments.

Domestic rivalry, like any rivalry, creates pressure on firms to improve and innovate. Local rivals push each other to lower costs, improve quality and service, and create new products and processes. ... [119] ...

Vigorous local competition not only sharpens advantages at home but pressures domestic firms to sell abroad in order to grow. ... **With little domestic rivalry, firms are more content to rely on the home market. Toughened by domestic rivalry, the stronger domestic firms are equipped to succeed abroad. It is rare that a company can meet tough foreign rivals when it has faced no significant competition at home. ...**’ [emphasis added; footnotes omitted]¹

Consequently, it is submitted that in order to ‘enhance the welfare of Australians’ it is essential that domestic rivalry be preserved. This, it is submitted, is best achieved through the application of a test that prohibits those mergers that *substantially* lessen competition and thereby reduce that domestic rivalry. Such a test ensures both that Australian consumers enjoy the benefits of competition in the domestic market and that Australian business is better placed to compete on a global scale.

¹ Michael E. Porter, *The Competitive Advantage of Nations*, MacMillan Press Ltd, 1990, pp 117-119.

3. Authorisation is possible

If the ACCC does raise concerns about the anti-competitive effects of a proposed merger, parties have the option of seeking authorisation if they can demonstrate their proposal will provide benefits to the public that will outweigh the detriments associated with the substantial lessening of competition. The ACCC will provide authorisation if '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.' (section 88(9)). It is submitted that if such benefit can not be demonstrated then it is appropriate and desirable that the merger be prohibited.

While any number of 'public benefits' may be advanced as grounds for authorising a merger that substantially lessens competition, enhancing Australia's ability to compete internationally is specifically recognised in the Act. Section 90(9A) requires the ACCC to have regard, amongst other things, to the following factors when considering authorisation applications:

- a significant increase in exports;
- 'a significant substitution of domestic products for imported goods;' and
- 'all other relevant matters that relate to the *international competitiveness* of any Australian industry' (emphasis added).

Thus, if there is any evidence that, in a particular industry, domestic firms are unable to compete internationally without the aid of a merger, this argument can be put forward in a claim for authorisation.

Despite its availability, authorisation is rarely sought with only 12 applications made since 1993. It is suggested that there are several reasons for this:

1. Very few mergers raise competition concerns;
2. Many of the mergers that do raise competition concerns are resolved by the provision of enforceable undertakings; and
3. Of the remaining mergers, it will be rare that parties can demonstrate a public benefit where a proposed merger will substantially lessen competition.

In the majority of cases where authorisation has been sought the ACCC has accepted the public benefit claims and allowed the merger to proceed. Consequently, it appears that the reluctance of parties to seek authorisation is not because of the nature or 'uncertainty' of the process itself or an ACCC track record of denying authorisation applications, but for a much more simple reason: there is no public benefit to be claimed!

The current substantial lessening of competition test, combined with this authorisation process where genuine public benefit can be demonstrated, appropriately protects the interests of Australians while permitting the vast majority of proposed merger activity.

Merger assessment under the SLC test: Statistical Analysis

In addition to the theoretical economic and consumer welfare benefits associated with the current substantial lessening of competition test, a statistical assessment of mergers considered by the ACCC since the introduction of this test provides no evidence that it is impeding, unreasonably, the ability of firms to merge. It has been statistically rare for the ACCC to oppose proposed mergers. Of the 1328 mergers fully considered by the ACCC between 1993 and 2001² only 100 (or 7.5%) have been opposed. Of these, 42 were resolved through enforceable undertakings by the parties, leaving only 4.4% opposed and not resolved. This number appears to be dropping, as indicated by the charts provided as attachments 1 and 2.³ Between 1997 and 2001 on average only 2.35% of mergers were opposed and not resolved and, in the last financial year (2000-2001), the figure was as low as 1.1%.⁴

According to the ACCC, since the adoption of the substantial lessening of competition test:

‘the Commission has considered, on average each year, about 160 mergers and acquisitions. Of these an average of eight were challenged On average a third of the mergers challenged ... were resolved by the parties putting in place alternative arrangements to allow the mergers to proceed’.⁵

These statistics hardly provide evidence of an overly intrusive enforcement body prohibiting all merger activity desired by business. Rather, it reflects appropriate application of the current test with the ACCC challenging only those mergers that would genuinely lead to substantial lessening of competition in the market.

² ACCC, *ACCC Annual Report, (2000-2001)*.

³ Statistics from ACCC, *ACCC Annual Report, (2000-2001)*, 69. These statistics do not include cases in which the ACCC did not reach a final decision because parties withdrew their application after the ACCC raised preliminary informal concerns.

⁴ ACCC, *Exports and the Trade Practices Act: Guideline to the Commission's approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry*, ACCC (October 1997), 6.

⁵ ACCC, *Exports and the Trade Practices Act: Guideline to the Commission's approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry*, ACCC (October 1997), 6.

Greater Transparency: A Mandatory Public Register

It is submitted that a mandatory mergers public register should be introduced to increase the transparency of the ACCC's 'informal' merger assessments. The ACCC currently maintains a voluntary Register, following a recommendation of the Griffiths Committee, but it is deficient in many respects. It contains only limited information about the competition analysis undertaken and omits certain essential information in many cases: for example, the word 'unknown' regularly appears in relation to whether concentration thresholds and/or imports above 10% have been achieved. This data is known (at least in relation to concentration thresholds as it is a necessary first step to competition analysis), but simply not entered. It is recommended that a requirement for the ACCC to provide a 'Mergers Public Register' for non-confidential matters be introduced so that the ACCC is required to provide accurate and timely information about the mergers it considers.

Conclusion

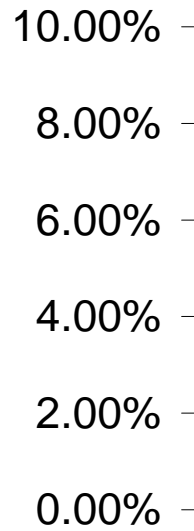
The current regulation of mergers in Australia is appropriate, giving due regard to the need to preserve competition for consumer welfare, while recognising the efficiencies and public benefits that may be derived from certain merger activity. The statistics available since the introduction of the substantial lessening of competition test provide no evidence of a competition watchdog which unreasonably prevents all efficiency-enhancing merger activity sought by business.

It is this submission that the current provisions be retained, save for an additional requirement that a mandatory Mergers Public Register be established to increase the transparency of the ACCC's informal assessment process.

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Attachment 1
Mergers opposed and not resolved
(by % of all mergers considered)



| | 93-94 | 94-95 | 95-96 | 96-97 | 97-98 | 98-99 | 99-00 | 00-01 |
|-------------|-------|-------|-------|-------|-------|-------|-------|-------|
| — % opposed | 6.50% | 6.20% | 7.70% | 3.40% | 2.80% | 3.80% | 1.70% | 1.10% |

Attachment 2
ACCC Merger Assessments 1993-2001 (by percentage)

