

# Proposed Changes to Merger Regulation in Australia

## Speaking notes

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## 1. Overview

The way in which mergers are evaluated in Australia is set to undergo significant change in the coming year. The *Review of the Competition Law Provisions of the Trade Practices Act* (the Dawson Review) was released by the Government in April.<sup>1</sup> While recommending the retention of the current substantial lessening of competition test, the Dawson Committee made a number of recommendations for change regarding the procedures to be applied in assessing potential mergers. These recommendations have received the support of the federal Government. This paper will critically discuss the recommendations of the Committee in light of the submissions made to the Review and will also consider the possible amendments to the TPA that may flow.

## 2. The Merger Recommendations

The Dawson Committee made several key recommendations in relation to the merger provisions and their administration.

### 2.1 Retain the substantial lessening of competition test

Strictly speaking this was not a recommendation. However, the lack of a recommendation for changing the substantive test signalled the Committee's endorsement of it in its current form. It was also discussed in some detail in the Committee's report.

There had been a number of submissions seeking to repeal or modify the substantive test in some way. The key submissions were as follows:

#### Repeal or weakening of the merger test

The bulk of the recommendations suggesting reform to the substantive test called for a return to a market dominance test which was the test applied in Australia from 1977-1993. This would have the effect of enabling mergers to proceed, even if they *substantially* lessened competition in an Australian market, provided it wouldn't result in the merged firm being in a position to *control or dominate* the relevant market. Thus, it is a weaker test than the existing one.

Arguments for repeal of the current test centred on the claimed need to create 'national champions' to effectively compete in global markets. It was argued, primarily by business groups, that 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. The counter-argument made in a number of submissions was that there is considerable evidence that international competitiveness is achieved, not by national dominance, but rather by the existence of fiercely competitive domestic rivals. The education market was presented as an example – there is fierce domestic rivalry for domestic and international placements in

<sup>1</sup> *Review of the Competition Provisions of the Trade Practices Act*, Commonwealth of Australia, January 2003 ('Dawson Report') <<http://tpareview.treasury.gov.au/content/report.asp>>.

Australia and yet Australian universities are among the most successful in the world at attracting international fee paying students.

This view is supported by Professor Michael Porter who has conducted empirical research on this issue and concluded that nations with ‘leading world positions often have a number of strong local rivals’ [Michael Porter, *The Competitive Advantage of Nations*, MacMillan Press Ltd, 1990, p 117]. The domestic rivalry, it is claimed, ‘creates pressure on firms to improve and innovate ... With little domestic rivalry, firms are more content to rely on the home market. ...’ [Porter, pp 118-119].

The Committee, surprisingly, didn’t address these claims in any detail – the ‘national champions’ claim, along with the counter-argument that ‘vigorous competition which encourages efficiency and innovation is more important than scale for entry into international markets’ [Dawson Report, p 60] and concluded that this issue was best left to be determined by the authorisation process.

It was also argued that competition laws should not try to manipulate market structure (as distinct from business conduct) and that ‘tough’ merger laws remove incentive for vigorous and successful competition – it was claimed that if a company was ‘too successful’ it would be penalised and prevented from taking over less efficient enterprises. The Committee did not even comment on these claims.

Ultimately, without mentioning the ‘dominance’ claims, the Committee noted that the ‘underlying assumption [of Part IV of the TPA is] that competition promotes efficiency, which in turn enhances public welfare ...’ [Dawson Report, p 43] and that the substantial lessening of competition test currently applied is the most in line with this assumption.

### **Efficiency defence/consideration**

It was also argued that efficiency claims should be given more prominence in the substantive analysis of mergers. In particular, it was argued first that an efficiency *defence* should be incorporated – so that proof that a merger would enhance economic efficiency would provide a defence to proof that the merger would result in a substantial lessening of competition and, second, that express mention should be made of efficiency considerations in s 50(3) of the Act which lists a number of factors required to be taken into consideration when assessing whether a merger substantially lessens competition.

