EFFECT ON COMPETITION OF CORPORATE ACQUISITIONS AS A FACTOR IN AUTHORISATION APPLICATIONS TO THE TRADE PRACTICES COMMISSION

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In this article the author exhaustively examines the decisions of both the Trade Practices Commission and Tribunal and abstracts from them a number of general conclusions which are of invaluable assistance in interpreting section 50 of the Trade Practices Act. This discussion is particularly apposite in the present economic climate when the merger is increasingly popular, especially as the Act has only been recently amended. The author concentrates on "market definition" in all its permutations and discusses the various indicia of altered competition levels and the consequent likelihood of success of a merger application. As the author points out in his conclusion, attention to such details amply repays the effort involved when viewed against the backdrop of sanctions which the Act contains against those who infringe it.

This article discusses the effect on competition of corporate acquisitions. It considers the competitive effect of proposed acquisitions as a factor when application is made for their authorisation.

Section 50 of the Trade Practices Act 1974 (Cth), as amended in 1977, ("the Act") prohibits, broadly speaking, those corporate acquisitions which lead to a position of control or dominance for the acquiring company. However, the purpose of this article is not to discuss that prohibition; it is to discuss only the competitive effect of the proposed acquisition.

It is possible, on application to the Trade Practices Commission ("the Commission"), to obtain an authorisation for a merger or other acquisition, if the applicant can show that the proposed merger or acquisition satisfies a public benefit test.[1]

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[1] The test for an authorisation is contained in sub-s. 90(9):

90(9) The Commission shall not make a determination granting an authorization under sub-section 88(9) in respect of a proposed acquisition of shares in the capital, or of assets, of a body corporate 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.

Until 1977 it was also possible to obtain a clearance for a proposed acquisition, which the Commission would grant if it found no likelihood of substantially lessened competition. Although clearances can no longer be obtained the Commission's clearance decisions afford useful guidance in determining the effect on competition as a factor on an authorisation application.

Since the Act became law on 1 October 1974 many authorisation decisions have been given by the Commission, and in the great majority the effect on competition has been the critical factor. If a merger or other acquisition were likely to be pro-competitive the applicant would point to the pro-competitive effect as a public benefit. Conversely, any anti-competitive effect might well outweigh any other public benefits, leading to a refusal of authorisation.

The likely effect on competition has certainly proved so far to be usually the most important aspect on which the applicant for authorisation needs to bring evidence. The writer believes that it will remain so, notwithstanding sweeping amendments to the Act effective on 1 July 1977. The note of caution that must be sounded is that the 1977 amendments make separate provision in respect of authorisation of several other restrictive practices. In those cases the Commission is specifically required by the Act to consider the competitive effect of the practice in question. Such a direction is conspicuously absent from sub-section 90(9), which lays down the test for authorisation of mergers and other acquisitions. (Moreover, section 50 itself, which until last year used to prohibit anti-competitive acquisitions, no longer does so.) Should one therefore conclude that the effect on competition is now to be ignored when such authorisations are being considered?

In the writer's view the answer must be no. Without doubt applicants for authorisation will still seek to show that their particular acquisitions would have a pro-competitive effect, and that such effect constitutes a public benefit. There is no compelling reason why the Commission should not listen to such an argument; indeed, in fairness it must surely do so, and if it does it would doubtless be obliged to take equal cognisance of any anti-competitive detriment shown to be a likely result of a proposed merger or acquisition. Moreover, the Commission is expressly required by sub-section 90(9) of the Act to consider "all the circumstances". The effect of the acquisition on competition is surely one of the circumstances, and thus to be taken into account. Again, under the public benefit test that existed until the 1977 amendments there was no express mention of competitive effects of a proposed acquisition, yet the competitive effects were always considered as a factor. Had Parliament wanted to exclude their consideration by the 1977 amendments it could have expressly so provided. Yet it did not do so. It seems very likely therefore, that the effect of a merger or acquisition on competition will remain a vital factor in determining whether or not an authorisation ought to be granted. The competitive effect will therefore continue to be of critical importance, and accordingly, after considering some preliminary questions, the bulk of this article is given over to a discussion of the competitive effects of acquisitions.

