

# The Dawson Report and Merger Regulation

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*The Dawson Report, released by the federal Government in April, recommended significant change to merger regulation in Australia. While retaining the substantial lessening of competition test, the Report calls for change to the merger clearance and authorisation processes. The recommendations have received the support of the Government and big business, but have attracted criticism from the ACCC, small business and consumer groups. This paper will critically discuss the recommendations in light of the public submissions made to the Review.*

## Introduction

The *Review of the Competition Law Provisions of the Trade Practices Act* (the Dawson Report)<sup>1</sup> was released by the federal Government in April 2003. In the first substantial chapter of the Report, the Dawson Committee (the Committee)<sup>2</sup> made a number of recommendations in relation to the merger prohibitions and procedures. Briefly, while recommending the retention of the current substantial lessening of competition test, the Committee made a number of significant recommendations for change regarding the procedures to be applied in assessing potential mergers. These recommendations have received the support of the Government, though no bill has yet been drafted for consideration by parliament. This paper will discuss the recommendations of the Committee in light of the submissions it received.<sup>3</sup> It will also consider Government, Australian Competition and Consumer Commission (ACCC) and other responses to the Review and speculate as to the likelihood and desirability of any or all of the recommendations being implemented..

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<sup>1</sup> Commonwealth of Australia, *Review of the Competition Law Provisions of the Trade Practices Act*, Canberra, January 2003 ('Dawson Report')

<sup>2</sup> The Committee comprised Sir Daryl Dawson AC KBE CB (Chairman), Ms Jillian Segal and Mr Curt Rendall.

<sup>3</sup> The submissions reviewed consist of the written public submissions made available on the Dawson Review's internet website (<http://tpareview.treasury.gov.au/content/home.asp>). The author is not aware of the contents of any of the confidential submissions (of which there were 14), informal representations (of which the Committee indicates there were 320) or of any oral submissions made through consultations. These are mentioned on page 3 of the Dawson Report but no meaningful details are provided regarding those consultations.

## Existing merger legislation in Australia

The *Trade Practices Act 1974* ('TPA') prohibits mergers that would, or would be likely to, substantially lessen competition in a market.<sup>4</sup> A market, for the purpose of this assessment, is defined as a substantial market for goods or services in Australia, a State, a Territory or a region of Australia.<sup>5</sup> In determining whether a proposed merger will, or will be likely to, substantially lessen competition, a number of factors *must* be considered, including actual and potential imports, barriers to entry, the level of concentration in the market, vertical integration and the availability of substitutes.<sup>6</sup> The ACCC's Merger Guidelines,<sup>7</sup> which do not have any legislative force, provide parties to a proposed merger with further guidance as to how the commission will analyse a proposed merger to determine if it contravenes s 50.<sup>8</sup>

There is no statutory notification regime in Australia requiring parties to seek approval before merging.<sup>9</sup> However, parties can, and frequently do, notify the ACCC in advance of a proposed merger to obtain an opinion about its legality.<sup>10</sup>

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<sup>4</sup> TPA, s 50(6).

<sup>5</sup> TPA, s 50(6).

<sup>6</sup> TPA, s 50(3). Other factors that *must* be taken into account include '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 dynamic characteristics of the market, including growth, innovation and product differentiation' and 'the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor (TPA, s 50(3)). Other factors *may* also be taken into account.

<sup>7</sup> ACCC, 'Merger Guidelines', June 1991.

<sup>8</sup> ACCC, 'Merger Guidelines', above n 7, p 29. First, the ACCC will identify the relevant market. The ACCC will normally only be concerned about a merger if it leads to the four largest firms holding 75 per cent or more of the market share, with the merged firm to supply at least 15 per cent of the market, or if the merged firm will supply 40 per cent or more of the market (ACCC, 'Merger Guidelines', above n 7, p 28 (para 5.27)). See also J Brebner, 'The Relevance of Import Competition to Merger Assessment in Australia' (2002) 10 *CCLJ* 119. Parties may also be assisted by information contained in the ACCC's annual reports and may be guided by information about recent mergers that is made publicly available on the ACCC's Merger Public Register (ACCC, Mergers Public Register <<http://www.accc.gov.au/pubreg/s50/MainIndex.htm>>).

<sup>9</sup> Most jurisdictions that regulate mergers have a compulsory notification regime. Approximately 51 countries require pre-notification of mergers, 12 have compulsory post-notification requirements and Australia is one of 9 with a voluntary scheme of notification (for more detail see International Competition Network, 'International Merger Law Database – Summer 2002', Compiled by the International Bar Association <[http://www.internationalcompetitionnetwork.org/new\\_merger\\_control\\_appendix-icn\\_jurisdictions2.pdf](http://www.internationalcompetitionnetwork.org/new_merger_control_appendix-icn_jurisdictions2.pdf)>). In 1992 the Cooney Committee recommended a mandatory pre-notification scheme be introduced in Australia, but the recommendation never came to fruition (Commonwealth, *Mergers, Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, Senate Standing Committee on Legal and Constitutional Affairs, AGPS, Canberra, 1991, recommendations 5&6, at pp xiv; 55-76 (the Cooney Report)). No public submission to the Dawson Committee called for a mandatory notification (save in limited cases of market concentration or creeping acquisitions, discussed below) and many specifically noted their opposition to the introduction of any such mandatory system. See also Law Council of Australia, *Supplementary Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 196, Trade Practices Act Review 2002, pp 14-17.

<sup>10</sup> See S Corones, 'The Strategic Approach to Merger Enforcement by the ACCC' (1998) 26 *ABLR* 64 at 67; ACCC, *The ACCC's Approach to Mergers: A statistical summary*, AGPS, Canberra, 1998, p 27; SFE Corporation Limited, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 92, Trade Practices Act Review 2002, p 11; Australia and New Zealand Banking Group Limited (ANZ), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 91, Trade Practices Act Review 2002, p 4.

After receiving such notification the ACCC may grant an informal clearance, refuse clearance, or grant clearance to the parties subject to them accepting enforceable undertakings designed to alleviate the anti-competitive concerns held by the Commission.<sup>11</sup> The ACCC is not required to provide reasons for its decision, but it does publish an informal mergers register which contains limited information about why clearance is (or is not) granted. The time taken for an opinion from the ACCC varies depending on the complexity of the merger.<sup>12</sup> Statistically, about four to five per cent of mergers notified to the ACCC raise competition concerns.<sup>13</sup> For those that do not, a grant of informal clearance means the parties can proceed with confidence that the merger will not be challenged. However, as the clearance has no force in law, there is nothing to prevent the ACCC subsequently opposing the merger.<sup>14</sup> In practice, this is likely to happen only if relevant information was not disclosed to the ACCC or aspects of the merger have changed since notification. More importantly, however, informal clearance does not guarantee freedom from prosecution by third parties who, while not able to seek an injunction to prevent a merger proceeding,<sup>15</sup> may nevertheless challenge a merger that has proceeded and obtain declaratory relief, orders for divestiture or damages.

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<sup>11</sup> These undertakings are legally binding and, if breached, the ACCC may enforce them in the courts. Parties have shown a general willingness to provide the undertakings requested by the Commission, with almost 50% of all mergers opposed between mid-1993 and mid-2001 being resolved in this way: between 1 July 1993 and 30 June 2001, of the 87 mergers opposed, 42 (just over 48%) were resolved by way of undertakings given by the parties: (see ACCC, *ACCC Annual Report*, (2000-2001)). This figure appears to be rising. In the 2000-2001 financial year, of 13 mergers opposed, 10 were resolved by way of enforceable undertakings.

<sup>12</sup> ACCC, 'Merger Guidelines', above n 7, p 17. A number of submissions to the Dawson Review discussed the time and procedures associated with informal clearance: see, for example: SFE Corporation, above n 10, pp 5 & 9; International Banks and Securities Association of Australia (IBSA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 93, Trade Practices Act Review 2002, p 7 (claims ACCC regularly exceeds the time frames it sets for itself); United Energy, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 25, Trade Practices Act Review 2002, p 7 (explains the current process in detail). For a more detailed history of the clearance process in Australia see Law Council of Australia, above n 9, pp 13-14.

<sup>13</sup> Dawson Report, above n 1, p 46. See also 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*, October 1997, p 6 and Brebner, above n 8, pp 127-129. Big business (in particular) has observed that these statistics will not include mergers not notified (or notified but abandoned prior to a decision by the ACCC) because the parties, while believing that their conduct will not substantially lessen competition, abandon the merger rather than risk an adverse informal finding by the ACCC, nor will they include proposed mergers so likely to substantially lessen competition that the parties abandon the proposal. In this respect, former ACCC Chairman, Prof Allan Fels has doubted whether there are any, or at least many, such cases ('Frankly, I do not regard Australian CEOs as shrinking violets afraid to sound out the regulator about possible mergers': A Fels, 'Persistent myths ignore the reality of ACCC action', *Australian Financial Review*, 21 November 2002). In any event, it should also be observed that these statistics also will not include mergers so unlikely to substantially lessen competition that they are not notified to the ACCC for clearance – one might expect this figure to compensate for any mergers not notified for fear of ACCC opposition.

<sup>14</sup> See, for example, *TPC v Santos Ltd* (1992) 38 FCR 382 where the ACCC initially indicated it would not object to a proposal but subsequently brought an action for an injunction to prevent the merger proceeding, having formed the view it was likely to create a position of dominance.

<sup>15</sup> Section 80(1) of the TPA permits the court to award an injunction in 'such terms as the court deems appropriate' for breaches of, inter alia, section 50 of the TPA. However, section 80(1A) provides that a person 'other than the Commission is not entitled to make an application under subsection (1) for an injunction [in relation to] section 50 ...'.

For proposed mergers that raise competition concerns, which cannot be alleviated by the provision of enforceable undertakings, a refusal of clearance from the ACCC leaves the parties with two options. First, they may proceed and risk almost inevitable challenge by the ACCC which, if successful, is likely to result in an injunction, if obtained prior to merger, or divestiture, subsequent to merger, as well as pecuniary penalties of up to \$10 million.<sup>16</sup> Alternatively, parties may seek authorisation which will only be granted if the merging parties can demonstrate a public benefit such that the merger ought to be allowed to proceed.<sup>17</sup> In this respect, the term “public benefit” is to be given its widest possible meaning.<sup>18</sup> For guidance, the ACCC merger guidelines list numerous factors that could constitute public benefits, including development of import replacements, more efficient allocation of resources and improved quality and safety.<sup>19</sup> A grant (or refusal) of authorisation may be reviewed by the Australian Competition Tribunal (the Tribunal) on application of any party with “sufficient interest” in the determination.<sup>20</sup>

## **Background and key recommendations of the Dawson Committee**

### **Background**

On 15 October 2001, the Prime Minister announced that there would be an independent review of the competition provisions of the TPA.<sup>21</sup> The Committee, consisting of Sir Daryl Dawson (Chair), Mr Curt Rendall and Ms Jillian Segal,<sup>22</sup>

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<sup>16</sup> TPA, s 76(1A)(b). A “person” (other than a corporation) involved in a contravention will also be liable to pay pecuniary penalties of up to \$500,000: TPA, s 76(1B).

<sup>17</sup> Section 88(9) gives the commission the power to grant such authorizations. Section 90(9) provides that the ACCC shall not grant an authorization in relation to proposed mergers ‘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.’ See further M Brunt, ‘The Use of Economic Evidence in Antitrust Litigation: Australia’ (1986) 14 *Australian Business Law Review* 261 at 265.

<sup>18</sup> *Re Queensland Co-operative Milling Association Ltd & Defiance Holdings Ltd* (1976) ATPR 40-012 at p 17,242 (QCMA) (‘... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. ...’).

<sup>19</sup> See further, ACCC, ‘Merger Guidelines’, above n 7, pp 68-69 (para 6.38). In determining what amounts to such a benefit, s 90(9A) TPA requires the Commission to have regard to, amongst other things ‘a significant increase in the real value of exports’, “a significant substitution of domestic products for imported goods’ and ‘all other relevant matters that relate to the international competitiveness of any Australian industry’.

<sup>20</sup> TPA, s 101(1).

<sup>21</sup> Prime Minister, ‘Securing Australia’s Prosperity’, Press Release, 15 October 2001 <[http://www.pm.gov.au/news/media\\_releases/2001/media\\_release1338.htm](http://www.pm.gov.au/news/media_releases/2001/media_release1338.htm)>.

<sup>22</sup> Sir Daryl Dawson AC KBE CB is a former High Court Justice and former Solicitor-General of Victoria. Ms Jillian Segal is a former corporate lawyer, Deputy Chair of the Australian Securities and Investments Commission (ASIC) and Commissioner of ASIC. Mr Curt Rendall is the Chairman of the Commonwealth Government’s Small Business Consultative Committee. It has been observed that ‘[l]ittle is known about the group that will decide the future of competition law in Australia’: J Thomson, ‘Regulation: The Rule Changers’, *BRW*, vol 24(43), 31 October 2002 <<http://brw.com.au/Stories/20021031/16743.aspx>>.

was appointed in May 2002 and given until 30 November 2002 to Report.<sup>23</sup> The terms of reference included reviewing Part IV of the TPA to determine whether the provisions therein:

- (a) inappropriately impede the ability of Australian industry to compete locally and internationally
- (b) provide an appropriate balance of power between competing business, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
- (c) promote competitive trading which benefits consumers in terms of services and price;
- (e) allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances; and
- (f) are flexible and responsive to the transitional needs of industries undergoing or communities affected by, structural and/or regulatory change and to the requirements of rural and regional areas'.<sup>24</sup>

The terms of reference then required the Committee to identify any justifiable improvements to the TPA and its administration 'to achieve a more efficient, fair, timely and accessible framework for competition law'.<sup>25</sup>

This was the first comprehensive public review of the TPA since the National Competition Review which reported on 25 August 1993.<sup>26</sup> The Committee's Report was submitted to the Treasurer on 31 January 2003<sup>27</sup> and released to the public, together with a government response, on 16 April 2003.

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<sup>23</sup> Treasurer, 'Review of the Competition Provisions of the Trade Practices Act 1974', Press Release No 23, 9 May 2002 <<http://www.treasurer.gov.au/tsr/content/pressrelease/2002/023.asp>>. The initial reporting date was announced as August 2002: Prime Minister, above n 21.

<sup>24</sup> Treasurer, above n 23.

<sup>25</sup> Term of Reference 2: Treasurer, above n 23.

<sup>26</sup> Report by the Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993 (Hilmer Report).

<sup>27</sup> The original reporting date of 30 November was extended to 31 January 2003: TPA Review, 'Report of the Review of the Trade Practices Act', Press Release, 12 November 2002 <[http://tpareview.treasury.gov.au/content/pr\\_121102.asp](http://tpareview.treasury.gov.au/content/pr_121102.asp)>.

## Key Recommendations

The Dawson Committee reached a number of conclusions and made a number of recommendations in relation to the existing merger regime. Key among them were that:

- the current substantive test should remain unchanged;
- reasons should be provided in some cases where the ACCC considers a request for informal clearance;
- an optional formal clearance procedure should be established; and
- merger authorisation requests should be made directly to the Australian Competition Tribunal and not the ACCC.

Each of these conclusions and recommendations, together with the submissions made to the Committee on each issue, will be considered in the following section.

### **Submissions to the Dawson Committee and the Committee's response**

#### Retention of the substantial lessening of competition test

A significant number of submissions addressed the substantive merger test, with many calling for the merger test to be repealed or modified in some way. The key submissions argued that:<sup>28</sup>

- the existing substantial lessening of competition test be retained;
- the existing test be replaced with a market dominance test;
- an 'efficiency defence' be introduced;
- a 'public benefit defence' be introduced; and
- that a test be introduced to capture 'creeping' acquisitions.

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<sup>28</sup> Other submissions included that it should be repealed completely (Gilbert, R.S, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 2, Trade Practices Act Review 2002, p 9: '*... the most important change to be made to Part IV is the repeal of section 50 – or, if it is not repealed, at least amended to apply only to mergers that would involve the creation of a monopoly ...*'); the test should become simply 'is the merger anti-competitive?' (R Speed, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 36, Trade Practices Act Review 2002, p 1); that the test should allow a merger 'if there would still be effective competition in the market following the acquisition, even if the acquisition itself would affect the degree of competition in that market' (Commonwealth Bank, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 96, Trade Practices Act Review 2002, p 6); and that the test should simply be 'two firms having a constraining degree of market power may exist in any market where there is ease of entry and expansion or potential import competition' (Energex, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 46, Trade Practices Act Review 2002, pp 2-3).

## ***Substantial lessening of competition versus dominance***

Several submissions called for a return to the market dominance test which applied in Australia from 1977-1993.<sup>29</sup> This would have the effect of enabling a merger to proceed, even if it *substantially* lessened competition in an Australian market, provided it would not result in the merged firm being in a position to *control or dominate* the relevant market. Thus, proponents of a return to the dominance test were pushing for a weaker test (in the sense that it would permit more mergers to proceed)<sup>30</sup> than the existing one.