The Committee recommended against the proposed changes. The Committee acknowledged economic efficiency ‘is an important goal because it is reflected in high productivity, which in turn is important to sustaining economic welfare’ but considered that maximising competition generally achieved this result [Dawson Report, p 55]. The Committee noted that in cases where there are gains in efficiency but also a substantial lessening of competition authorisation is the most appropriate avenue [Dawson Report, p 56] for parties wishing to claim their merger should be permitted. The Committee also considered that an efficiency test within s 50 would inhibit the ability of the ACCC to provide a quick clearance process because of increased complexity [Dawson Report, p 57].

In relation to incorporating a new factor in s 50(3) requiring specific consideration of efficiency in assessing the competitive effects of a merger the Committee also believed this

was best left to the authorisation process. Where efficiencies are relevant to the competition test they are already required to be considered.

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

In addition to claims that efficiencies 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 and international competitiveness should be referred to in section 50(3). The Committee briefly noted that these matters were best dealt with as part of the authorisation process [*Dawson Report, pp 57-58*].

### **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 (section 50(6)). It was argued by some that it was necessary to widen the definition to enable the merged entity ‘to compete more effectively in a global market’ [*Dawson Report, p 60*].

The Committee rejected the claims, first noting that regard can, and is, paid to imports when determining whether there is a substantial lessening of competition.<sup>2</sup> Also, if this matter is important in an individual case it is best left to the authorisation process that can engage in a public benefit analysis [*Dawson Report, p 60*]

### **Creeping acquisitions**

Finally, it was submitted that the law should be changed to address the problem of creeping acquisitions. This refers to the situation where no individual merger in a particular market will substantially lessen competition, but a number of small mergers, over time, may have the same effect. The focus of these claims has been the retail grocery market. It was argued that a ‘cap’ should be placed on the market share of companies, beyond which acquisitions should not be permitted.

The counter-argument to this was that a cap would ‘stifle competition and protect the unsustainable position of inefficient competitors’ [*Dawson Report, p 67*]. The Committee seemed to agree. The Committee believed that 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’ [*Dawson Report, p 67*]. 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 [*Dawson Report, p 67*].

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<sup>2</sup> I published a paper on this issue last year which examined this issue in some detail: Brebner, ‘The Relevance of Import Competition to Merger Assessment in Australia’ (2002) 10(2) *CCLJ* 119-143. Generally, if imports comprise 10% or more of the relevant market the ACCC will clear the merger.

## 2.2 Retain the informal clearance process with some modifications

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. In particular, ‘adequate’ reasons must be provided where informal clearance is denied, or cleared subject to the parties providing enforceable undertakings designed to alleviate competition concerns and where the parties request reasons.

### Retention of the informal system

Submissions generally expressed satisfaction with the current informal system. In particular, parties would prefer not to be required to notify the ACCC (as is the case in most jurisdictions with merger laws) and are satisfied with the speed at which the ACCC provides their decisions. Problems identified in submissions were a lack of transparency, because no reasons are required to be provided by the ACCC (the ACCC does maintain a voluntary register but it is incomplete and doesn’t provide much detail on the ACCC’s evaluation of the proposal), and the fact that under the current informal system a clearance does not provide immunity from challenge – by third parties or by the ACCC. Some also claimed there should be a formal review mechanism. Concerns were also expressed that, because of the lack of review or need for detailed reasons, the ACCC was in a position to extract undertakings from parties that were not necessary to alleviate the ACCC’s competition concerns.

### Reasons to be provided in some cases

The Committee accepted that the current system would benefit from a requirement for ‘adequate’ reasons to be given when clearance is denied, or cleared subject to the parties providing enforceable undertakings designed to alleviate competition concerns and where the parties request reasons. This would allow development of precedent to overcome current potential for inconsistency and the lack of predictability for merging parties [*Dawson Report, pp 60-61*] and limit the ability of the ACCC to ‘extract undertakings which go beyond competition concerns arising from a merger’ [*Dawson Report, p 60*]

### No immunity from challenge

The Committee considered that to overcome the problems associated with lack of certainty that a party would be free from legal challenge, despite receiving an informal clearance from the ACCC, a voluntary formal notification system should be established (below)

### No review of ACCC clearance decisions

The Committee did not believe a review board was appropriate for the informal clearance process. One of the concerns expressed was that this would involve some formalisation of the process that would detract from its current speed and efficiency.

