

RECOMMENDATIONS

Mergers and acquisitions: the appropriate test

Recommendation 1 (see paragraph 3.131)

1 The Committee recommends that section 50 of the Trade Practices Act 1974, be amended to prohibit mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods and services.

Recommendation 2 (see paragraph 3.132)

2 The Committee recommends that, to make clear the ambit of the new test, guidelines be incorporated in the Trade Practices Act 1974.

Recommendation 3 (see paragraph 3.133)

3 The Committee recommends that the guidelines should contain criteria including:

- . the level of concentration in the market;
- . the likely level of foreign competition in the market;
- . the availability of product substitutes;
- . barriers to entry;
- . whether one party to the merger is a failing firm;
- . the likelihood that the proposed merger would remove a vigorous and effective competitor;
- . the extent to which effective competition remains or would remain in the market;
- . change and innovation in the market;
- . the ability to significantly increase prices following a merger; and
- . any other factors relevant to competition in a market.

Recommendation 4 (see paragraph 3.134)

4 The Committee recommends that where a proposed merger fails to meet the test including the guidelines the Trade Practices Commission should nevertheless have the power to authorise it when it is for the benefit of the public.

Compulsory pre-merger notification

Recommendation 5 (see paragraph 4.40)

5 The Committee recommends that it be obligatory for a notice to be given to the Trade Practices Commission where mergers or acquisitions of a substantial nature are proposed. What is a matter of a substantial nature should be defined in the Act. The matters of which notice is to be given should be limited so that undue burden is not cast on those who must comply.

Recommendation 6 (see paragraph 4.41)

6 The Committee recommends that proposals for what the notice is to contain should be drawn up by the Attorney-General's Department and released for public comment. The proposal should be drawn up on the basis that those seeking a merger or an acquisition should not have to comply with requirements that are too wide, vague, onerous or vexatious.

Mandatory authorisation and sensitive industries

Recommendation 7 (see paragraph 4.62)

7 The Committee recommends that section 50 should remain legislation aimed at protecting competition generally. Where there are other than economic issues involved in industry structure or ownership, they may well be dealt with in specific legislation. For example, at the moment, there are issues arising in the banking and media industries which could be dealt with in terms of discrete legislation

Pre-notification authorisation and the Trade Practices Tribunal

Recommendation 8 (see paragraph 4.74)

8 The Committee recommends that parties proposing to merge should have the option of either approaching the Trade Practices Commission for authorisation, with a right of appeal to the Trade Practices Tribunal, or of approaching the Trade Practices Tribunal directly.

Recommendation 9 (see paragraph 4.75)

9 The Committee recommends that strict time limits be imposed on the Trade Practices Commission and the Trade Practices Tribunal within which they are to determine authorisation applications or appeals. The Commission should continue to be required to determine an application within 45 days. Any appeal from a decision of the Commission to the Tribunal should be determined by the Tribunal within 45 days. Where the Tribunal is approached directly, it should be required to determine an application within 60 days.

Recommendation 10 (see paragraph 4.76)

10 The Committee further recommends that adequate funding should be made available to the Commission and the Tribunal to enable this to be done.

Misuse of market power: s46

Recommendation 11 (see paragraph 5.67)

11 The Committee recommends that section 46 be amended by adding a further subsection to provide that, although the Trade Practices Commission has the overall onus of proving a breach of that section, when it has brought forward evidence which makes it as likely as not that one has occurred then one will be taken to have occurred unless the corporation in question shows otherwise.

Recommendation 12 (see paragraph 5.74)

12 The Committee recommends that section 46 be amended to provide that where persons engage in conduct for the purpose of eliminating from or harming a class of persons in a market they shall be taken to be doing so in respect of a specific member of it.

Recommendation 13 (see paragraph 5.80)

13 The Committee recommends that serious and persistent misuse of market power be dealt with by increased monetary penalties. It recommends that divestiture not be made available as a remedy.

Unconscionable conduct

Recommendation 14 (see paragraph 6.56)

14 The Committee recommends that section 52A of the Trade Practices Act be repealed. It recommends that legislation be introduced giving the Trade Practices Commission the ability to bring proceedings on behalf of a person who has a right of action at common law arising from the unconscionable conduct of another.

Recommendation 15 (see paragraph 6.57)

15 The Committee further recommends that appropriate funds be made available to the Trade Practices Commission to enable this to be done.

Pecuniary penalties

Recommendation 16 (see paragraph 7.22)

16 The Committee recommends that subsection 76(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties available to punish breaches of the provisions of Part IV of the Act.

Recommendation 17 (see paragraph 7.23)

17 The Committee recommends that subsection 79(1) of the Trade Practices Act be amended to substantially increase the pecuniary penalties to punish breaches of the provisions of Part V of the Act.

Private right to injunctive relief

Recommendation 18 (see paragraph 7.40)

18 The Committee recommends that the private right to injunctive relief in relation to mergers not be reintroduced into the Trade Practices Act 1974.

Enforceability of undertakings

Recommendation 19 (see paragraph 7.48)

19 The Committee recommends that the Trade Practices Act be amended to provide remedies for breaches of undertakings made between the Trade Practices Commission and another person or persons.

Other remedies

Recommendation 20 (see paragraph 7.59)

20 The Committee recommends that consideration be given by the Attorney-General to introducing a range of appropriate remedies for contraventions of Part IV of the Trade Practices Act 1974.

Implementation of Recommendations

Recommendation 21

21 The Committee recommends that the details of any proposed amendments to the Act should be developed by the Attorney-General's Department following consultation with all relevant parties and released by way of Exposure Draft Bill for public comment. Public comment should occur over a reasonable time of not less than three months.