It is not surprising that this issue was the focus of a number of submissions as, historically, this has been the key debate in relation to the substantive merger test in Australia.<sup>31</sup> Traditionally, big business has argued for a dominance test<sup>32</sup>

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<sup>29</sup> United Energy, above n 12, p 3; Duke Energy Australia Pty Ltd, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 26, Trade Practices Act Review 2002, pp 2-3; W Pengilley, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 8, Trade Practices Act Review 2002; A Morgan & J Hoggett (Institute of Public Affairs Ltd), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 18, Trade Practices Act Review 2002; Australian Industry Group, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 109, Trade Practices Act Review 2002, p 48 (noting that it did not 'demand' reversion to dominance but that it 'might be argued that the dominance test is a more appropriate test for a market and markets as small as those in Australia').

<sup>30</sup> See Victorian Government, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, 'A Competitive and Fair Marketplace', Public Submission 148, Trade Practices Act Review 2002, p 12 (the problem with dominance test is '... highlighted by the acquisition by Amcor and Visy Board of 50 per cent each of the only remaining Australian corrugated fibreboard manufacturer ... The acquisition did not lead to dominance ... but it did substantially lessen competition.') Compare SFE Corporation, above n 10, p 10 ('... doubts whether a change from the substantial lessening of competition to the dominance test would make any discernible difference to the likely outcome ...') and Pengilley, above n 29 ('My guess is that an analysis of company mergers since the introduction of the "substantial lessening of competition" test would show that most of those disallowed would also come within the previous dominance test ...').

<sup>31</sup> When the TPA was first introduced in 1974 it prohibited mergers which substantially lessened competition. Criticism of this test led the legislature to replace it with a dominance test in 1977. Under this test, mergers that created or substantially strengthened a position of 'control or dominance' in a 'substantial' market were prohibited. In 1986 this test was amended to prohibit acquisitions if they would result in the corporation being, or being likely to be 'in a position to dominate a market for goods or services' or mergers that would 'substantially strengthen' an existing position of dominance. In 1989 the Griffiths Committee recommended against changing back to a substantial lessening of competition test (Commonwealth, *Mergers, Takeovers and Monopolies: Profiting from Competition*, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, May 1989, p 63, recommendation 63 (Griffiths Report)). There was, however, some support for a return to the substantial lessening of competition test during this inquiry: see, for example, Standing Committee on Legal and Constitutional Affairs, *Mergers, takeovers and monopolies*, sub-committee workshop, 24 October 1988, 22 (P Clarke): 'I am of the opinion that section 50 is currently too tolerant of mergers. ... the dominance test would ... allow mergers which would result in there being a substantial lessening of competition. I would advocate that a harsher test be applied ...'. In 1992 the Cooney Committee recommended a return to the 'substantial lessening of competition' test, which was accepted by the government and re-introduced into the Act in 1993 (Cooney Report, above n 9, chapter 3). See also W Pengilley, 'The Ten Most Disastrous Decisions Made Relating to the Trade Practices Act' (2002) 30 *ABLR* 331, pp 349-352.

<sup>32</sup> See also A Fels, 'Mergers and Market Power', Speech to the Australia-Israel Chamber of Commerce, Boardroom Lunch, Sydney, 15 March 2001 <[http://www.accc.gov.au/speeches/2001/fels\\_israel\\_15\\_3\\_01.htm](http://www.accc.gov.au/speeches/2001/fels_israel_15_3_01.htm)>: '... the big business's agenda over the years has been to weaken and water down the merger law at every opportunity. Some CEOs want a soft merger law others want no law even if this means an economy made up of monopolies that cannot compete internationally.'

while small business and consumers have advocated the substantial lessening of competition test. This has also been one of the key debates internationally, with most jurisdictions adopting one or other of these tests.<sup>33</sup>

In submissions to the Review, a number of reasons were advanced to justify a return to the dominance test, including that:

- it would facilitate the creation of 'national champions' or otherwise better enable Australian companies to compete effectively in the global marketplace;<sup>34</sup>
- it would lead to greater certainty;<sup>35</sup>
- it would involve less of a waste of resources;<sup>36</sup> and
- it would not obstruct mergers unnecessarily, as it was argued the current test does.<sup>37</sup>

It was also argued that, because tests focussing on market conduct rather than structure are to be preferred, where structural prohibitions exist they should not be overly burdensome.<sup>38</sup>

The first of these arguments (that Australian firms needed to be permitted to reach a certain scale, or 'critical mass' to successfully compete in global markets) received the most attention in submissions to the Dawson Committee. The claim was advanced that the current test inhibits Australian business from

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<sup>33</sup> The substantial lessening of competition test (or restriction on competition test) has been adopted in a number of countries, including the United States (Clayton Act, s 7), Canada, New Zealand (which, until 2001, applied a dominance test), France, Ireland, South Africa and the United Kingdom (*Enterprise Act 2002*, Part 3). On the other hand, a dominance test applies in the European Union (Council Regulation 4064 of 1989; this test also applies in a number of the EU Member States; for example, Belgium, Denmark, Finland, Germany, Sweden, Italy and the Netherlands) and in a number of other States, including Switzerland, Hungary, Poland and Norway. Note, however, that in relation to a number of these countries additional tests relating to public benefits or efficiencies may also apply.

<sup>34</sup> Only this reason attracted a significant number of submissions. They are discussed in detail, below.

<sup>35</sup> Pengilley, above n 29 ('The non-prohibition of those few mergers which might not be caught by a "dominance" test but would be caught by the lower "substantial lessening of competition test" can be justified by the greater certainty of, and smoother overall operation of, s.50 which a dominance test would bring.');

<sup>36</sup> United Energy, above n 12, p 3.

<sup>37</sup> Duke Energy, above n 29, pp 2-3.

<sup>38</sup> See, for example, Optus, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 17, Trade Practices Act Review 2002, p 5 ('Conduct based regulation is superior to market structure regulation ... a useable and effective s.46 test is preferred to an overly restrictive s.50 test. ... '); Gilbert, above n 28. Compare Telstra, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 117, Trade Practices Act Review 2002, p 90 (Quoting with approval the World Bank and OECD: "The rationale for merger control is simple: it is far better to prevent firms from gaining market power than to attempt to control market power once it exists." (World Bank & OECD *A Framework for the Design and Implementation of Competition Law and Policy*, Washington DC, 1998, p 41)). See also Fels, above n 32 ('... once industry structures are in place, they are difficult to alter ...').



being competitive internationally.<sup>39</sup> This, it was said, was particularly acute given Australia's small size.<sup>40</sup> Along this line it was also argued that failure to loosen merger laws would result in Australia becoming a branch economy.<sup>41</sup> It

<sup>39</sup> Duke Energy, above n 29, pp 2-3 ('... the current test inhibits firms from gaining the critical mass necessary to compete globally ...'); BP Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 47, Trade Practices Act Review 2002, p 1 ('... amendments to s.50 are required to improve the competitiveness of Australian business internationally'); Gilbert, above n 28; Optus, above n 38, p 5 ('The current merger test prevents Australian companies from attaining a critical mass that enables them to compete on an international scale. ... being strong at home provides companies with strength abroad'); ExxonMobil, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 50, Trade Practices Act Review 2002, p 6 ('...there may be circumstances where a corporation needs to be able to merge with a competitor, either to gain a critical mass in the domestic market in order to expand into overseas markets, or to effectively compete against other local manufacturers or importers.');

SFE Corporation, above n 10, pp 6-7 ('There is a ... growing imperative for Australian companies to achieve the scale and efficiencies necessary to compete internationally. ...'); Commonwealth Bank, above n 28, p 7 ('... Australian enterprises need to be able to grow in size and resources to compete successfully in foreign markets.');

CSR Limited, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 97, Trade Practices Act Review 2002, p 2 ('... Given the size of the Australian economy relative to the more populous economies, the level of market concentration needs to be higher in order to realise economies of scale and efficiency. ...');

Australian Industry Group, above n 29, p 48 ('... there is a perception that the mergers rules impede companies in Australia from globalising or becoming of sufficient size and mass as to be internationally competitive. ...');

UBS Warburg Australia Ltd, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 127, Trade Practices Act Review 2002, p 5 ('... significant consideration needs to be given to the ability of Australian companies to obtain the economies of scale necessary to compete internationally ...');

International Chamber of Commerce Australia (ICC), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 143, Trade Practices Act Review 2002, p 23 ('It would seem fairly common sense that in a small economy such as Australia's, mergers ought to be permitted according to market forces – even to the extent of allowing monopolization to occur. Apart from anything else, such mergers may well be necessary to achieve economies of scale, and facilitate greater competitiveness on the international market.')

Not all of these submissions called for a return to the dominance test: see, for example, the Business Council of Australia, which did not call for a reversion to the dominance test but claimed that '... the TPA and its administration be reformed ... to allow Australian companies to achieve the scale and efficiencies necessary to compete both internationally and against international competitors in the domestic market' (Business Council of Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, 'Towards Prosperity', Public Submission 71, Trade Practices Act Review 2002, p 12).

<sup>40</sup> See, for example, M Gal, 'Size Does Matter: The Effects of Market Size on Optimal Competition Policy' (2001) 74 *University of Southern California Law Review* 1437 at 1476 ('... the size of an economy significantly affects its optimal competition policy. ... [there is a] greater need to recognize the inevitability of concentrated market structures protected by high entry barriers in many industries in small economies.')

Compare comments by Prof Allan Fels, claiming that there is a 'risk that national champions could become indolent monopolies charging high prices to consumers to subsidise overseas expansion': Fels, above n 13.

<sup>41</sup> CSR Limited, above n 39, p 2 ('... CSR remains concerned about Australia becoming a branch economy ...'). Compare AAMI, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 69, Trade Practices Act Review 2002, p 2 ('The prospect of large international corporations buying large (in the Australian market) public companies and converting them to "branch office operations" is ... over-stated');

Productivity Commission, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 125, Trade Practices Act Review 2002, p 47 ('... in our recent survey of Australian offshore investment ... mergers regulation is not identified as a major influence on firms' decisions to locate offshore. ...')

and Victorian Government, above n 30, p 13 ('... there seems to be little evidence that companies have been forced overseas because their merger proposals have not succeeded. ...'). See also Fels, above n 13 ('there are many reasons why companies move offshore and merger law ranks low on the list') and B Clegg & A Hepworth, 'ACCC not to blame for knocking our champions', *Australian Financial Review*, 19 September 2002 <<http://afr.com/specialreports/report1/2002/09/19/FFXQC2DP66D.html>> ('[t]here are many factors that have held back Australian companies from making a success of it overseas – often it just comes down to simply bad management decisions. ...' (quoting Ron Malek, of the Calburn Partnership)).

was argued, primarily by business groups, that to avoid these problems firms ought to be able to merge to achieve economies of scale 'necessary' for the global market, even if this resulted in a substantial lessening of competition.

In response, numerous other submissions argued for the retention of the substantial lessening of competition test.<sup>42</sup> In respect of the national champions argument, it was submitted that there is no evidence that scale is necessary to compete effectively in global markets.<sup>43</sup> Rather, it was claimed, international

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<sup>42</sup> See, for example, Independent Paper Group, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 21, Trade Practices Act Review 2002, p 3 ('... the current provisions provide a proper balance of power between small and large businesses ...'); Queensland Retail Traders & Shopkeepers Association (QRTSA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 58, Trade Practices Act Review 2002, p 7 (...strongly supports the present role of the ACCC in merger cases'); ACCC, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 56, Trade Practices Act Review 2002, p 134; Civil Contractors Federation, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 68, Trade Practices Act Review 2002, p 2 ('... the current merger law works well ...'); Small Business Development Corporation (WA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 84, Trade Practices Act Review 2002, p 4 ('... opposed to any relaxation of current merger laws, particularly a return to the 'market dominance' test which would make the legislation ineffective'); ANZ, above n 10, p 1 ('ANZ supports the current 'substantial lessening of competition test' for mergers ...'); SFE Corporation, above n 10, p 1 ('there is insufficient basis for changing the "substantial lessening of competition" test in section 50 of the TPA'); Fair Trading Coalition (A Coalition of Small Business for Trade Practices Act Reform), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 98, Trade Practices Act Review 2002, pp iii & 33 ('The current mergers test ... should not be changed'); Australian Chamber of Commerce and Industry (ACCI), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 104, Trade Practices Act Review 2002, pp 13 & 97; Australian Bankers' Association (ABA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 118, Trade Practices Act Review 2002, p 1; J Brebner, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 123, Trade Practices Act Review 2002, p 2; P Armitage, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 128, Trade Practices Act Review 2002, p 1; Senator R Boswell, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 129, Trade Practices Act Review 2002, p 17; The Pharmacy Guild of Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 131, Trade Practices Act Review 2002, p 1; Spier Consulting Pty Ltd, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 133, Trade Practices Act Review 2002, p 4 & 20; Business Law Committee of the Law Council of Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 138, Trade Practices Act Review 2002, p 2; Victorian Government, above n 30, p 3; AAPT Limited, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 160, Trade Practices Act Review 2002, p 14.

<sup>43</sup> AAMI, above n 41, p 2 ('... the "international scale" argument is over-stated. ...'); ACCC, above n 42, p 16 ('... there is no compelling evidence to support claims that the current mergers law is stifling Australia's international competitiveness or that it is unsuitable in an era of globalisation. ... [142] The Australian business community is far from unanimous in its support for the creation of national champions... a number of academic studies have arrived at an entirely different conclusion on the desirability of national champions as compared to big business ... [143] ... no empirical evidence exists to support the national champions thesis. ...'); W McComas, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 75, Trade Practices Act Review 2002, p 12 ('Whether section 50 in its present form really inhibits the opportunity for Australian business to compete on global markets is at large, and, in the writer's opinion, not made out. Protagonists of that argument are few, albeit vocal, but to date, it is difficult to identify any empirical evidence of its validity'); State Chamber of Commerce (NSW), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 79, Trade Practices Act Review 2002, p 3 ('We believe the "national champions" argument, often used by parties in favour of relaxing merger law, is invalid. ... [4] ... there is no empirical evidence to support the national champions view that there is a net benefit to the country if domestic competition is sacrificed so that big corporations can be internationally competitive'); Fair Trading

competitiveness is best achieved by the existence of fiercely competitive domestic rivals.<sup>44</sup>

This position has been most vigorously championed by Professor Michael Porter<sup>45</sup> who has conducted empirical research on what gives business competitive advantage in the age of globalisation. Professor Porter's research

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Coalition, above n 42, p 35 ('There is ... considerable doubt that the so called benefits or larger scale actually eventuate. ... domestic monopoly [may] in no way [assist] in the international market'); Commonwealth Consumer Affairs Advisory Council (CCAAC), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 111, Trade Practices Act Review 2002, p 4 ('... There is simply no evidence to support this indeed, the evidence is to the contrary'); Australian Business Limited, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 112, Trade Practices Act Review 2002, p 4 (claimed results of a survey it conducted among manufacturers were 'clear with strong opposition to big business mergers to create "national champions"'); Productivity Commission, above n 41, p 47 ('not aware of any empirical evidence that suggests that domestic size is closely related to export performance or propensity. '); Boswell, above n 42, p 17 (there are 'many examples of global expansion by Australian companies demonstrating that the present test does not prevent the global entry of industries'); Spier Consulting, above n 42, p 12 (the Act 'does not inappropriately impede the ability of Australian Industry to compete locally and internationally ... it has remained remarkably flexible in the fact of dramatic changes to the Australian market and the global environment. Those who say otherwise often do so out of self-interest ... [22] ... [t]here is ... considerable doubt that the so-called benefits of large scale entities actually eventuates. ... '); Independent Petroleum Marketers Association Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 134, Trade Practices Act Review 2002, p 13; Victorian Government, above n, p 13 ('... Victoria's view is that business size is not a prerequisite to export success: ... '); Communications Law Centre, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 177, Trade Practices Act Review 2002, p 1. See also Clegg & Hepworth, above n 41 (quoting Ron Malek of the Caliburn Patnership: 'I think it is too simplistic to say that competition regulation stifles Australian companies from building global businesses ... In some industries, scale is much more important than others' and Freehills' Donald Robertson: there is 'a growing realisation, if not acceptance, that the so-called national champions argument is a deeply flawed argument.')

<sup>44</sup> G Masterman, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 6, Trade Practices Act Review 2002, p 1 ('The argument that Australian companies in order to compete internationally need increases in size through mergers having the effect of substantially lessening competition in their domestic market is fallacious. Strong competition in the domestic market primes a company for entry into foreign markets. Many examples could be given, ... '); ACCC, above n 42, p 16 ('... a weak or compromised mergers policy could actually undermine Australia's international competitiveness'); CCAAC, above n 42, p 3 ('the best way to ensure Australian companies can compete effectively is to have a competitive and effective market that drives the building of genuine competitive advantage'); Brebner, above n 42, p 3 (vigorous domestic competitors 'create firms that are better able to compete internationally'); Victorian Government, above n 30, p 13 ('It is strong domestic competition that ultimately creates the 'national champions'. Big businesses benefit from strong domestic competition, which lowers costs and enables them to compete internationally. ... '); Canberra Consumers, above n 44, p 1 ('... Global success can only be achieved in a marketplace which is responsive to customer desires and competition ... reduced competition ... [results in] companies [becoming] complacent and uncompetitive. '); Queensland Government, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 198, Trade Practices Act Review 2002, p 7 ('... the basis for the international competitiveness of Australian firms is their success in a vigorously competitive domestic market').