### 2.3 Voluntary formal clearance process

To overcome the limitations of the informal clearance process the Committee suggested a voluntary formal clearance process whereby parties may choose to request a clearance which, if successful, would provide immunity from legal challenge (Recommendation 2.2). It would also include a mechanism whereby the parties could appeal to the Australian Competition Tribunal for a rehearing of the matter (not a de novo hearing).

The Committee made it clear that it did not consider that notification should be compulsory.

The voluntary process would be less efficient than the informal process and would require parties to provide more detailed information on their proposed merger. The ACCC would have 40 days for review. An appeal would be permitted within 14 days and the Tribunal would have 30 days to review the material and reach a decision whether to clear a merger, refuse clearance or provide a conditional clearance [*Dawson Report, p 64*].

Because third parties would not be able to challenge a decision of the ACCC for clearance the Committee considered that the ACCC should be required to engage in 'appropriate' consultation with interested third parties [*Dawson Report, p 64*].

The Committee considered that this process would increase accountability of the ACCC [Dawson Report, pp 61-62], 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.

### 2.4 A new authorisation system

The Committee Recommended (Recommendation 2.3) that applications for authorisation should be made directly to the Australian Competition Tribunal and not to the ACCC.

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 benefits to the public that outweigh the anti-competitive detriment. While any number of 'public benefit' factors may be considered, s 90(9A) of the TPA requires the ACCC to consider

- 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).

Numerous 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. It was also argued that a number of extra factors should be included in the list of factors required to be considered as public benefits under s 90(9A), including rural and regional issues and the protection of small business.

On the other hand, it has been argued that because authorisation necessarily permits mergers that substantially lessen competition the process should be a difficult one. Most countries – for example, the United States, Canada and the European Union – have no mechanism whereby mergers which would otherwise contravene their laws can be authorised on public benefit grounds.

### **A more commercially realistic authorisation process**

The Committee accepted that the current authorisation process was commercially unrealistic – this was largely based on the observation that only 5 applications for authorisation had been made in the last 8 years. The concerns about time stem from the fact that while the ACCC has 30 days (45 if complex) to review a merger, this time may be extended if the ACCC requests more information from the applicant, or with the agreement of the applicant. Also, once the ACCC has reached a decision an appeal may be made by any interested party to the Australian Competition Tribunal, who has 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 suggested applications be made directly to the Competition Tribunal who would have a time limit of 3 months to determine an application (recommendation 2.3.1). There would be no review on the merits from a decision of the Tribunal (recommendation 2.3.2) – judicial review would be available. The Committee considered the detriments associated with the removal of the review mechanism would be offset by the benefits of time saving and greater certainty, making the process more commercially acceptable.

The Committee accepted, however, that there would be ‘significant implications’ for the Tribunal. They recommended that the ACCC ‘appear to assist the Tribunal [*Dawson Report, p 65*] and should use resources to ‘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’ [*Dawson Report, p 66*]

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) [*Dawson Report, p 66; Recommendation 2.3.3*]

### **No more ‘public benefit factors’ to be listed**

The Committee rejected the call for additional public benefit factors. The Committee noted that any matter can be taken into consideration as a public benefit already and listing them risked ‘their being given undue influence’ [*Dawson Report, p 58*]



### 3. The Government Response

The Government responded favourably to the Dawson Report as a whole and, in relation to mergers, supported all recommendations.<sup>3</sup> In particular it

- 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.’ The Government accepted 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 recommendation.
- agreed that authorisation applications should be made directly to the Tribunal who would consider third party interests

### 4. Other Responses to the Dawson Report

The Report, when released, didn’t entirely satisfy interested parties, but neither did it seem to strike any severe blows.<sup>4</sup> It was reported that the Dawson committee ‘tinkered with the operation of the Trade Practices Act in a restrained and sensible way’<sup>5</sup> and that only ‘cosmetic reforms’ had been made to the merger laws. Others, however, considered the proposed merger changes were also variously labelled ‘convoluted and unpredictable’.<sup>6</sup> Debate has continued, on and off, since the release of the paper and no doubt will continue for some time before any legislative implementation of the recommendations is considered.

#### 4.1 ACCC Response

The ACCC issued a preliminary response via press release on 16 April 2003.<sup>7</sup> In relation to mergers, while generally welcoming the decision not to recommend amendment to the substantive test, the ACCC raised concerns about the proposed amendments to the clearance system (in terms of the optional formal process) 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

<sup>3</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>4</sup> Durie, John, ‘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.