History of Australian Mergers Legislation

Section 50[2] has its antecedent in section 50 of the Act when it was first introduced in 1974. It was then modelled on section 7 of the United States Clayton Act 1914 (U.S.) prohibiting anti-competitive acquisitions, but unlike that Act did not prohibit acquisitions tending to a monopoly. Before the 1974 Act there had been no attempt by any Australian Parliament, Federal or State, to control domestic mergers. There has for some time been legislation on foreign takeovers. The combined effect of sub-sections 89(7) and 90(10)-(14) of the 1974 Act required that foreign takeovers be primarily dealt with under the then Companies (Foreign Takeovers) Act 1972-1973 (Cth), but those sub-sections were repealed on 31 August 1976. Foreign takeovers are now regulated by the Foreign Takeovers Act 1975 (Cth), but they are in no way immune from the provisions of the Trade Practices Act.

Previously it was possible for the Minister, pursuant to sub-section 90(9) of the Act as it stood before 1 July 1977 to inform the Commission that there were special considerations relating to a merger that made it desirable in the interests of national economic policy to grant an authorisation. In those circumstances one had to be granted.[3]

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[2] S. 50, so far as is material, now provides:
50(1) A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if—
(a) as a result of the acquisition, the corporation would be, or be likely to be in a position to control or dominate a market for goods or services; or
(b) in a case where the corporation is in a position to control or dominate a market for goods or services—
(i) the body corporate, or another body corporate that is related to that body corporate, is or is likely to be, a competitor of the corporation or of a body corporate that is related to the corporation; and
(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to control or dominate that market.
(2) If—
(a) a body corporate that is related to a corporation is, or two or more bodies corporate each of which is related to the one corporation together are, in a position to control or dominate a market for goods or services; or
(b) a corporation, and a body corporate that is, or two or more bodies corporate each of which is, related to that corporation, together are in a position to control or dominate a market for goods or services,
the corporation shall be deemed for the purposes of this section to be in a position to control or dominate that market.
(3) In this section—
(a) a reference to a market for goods or services shall be construed as a reference to a substantial market for goods or services in Australia or in a State; and
(b) a reference to controlling or dominating a market for goods or services shall be construed as a reference to controlling or dominating such a market either as a supplier or as an acquirer of goods or services in that market.

[3] The Commission was so informed in at least two matters, *Australian Products & Distribution Ltd* (1975) T.B. 8,912, and *Olympic Tyre & Rubber Company* (1975) T.B. 8,912.

Sub-section 90(9), however, was repealed and replaced on 1 July 1977 and no equivalent provision now exists. Section 29 of the Act does allow the Minister to direct the Commission to give special consideration to matters set out in the direction, and in making its authorisation decision the Commission would then have regard to those matters.

It is convenient now to turn to the principles related to the effect on competition in individual cases of particular acquisitions, and to illustrate them by reference to the decisions of the Trade Practices Tribunal, particularly in *Queensland Flour*,[4] and the decisions of the Commission.

The Queensland Flour Case

Without a doubt the most important of the tests by which effects on competition have come to be measured are the effect of the proposed acquisition on barriers to entry into the market and its effect on concentration levels in the market. Both are well illustrated by *Queensland Flour*, the Commission having in its decision emphasised how the acquisition might increase concentration levels and the Tribunal on review having pointed to entry barriers as the most important of the market structure factors.

All three companies were flour millers and bread bakers in Queensland and the Northern Rivers district of New South Wales. The Queensland Co-operative Milling Association Ltd ("Q.C.M.A.") and Defiance Holdings Ltd ("Defiance") had made separate takeover bids for Barnes Milling Ltd ("Barnes"), which was the smallest of the millers in Queensland. All three traded chiefly in country areas where they had little or no competition from the large millers in Brisbane. They also traded to a limited extent in Brisbane itself.