<sup>45</sup> The ACCC in its submission relied heavily on the research of Michael Porter: see ACCC, above n 42, p 142 ('Porter found a strong empirical link between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry'), at p 143 ('Porter and Sakakibara concluded that their examination provided robust evidence that domestic rivalry is positively associated with international trade performance. [from Sakariko, M. & Porter, M.E., 'Competing at Home to Win Abroad: Evidence from Japanese Industry', *Fundamental Theory Task Force Report*, American Bar Association 2001]) and at p 143 ('... Unless a firm is forced to compete at home, it will quickly lose its competitiveness abroad. [fn 181: Professor Michael E. Porter, Competition and Antitrust: Towards a Productivity-Based Approach to Evaluating Mergers and Joint Ventures, *Fundamental Theory Task Force Report*, American Bar Association, 2001]).

led him to conclude that nations with 'leading world positions often have a number of strong local rivals'.<sup>46</sup> In his seminal work, *The Competitive Advantage of Nations*, Porter claims:

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. ... 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. (footnotes omitted)<sup>47</sup>

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. ...' (footnotes omitted)<sup>48</sup>

In this respect, a number of submissions highlighted the fact that there have been many small-to-medium sized Australian businesses that have been successful in the global market<sup>49</sup> and that, given Australia's relatively small economy, even if the scale argument did have merit, a domestic firm allowed monopoly status would still not be large enough to compete with firms from larger economies.<sup>50</sup>

Other reasons advanced in submissions for retention of the substantial lessening of competition test included that:

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<sup>46</sup> M Porter, *The Competitive Advantage of Nations*, MacMillan Press Ltd, 1990, p 117.

<sup>47</sup> Porter, above n 46, p 117.

<sup>48</sup> Porter, above n 46, p 119.

<sup>49</sup> A number of submissions highlighted the success of many small Australian firms in the global market: see, for example, AAMI, above n 41, p 2 ('[m]any relatively small Australian companies successfully compete both domestically and internationally with other companies big and small. On the other hand, there have been monopolies, duopolies – operations with "scale" – where the businesses and consumers they supply and service have been disadvantaged in terms of pricing, responsiveness and outmoded products and services.');

McComas, above n 43, p 10 ('... it be said that, to the extent that particular Australian corporations have been able to establish operations offshore, their success of itself has not depended upon their relative size in Australia. ... Conversely there are notable illustrations where corporations which have achieved growth by merger in Australia have not succeeded in their offshore expansion, ...');

State Chamber of Commerce, above n 43, p 4 ('[t]here are many examples of firms competing internationally without being the dominant firm in the domestic market. There are around 25,000 businesses engaged in exporting, with over 95% being small and medium enterprises ...');

CCAAC, above n 43, p 3; Communications Law Centre, above n 43, p 7. See also Fels, above n 32 ('[there] are several examples of smaller companies achieving great export success. Cowan Manufacturing at Warner Bay NSW, supplies recompression chambers to export markets including the United States navy. This year it expects to double exports to around \$1.2 million. Compumedics makes computer based medical monitoring and diagnostic equipment at its Melbourne plant. Last year it earned \$7 million on export markets. Perini & Scott Masterman is a small Sydney firm supplying electrical control systems for cranes. Its exports of \$2 million constitute approximately two thirds of its annual turnover ... the figures ... show that exporting is not the exclusive preserve of big business ...').

<sup>50</sup> State Chamber of Commerce, above n 43, p 4 ('... Australia's small domestic market means that even if monopolies were created in certain industries, the size of the new mega-firm would still be too small to have a significant impact on the global market. ...').

- even if the 'national champions' claim had merit, Australian consumers should not be disadvantaged by large firms wanting to compete internationally<sup>51</sup> and that, in any event, the current process already allows for international considerations, including the consideration of import competition, at the clearance stage and as part of the authorisation process;<sup>52</sup>
- the current system cannot be said to inappropriately impede mergers given the high approval rate;<sup>53</sup>

<sup>51</sup> AAMI, above n 41, p 2 ('AAMI does not believe that any action proposed by Australian companies to acquire the scale perceived as needed for them to be able to compete internationally should disadvantage other Australian businesses and consumers.');

State Chamber of Commerce, above n 43, p 3 ('... we are concerned any lowering of the merger hurdles could be unduly detrimental to smaller domestic-oriented firms operating in the same industry ... [4] ... [questions whether] it is worth sacrificing domestic competition to achieve these international gains. ...');

CCAAC, above n 43, p 4 ('Australian consumers should not have to tolerate (and pay the price for) monopolies or oligopolies on the basis that such are necessary to enable Australian corporations to gain sufficient scale to compete effectively overseas. There is simply no evidence to support this indeed, the evidence is to the contrary');

National Association of Retail Grocers of Australia (NARGA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 126, Trade Practices Act Review 2002, p 5 ('[n]ational champions must not come at the expense of domestic competition and its benefits to domestic consumers');

Spier Consulting, above n 42, p 22 ('[g]lobal issues are important, but so are domestic. ...');

Victorian Government, above n 30, p 13 ('[t]he 'national champion' argument ... could result in Australian consumers paying higher prices to help support businesses charging lower prices to overseas consumers');

Communications Law Centre, above n 43, p 7 ('domestic consumers should [not have to] subsidise the performance of domestic firms in international markets').

<sup>52</sup> ACCC, above n 42, p 137 ('[t]he extent of international competition is given full consideration in the Commission's merger assessment process. Section 50(3)(a) requires that the Commission consider the [138] actual and potential level of import competition ... 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 3 years. ... The merger authorisation process also places a heavy emphasis on the international competitiveness of Australian industry. ... [144] ... the Commission has never opposed a merger where imports constrain the exercise of domestic market power');

Spier Consulting, above n 42, p 21 (notes that mergers in sectors already exposed to international trade are not opposed (10% imports) and authorisation is possible; '[c]learly the framework of the Act is not an obstacle to allowing Australian firms to merge, to achieve the scale necessary for international competitiveness providing there is sufficient public benefit. ...'). See also Fels, above n 32 ('[t]he authorisation provisions of the Act are available to those firms that want to ensure international competitiveness through acquisition. ... Since 1993, the Act has explicitly stated that export generation, import replacement or contributions to the international competitiveness of the Australian economy are public benefits').

<sup>53</sup> See Brebner, above n 42, p 6 ('... a statistical assessment of mergers considered by the ACCC since the introduction of the substantial lessening of competition 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 2001 ... only 100 (or 7.5%) were 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 ... 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). See also QRTSA, above n 42, p 7 ('[g]iven that the vast majority of acquisitions (mergers) are not prevented by the present s 50, any suggestion that s 50 stands in the way of acquisitions (mergers) must be dismissed');

State Chamber of Commerce, above n 43, p 4 ('[t]he current regime is clearly not unduly inhibiting mergers because the overwhelming majority of applications are approved');

Association of Consulting Engineers Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 89, Trade Practices Act Review 2002, p 10; Business Law Committee of the Law Council of Australia, above n 43, p 54 ('... where an Australian firm is actually trading in a global market, a merger, even within a highly concentrated Australian market, is unlikely to lead to a

- the dominance test would be detrimental;<sup>54</sup>
- we need competitive markets;<sup>55</sup>
- change is not called for because it would make no discernable difference to the outcome;<sup>56</sup>
- the current test accords with that applied in comparable jurisdictions;<sup>57</sup> and
- the current test maintains consistency with other provisions in Part IV of the TPA and with the object of the Act.<sup>58</sup>

Given the volume of submissions the Committee received on this issue, it was anticipated they would address it in some detail; that is, that there would be some discussion in the Report regarding whether there was any merit in the claims that a return to the dominance test was warranted or that the current test inappropriately impeded international competition.<sup>59</sup>

Unfortunately no such analysis was provided. Extraordinarily the Committee did not even acknowledge that there had been submissions made for a return to the market dominance test, or that the provisions needed watering down to facilitate firms achieving a sufficient size to be able to successfully compete

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substantial lessening of competition, as the Australian firms will continue to be subject to international competition’).

<sup>54</sup> State Chamber of Commerce, above n 43, p 4 (‘... concerned that a return to the *market dominance* test would be detrimental to the competitive environment ...’); Victorian Government, above n 30, p 12; Canberra Consumers, above n 44, p 1.

<sup>55</sup> ANZ, above n 42, p 4 (‘... supports current merger law ... the interest of the Australian economy and the public interest generally, are enhanced by competitive markets and does not support the creation of anti-competitive market structures.’); Brebner, above n 42, p 2.

<sup>56</sup> SFE Corporation, above n 10, p 10 (‘SFE doubts whether a change from the substantial lessening of competition to the dominance test would make any discernible difference to the likely outcome of the majority of mergers proposed. ...’); Pengilley, above n 29 (‘[m]y guess is that an analysis of company mergers since the introduction of the “substantial lessening of competition” test would show that most of those disallowed would also come within the previous dominance test ...’).

<sup>57</sup> Fair Trading Coalition, above n 42, p 33 (‘[t]he current section 50 accords with most comparable jurisdictions ...’); Spier Consulting, above n 42, p 20; Business Law Committee of the Law Council of Australia, above n 42, p 54 (reverting to a dominance test ‘would be inconsistent with current international practice’); Victorian Government, above n 30, p 3.

<sup>58</sup> Fair Trading Coalition, above n 42, p 33 (‘The current section 50 ... maintains consistency of thresholds within the TPA ...’); Brebner, above n 42, p 2 (the SLC test ‘is the one most aligned with the object of the Act, namely, preserving and promoting competition ... If this is what the Act promotes then if 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, ... would reduce, rather than ‘enhance’, the ‘welfare’ of Australians. ...’); Spier Consulting, above n 42, p 20 (the current test ‘... maintains consistency of thresholds within the TPA.’); AAPT Limited, above n 42, p 14. See also Cooney Report, above n 9, p 48 (para’s 3.109-3.110) (‘[t]he philosophy underlying Part IV of the Trade Practices Act is the protection and enhancement of competition. Implicit in Part IV is the assumption that acts or occurrences which substantially lessen competition contravene the Act, unless authorised ... on public benefit grounds. ... The existence of a dominance test in the area of merger regulation is difficult to reconcile with the essential thrust of the Act which is directed to preventing anticompetitive conduct.’)

<sup>59</sup> See, for example, Clegg & Hepworth, above n 41 (‘[t]he head of the national competition law group at Freehills, Donald Robertson, says he expects the issue [of national champions] will be addressed during the Federal Government’s inquiry into the [TPA]’).

internationally.<sup>60</sup> The absence of discussion on this issue is surprising in light of the fact that the first term of reference for the Review required the Committee to identify if any provisions of Part IV of the TPA ‘inappropriately impede the ability of Australian industry to compete locally and internationally’. Nowhere is this issue more acute than in relation to s 50.

Ultimately, without mentioning the ‘dominance’ claims, the Committee concluded that the ‘underlying assumption [of Part IV of the TPA is] that competition promotes efficiency, which in turn enhances public welfare ...’<sup>61</sup> and that the substantial lessening of competition test currently applied is the one most in line with this assumption. Thus, while making no formal recommendation that the existing test for assessing mergers be retained, this acknowledgement, combined with the absence of any recommendation to the contrary, signalled the Committee’s endorsement of the test in its current form.

As highlighted in a number of submissions, the current test is consistent with the express objective of the TPA, to ‘enhance the welfare of Australians *through the promotion of competition ...*’ (emphasis added).<sup>62</sup> It follows from this purpose that conduct *substantially* lessening competition should be prohibited. A test that prohibits mergers only when they create or enhance market dominance is contrary to this goal because it necessarily permits mergers which not only lessen competition, but do so substantially. Furthermore, the promotion and preservation of competition is 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 also the case that there is little evidence to support the national champions argument advanced in several submissions, whereas empirical evidence exists which suggests that the reverse (that is strong domestic competition) is more likely to facilitate international competitiveness.<sup>63</sup> Consequently, the Dawson Committee’s decision not to recommend change to the substantial lessening of competition test is to be welcomed.

Nevertheless, the volume of submissions, the historical debate over this issue (in Australia and internationally) and the key term of reference dealing with

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<sup>60</sup> The Committee did acknowledge the sale argument very briefly in the context of submissions referring to a change to the definition of market: Dawson Report, above n 1, pp 59-60. However, the Committee did not discuss or reach any conclusion on the matter, but simply noted that international competitiveness was best left to be determined by the authorisation process.

<sup>61</sup> Dawson Report, above n 1, p 43. It is unclear on what basis the Committee made this assumption.  
<sup>62</sup> TPA, s 2, as inserted by section 3 of the *Competition Policy Reform Act 1995* (Cth) (emphasis added).

<sup>63</sup> The validity of this evidence was challenged in some submissions. See, for example, ICC, above n 39, p 25 ([t]ypical arguments concerning the detrimental effects of mergers draw from irrelevant empirical studies ...).

international competitiveness make the Committee's failure to comment on these submissions unfortunate.

### ***Efficiency defence/consideration***

A number of submissions argued that efficiency claims should be given more prominence in the substantive analysis of mergers.<sup>64</sup> In particular, it was argued that an efficiency *defence* should be incorporated,<sup>65</sup> so that proof that a merger would enhance economic efficiency would provide a defence to a claim that the merger would result in a substantial lessening of competition. Other submissions sought express mention of efficiency considerations in s 50(3) of the Act,<sup>66</sup> which currently lists a number of factors required to be taken into account when assessing whether a merger substantially lessens competition.

In discussing these proposals the Committee stated that they considered economic efficiency a more appropriate test for mergers.<sup>67</sup> This is an extraordinary (and controversial) finding, and is apparently based on the Committee's understanding that the object of s 50 is to enhance the welfare of Australians through increased economic efficiency. In doing this the Committee seem to have equated "competition" with "economic efficiency",<sup>68</sup> given that the clear object of the Act (including s 50),<sup>69</sup> is expressed in s 2 as being 'to enhance the welfare of Australians through the promotion of *competition ...*' (emphasis added).<sup>70</sup> That is, it is competition and not economic efficiency that

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<sup>64</sup> See generally, SFE Corporation, above n 10, p 1 ('the focus [of any change] should be on finding the best way of ensuring that countervailing public interest issues – including those relating to efficiencies – are considered and given proper weight').

<sup>65</sup> Business Council of Australia, above n 39, p 12 (argued for public benefit defence that would include efficiency gains); Business Law Committee of the Law Council of Australia, above n 42, p 58 (argued efficiency-enhancing mergers, as a matter of policy, should be permitted). There was also some express opposition to such a defence: Spier Consulting, above n 42, p 12 ('... the inclusion of issues such as efficiencies has not worked in Canada and has so far not allowed mergers found to be a breach of competition law to proceed.')

<sup>66</sup> SFE Corporation, above n 10, p 14 (section 50(3) should 'make specific reference to the consideration of efficiencies'); Australian Industry Group, above n 29, p 12 ('[t]he factors in s 50(3) must 'recognize efficiency gains and issues of scale'); ABA, above n 42, p 11; Business Law Committee of the Law Council of Australia, above n 42, p 57 ('... assessment of the competitive impact of a merger should also take into account the pro-competitive contributions of efficiencies').

<sup>67</sup> Dawson Report, above n 1, p 56 ('... economic efficiency is ultimately the more appropriate test for assessing the desirability or undesirability of a merger ...'). A few submissions also claimed efficiency was more important than competition: Productivity Commission, above n 41, p 47 ('[t]he key requirement is to examine mergers from a primarily economic perspective and to only block significant market consolidation when it is likely to detract from economic efficiency'); Business Law Committee of the Law Council of Australia, above n 42, p 58 (claims efficiency-enhancing mergers, as a matter of policy, should be permitted). Compare Spier Consulting, above n 42, p 15 ('... [t]he authorisation process is not solely about economic efficiency ... it is about public benefit in its broadest. The Law is ultimately about consumer welfare'). For a view that in a small economy economic efficiency should be given priority over all other goals see Gal, above n 40, p 1451 ('... small economies ... are less able to afford a competition policy that sacrifices economic efficiency for broader objectives. Where social goals conflict with economic efficiency, both goals cannot be materially promoted. ...').

<sup>68</sup> Dawson Report, above n 1, p 58. See also Gal, above n 40, who clearly distinguishes the two by suggesting economic efficiency should be advanced at the expense of 'other' social goals.

<sup>69</sup> There is no separate object in the TPA for the operation of s 50.