<sup>5</sup> Kohlar, Alan, ‘A sensible tinkering with the TPA’, The Weekend Financial Review, April 17-April 21 2003, p 2.

<sup>6</sup> Kohlar, Alan, ‘A sensible tinkering with the TPA’, The Weekend Financial Review, April 17-April 21 2003, p 2.

<sup>7</sup> ACCC, ‘Dawson Report – Preliminary Response: Criminal Sanctions Major Step Forward for Competition Policy’, MR74/03, 16/04/2003.



simply a merger analysis (eg, price fixing issues might be raised). In relation to the later 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’, noting that the Tribunal ‘is a poor venue for consumers and small businesses to use’ and is not as open and transparent as the current ACCC process ‘which facilitates participation in the process by all interested parties’. They also expressed concern that implementation of this recommendation would ‘eliminate the opportunity for merits review’, affecting the rights of parties affected by a proposed merger’.<sup>8</sup>

In a less formal setting on 30 June 2003, then Chairman of the ACCC (on his last day in that position), speaking to the National Press Club, expressed further concern, in relation to the proposed authorisation process, about the ‘obvious severe mechanical difficulties ... concerning the role which the Commission would play, given that the Tribunal is not an investigative body’ and noted that the Tribunal has, to date, ‘been an unfriendly forum for consumer and small business.’<sup>9</sup> He also noted that the authorisation process is one 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 claimed, ‘and the level of concentration in the economy will sharply increase.’<sup>10</sup>

## 4.2 Other Responses

Not surprisingly big business are happy about the proposed amendments to the authorisation process, allowing them to bypass the ACCC. They believe the new process will make them more internationally competitive – presumably they believe they can convince the Tribunal that scale is needed to achieve international competitiveness and that that is in the public interest. Time will tell.<sup>11</sup>

Recently Henry Ergas has criticised the Committee’s ‘dismissive view’ of creeping acquisitions.<sup>12</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 one. He has no easy solution, but expresses his disappointment that the committee didn’t consider it further. He is also critical of the suggested amendments to the authorisation process. As with the ACCC, he expressed concerns about how applications involving more than merely 50 issues would be handled. He also questions providing the Tribunal with an inquisitorial role – practically and in terms of maintaining its independence.

<sup>8</sup> ACCC, ‘Dawson Report – Preliminary Response: Criminal Sanctions Major Step Forward for Competition Policy’, MR74/03, 16/04/2003.

<sup>9</sup> Fels, ‘Competition Policy: A Report Card for the last 12 years and an Agenda for the Future’, 30 June 2003.

<sup>10</sup> Ibid. See also, 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)

<sup>11</sup> Salmons, Richard, ‘Big Business Welcomes Plan to Streamline Mergers’, *The Age*, 17 April 2003, p 2.

<sup>12</sup> 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 Ergas, Henry, ‘Good Report, Pity About All the Flaws’, *Australian Financial Review*, 18 June 2003, p 63.

## 5. Where to now?

### 5.1 Good or bad?

The Dawson recommendations in relation to mergers are, generally, good. The retention of the substantial lessening of competition test was a good start. Merger law that preserves competition is good and, unless public interest can be demonstrated, parties should not be permitted to enter into agreements – structural or otherwise – which result in a substantial lessening of competition. It has yet to be adequately demonstrated that scale – or domestic monopoly – is necessary for success in international markets; logic (combined with a good deal of empirical evidence) would dictate otherwise.

The requirement that the ACCC provide reasons in cases where clearance is denied, undertakings are given or where parties request reasons is also to be welcomed. The existing register doesn't provide a great deal of assistance to parties wanting to understand the ACCC's reasons for a clearance decision. Just what constitutes 'adequate' reasons is yet to be determined. However, given that reasons will not have to be provided in all cases, this requirement should not substantially increase – if at all – the administrative burdens on the ACCC.