The Commission had denied clearance and refused authorisation. On review of the refusal of authorisation[5] the Tribunal affirmed the decision of the Commission, because on balance it could see no substantial public benefit flowing from either acquisition, but it criticised the Commission's emphasis on likely changes in concentration levels when determining the competitive effects.

Throughout this article the abbreviation "T.B." refers to the CCH Australia Ltd, Trade Practices Reporter, Transfer Binder.

[4] The Trade Practices Tribunal, on application made to it, re-hears authorisations refused by the Commission. Such an application is called an application for review and is provided for by s. 101 of the Act. The case in Queensland was the first fully heard and determined by the Tribunal under the 1974 Act. It has a long title and may be shortly referred to as the *Queensland Flour* case. The full title is *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1975) 25 F.L.R. 169. That report is abridged and the judgment is fully reported in CCH Australia Ltd, Trade Practices Reporter, Vol. 2, case no. 40-012, page 17,223.

[5] It was never possible to obtain a review of a clearance denied by the Commission. Accordingly only the refusal of authorisation was taken to the Tribunal.

The Tribunal's decision provides a starting point for any discussion of competition in the merger context, because it sets out a long and helpful explanation of the nature of competition, although without attempting to define it.

Notwithstanding their length the Tribunal's[6] comments are well worth setting out in full:

> "competition" is such a very rich concept (containing within it numbers of ideas) that we should not wish to attempt any final definition which might, in some market settings, prove misleading or which might, in respect of some future application, be unduly restrictive. Instead we explore some of the connotations of the term.
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> Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of that information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.
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> This does not mean that we view competition as a series of passive, mechanical responses to "impersonal market forces". There is of course a creative role for firms in devising the new product, the new technology, the more effective service or improved cost efficiency. And there are opportunities and rewards as well as punishments. Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.
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> As was said by the U.S. Attorney-General's National Committee to Study the Antitrust Laws in its Report of 1965 (at p. 320):
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> > "The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements. . . ."
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> Or again, as is often said in the U.S. antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. That power may or may not be exercised. Rather, where there is significant market power the firm (or group of firms acting in concert) is sufficiently free from market pressures to "administer" to its own production and selling policies at its discretion. Firms may be public spirited in their motivation; but if their business conduct is not subject to severe market constraints this is not competition. In such a case there is substituted the values, incentives and penalties of management for the values, incentives and penalties of the market place.
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> Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand it was put to us that price competition is the most valuable and desirable form of competition. On the other hand it was said that if there is rivalry in other dimensions of

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[6] Woodward J., President; Shipton and Brunt, Members.

business conduct—in service, in technology, in quality and consistency of product—an absence of price competition need not be of great concern.

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

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

(1) the number and size distribution of independent sellers, especially the degree of market concentration;
(2) the heights of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
(3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
(4) the character of "vertical relationships" with customers and with suppliers and the extent of vertical integration; and
(5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Of all these elements of market structure, no doubt the most important is (2), the condition of entry. For it is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.[7]

Identification of Markets

Having described the nature of competition in the extract quoted above, the Tribunal in *Queensland Flour* then turned to apply its views to the case before it. It thought that the essential first step in assessment of present competition and likely competitive effects was the identification of markets. The usefulness of the market concept, it thought, went beyond the determination of market concentration to the identification of rivalrous relationships between sellers. It took the view that on the facts before it there were two product markets, flour and bread, with bakers' flour being an important sub-market.

Determination of the relevant market will often be difficult. Normally it will consist of those products sold by both acquirer and target company and any other reasonably substitutable products, in areas where both companies operate. That however, is greatly to over-simplify the question, and set out below are a number of useful tests which help to determine what the market will be in different circumstances.[8]

The Tribunal's attitude to geographic markets is of considerable interest. Normally the market will consist of a number of sub-markets,

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[7] (1975) 25 F.L.R. 169, 187-189.