<sup>70</sup> TPA, s 2.



is to be promoted. While these concepts overlap – often considerably - the Committee itself recognised, elsewhere in its Report, that they were not the same thing:

In most circumstances maximising competition will maximise economic efficiency. Thus, a test that prevents the substantial lessening of competition will generally be a good test for economic efficiency. However, there may be circumstances in which a merger will offer gains in efficiency but will also SLC.<sup>71</sup>

[Section 50] does not address the situation where a merger fails the competition test, but offers economic efficiencies with the potential to enhance overall welfare.<sup>72</sup>

It is suggested that the Committee erred in finding that the object of s 50 is to increase economic efficiency. This error, in turn, taints the Committee's statement that economic efficiency is 'the more appropriate test for assessing the desirability or undesirability of mergers'.<sup>73</sup> This is not to reject the possibility that economic efficiency may be a better test for mergers – although the author does not share this view – it is simply to observe that, in the context of the TPA, economic efficiency is not the most appropriate test to fulfil the stipulated purpose of enhancing consumer welfare through the promotion of competition. This purpose is best achieved by a *competition* and not an efficiency test, even if in many case the same result will be reached.

Nevertheless, despite believing efficiency to be a better test and highlighting economic efficiency as 'an important goal because it is reflected in high productivity, which in turn is important to sustaining economic welfare', the Committee recommended against the proposed change for a number of reasons. First, they noted that where there are other efficiencies, that have the potential to enhance overall welfare, authorisation is possible. Thus, where there are gains in efficiency but also a substantial lessening of competition, the Committee considered authorisation to be the most appropriate avenue<sup>74</sup> for parties wishing to proceed with claim their merger.

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<sup>71</sup> Dawson Report, above n 1, p 56.

<sup>72</sup> Dawson Report, above n 1, p 56. In noting this the Committee referred to *Davids Holdings Pty Ltd v Attorney-General of the Commonwealth* (1994) 49 FCR 211 at 248 per Drummond J.: 'Provisions such as s 50 are not tools designed to enable the Court to strike a balance between the economic advantages that might flow from the economies of scale and other efficiencies resulting from a particular merger, on the one hand, and the economic detriments of the merger, such as increased prices that consumers may have to pay, on the other. ...' Further quoting Drummond J (at 248), the Committee accepted: 'It is no answer [to a finding of a contravention of s 50] to show, eg, that a moderate reduction in price competition resulting from a particular merger would be greatly off-set, so far as the general public interest in the efficient allocation of resources is concerned, by benefits created by the merger. Any such balancing exercise is for the Trade Practices Commission to carry out in dealing with an authorisation application under ss 88(9) and 90(9), not the Court that has to consider whether s 50 bars a particular merger.'

<sup>73</sup> Dawson Report, above n 1, p 56.

<sup>74</sup> Dawson Report, above n 1, p 56.

Second, where efficiencies are relevant to the competition test they are already required to be considered. In this respect the Committee makes note of the ACCC merger guidelines:

'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.'<sup>75</sup>

Consequently, they rejected calls to incorporate a new factor in s 50(3) requiring specific consideration of efficiency in assessing the competitive effects of a merger.

Finally, and most importantly, the Committee believed that an efficiency test within s 50 would inhibit the ability of the ACCC to provide a quick clearance process because of increased complexity.<sup>76</sup> Along the same lines, such a test would also give the ACCC more discretion than it currently has,<sup>77</sup> something the Committee considered undesirable.

The Committee did not consider separately the possibility of introducing an 'efficiency defence'<sup>78</sup> (which would throw the burden of proof of efficiency gains on the parties) as some had advocated. Given the elevated status the Committee were prepared to give economic efficiency, their failure to address this issue is surprising and unfortunate.

### ***Public benefit test as part of s 50 test***

A number of submissions called for public benefits to be incorporated at the clearance stage<sup>79</sup> or, specifically, combined with the existing substantive test so that merger assessment, where public benefits are relevant, would become a

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<sup>75</sup> ACCC, 'Merger Guidelines', above n 7, p 60. Further, '[w]hile 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.' See also P Williams & G Woodbridge, 'The Relation of Efficiencies to the Substantial Lessening of Competition Test for Mergers: Substitutes or Complements?' (2002) 30 *ABLR* 435.

<sup>76</sup> Dawson Report, above n 1, p 57.

<sup>77</sup> Dawson Report, above n 1, p 57. ('... application of an efficiency test at the clearance stage would confer on the ACCC a significantly greater degree of discretion in deciding whether to clear or to oppose a merger proposal').

<sup>78</sup> The Committee's discussion of efficiencies appeared only in the context of replacing the substantial lessening of competition test with an efficiency test.

<sup>79</sup> SFE Corporation, above n 10, p 13 ('the regulator should not be encouraged to give primacy to competition issues over public benefit arguments'); IBSA, above n 12, p 1 ('[s]ection 50 should be modified to deal with mergers that substantially lessen competition and are likely to disadvantage consumers').

one-stage process.<sup>80</sup> There were also a number of submissions that were opposed to this proposal.<sup>81</sup>

None of these submissions were mentioned in the Committee's report.

### **Other factors to be incorporated in section 50(3)**

In addition to claims that efficiencies and public benefits should be specifically identified as a factor to be considered in a substantial lessening of competition analysis, several submissions also claimed that other matters, such as rural and regional issues,<sup>82</sup> small business considerations<sup>83</sup> and international

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<sup>80</sup> IBSA, above n 12, p 1 ('... the competition test in Section 50 of the Trade Practices Act should be combined with a public benefit test including the elements already identified in Section 90 – export potential, import replacement and international competitiveness – and other relevant factors') and p 3 ('IBSA believes there is merit in changing the merger approval process to combine the competition test and the public interest test in a one-stage process. This would require the ACCC to assess all mergers referred to it in terms of their likely impact on competition and consumer welfare and whether they would be compatible with broader economic and social objectives. These could include ...') and p 5 ('[s]ection 50 should be amended to refer to mergers that would substantially lessen competition and are likely to significantly disadvantage consumers'); CSR Limited, above n 39, p 1 ('... the public benefits test should become part of section 50, such that a merger would not contravene section 50 even if it substantially lessened competition in a market so long as the public benefit outweighed the public detriment'); Australian Industry Group, above n 29, p 12 ('the current public interest criteria in section 90 should be introduced into section 50 itself) and at 50 (s 50 should be redrafted to enable public interest test in s 90 to become 'a statutory defence to a claim that a merger resulted in a substantial lessening of competition'); UBS Warburg Australia, above n 39, p 7 (test should be changed so that 'a merger proposal is only rejected under section 50 if "any resultant reduction in competition outweighs the public benefit"'); Freehills, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 135, Trade Practices Act Review 2002, p 3 (public benefit test should be part of a two-tiered s 50); Business Law Committee of the Law Council of Australia, above n 42, p 54 ('... a "public benefits" qualification for mergers should be incorporated directly into s50 to supplement the current authorisation process. Public benefits, ... could then be considered in the informal clearance process, ...'); Victorian Government, above n 30, p 17 ('... mixing of competition and public benefit considerations could be given statutory recognition'); Allens Arthur Robinson, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 162, Trade Practices Act Review 2002, p 6 (public benefit considerations should exist within s 50 'to ensure that the ACCC takes public benefit considerations into account as part of the informal process'); Minerals Council of Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 178, Trade Practices Act Review 2002, pp 4-5 (public benefits should be considered as part of s 50 analysis); Securities Institute of Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 193, Trade Practices Act Review 2002, p 2 (should amend's 50 to require the public benefits of a merger proposal to be considered at the same time as the implications for competition').

<sup>81</sup> Australian Consumers' Association (ACA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 105, Trade Practices Act Review 2002, p 6 (oppose public benefit test as part of main test – because then it would be considered 'behind closed doors' instead of publicly); Armitage, above n 42, p 1; Canberra Consumers, above n 44, p 2 (opposed to public benefit test - '[p]roposals to amend s 50 and s 87B, which would see the public benefits test inserted into the initial consideration of a merger mean that the supposed benefits of a merger would not be subject to public scrutiny before a merger is agreed. There is no reason to accord business this level of confidential privilege ...'). See also Fels, above n 13 ('[i]ncorporating an upfront public benefit test would undermine the substantial lessening of competition test, erode the effectiveness and transparency of the law and deny consumers, suppliers and others the right of merits review.')

<sup>82</sup> QRTSA, above n 42, p 7; Association of Consulting Engineers Australia, above n 53, pp 12-13; Liquor Stores Association of Victoria Inc, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 124, Trade Practices Act Review 2002, p 16; NARGA, above n 51, p 9.

competitiveness<sup>84</sup> should be referred to in section 50(3).<sup>85</sup> The Committee briefly noted that these matters were best dealt with as part of the authorisation process:

... the suggestion in some submissions that section 50(3) explicitly require the consideration of additional factors such as international competitiveness and rural and regional issues raise matters which may not be relevant to the competition test. Those matters are best dealt with in the authorisation process<sup>86</sup>

While it is perhaps true that most of these factors were more suited to a public benefit analysis (as part of the authorisation process), rather than a competition analysis, this was not true for all. For example, specific mention of rural and regional factors may be relevant in that it would *require* the ACCC to consider how a merger might effect competition in those areas; similarly, a failing firm in the market is relevant to a competition analysis because it would require the ACCC to consider what the state of competition would be, should the firm in question fail. This, of course, does not mean they need to be listed in 50(3) – certainly the ACCC can already take into account any matter that might be relevant to competition, but there is a difference between relevant factors listed in s 50(3) and factors which are not; that is the *requirement* that they be considered. As a result, submissions in this respect deserved some real consideration by the Committee. This is particularly so given one of the Committee's terms of reference was to give consideration to the requirements of rural and regional Australia.

### ***Amendment to the definition of market***

The market, for the purpose of merger analysis is defined as a substantial market for goods or services in Australia, a State, a Territory or a region of Australia.<sup>87</sup> A few submissions argued that it was necessary to widen the

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<sup>83</sup> QRTSA, above n 42, p 7; Association of Consulting Engineers Australia, above n 53, pp 12-13; NARGA, above n 51, p 9.

<sup>84</sup> Many of the submissions dealing with this were considered in the context of the dominance/national champions arguments, however some also called for an additional factor to be added to s 50(3), recognising the need to compete internationally. See, for example Commonwealth Bank, above n 28, p 7 (recommended adding the following factors: 'the likelihood of a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia' and 'the likelihood of a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets'); Australian Industry Group, above n 29, p 10.

<sup>85</sup> Other submissions called for inclusion of failing firms and general public interest considerations into s 50(3): Business Council of Australia, above n 39, p 12 (s 50(3) should 'include considerations such as efficiency gains, and impact on Australian jobs and failing companies'); Business Law Committee of the Law Council of Australia, above n 42, pp 2 & 60 (failing firms); Commonwealth Bank, above n 28, p 9.

<sup>86</sup> Dawson Report, above n 1, pp 57-58.

<sup>87</sup> TPA, s 50(6).

definition to better recognise the global marketplace.<sup>88</sup> It was also argued that the definition of markets 'should be subject to a minimum turnover threshold to exclude non-substantial markets'.<sup>89</sup>

While there were fewer submissions on this issue compared with others (for example, a public benefit defence) the Committee found room in its report to comment in some detail on the first of these proposals.<sup>90</sup> The Committee rejected the claims that a broader definition was necessary to take account of global markets. They claimed that regard can, and is, paid to imports when determining whether there is a substantial lessening of competition,<sup>91</sup> and made note of the ACCC's Merger Guidelines which state that the ACCC

'is unlikely to oppose mergers where there is a significant and sustained level of competition from imports in the relevant market.'<sup>92</sup>

The Committee went on to note that if the issue of global competition was important in a particular case and consideration of imports didn't give due recognition to this, it was a factor that could be considered on a case-by-case basis in the authorisation process.<sup>93</sup>

Further, the Committee observed that

'the adoption of a wider geographical definition of a market would risk extending the relevant market beyond national borders altogether, making it more difficult to demonstrate that the merger ... would SLC'.<sup>94</sup>

This, of course, was the point of the submissions; that is, that as global markets extend beyond national borders, formal recognition of this should exist within the TPA which would, at least in respect of markets traded items, make it more

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<sup>88</sup> Dawson Report, above n 1, p 60. For examples of submissions claiming the current definition was too restrictive see: Morgan & Hoggett, above n 29; UBS Warburg, above n 39, p 7 ('... the definition of market should take into account the flow of capital and labour, especially skilled labour, into and out of Australia'); M Brunt, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 183, Trade Practices Act Review 2002, p 3 (the 'narrow definition of "market" ... in ... s 50(6)' is 'glaringly inappropriate to the global challenge.' Proposes the definition be amended to mean 'a market in relation to Australia'); Business Council of Australia, above n 30, p 16 (supports proposals by Brunt).

<sup>89</sup> CSR Limited, above n 39, p 2 ('CSR proposes that section 50(6) be amended such that a market is deemed not to be substantial if the combined annual turnover of all participants in the market is less than a prescribed amount'. CSR suggests at least \$10m).

<sup>90</sup> The second proposal – to introduce a minimum turnover threshold – was not mentioned in the Committee's report.

<sup>91</sup> For more detail on the extent to which import competition is considered at the clearance stage see Brebner, above n 8. Generally, if imports comprise 10% or more of the relevant market the ACCC will clear the merger.

<sup>92</sup> Dawson Report, above n 1, p 59. See also Fels, above n 32 ('[d]omestic mergers of Australian firms have not been opposed where there is a clear and identifiable constraint from offshore.')

<sup>93</sup> Dawson Report, above n 1, p 60

<sup>94</sup> Dawson Report, above n 1, p 59

difficult to establish a lessening of competition – the argument being that it is less likely to substantially lessen competition; so much seems obvious.

Despite observing that a wider definition would make proving a contravention more difficult, the Committee noted, with apparent approval, the ACCC's Merger Guidelines which acknowledge that it may, in appropriate cases, be 'relevant to define the market as broader than Australia'.<sup>95</sup> The Committee considered that, as a result of the ACCC applying – in some cases - a wider definition than that allowed by the legislation, any problem with the existing definition was already being adequately dealt with. However, as Brunt correctly points out, while the commission may have "solved" the problem of a restricted market definition through their merger guidelines, if the issue was litigated a 'court might feel impelled to obey the statutory definition',<sup>96</sup> which does not allow for such a broad definition of market. The Committee did not acknowledge this problem.

In any event, if the Committee believed the ACCC's merger guidelines to be appropriate, then why not recommend that this interpretation be given legislative effect? In addition, the argument that the authorisation process can accommodate any issues that do result in an overly narrow definition of market is flawed. Market definition is a necessary first step in applying the *competition* test. If the existing test is inadequate it should be rectified, rather than leaving it to the authorisation process to undo any damage caused by an unrealistic definition of market – even if it could be demonstrated that the authorisation process was capable of achieving this objective, which is doubtful. The Committee's dealing with this issue – or rather their failure to deal with it - was unsatisfactory.

### ***Creeping acquisitions***

Finally, it was submitted that the law should be changed to deal directly with creeping acquisitions.<sup>97</sup> This refers to the situation where no individual merger

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<sup>95</sup> ACCC, 'Merger Guidelines', above n 7, p 37 (para 5.63)

<sup>96</sup> Brunt, above n 88, p 3.

<sup>97</sup> See, for example, Independent Paper Group, above n 42, p 2; Small Business Development Corporation, above n 42, p 5 ('... current merger provisions are inadequate to prevent growth by "creeping acquisitions" ...'); Association of Consulting Engineers Australia, above n 53, p 10 ('[a] new specific prohibition against anti-competitive creeping acquisitions is called for ... While a large acquisition by a dominant corporation can, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to be subject to the same scrutiny. Where in fact scrutinised the ACCC faces considerable limitations on its ability to assess the cumulative effect of the creeping acquisitions on the level of competition. ... '); Fair Trading Coalition, above n 42, p 37; NARGA, above n 51, p 9 (recommends 'a new prohibition against anti-competitive creeping acquisitions be introduced ... [p 29] ... although individually these minor or one-off acquisitions may not substantially lessen competition, they may collectively substantially lessen competition to the detriment of consumers. ...'); National Association of Retail Grocers of Australia, *Supplementary Submission 2 to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 206, Trade Practices Act Review 2002, p 7 (recommends insertion of a new s 50(7) into s 50 'providing that where s 50(1) and s50(2) do not

in a particular market will substantially lessen competition, but a number of small mergers, over time, may have the same effect. The majority of submissions on creeping acquisitions made reference to the retail grocery market as a prime example of creeping acquisitions which may ultimately result in a significant lessening of competition.