The introduction of a formal voluntary notification scheme to operate in parallel with the existing informal one is also good – at least in theory. While a mandatory notification scheme would be undesirable – to the ACCC or the parties – a voluntary system enables parties to proceed with a merger that may be borderline in terms of competitive effect, with confidence that it cannot be challenged. Currently a borderline case, even if approved by the ACCC, can risk challenge by the ACCC or a third party. It also provides an avenue for appeal. It is suggested that questionable mergers are more appropriately considered prior to the merger taking place rather than after the process has taken place when the only options are fines, damages or divestiture; prevention is better than cure. Thus, provided administrative matters – such as necessary information for the ACCC to make a confident analysis (without overburdening parties) can be resolved, this should also be seen as a welcome change.

The more troubling recommendation relates to authorisation. While authorisation may be a lengthy process – and business has complained ad nauseam that the process is 'commercially unrealistic' it is suggested that it wasn't in need of such radical reforms. Perhaps some reform may have been possible, but given that authorisation is a process where anti-competitive conduct is necessarily permitted it is suggested that a detailed and – if need be – lengthy process is warranted. 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 cause them damage is eliminated! It is also far from clear how the ACCC will be involved in the process. The Committee insists that ACCC must be seen to 'help' the Committee. It is not clear exactly how this will be accomplished. Henry Ergas believes the procedure will be 'extremely harmful'.<sup>13</sup> I suspect he is not far of the mark, if at all.

<sup>13</sup> Ergas, 'Doubts about Dawson', NECG, June 2003, [http://www.necg.com.au/pappub\\_PSR SAP.shtml](http://www.necg.com.au/pappub_PSR SAP.shtml), p 4.

## 5.2 Challenges

The Government has come under pressure in relation to the implementation of the Dawson proposals. It was recently reported that ‘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>14</sup> It is unlikely to receive bipartisan support.

In fact, no one seems happy anymore. Big business have indicated they are prepared to sacrifice all gains from the Dawson Report (presumably including the authorisation procedure proposed) rather than risk having the government implement a stricter version of the misuse of market power provision (which wasn’t recommended by the Dawson Review but has been subject to small business group lobbying).<sup>15</sup>

A further area of uncertainty with existing merger law and implementation is the appointment of a new chairman to the ACCC. The new chairman, Graeme Samuel, made some of his views about competition policy clear in a recent article in the *Business Review Weekly*.<sup>16</sup> While, not surprisingly, 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>17</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 – and indeed, assessment of authorisation applications. Part of the controversy surrounding his appointment – in addition to the procedural problems associated with his appointment<sup>18</sup> – has surrounded his business background – the fear being that he will be softer on big business than his predecessor. However, as was recently suggested, the more criticism of his business background, the more frightened big business should be – he’ll be out to demonstrate a pro-consumer stance.<sup>19</sup> Let’s hope they’re right.

## 6. Conclusion

Only time will tell whether the Dawson Committee recommendations will find their way into Part IV of the TPA. A number of challenges face any attempt to enact such legislation – particularly in relation to merger authorisations – and these are likely to – at the least – slow down the implementation process. It is hoped – and anticipated – that the recommendations in relation to informal and formal clearance processes can be appropriately implemented. It is equally hoped, however, that the recommendations in relation to authorisation are not implemented – at least not in the form recommended, as this would risk allowing a number of anti-competitive mergers to proceed without any appeal of the decision to do so. Authorisation of anti-competitive mergers is fairly novel concept and ought to be handled with care.

<sup>14</sup> O’loughlin, Toni, ‘Dawson Plan Facing Resistance’, *Australian Financial Review*, 23 April 2003, p. 4.

<sup>15</sup> Wallace, ‘Big end of town: axe reforms’, *The Australian*, 20 June 2003, p 19 (finance). See also, Switzer, Peter, ‘Time for Howard to tell those bleating big wigs to butt out’, *The Australian*, 20 June 2003, p 19 (finance).

<sup>16</sup> Samuel, Graeme, ‘My Way’, *BRW*, June 26-July 2, 2003, p 36.

<sup>17</sup> *Id* at 38.

<sup>18</sup> The appointment must have the approval of a majority of states and territories.

<sup>19</sup> See Bartholomeux, ‘ASIC’s aggressive stance a warning to all directors’, *Sydney Morning Herald*, 1 July 2003, <http://www.smh.com.au/articles/2003/06/30/1056825340088.html>