Some submissions argued that a 'cap' should be placed on the market share of companies, beyond which acquisitions should not be permitted (or at least not permitted without approval),<sup>98</sup> while others argued that s 50 should be altered to allow the ACCC to take into consideration the cumulative effects of the current and previous mergers by the same party.<sup>99</sup>

The counter-argument to this, set out by the Dawson Committee in its report, was that a cap would 'stifle competition and protect the unsustainable position of inefficient competitors'.<sup>100</sup> The Committee believed that the current s 50, combined with the ACCC's merger guidelines adequately dealt with creeping acquisitions. They also accepted that a cap would prove 'unworkable' and could deny consumers access 'to the products or services offered by an efficient producer'.<sup>101</sup> Similarly, the Committee rejected (although not

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prevent the acquisition, yet the cumulative effect of the proposed acquisition and previous acquisitions in any relevant market is to SLC in any relevant market, the proposed acquisition is not to proceed unless authorized or subject to an enforceable undertaking ... [p 24] ... Creeping acquisitions are an obvious way to avoid scrutiny under the existing s50'; Victorian Government, above n 30, p 3 ('current merger law does not cover the gradual acquisition of small participants in an industry by a larger participant').

<sup>98</sup> Association of Consulting Engineers Australia, above n 53, p 11; Fair Trading Coalition, above n 42, pp iv & 37; NARGA, above n 51, p 81 (propose that a 'concentrated market notice' be issued when markets are identified as highly concentrated); Pharmacy Guild of Australia, above n 42, p 2; Spier Consulting, above n 42, p 22; WA Independent Grocers Association (Inc), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, 'Restoring Competitive Equality in an Increasingly Anti-Competitive Environment', Public Submission 158, Trade Practices Act Review 2002, p 13.

<sup>99</sup> Small Business Development Corporation, above n 42, p 5; Association of Consulting Engineers Australia, above n 53, p 10; Fair Trading Coalition, above n 42, p 37 (recommends TPA provisions should be altered to allow 'ACCC to take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition ...'); NARGA, above n 51, p 29 ('[w]here the cumulative effect of acquisitions is to substantially lessen competition, NARGA would submit that s 50 should allow consideration of such a cumulative effect. Not to do so has the potential to undermine the operation of s 50 in those instances where an entity can over time acquire a substantial degree of market power through relatively minor piecemeal or ad-hoc acquisitions'); Boswell, above n 42, p 17 (merger provisions could be amended 'to allow the ACCC to take into consideration previous mergers ... and to aggregate the effect of previous mergers'); Pharmacy Guild of Australia, above n 42, p 2 ('... the Act should be amended to allow the ACCC to take into consideration previous mergers and assess the resultant state of competition in any relevant market ...'); Victorian Government, above n 30, pp 3, 12 & 15 (s 50 should be strengthened to 'allow for cumulative effects rather than just 'one-off' acquisitions. This could be sectorally based' (at p 3)); NARGA (supp 2), above n 97, pp 7, 24-25. It was also argued that the s 50(3) criteria should be amended to include a reference to creeping acquisitions. The Committee considered that the existing s 50(3) was already capable of addressing this issue where relevant: Dawson Report, above n 1, p 67.

<sup>100</sup> Dawson Report, above n 1, p 67.

<sup>101</sup> The Committee claim that the Baird Committee and ACCC both agree this would be unworkable (Dawson Report, above n 1, p 67). The Baird Committee reported in 1999: Report by the Joint Select Committee on the Retailing Sector (the Baird Committee), *Fair Market or Market Failure? A Review of Australia's retailing sector*, Parliament of the Commonwealth of Australia, Canberra,

expressly) the proposal that the Government should declare highly concentrated industries<sup>102</sup> which, once declared, would require notification to the ACCC before any acquisition could proceed.<sup>103</sup> The Committee claimed that compulsory notification:

‘might result in larger participants establishing new facilities rather than acquiring existing businesses, possibly to the detriment of those wanting to sell their business.’

It is not clear why the Committee believed this would be the case. If the test applied were to be something other than the existing substantial lessening of competition test (as suggested in some submissions) this may have some implications, but the Committee does not suggest the test applied would be different to the existing test.

Requiring notification in certain industries, absent a modified substantive test would have virtually no effect at all – thus, the Committee was correct to reject this in isolation, though not for the reasons provided. However, a mandatory notification requirement in certain industries, combined with a modified substantive test, such as one requiring the ACCC (and the courts) to combine the effect of the current acquisition with the effect of previous acquisitions by the same party, or one that required a general public benefit analysis before the

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1999 ('Baird Report'). This report (at p viii and pp 47-53) states that the Committee heard compelling evidence that a market cap (of the nature suggested to that Committee – which would have required divestiture of existing assets) would prove unworkable. The ACCC's submission to the Dawson Report does not contain any suggestion that a cap as proposed in Dawson Review submissions would be unworkable. The Baird Committee Report does, however, indicate that the then Chairman of the ACCC, Professor Allan Fels, provided evidence to the Baird Committee that there would be 'significant mechanical problems associated with a market cap' (Baird Report, p viii; see also p 51).

<sup>102</sup> See, for example, Fair Trading Coalition, above n 42, p 37, which suggests that the Government could 'declare' certain highly concentrated industries and 'where declared any acquisitions would need to be notified to the ACCC and assessed by the ACCC on public benefit criteria ...'.

<sup>103</sup> Despite supporting the Baird Committee's finding on viability of a market 'cap', the Committee did not acknowledge the Baird Committee's recommendation that "mandatory notification of retail grocery store acquisitions by publicly listed corporations be prescribed within the mandatory Code of Conduct (Recommendation 5), and approved by the ACCC, with a requirement that the ACCC consult with local authorities and other relevant parties in order to make an informed assessment of the likely impact on local businesses of such acquisitions. ..." (Recommendation 4). The Government rejected this proposal ('the Government does not consider there is a need for mandatory pre-notification of retail grocery store acquisitions by publicly listed companies to be prescribed within a code of conduct. Mandatory pre-notification systems can be complex and difficult to administer. A pre-notification requirement would increase costs for businesses, and - most importantly - be unnecessary because the Trade Practices Act already prohibits acquisitions or mergers which would have the effect or likely effect of substantially lessening competition in a substantial market': *Government Response to the Report of the Joint Select Committee on the Retailing Sector: Fair Market or Market Failure*, December 1999, p 4 <[http://www.aph.gov.au/senate/committee/retail\\_ctte/govt\\_resp.doc](http://www.aph.gov.au/senate/committee/retail_ctte/govt_resp.doc)>). However, the Dawson Committee does acknowledge that the current voluntary Retail Grocery Industry Code of Conduct provides that industry participants will notify the ACCC of acquisitions (paragraph 8: <<http://www.mediate.com.au/rgio/code.htm>>).



merger could proceed, may assist in resolving the problems associated with creeping acquisitions. The Committee did not consider these proposals at all.

In its general discussion of this issue the Committee noted that where a market is competitive, the preservation of the *number* of participants should be left to industry policy; competition law – which should focus on *competition* – was not the appropriate mechanism for the protection of the number of participants.<sup>104</sup>

[W]hile a genuine competitive environment exists, the preservation of the number of competitors in a market is more a matter for industrial policy than for competition policy. A concentrated market may be highly competitive.<sup>105</sup>

It is suggested that this reasoning is flawed. While s 50 is designed to protect and preserve competition, it does not call on the ACCC to determine whether a genuinely competitive environment exists. It calls upon the ACCC to determine whether the proposed merger would substantially lessen the existing level of competition; that is a *different* test. A by-product of protecting competition in a market may also be the protection of some existing competitors.<sup>106</sup> It is clearly possible for there to be a substantial reduction in competition despite a competitive environment remaining post-merger. However, when small ‘creeping’ acquisitions each lessen competition by only a ‘small’ amount this criteria is unlikely to be satisfied, despite the fact that, over time, a number of these acquisitions might substantially lessen competition – whether or not there remains a competitive market environment. The question put before the committee by a number of submissions was, in effect, as follows:

Why is one acquisition, that substantially lessens competition, prohibited, but a series of smaller acquisitions by the same party, which individually do not substantially lessen competition, but have the combined effect of substantially lessen competition, not prohibited.

This question was not answered by the Committee. It is not clear whether they even understood the question. For example, the Committee stated that

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<sup>104</sup> Dawson Report, above n 1, p 67.

<sup>105</sup> Dawson Report, above n 1, p 67.

<sup>106</sup> In that respect, the Chairman of the ACCC has acknowledged that: ‘[I]t may be the case that to promote and nurture competition in a market, it is necessary to intervene to protect competitors or a class of competitors in that market from substantial damage or indeed elimination as a result of a course of behaviour by another competitor’: G Samuel, ‘A New Chairman of the Australian Competition and Consumer Commission: A Change in Substance or a Change in Style?’, Melbourne Press Club, Melbourne, 18 July 2003, p 3 <[http://www.accc.gov.au/speeches/2003/Samuel\\_Melb.pdf](http://www.accc.gov.au/speeches/2003/Samuel_Melb.pdf)>. Samuel also acknowledges (at p 3) that the ‘purpose of competition policy is to promote competition in the interests of consumers, not to preserve competitors or to protect certain sectors of business from the rigours of competition.’

'[n]othing before the Committee suggests that the ACCC is not presently aware of acquisitions that raise competition concerns under section 50'.<sup>107</sup>

Regardless of how aware the ACCC may be about creeping acquisitions, they are not able to effectively deal with them because they are restricted by the current legislative definition requiring 'the' current acquisition to substantially lessen competition, without regard to the cumulative effect of previous acquisitions. The whole point of the submissions, which seems to have been lost on the Committee, was that creeping acquisitions do not meet the s 50 criteria.

Recently, Ergas has criticised this 'dismissive view' of creeping acquisitions.<sup>108</sup> He likens creeping acquisitions to hair loss – no one lost hair will make you bald, but if it keeps happening you're in trouble. Similarly with mergers, while no one merger in a particular industry may substantially lessen competition, several may do so without breaching the current provisions – which analyse only the current one. Ergas offers no easy solution, but also expresses his disappointment that the Committee didn't consider it further. This author agrees.

## Retention of the informal clearance process with some modifications

### ***Reasons to be provided in some cases***

The first of the formal recommendations was that the current informal clearance process, whereby parties may voluntarily approach the ACCC seeking their views on a proposed merger, should be retained, but that the ACCC should be required to provide reasons for their decision in some cases. Specifically, 'adequate' reasons must be provided where informal clearance is denied, or cleared subject to the parties providing enforceable undertakings and where the parties request reasons.<sup>109</sup>

This conclusion is in line with the majority of submissions on this issue. Submissions generally expressed satisfaction with the informal clearance

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<sup>107</sup> Dawson Report, above n 1, p 67.

<sup>108</sup> H Ergas, 'Doubts about Dawson', NECG, June 2003, <[http://www.necg.com.au/pappub\\_PSRsAP.shtml](http://www.necg.com.au/pappub_PSRsAP.shtml)>. See also H Ergas, 'Good Report, Pity About All the Flaws', *Australian Financial Review*, 18 June 2003, p 63.

<sup>109</sup> Dawson Report, above n 1, p 69. [The ACCC has recently announced that it will provide detailed reasons in the circumstances recommended in the Report: see ACCC, 'ACCC to Publish Reasons for its Merger Decisions', Media Release 238/03, 12 November 2003.](#)

system.<sup>110</sup> In particular, parties would prefer not to be *required* to notify the ACCC<sup>111</sup> and are generally satisfied with the speed at which the ACCC provides their decisions.<sup>112</sup> However, a number of problems were identified in the submissions. The three key complaints related to the lack of transparency,<sup>113</sup> the lack of immunity from challenge by third parties or the ACCC and the fear that the ACCC may be able to use its position to extract undertakings from parties that are not necessary to alleviate the ACCC's competition concerns.

In respect of transparency, numerous submissions noted that they considered the current voluntary mergers register inadequate<sup>114</sup> and called for reasons to be provided in some<sup>115</sup> or all cases,<sup>116</sup> provided confidential matters could be

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<sup>110</sup> The ACCC does maintain a voluntary register but it is incomplete and does not provide much detail on the ACCC's evaluation of the proposal. See for example: United Energy, above n 12, p 7 (the 'flexibility inherent in the ACCC's informal clearance process is generally in tune with the commercial realities of a merger. ...'); ANZ, above n 10, p 5 ('... strengths [of informal clearance include] that mergers which obviously do not create any competition concerns can be dealt with expeditiously ...'); Fair Trading Coalition, above n 42, p 35 (the 'Australian merger regime is one of the fastest and least cumbersome of those jurisdictions having merger control'); Department of Agriculture, Fisheries and Forestry, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 120, Trade Practices Act Review 2002, p 21 ('... the ACCC is understood to be world's best practice in respect of timeliness for its informal consideration of merger proposals'); AAPT Limited, above n 42, p 14.

<sup>111</sup> See, for example, Law Council of Australia, which examined the cost and inefficiency experienced in other jurisdictions having a mandatory notification system (including the United States and the European Union) and concluded that given the significant administrative inefficiencies that would follow, there 'is no demonstrable need for compulsory pre-merger notification in Australia (Law Council of Australia, above n 9, pp 14-17).

<sup>112</sup> Some submissions expressed dissatisfaction at the time frame for clearance and suggested the ACCC regularly exceeded the time frames they set for themselves. See, for example, United Energy, above n 12, p 7 ('... timing is a key issue for merging parties and this is one area the informal clearance process does not take into account. ... By simply delaying a decision on a merger the ACCC may be effectively blocking it from proceeding. ...' [footnotes omitted]).

<sup>113</sup> See for example: United Energy, above n 12, p 7 ('... the process should be clearly set out in the TPA or an enforceable code in order to provide greater transparency.')

<sup>114</sup> ANZ, above n 10, p 6 (the voluntary competition analysis the ACCC presents 'is perfunctory at best, usually just a couple of short paragraphs and rarely more than one page ...'); SFE Corporation, above n 10, p 5 ('[t]he volume and detail of any such information is at the discretion of the ACCC'); Brebner, above n 42, p 7 (the voluntary register 'is deficient in many respects. It contains only limited information about the competition analysis undertaken and omits certain essential information in many cases ...'); and Securities Institute of Australia, above n 80, p 1 (notes that the current process doesn't require ACCC to provide full reasons and the reasons it does provide are often inconsistent).

<sup>115</sup> Those submissions that did not call for reasons in all cases (because of efficiency concerns) suggested that reasons should be provided when either/or a merger was rejected, undertakings extracted, thresholds crossed or there was otherwise merit in providing reasons: see ANZ, above n 10, p 6 ('... complex cases and those that cross its concentration thresholds ...'); SFE Corporation, above n 10, p 13 ('if it opposes a merger'); Law Council of Australia (supplementary), above n 9, p 11 (international experience indicates 'that if the ACCC were required to give written reasons in relation to every informal clearance application, these potential advantages may be outweighed by the inefficiency associated with the increased administrative burden. ...'). Written reasons should be required 'where informal clearance is refused' and 'where informal clearance is granted or a no action letter is provided subject to s87B undertakings or other conditions'. The ACCC could also choose to publish reasons in other cases, such as where market definition is contentious; and Business Council of Australia, *Supplementary Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 197, Trade Practices Act Review 2002, p x (more extensive reasons should be given where ACCC opposes a merger, the merger is cleared with conditions, 'the merger raises new issues, or a new approach is adopted by the ACCC', 'the merger occurs in a sector of the economy not recently examined by the ACCC' and/or, 'they are requested by the parties').

excluded.<sup>117</sup> In addition to improving transparency,<sup>118</sup> the key reason given was the desire for development of precedent to ensure greater certainty and consistency.<sup>119</sup> The majority of submissions on this issue called for 'substantial'<sup>120</sup> or 'detailed'<sup>121</sup> reasons to be provided with a few suggesting a more detailed list of what should be contained in any published reasons.<sup>122</sup>

The Committee believed their recommendation<sup>123</sup> would address these concerns. Specifically, the Committee opined that it would allow development of precedent to overcome the current potential for inconsistency and the lack of predictability for merging parties<sup>124</sup> and it would also limit the ability of the ACCC to unnecessary undertakings.<sup>125</sup>

This was, generally speaking, a good recommendation. The current register is incomplete (and even inaccurate) in several respects and does not provide sufficient detail of the ACCC's processes for any meaningful precedent to develop. While not binding due to the appropriately voluntary nature of the process, any precedent that could be developed would, at the least, provide a valuable guide to the ACCC's current thinking and increase the transparency of the ACCC's processes. Given that clearance is so heavily relied upon to determine whether a merger will proceed,<sup>126</sup> it is desirable that such precedent

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<sup>116</sup> Armitage, above n 42, p 2; AAPT Limited, above n 42, p 14; Business Council of Australia, above n 39, p 13 ('... to clear or oppose a merger or acquisition ...'); Minerals Council of Australia, above n 80, p 5.

<sup>117</sup> National Farmers Federation, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 53, Trade Practices Act Review 2002, p 21; Telstra, above n 38, p 91.

<sup>118</sup> National Farmers Federation, above n 117, p 21 (publishing reasons 'will enable greater scrutiny of ACCC processes'); SFE Corporation, above n 10, p 11 ('... it seems incongruous for such a crucial decision to proceed using a process that remains relatively shrouded in mystery'); Brebner, above n 42, p 7; Armitage, above n 42, p 2; Spier Consulting, above n 42, p 22; Business Law Committee of the Law Council of Australia, above n 42, p 61; AAPT Limited, above n 42, p 14; Seven Network Ltd, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 176, Trade Practices Act Review 2002, p 12.

<sup>119</sup> National Farmers Federation, above n 117, p 21; ANZ, above n 10, p 6; AAPT Limited, above n 42, p 14.

<sup>120</sup> Business Council of Australia, above n 39, p 12; ABA, above n 42, p 2; Minerals Council of Australia, above n 80, p 5 ('substantive and substantial reasons ...').

<sup>121</sup> ANZ, above n 10, p 6 ('...detailed reasons'); Telstra, above n 38, p 91 ('... detailed reasoning ...'); SFE Corporation, above n 10, p 13 ('... detailed reasons and the contents of any expert opinions').

<sup>122</sup> Armitage, above n 42, p 2 ('... reasons should include: the relevant market(s) identified by the ACCC and its reasons; the level of imports and the nature of the data accepted by the ACCC in that regard; the nature and extent of all relevant barriers to entry; the nature and extent of countervailing power in the market and the significance attached to it by the ACCC; and the ACCC's position concerning any other matters raised by the parties to the transaction'); Clayton Utz, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 168, Trade Practices Act Review 2002, pp 1-2 (reasons should address 'in detail, the relevant market definition, the merger factors under section 50(3) and the arguments that the Commission rejected in its consideration of the merger. ...').

<sup>123</sup> Dawson Report, above n 1, p 61.

<sup>124</sup> Dawson Report, above n 1, p 60-61.

<sup>125</sup> Dawson Report, above n 1, p 60.

<sup>126</sup> SFE Corporation, above n 10, p 11 ('...Australian companies have made extensive use of the informal process [and] the informal clearance decision has attained a practical stature that may not have been initially anticipated by the ACCC or the legislature. In the limited time available for commercial deals to proceed, a negative informal clearance response from the ACCC may sound

develop to guide the parties. It remains uncertain, however, what would constitute 'adequate' reasons. Will it require explanation of how the ACCC evaluated market share or would a mere statement of market share determined suffice? Will all factors in s 50(3) need to be analysed and discussed? It is also unclear, given the limited number of clearances denied, or cleared with undertakings, whether a sufficient volume of precedent could develop to provide a meaningful guide to parties. In this respect, some consideration could have been given to the suggestion that the ACCC should be required to provide reasons every time ACCC thresholds were crossed.<sup>127</sup> If this test were adopted, in place of the requirement for the ACCC to provide reasons whenever requested, it might also alleviate any concern that too many parties will 'request' reasons, even where proposals are relatively non-contentious.

The test adopted by the Committee in relation to voluntary informal notifications might not, however, prove too problematic, provided it is implemented in conjunction with the Committee's recommendation for a voluntary *formal* clearance process. This is because merger proponents who are concerned about achieving some sort of certainty are more likely to adopt the voluntary formal process recommended. This would leave virtually no cases in which reasons would need to be given under the informal system; it being almost inconceivable that those merger applications that currently fall within the 5% or less that raise competition concerns each year would be notified under this much more uncertain informal system.

### ***No independent mergers review panel***

The Committee did not believe a review board was appropriate for the informal clearance process.<sup>128</sup> Arguments included that a Review Panel similar to the

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the death knell for a proposed acquisition. ... it seems incongruous for such a crucial decision to proceed using a process that remains relatively shrouded in mystery.'). ANZ, above n 10, p 4 ('... no section 50 cases have gone to court under the SLC test. The end result is that the ACCC's decisions on mergers essentially become *de facto* rulings'). Corones, above n 10, p 67 (because only the 'ACCC and the Minister responsible for the TPA ... have the statutory power to seek to enjoin mergers that are likely to substantially lessen competition pursuant to s. 80(1) of the TPA. ... control over mergers has passed from the courts to the ACCC').

<sup>127</sup> This would occur where a merger would lead to the four largest firms holding 75 per cent or more of the market share, with the merged firm to supply at least 15 per cent of the market, or where the merged firm will supply 40 per cent or more of the market: ACCC, 'Merger Guidelines', above n 7, p 28 (para 5.27).

<sup>128</sup> Dawson Report, above n 1, p 60. See submissions for a general Independent Mergers Panel by Speed, above n 28, p 1 ('[t]he Panel should act informally. Its decisions should be final except on limited grounds. The Panel should have power to constructively shape orders most suitable to the particular merger - with the emphasis on how best to strengthen competition and Australian business'); Investment and Financial Services Association Ltd (IFSA), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 86, Trade Practices Act Review 2002, p 3 ('[a]n independent Mergers Panel should be established to determine whether a merger above a certain threshold is anti-competitive'); Telstra, above n 38, p 92 (submits that a specialist merger division of the ACT should be created for formal clearance and authorisation appeals. Another option might be to create a 'specialist, independent, merger review oversight panel').

Takeovers Panel<sup>129</sup> should be established,<sup>130</sup> that an Independent Mergers Panel be established generally, that a Mergers Review Panel be established for authorisation hearings only<sup>131</sup> and that a Panel be available to review rejected or contentious mergers.<sup>132</sup>

In rejecting these proposals the Committee expressed concerns that this would involve a formalisation of the process that would detract from its current speed and efficiency<sup>133</sup> and that, in any event, a Panel would not be better equipped than the ACCC to assess the proposed mergers.<sup>134</sup>

The cursory nature of the Committee's dealing with these submissions can probably be attributed, in part at least, to their recommendation for a voluntary clearance process which would provide an avenue for appeal.

### ***Additional recommendations regarding informal clearance process***

Other submissions argued that there should be mandatory penalties if a merger, which later proves to be anti-competitive, is not notified<sup>135</sup> and that there should be fees imposed on requests for clearance in order to avoid unnecessary

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<sup>129</sup> The Takeovers Panel is the primary forum for dispute resolution in relation to takeover bids. More information about the panel is available from its dedicated web site: <<http://www.takeovers.gov.au/>>  
<sup>130</sup> IBSA, above n 12, p 5 ('[t]he Mergers Panel would be similar in concept to the Takeovers Panel, which reviews decisions of the Australian Securities and Investments Commission'); UBS Warburg, above n 39, p 8 ('... applicants could choose to apply directly to the panel rather than wait for an ACCC decision ... operate in a similar manner to the Takeovers Panel, separate from the ACCC .... Accountability and transparency will improve .... Also ... should be required to give "post decision reviews" ...'); Law Council of Australia, above n 9, p 18.

<sup>131</sup> NARGA, above n 51, p 12 (proposes the 'creation of a specialized ACCC Merger Authorization Taskforce or Unit').

<sup>132</sup> UBS Warburg, above n 39, p 8 (should introduce 'an independent panel as a first point of review of rejected mergers ... Alternatively applicants could choose to apply directly to the panel rather than wait for an ACCC decision ...'); Business Law Committee of the Law Council of Australia, above n 42, p 64 ('... an independent review panel should be set up to review informal clearance decisions ...'); Allens Arthur Robinson, above n 80, p 6 (argues for introduction of 'independent review panel to refer a decision back to the ACCC for further analysis or to substitute its own decision ...'); Clayton Utz, above n 122, p 3 (argues for a 'quick and efficient administrative review mechanism, by a Review Panel' only available 'for informal merger clearance decisions by the Commission ...'); Woolworths Limited, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 171, Trade Practices Act Review 2002, p 39 (in certain circumstances (eg, where issues are contentious), 'there should be an independent Competition Review Board, which could monitor and review the ACCC's decision on an individual case and overall ACCC policies and guidelines ...'); Securities Institute of Australia, above n 80 p 2; Law Council of Australia (supp), above n 9, p 18 (an independent review panel would 'impose a discipline on the ACCC's informal clearance process in the same way as an appeals process'); IBSA, above n 12, p 1 ('[a]n independent expert Mergers Panel should be appointed by the Treasurer to consider contentious merger applications and resolve any differences between consumer interests and the broader national interest.')

<sup>133</sup> Dawson Report, above n 1, p 60.

<sup>134</sup> Dawson Report, above n 1, p 61.

<sup>135</sup> Fair Trading Coalition, above n 42, p 35 (failure to notify, when eventual breach is found, should 'attract a mandatory extra penalty'); Pharmacy Guild of Australia, above n 42, p 2 (mandatory penalties should be applied for failure to notify 'where a merger is subsequently determined to have SLC'); Spier Consulting, above n 42, p 22.

notifications.<sup>136</sup> Neither of these proposals were mentioned in the Committee's report.

### Voluntary formal clearance process

To overcome the other perceived limitations of the informal clearance process – that is, that it does not provide parties with sufficient certainty and it suffers from a lack of accountability - the Committee recommended the creation of a voluntary formal clearance process to operate parallel to the existing process.<sup>137</sup> This process would provide successful applicants with immunity from legal challenge.<sup>138</sup>

The Committee made it clear that it did not consider that notification should be compulsory. The voluntary nature of this process is designed to ensure both parties and the ACCC do not suffer the costs and other administrative burdens associated with a compulsory notification system and would also be in line with current practice in New Zealand.<sup>139</sup> However, for reasons set out below, it is not clear whether the ACCC would, in practice, avoid the costs and administrative burdens associated with a mandatory notification system.

The Committee acknowledged that this 'formal' process would be less efficient than the informal process and would require parties to provide more detailed information on their proposed merger. Information required for the application should be set out in revised ACCC Merger Guidelines and be sufficient for a 'reasoned assessment' but should not be 'onerous'.<sup>140</sup> The ACCC would have 40 days to review a proposal and make a decision. Time could be capable of extension only at the request of the applicant. If no decision was given within 40 days clearance would be deemed refused.<sup>141</sup> The Committee recommended that appropriate reasons be required,<sup>142</sup> though it is not clear how this would work where a proposal is deemed refused because of the absence of a decision within 40 days. The merger proponents (not third parties) would then have the opportunity to appeal within 14 days to the Tribunal which would have 30 days

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<sup>136</sup> Fair Trading Coalition, above n 42, p 35; Spier Consulting, above n 42, p 23.

<sup>137</sup> Dawson Report, above n 1, p 70, recommendation 2.2. The Committee believed that '[t]he creation of a voluntary formal process that would operate in parallel with the existing informal system would seem to offer the best of both worlds': at p 61.

<sup>138</sup> 'The applicant would have immunity from proceedings by any party while complying with any conditions specified by the ACCC as a condition of the approval of the merger. The ACCC would be required to monitor compliance': Dawson Report, above n 1, p 70, recommendation 2.2.1.

<sup>139</sup> Dawson Report, above n 1, p 62.

<sup>140</sup> Dawson Report, above n 1, p 70, recommendation 2.2.2.

<sup>141</sup> Dawson Report, above n 1, p 70, recommendation 2.2.3. However, note that the Committee considered that the applicant should be able to apply for an extension of time.

<sup>142</sup> Dawson Report, above n 1, p 62.

to review the material and reach a decision whether to clear a merger, refuse clearance or provide a conditional clearance.<sup>143</sup>

The Committee considered that this process would increase accountability of the ACCC,<sup>144</sup> provide parties with greater certainty when proceeding with a merger and, because of its optional nature, would mean that the benefits of the informal clearance system could be retained.

The Committee acknowledged that this process would effectively remove the rights of interested third parties to challenge a merger once clearance is given, but believed this could be addressed by requiring the ACCC to engage in 'appropriate' consultation with interested third parties.<sup>145</sup>

Given the recommendation, there were surprisingly few submissions on this issue. Some simply noted the problem of 'uncertainty' with the existing system,<sup>146</sup> some called for statutory recognition of the current process to allow those mergers that were cleared to proceed with certainty,<sup>147</sup> some specifically called for a formal notifications system to compliment the existing informal one<sup>148</sup> and a few expressed opposition to the idea of a voluntary formal clearance process.<sup>149</sup>

The option of a voluntary formal clearance system is a good one, provided some difficulties, which were not addressed by the Dawson Committee, could be overcome. First, increased administrative costs of the ACCC and Tribunal must be accommodated. Second, there would need to be some deterrent to prevent all merger proponents seeking this path – if formal clearance is free, why would anyone seek informal clearance which doesn't provide the same

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<sup>143</sup> Dawson Report, above n 1, p 64. The Tribunal hearing would not be a hearing de novo and should be made within 30 days. The Tribunal could clear, reject or clear subject to conditions: recommendation 2.2.4.

<sup>144</sup> Dawson Report, above n 1, pp 61-62

<sup>145</sup> Dawson Report, above n 1, p 64.

<sup>146</sup> Shell Australia, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 15, Trade Practices Act Review 2002, p 5 ('... the current informal clearance process ... does not give the parties to the proposal a sufficient degree of certainty, in that ... the proposal remains exposed to attack from third parties'); ANZ, above n 10, p 4; Australian Industry Group, above n 29, p 12 ('[r]esort to the informal process of clearance leads to uncertainty and cannot satisfy commercial and legal requirements that require unequivocal approvals'); Telstra, above n 38, p 92.

<sup>147</sup> Shell Australia, above n 146, p 1 ('[t]he informal clearance process should be given statutory recognition to allow those proposals which have obtained informal clearance to proceed with certainty'); Fair Trading Coalition, above n 42, p 35 (the act should specifically recognise the informal clearance system); BP Australia, above n 39, p 4 (the process for informal clearances should be reviewed to make them binding).

<sup>148</sup> Telstra, above n 38, p 4 (a 'hybrid approach should be adopted based on an optional formal or informal clearance process' and, at p 91, '[f]ormal clearance would be subject to a clear statutory procedure which set out strict time-frames and criteria for Commission decision-making. ... would be confidential, at the option of the party seeking clearance').

<sup>149</sup> The key reason for opposing the voluntary formal system was that it would reduce the ability of interested third parties to express their views or challenge the merger.



level of security?<sup>150</sup> A modest, but real, cost associated with the formal clearance system would help to ensure that it is limited to those mergers most appropriately dealt with through this method; that is, those cases where the merger thresholds are likely to be approached or exceeded, or those cases where third party intervention is likely. Third, details about how long the clearance, once granted, would remain in force would need to be determined,<sup>151</sup> along with a mechanism for ensuring the merger is implemented in the way approved by the ACCC (with no significant modifications).<sup>152</sup> Finally, the problem of how to deal with proposed mergers that raise concerns under other provisions of the TPA would need to be addressed.

Unless these difficulties are overcome prior to any legislative implementation of the Committee's recommendations, there is a risk that the voluntary formal process would become the norm for all proposed mergers. This would have significant resource implications for the ACCC, beyond that predicted by the Committee.

## Undertakings

As indicated earlier, it was claimed in a number of submissions that section 87B undertakings could currently be extracted

'even though the parties involved do not consider them to be appropriate, because undertakings are often considered to be a more commercially realistic option than ... authorisation ...'<sup>153</sup>

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<sup>150</sup> D Inglis, 'New Avenues for Competition Clearance', Minter Ellison, *Mergers & Acquisitions*, May 2003, p 5 ('[w]e anticipate that the voluntary formal merger clearance process will become the process of choice for merging companies. Its principal advantages are likely to be speed and certainty, the existence of formal statutory protection once clearance is granted, and the ability to seek a review by the Tribunal if the ACCC rejects the application for clearance.')

<sup>151</sup> See, for example, the submission of Telstra, above n 38, p 91, suggesting that 'if granted the clearance would remain in force for 12 months ... [d]uring this period, a statutory immunity would apply.'

<sup>152</sup> The Dawson Committee indicated that the ACCC would be required to monitor compliance with any conditions for clearance: Dawson Report, above n 1, p 70, recommendation 2.2.1.

<sup>153</sup> Dawson Report, above n 1, p 49. The Committee goes on to observe that '[u]ndertakings may be inappropriate, it is said, because they go beyond the scope of competition concerns in the relevant market or, if relevant to the relevant market, go too far because they are not necessary for the purpose of ensuring the merger does not substantially lessen competition'. See further Shell Australia, above n 146, p 6 ('... the Commission has used [enforceable undertakings] as a means to reconstruct an industry or business to conform with its vision. In so doing, the Commission strays beyond the purpose of the undertakings, namely, to redress the perceived anti-competitive impact of the proposal. This intervention can have dangerous and distorting commercial implications. ...'); ABA, above n 42, p 12 ('... it is not always clear that the remedy, which is effectively imposed by the ACCC ... is set to the minimum level necessary to address the competition problem identified. ... use of section 87B undertakings ... appears at times to be disproportionate to the anti-competitive detriment ...'); Securities Institute of Australia, above n 80, p 2 ('commercial circumstances may often force merger parties to offer undertakings which are disproportionate to the competition problems they are intended to address').

Other submissions took the view that undertakings were undesirable because interested third parties did not have sufficient input and recognition in the undertaking 'deal-making' process.<sup>154</sup> To deal with this perceived problem, some called for strict guidelines to which the ACCC would be bound when extracting undertakings,<sup>155</sup> while others called for greater transparency for undertakings generally.<sup>156</sup>

It is certainly possible to imagine that undertakings could be extracted that were not necessary to ensure a proposed merger would not result in a substantial lessening of competition. Given the current absence of a requirement for detailed reasons for giving the undertakings, there are understandable concerns in this regard. While not directly addressing the submissions relating to undertakings, the Dawson Committee's recommendation that reasons be given in all cases where undertakings are extracted (whether as part of the formal or informal notification process) should go some way to addressing these transparency issues.

Further, complaints that third parties do not have sufficient input are also misconceived – if undertaking addresses anti-competitive concerns (that is, they are only given and received for this purpose as required by the Act) then third parties should not be concerned. If they believe that undertakings do not achieve this purpose and the proposed merger would be anti-competitive then, at least under the informal clearance system, third parties may take private action in relation to the merger.

### A new authorisation system

Submissions in relation to authorisation fell into two categories; those relating to whether authorisation should be able to be made directly to the Tribunal and those calling for amendments to the public benefits test.

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<sup>154</sup> Pharmacy Guild of Australia, above n 42, p 2 (claims the process for accepting s 87B undertakings should be more transparent. In particular, ACCC should consult with interested parties); Fair Trading Coalition, above n 42, pp iii & 30 ('... the process for accepting s87B undertakings should be more transparent, with the Commission being required to consult with all interested parties ... before those undertakings are accepted by the Courts').

<sup>155</sup> Shell Australia, above n 146, p 6 ('Shell submits that the Commission should be bound to follow the strict guideline that, when seeking enforceable undertakings, those undertakings should only extend to matters which directly relate to redressing the anti-competitive effect of a proposal'); Securities Institute of Australia, above n 80, p 2 (merger guidelines should be amended to 'provide more guidance on the circumstances in which enforceable undertakings will be used'); ABA, above n 42, p 2 (should expand Merger Guidelines 'to provide greater guidance in relation to the circumstances in which section 87B undertakings will be used, to ensure they are appropriate and proportional to the actual competitive concerns associated with mergers.')

<sup>156</sup> ANZ, above n 10, p 5 (claims a weakness of the informal process is it leads to 'deal making' and the ACCC's actions can be 'difficult to understand and it is under no obligation to explain them'); NARGA, above n 51, p 12 (recommends greater transparency for enforceable undertakings); Minerals Council of Australia, above n 80, p 5 (more transparency needed).

### ***Application direct to the Tribunal***

The TPA currently permits parties to make application to the ACCC for authorisation of mergers that would otherwise substantially lessen competition where it can be demonstrated the merger would result in such benefit to the public it should be allowed to take place.<sup>157</sup> Any sufficiently interested party may appeal to the Tribunal for a review of a grant (or denial) of authorisation.<sup>158</sup>

The key submissions in relation to direct application to the Tribunal fell into three categories:

- those that recommended direct application to the Tribunal for authorisations;<sup>159</sup>
- those that recommended there should be an *option* of applying first to ACCC and then the Tribunal, or to the Tribunal at first instance;<sup>160</sup>
- those that recommended against any option of applying to the Tribunal at first instance<sup>161</sup>

It was also argued by some that because authorisation necessarily permits mergers that substantially lessen competition the process should be a difficult

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<sup>157</sup> See TPA, ss 89(9) and 90(9).

<sup>158</sup> TPA, s 101.

<sup>159</sup> Many submissions calling for direct application to the Tribunal did not indicate whether direct application would be optional or compulsory. See BP Australia, above n 39, p 5 ('[t]here should be direct applications to the Australian Competition Tribunal for merger authorizations within strict time limits ...'); McComas, above n 43, p 13 ('[p]rovide for direct access to the Australian Competition Tribunal for all authorisation applications, ... [However], careful thought would have to be given to the practicality of this suggestion before it could be adopted'); Business Law Committee of the Law Council of Australia, above n 42, pp 2 & 56 (direct application to ACT should be available); Victorian Government, above n 30, p 13 (the suggestion of allowing parties to go straight to ACT for authorisation is worthy of consideration); Seven Network, above n 118, p 13 ('... the Act should be amended to allow parties to take their matters directly to the [Tribunal] rather than first having to go through a protracted process with the ACCC ...'); Securities Institute of Australia, above n 80, p 2 (authorisation provisions should allow merger parties to 'apply directly to the ACT for review').

<sup>160</sup> See Shell Australia, above n 146, p 5; A Tonking, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 64, Trade Practices Act Review 2002, p 1; Business Council of Australia, above n 39, p 13; ABA, above n 42, p 2; Allens Arthur Robinson, above n 80, p 6.

<sup>161</sup> ACA, above n 81, p 27 (direct application to the Tribunal would 'remove the merger proposal into a forum which is inaccessible to many ... Bypassing the Commission, and taking a merger bid to the unappealable decision of the Tribunal, which has much less expertise than the Commission, is clearly a very attractive option to the big business [28] community. ...The present ACCC process allows for independent research and wide community input. It would not be a good outcome for the Australian economy, or a good process for the society, if wide public participation in decisions about mergers that substantially lessen competition were effectively denied'); Australian Business Limited, above n 43, p 4 ('[f]or smaller and medium sized business, the issue of larger business mergers is much too important for it to be conducted with no opportunity for review'); Communications Law Centre, above n 43, p 6 (proposals that initial consideration be moved to the ACT 'would ... tend to exclude public input and would remove the right to appeal ...'); Canberra Consumers, above n 44, p 3 (moving authorisation to the Tribunal 'would effectively lock out consumers, small businesses and other poorly resourced stakeholders from the decision making process'). See also R Smith & T Grimwade, 'Authorisation: Some Issues' (1997) 25 *ABLR* 351, who discuss in detail the benefits and detriments associated with direct access to the Tribunal for authorisation.

one – and that there is no real problem with the current system.<sup>162</sup> It was also noted that most countries, including the United States, Canada and the European Union, have no mechanism whereby mergers that would otherwise contravene their laws can be authorised on public benefit grounds.<sup>163</sup>

However, the bulk of the submissions complained that the current authorisation process was too time-consuming, which made it commercially unrealistic for parties to time-sensitive mergers to make application and that, therefore, it needed to be more efficient.<sup>164</sup> It was also argued that the fact so few authorisations have been made – and even less successfully – provided evidence of a failure of the current system – or at least evidence of a system in need of drastic reform.<sup>165</sup> Another complaint was that the process was too public and, hence, commercially unattractive.<sup>166</sup>

Despite observing that public interest requires merger authorisation applications to be ‘thoroughly investigated’<sup>167</sup> and conceding that this will inevitably require ‘a public and relatively lengthy process’,<sup>168</sup> the Committee accepted that the current authorisation process was commercially unrealistic, based primarily on the observation that only 5 applications for authorisation had been made in the previous 8 years. The key concern accepted by the Committee was in relation to the potentially lengthy time-frame associated with authorisation applications. While the ACCC has 30 days (45 if complex) to review a merger, this time may

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<sup>162</sup> ACA, above n 81, p 6 (‘... business is reluctant to make its arguments in public since it does not wish to subject itself to the public scrutiny that this process involves. ... business needs to get itself into the 21<sup>st</sup> century, where societal requirements for transparency and public scrutiny will be increasing, not decreasing’); Telstra, above n 38, p 99; Spier Consulting, above n 42, p 22; Canberra Consumers, above n 44, p 4 (‘... business is reluctant to make its arguments in public because it does not wish to subject itself to public scrutiny. This goes against societal requirements for the transparency and the process of public scrutiny that supports and promotes an effective marketplace and many other democratic principles’).

<sup>163</sup> The Committee notes that this ‘flexible’ approach of allowing mergers which do SLC to proceed where public benefit can be demonstrated ‘is not to be found in other jurisdictions’: Dawson Report, p 58. However, note that in some jurisdictions the government, or relevant minister, has the power to ‘approve’ an otherwise unlawful merger (see, for example, Germany) and some other jurisdictions incorporate a form of public benefit test into their substantive merger analysis.

<sup>164</sup> Shell Australia, above n 146, p 4 (‘[i]t is ... imperative that the process for authorising mergers and acquisitions is as efficient as it can be and that any inefficiency in the process itself does not either cause deals to fail or deter mergers and acquisitions from being undertaken at all. ... the current authorisation process does contain some aspects which can result in a longer and more inefficient process than is necessary’); BP Australia, above n 39, p 4 (‘... the current process is marked by delays and uncertainty, which can be detrimental to the business involved. ...’); Commonwealth Bank, above n 28, pp 10-11; Australian Industry Group, above n 29, p 49; Business Law Committee of the Law Council of Australia, above n 42, pp 54 & 67-68 (claims the ‘clock-stopping’ mechanism in s 90(11)(a), which stops the time limit when ACCC requests further information, can significantly extend the time limit and claims that this ‘does not impose sufficient discipline on the ACCC’s consideration’ of mergers.)

<sup>165</sup> See for example: Shell Australia, above n 146, p 4; Business Council of Australia, above n 39, p 75 (‘[t]he low number of authorisations sought for mergers provides ample illustration of the failure of the current process’); SFE Corporation, above n 10, p 2; Business Law Committee of the Law Council of Australia, above n 42, p 54.

<sup>166</sup> See Australian Industry Group, above n 29, pp 49-50.

<sup>167</sup> Dawson Report, above n 1, p 66.

<sup>168</sup> Dawson Report, above n 1, p 66.

be extended if the ACCC requests more information from the applicant, or with the agreement of the applicant. Of greater concern to the Committee was that even if the ACCC reached a decision favouring authorisation an appeal could be made by any interested party to the Australian Competition Tribunal,<sup>169</sup> which would have 60 days to hear the matter de novo and reach a decision. The Tribunal is also able to extend this time frame in certain cases.

In response to these concerns, the Committee recommended that applications for authorisation be made directly to the Tribunal who would have a time limit of 3 months to determine an application.<sup>170</sup> There would be no review on the merits from a decision of the Tribunal.<sup>171</sup> Authorisation would thus become a 'one-step' process.<sup>172</sup> The Committee considered that this lack of a review mechanism 'may be regarded as a shortcoming' but considered this would be off-set by the benefits of time saving and greater certainty of outcome which would make the process more commercially acceptable.<sup>173</sup>

The Committee also accepted that this proposal would have 'significant implications' for the Tribunal<sup>174</sup> and that Tribunal resources would need to be enhanced to facilitate this new role.<sup>175</sup> They also acknowledged there would have to be a way to enable third parties to present their views.<sup>176</sup> In this respect, they recommended that the ACCC 'appear to assist the Tribunal'<sup>177</sup> and that the ACCC should use resources to

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<sup>169</sup> A number of submissions complained about the low threshold for third party intervention: see Shell Australia, above n 146, pp 5 (the 'low threshold required for a party to establish itself as a sufficiently interested party to appeal a Commission decision to grant an authorisation, and thereby significantly prolong the process, is unnecessary and should be reformed. ... the only parties who should be permitted to appeal against a decision of the Commission are the parties directly involved in the merger itself'); ANZ, above n 10, p 5 ('[a] major problem with the authorisation process is that any person that can establish a sufficient interest can make an application to the Australian Competition Tribunal. ...'); Commonwealth Bank, above n 28, p 11 ('... objections by third parties should be subject to disciplines designed to deter unsubstantiated or vexatious submissions'); Fair Trading Coalition, above n 42, p 35 (should allow only applicant or federal minister to have standing to appeal to ACT); Spier Consulting, above n 42, p 22 (should allow only applicant or federal minister to have standing to appeal to ACT); Tonking, above n 160, p 1 ('... a grant of authorisation may be set at nought by a person who has a "sufficient interest" and who is dissatisfied with the ACCC's determination'); Australian Industry Group, above n 29, p 52 ('[c]ommercially only the parties to the merger and the regulatory authorities should have any say in the deliberations'); Allens Arthur Robinson, above n 80, p 6 (only 'persons with a real and substantial interest in an authorisation should be able to seek a review by the Tribunal').

<sup>170</sup> Dawson Report, above n 1, p 70, recommendation 2.3.1.

<sup>171</sup> Dawson Report, above n 1, p 70, recommendation 2.3.2. Judicial review would be available (Dawson Report, above n 1, p 65). Note, in this respect, the difficulties of judicial review for the authorisation process, discussed in Smith & Grimwade, above n 161, pp 364-365.

<sup>172</sup> This is quite an extra-ordinary finding given the submissions did not even argue for it as the only option – but rather as an available option. See J Schubert, 'Trade Practices Act Now Hinders More Than Helps', *Australian Financial Review*, 10 July 2003, Supplement, p 11: 'The Dawson committee recommended that direct application to the tribunal occur for all authorisations, although the BCA argued it need only be an option available to merger proponents.'

<sup>173</sup> Dawson Report, above n 1, p 65.

<sup>174</sup> Dawson Report, above n 1, p 65.

<sup>175</sup> Dawson Report, above n 1, p 66.

<sup>176</sup> Dawson Report, above n 1, p 65.

<sup>177</sup> Dawson Report, above n 1, p 65.

'prepare and place before the Tribunal the material necessary for it to evaluate the application and make a decision. In this way the quasi-judicial role of the Tribunal would be preserved'.<sup>178</sup>

In preparing the relevant material the ACCC would be required to consult with interested third parties. The Committee also recommended that the Tribunal should be able to 'remit an application for consideration by the ACCC' if it believed the application required a decision solely on competition issues rather than a public benefit assessment (on the proviso ACCC hadn't already considered this issue).<sup>179</sup>

This recommendation has, not surprisingly, been the most contentious of those made by the Committee in relation to mergers. However, it has been supported by big business and the Government. While authorisation may currently be a lengthy process – and business has complained that it is 'commercially unrealistic' as a result - it is suggested that the system was not in need of such radical reforms. Perhaps some less drastic change, designed to resolve time frame concerns and the low threshold for third party intervention, may have been more appropriate.<sup>180</sup> Given that authorisation is a process where anti-competitive conduct is permitted, it is suggested that a detailed and – if need be – lengthy process, capable of review, is warranted.<sup>181</sup> Commercial expediency or convenience should not prevail over the public interest. If the recommendations are implemented there will be little opportunity for interested third parties to be heard and their right to challenge a merger that will, or may, cause them damage is eliminated.

It is also far from clear how the ACCC will be involved. The Committee insists that ACCC must be seen to 'help' the Committee, but it is not clear exactly how this will be accomplished. It is also not clear how parties seeking authorisation for conduct that may contravene both the merger provisions and other provisions of the Act would proceed. This issue has arisen recently in relation to the proposed Qantas/Air New Zealand alliance in which the ACCC denied authorisation.<sup>182</sup> Would authorisation of the merger protect parties from action

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<sup>178</sup> Dawson Report, above n 1, p 65-66.

<sup>179</sup> Dawson Report, above n 1, p 66, recommendation 2.3.3.

<sup>180</sup> See, for example, Smith & Grimwade, above n 161, pp 365-366, who discuss other possible solutions to the problem of delay and cost.

<sup>181</sup> See further Smith & Grimwade, above n 161, p 368 ('[a]s a proposed solution to some of the problems associated with the authorisation process, direct access appears to have serious problems of its own .... there are serious administrative policy implications for the proposal – not the least of which is that direct access is founded on the idea of limiting merits review.')

<sup>182</sup> This very issue has recently arisen in relation to the Qantas/Air New Zealand authorisation application which related both to a proposed merger and anti-competitive conduct under s 45. See ACCC, 'Qantas/Air New Zealand Alliance "Not in Public Interest"', Media Release 194/03, 9 September 2003 <[http://203.6.251.7/accinternet/digest/view\\_media.cfm?RecordID=1116](http://203.6.251.7/accinternet/digest/view_media.cfm?RecordID=1116)>.

under other provisions within Part IV? The Report does not address this issue at all.

It is suggested that much more consideration needs to be given to the implications of this recommendation before such a drastic change is implemented.

### **No more 'public benefit factors' to be listed**

In determining whether 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',<sup>183</sup> the ACCC is required to pay regard to the possibility that the merger will enhance Australia's ability to compete internationally. More specifically, s 90(9A) requires the ACCC to have regard to whether the merger would result in:

- 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).

This list is non-exhaustive, so other public benefits may be considered and, in this respect, the Tribunal has held that the term 'public benefit' should be given 'its widest possible meaning'.<sup>184</sup>

A number of submissions called for a more detailed list of public benefits and/or a clearer indication of what else might be considered a public benefit,<sup>185</sup> greater consideration of the need to compete globally as a public benefit,<sup>186</sup> consideration of rural and regional issues,<sup>187</sup> consideration of small business<sup>188</sup> and other specific public benefits.<sup>189</sup> One submission specifically opposed any change to the public benefit criteria.<sup>190</sup> Another proposed that the test itself should be changed to one of 'no significant public detriment'.<sup>191</sup>

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<sup>183</sup> TPA, s 90(9).

<sup>184</sup> Dawson Report, above n 1, p 58. See also QCMA, above n 18.

<sup>185</sup> ExxonMobil, above n 39, p 6; Spier Consulting, above n 42, p 15.

<sup>186</sup> Commonwealth Bank, above n 28, p 9 (section 90(9A)(a) should 'require the Commission to regard as a benefit to the public: a significant enhancement in the ability of an Australian enterprise to compete more effectively with global competitors in Australia; [and] a significant enhancement in the ability of an Australian enterprise to compete more effectively in global markets').

<sup>187</sup> Spier Consulting, above n 42, p 15; Department of Transport and Regional Services, *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 189, Trade Practices Act Review 2002, p 9.

<sup>188</sup> Spier Consulting, above n 42, p 15.

<sup>189</sup> Spier Consulting, above n 42, p 15 (should include 'the impact of deregulation and any other structural adjustment on the Australian community or communities ...').

<sup>190</sup> Law Council of Australia (supp), above n 9, p 11 ('[t]he public benefits which arise from a proposed merger or acquisition will always depend heavily on the facts and circumstances of the merger in question ... it is appropriate that the Act leaves the determination of what constitutes the public

On the basis that the Tribunal has applied the public benefit test widely, the Committee rejected the call for additional public benefit factors, believing there would not be any 'real benefit to be gained'<sup>192</sup> from any such change. The Committee noted that any matter can be taken into consideration as a public benefit already and listing them risked 'their being given undue emphasis'<sup>193</sup>

However, if one takes the view that matters should not be listed in s 90(9A) simply because they may already be considered generally as a public benefit, there would be no justification for any matters being listed in s 90(9A). Clearly, the government, when introducing section 90(9A) was doing so to ensure that international matters were considered in *every* case as a public benefit – even though they were already capable of being considered. As the Committee itself observed, matters listed in s 90(9A) currently are given greater 'emphasis' than other public benefits. Thus, the submissions calling for additional factors to be listed were claiming that their proposed public benefit should enjoy the same level of importance – or *emphasis* - as the existing factors.

Further consideration should have been given to determining if it was appropriate to elevate other potential benefits to the same level as international factors. This was especially relevant in relation to submissions for rural and regional issues to be included as a public benefit, given the term of reference calling for consideration to be given to whether the current competition provisions are responsive to the needs and requirements of rural and regional areas. A broader list would also provide further guidance as to what will be considered public benefits in any given case, as the concept is clearly a subjective one. The Committee's cursory dealing with these submissions was disappointing.

## Response to the Dawson Report

The Report, when released, did not entirely satisfy interested parties, but neither did it seem to strike any severe blows.<sup>194</sup> Some took the view that the Dawson Committee 'tinkered with the operation of the Trade Practices Act in a

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benefit to the ACCC or the Tribunal who have the opportunity to consider the facts surrounding the merger.')

<sup>191</sup> Spier Consulting, above n 42, p 22 and Fair Trading Coalition, above n 42, p 35.

<sup>192</sup> Dawson Report, above n 1, p 58.

<sup>193</sup> Dawson Report, above n 1, p 58.

<sup>194</sup> J Durie, 'A little something for everyone', *The Weekend Financial Review*, April 17-April 21 2003, p 6. See also comment by Heather Ridout, of the Australian Industry Group: '... there's something in it for everyone and no-one has got everything they wanted': *The Weekend Financial Review*, April 17-April 21 2003, p 6. It has also been suggested the Dawson Review has 'failed to provide any meaningful reforms': A Gome & J Walker, 'The unloved ones', *BRW*, 8-14 May 2003, p 40.



restrained and sensible way<sup>195</sup> and that only 'cosmetic reforms' had been made to the merger laws, while others labelled the proposed changes to merger regulation 'convoluted and unpredictable'.<sup>196</sup> Debate on the desirability or otherwise of the proposed reforms continues.<sup>197</sup>

Perhaps not surprisingly big business appear happy about the proposed amendments to the authorisation process,<sup>198</sup> allowing them to bypass the ACCC<sup>199</sup> and, more importantly, precluding third-party intervention on appeal. They believe the new process will contribute to making them more internationally competitive, presumably on the basis that they would be more successful at convincing the Tribunal that scale is needed to achieve international competitiveness and that this would be in the public interest. The Government apparently shares their enthusiasm for reform.

On the other hand, the ACCC, small business, consumer groups and some academic commentators appear less enamoured with the Report's recommendations.<sup>200</sup>

## Government Response

The Government responded favourably to the Dawson Report as a whole and, in relation to mergers, supported all recommendations.<sup>201</sup> In particular the Government:

- supported the recommendation that the ACCC provide reasons for its informal clearance decisions 'when requested by the applicants and in cases where it has rejected a merger or accepted undertakings',<sup>202</sup>

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<sup>195</sup> A Kohlar, 'A sensible tinkering with the TPA', *The Weekend Financial Review*, April 17-April 21 2003, p 2.

<sup>196</sup> Kohlar, above n 195, p 2.

<sup>197</sup> The major focus of comment in relation to the Dawson Report has been on the Committee's dealing with the misuse of market power prohibition (TPA, s 46), their recommendation for the introduction of criminal sanctions for hard core cartels and their recommendations in relation to the ACCC's dealings with the media. Relatively little has been written on the merger provisions.

<sup>198</sup> R Salmons, 'Big Business Welcomes Plan to Streamline Mergers', *The Age*, 17 April 2003, p 2.

<sup>199</sup> Allens Arthur Robinson, 'Striking the right balance: business will welcome the Dawson Report', Press Release, 16 April 2003 (<http://www.aar.com.au/med/pressreleases/pr3apr03.htm>) ('[The Dawson Report] will be warmly welcomed by most sections of the business community ...').

<sup>200</sup> Henry Ergas, for example, has expressed concerns about the suggested amendments to the authorisation process. His concern focuses on how applications involving more than merely s 50 issues Ergas would be handled. He also questions the merit of providing the Tribunal with an inquisitorial role – practically and in terms of maintaining its independence: Ergas, 'Doubts about Dawson', above n 108 and Ergas, 'Good Report, Pity About All the Flaws', above n 108, p 63.

<sup>201</sup> *Commonwealth Government Response to the Review of the Competition Provisions of the Trade Practices Act*, 15 April 2003, <<http://www.treasurer.gov.au/tsr/content/publicatons/TPAResponse.asp>>.

<sup>202</sup> *Commonwealth Government Response*, above n 201.

accepting that this would promote a better understanding of the ACCC's decisions and would reduce current uncertainty;

- agreed that a voluntary *formal* clearance process that operated in parallel with the existing *informal* clearance should be established in accordance with the Committee's recommendation; and
- agreed that authorisation applications should be made directly to the Tribunal which would be required to consider third party interests.

The Government has not released any formal plans for legislative change since their initial response.

## ACCC Response

The ACCC issued a preliminary response via press release on 16 April 2003.<sup>203</sup> No more detailed response has been issued. In relation to mergers, while generally welcoming the decision not to recommend amendment to the substantive test, the ACCC raised concerns about the proposed optional formal clearance system and the recommendation that authorisations proceed directly to the Australian Competition Tribunal. In relation to the former the ACCC was concerned at the complexities involved when a proposal involves more issues than simply a merger analysis. In relation to the latter the ACCC was concerned about 'what role, if any, there would be for public or small business participation in public interest determinations under this proposal',<sup>204</sup> noting that the Tribunal 'is a poor venue for consumers and small businesses to use'<sup>205</sup> and is not as open and transparent as the current ACCC process 'which facilitates participation ... by all interested parties'.<sup>206</sup> The ACCC also expressed concern that implementation of this recommendation would 'eliminate the opportunity for merits review',<sup>207</sup> affecting the rights of parties affected by a proposed merger'.<sup>208</sup>

In a less formal setting, speaking to the National Press Club, Prof Allan Fels, on his last day as Chairman of the ACCC, expressed further concern in relation to the proposed authorisation process, about

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<sup>203</sup> ACCC, 'Dawson Report – Preliminary Response: Criminal Sanctions Major Step Forward for Competition Policy', MR74/03, 16/04/2003.

<sup>204</sup> ACCC, 'Dawson Report – Preliminary Response', above n 203.

<sup>205</sup> ACCC, 'Dawson Report – Preliminary Response', above n 203.

<sup>206</sup> ACCC, 'Dawson Report – Preliminary Response', above n 203.

<sup>207</sup> ACCC, 'Dawson Report – Preliminary Response', above n 203.

<sup>208</sup> ACCC, 'Dawson Report – Preliminary Response', above n 203.

'[the] obvious severe mechanical difficulties ... concerning the role which the Commission would play, given that the Tribunal is not an investigative body'.<sup>209</sup>

Fels also noted, again, that the Tribunal has, to date, 'been an unfriendly forum for consumer and small business.'<sup>210</sup> In relation to the lack of an appeal mechanism he re-iterated that the authorisation process is one that most other jurisdictions don't have and, because it provides the possibility of permitting monopoly, it should contain stringent safeguards. The lack of appeal for such a powerful mechanism is not 'desirable'. 'A few lax decisions', Fels claims, 'and the level of concentration in the economy will sharply increase.'<sup>211</sup>

More recently, the new Chairman of the ACCC, Graeme Samuel, has announced that the Commission will implement the recommendation to publish reasons for a decision made as part of the informal clearance process where the merger has been rejected, approved with undertakings or where parties have sought such disclosure.<sup>212</sup> Other recommendations regarding merger processes have received a cool reception from the new Chairman. In particular, Samuel has expressed concern about the Dawson Committee's proposed formal notification system. Samuel's concerns are twofold. First, that the system as proposed may effectively mean the end of the informal system in Australia and its associated benefits.<sup>213</sup> Second, Samuel is concerned that restrictive time frames for providing decisions under the formal process will result in more merger rejections than is currently the case.<sup>214</sup> In relation to authorisations, Samuel has also expressed concern that there will be reduced opportunity for parties to engage in an 'interactive process' with the Commission because of 'the Commission's envisaged role in assisting the Tribunal' which would render such discussion inappropriate.<sup>215</sup>

<sup>209</sup> A Fels, 'Competition Policy: A Report Card for the last 12 years and an Agenda for the Future', 30 June 2003, p 7 <[http://www.accc.gov.au/speeches/2003/Fels\\_Report\\_Card\\_30703.pdf](http://www.accc.gov.au/speeches/2003/Fels_Report_Card_30703.pdf)>.

<sup>210</sup> Fels, 'Competition Policy: A Report Card', above n 209, p 7.

<sup>211</sup> Fels, 'Competition Policy: A Report Card', above n 209, p 8. See also A Fels, 'A Small Business Friendly Trade Practices Act', Speech to The Council of Small Business Organisations of Australia – National Small Business Summit Agenda, 18 June 2003 (Canberra) <[http://www.accc.gov.au/speeches/2003/Fels\\_COSBOA\\_Conf\\_1863.pdf](http://www.accc.gov.au/speeches/2003/Fels_COSBOA_Conf_1863.pdf)> and comments by Fels extracted in A Gome, 'Small-business defenders', *BRW*, 8-14 May 2003, p 42 ('[w]e are quite concerned about direct access to the Australian Competition Tribunal for merger authorisation ... the tribunal is not a friendly place for small business ... Also, there is no right of appeal ...').

<sup>212</sup> ACCC, 'ACCC to Publish Reasons for its Merger Decisions', Media Release 238/03, 12 November 2003. See also Samuel, G. 'Balancing the Competing Pressures', Speech to the National Press Club, 12 November 2003. Since announcing this new policy two applications for informal clearance have been rejected. Reasons for the first were made available on the ACCC website in December 2003: see ACCC, 'ACCC assessment of Coca-Cola Amital Limited's proposed acquisition of Berrie Limited' <[http://www.accc.gov.au/new/CCA\\_Berrie\\_Assesment.pdf](http://www.accc.gov.au/new/CCA_Berrie_Assesment.pdf)>, accessed 10 December 2003.

<sup>213</sup> Samuel, above n 212, pp 8-9.

<sup>214</sup> Samuel, above n 212, p 10.

<sup>215</sup> Samuel, above n 212, p 9.

## Challenges facing implementations of the recommendations

Implementing legislation was predicted for late 2003/early 2004, but this may be hindered by the pressure the Government has been subjected to in relation to the proposed changes. It has been claimed that

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'some government backbenchers say they will oppose a key proposal in the Dawson report to allow businesses to bypass the Australian Competition and Consumer Commission and go straight to the Competition Tribunal for approval of anti-competitive mergers'<sup>216</sup>

and the proposal is unlikely to receive bipartisan support.

At present, however, it appears the greatest challenge to the implementation of the reform comes from the big winners – big business. The Business Council of Australia has threatened to withdraw support for the entire Dawson Report if the government considers making amendments to s 46.<sup>217</sup> The Dawson Committee recommended against changes to s 46, relating to the misuse of market power, but recently a Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting small business has been established at the behest of small business. Big business, it appears, would rather sacrifice all gains achieved in relation to mergers than risk having the government implement a stricter version of the misuse of market power provision.<sup>218</sup>

A further area of uncertainty with existing merger law and the implementation of any reforms, stems from the appointment of a new Chairman to the ACCC, Graeme Samuel.<sup>219</sup> Part of the controversy surrounding Samuel's appointment - in addition to the procedural problems<sup>220</sup> - has stemmed from his business background; the fear being that he will be softer on big business than his predecessor.<sup>221</sup> Samuel made some of his views about competition policy clear in

<sup>216</sup> T O'loughlin, 'Dawson Plan Facing Resistance', *Australian Financial Review*, 23 April 2003, p 4.

<sup>217</sup> R Boswell, 'Safeway Decision not be-all-and-end-all on s 46 Effectiveness', Press Release B74/2003, 8 July 2003 ('[t]he Business Council of Australia has made it clear that they believe the outcome of any further TPA reform would be unfavourable for the companies they represent, even to the extent that they have said they may withdraw support for all of the changes proposed by Dawson, if Section 46 is re-examined'); C Wallace, 'Big end of town: axe reforms', *The Australian*, 20 June 2003, p 19 (finance); P Switzer, 'Time for Howard to tell those bleating bigwigs to butt out', *The Australian*, 20 June 2003.

<sup>218</sup> Wallace, above n [217](#), p 19 (finance). See also, P Switzer, 'Time for Howard to tell those bleating big wigs to butt out', *The Australian*, 20 June 2003, p 19 (finance).

<sup>219</sup> Treasurer, 'Appointment of Mr Graeme Samuel AO AS ACCC Chairman', Press Release, 30 July 2003 <<http://www.treasurer.gov.au/tsr/content/pressreleases/2003/064.asp>>.

<sup>220</sup> The appointment must have the approval of a majority of states and territories.

<sup>221</sup> For example, see M Latham, 'Claytons Competition Minister', ALP News Statement, 18 July 2003 <<http://www.alp.org.au/media/0703/20005120>> ('[s]omeone who lists his occupation as "company director and corporate strategic consultant" (*Who's Who 2002*) should not be in charge of corporate competition policy').

an article in *Business Review Weekly*.<sup>222</sup> While speaking out in favour of vigorous competition (noting that without our vigorous competition policy Australia 'would not have weathered the international economic storm in such good shape'),<sup>223</sup> he gave little away about how mergers would be considered, noting only that very few are opposed by the ACCC. It remains to be seen how his views – whatever they may be - on the competitive effects of mergers will influence merger assessment, including the assessment of authorisation applications. However, the ACCC's recent rejection of the first application for merger authorisation since Samuel's appointment<sup>224</sup> at least indicates the Commission is not going to become too soft in its dealings with big business. It may even provide evidence of Samuel's claim that 'poachers make the best gamekeepers.'<sup>225</sup>

## Conclusion

The Dawson Committee's discussion of mergers was far from adequate. The Committee's retention of the substantial lessening of competition test and its recommendations relating to the ACCC's clearance processes were generally good. On the other hand, the Committee's recommendations in relation to the authorisation procedure, its dismissal of numerous other legitimate submissions, with very little by way of explanation, and its failure to even acknowledge other important submissions, such as those relating to the international competitiveness of Australian business, were inadequate for a review of this nature, especially when considering the terms of reference with which the Committee was armed. Even for those recommendations the Committee did make, they did not address a number of vital procedural matters which might affect their implementation. This Review provided an important opportunity to thoroughly assess the state of merger regulation in Australia. Unfortunately, the final report – comprising less than 14 pages of analysis on the various contentious aspects of merger regulation in Australia, constituted a failure by the Committee to take advantage of this unique opportunity.

<sup>222</sup> G Samuel, 'My Way', *BRW*, June 26-July 2, 2003, p 36.

<sup>223</sup> Samuel, above n [222](#), p 38.

<sup>224</sup> See ACCC, 'Qantas/Air New Zealand Alliance', above n 182.

<sup>225</sup> Samuel, above n 106, p 3. Samuel notes claims that he is 'a creature of big business and ... lack an understanding of the difficulties encountered by small business. ...' (at p 1). In response (at p 2) Samuel claims '[i]n substance, I cannot and will not be any different from my predecessor ... The only sections of business who have anything to fear from the ACCC are those who don't believe in the fundamental principles of lawful, honest competition. And to those I have one message – watch out! ...'.