[8] S. 4E, introduced after *Queensland Flour*, on 1 July 1977, now defines "Market" as follows:

4E. For the purposes of this Act, "market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

and in the case itself the Tribunal found that while the overall market was Queensland and the Northern Rivers of New South Wales, there were four important sub-markets. These were Brisbane, Northern Queensland, Southern Queensland apart from Brisbane, and the Northern Rivers. Bread markets were conceded to be local, because of the perishability of bread preventing far-flung delivery.

The Tribunal thought the concept of a market to be the area of close competition or the field of rivalry between firms. A market, it thought, is the field of actual and potential transactions between buyers and sellers, amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.[9]

The Tribunal thought that to determine the boundaries of a market one must ask the question—if the firm were to give less and charge more, would there be much of a reaction, and if so, from whom?

The Tribunal thought that the distinction between markets and sub-markets could be merely one of degree. Sub-markets might be especially useful in registering the short run effects of change; but they may be misleading if used uncritically to assess long-run competitive effects.

In the writer's view it should not be concluded from the Tribunal's attitude to sub-markets that these can never be decisive.[10] After all, if a substantial effect on competition is confined to a sub-market, whether a geographic or a produce sub-market, does not that very fact point to the sub-market really being a market in its own right? Support for this view can be inferred from the attitude to the determination of the "market", put forward by Professor Bok[11] in the context of the effect on competition of exclusive dealing arrangements:

> The "market" is only intended as an analytical tool to help estimate how great a likelihood exists that some undesirable effect will take place. The market is "relevant", therefore, in the sense that it is, or should be, constructed with reference to the particular evil, or adverse effect, under investigation.

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[9] A view that was applied by the Commission, in *Grosby Footwear Pty Ltd* (1976) T.B. 16,111.

[10] The Commission has proved itself quite prepared to look at sub-markets. See its decision in *Queensland Flour* (1975) T.B. 8,847-15; and *Williams The Shoeman Pty Ltd* (1975) T.B. 8,845-30. So did the Tribunal itself in *Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd*, CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 17,324, hereinafter called "Howard Smith".

[11] Bok, "The Tampa Electric Case and the Problem of Exclusive Arrangements under the Clayton Act" 1961 Supreme Court Review (United States) 267, 301, n. 99.
It may also be that support for the view expressed above can be found in some of the Commission's decisions. In *A.R.C. Industries Ltd* (1975) T.B. 8,845-9, 8,845-12, the Commission said: "The Commission considers the product markets directly affected by the proposed acquisition to be the markets in which A.R.C. and Cyclone (the target company) are actually or potentially in competition." That approach seems very close to "constructing the market" with reference to the particular evil under investigation.

Product Market Definition

In *Coca-Cola Operations/Cohns Industries* authorisation decision,[12] the Commission declined to agree with a submission put by the acquiring company that the relevant market should include fruit juices and cordials "as it does not see these products as being closely substitutable for aerated soft drinks".[13] The Commission reached an opposite result, applying the same principles, in the *Diverse Bottlers Ltd* decision.[14]

In choosing as it did to look at the end-use interchangeability of the products to determine the market, the Commission was adopting an approach similar to that adopted in the United States. In *U.S.* v. *Continental Can Co.*[15] the Supreme Court concluded that glass and metal containers competed with each other and therefore constituted a separate market. Another good example is the *Cellophane* case[16] where the Supreme Court found that cellophane was reasonably interchangeable with some other wrapping materials, and therefore did not constitute a separate product market. In Australia the idea is now (since the 1977 amendments) given official recognition and expression in section 4E of the Act.

The statutory definition is not applicable at all to an authorisation determination, because the word "market" is not used in the sections which provide for authorisation of acquisitions. In any event it is not the complete answer to product market definition. Even in the United States one could not always determine the market so easily. Neither there nor in Australia has the test been confined to substitutability. Such a test may often give a market which is really composed of a number of separate and distinct sub-markets. In the United States, for example, in *U.S.* v. *Brown Shoe*[17] the Supreme Court noted that:

> The outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined sub-markets may exist, which in themselves constitute product markets for anti-trust purposes. . . . The boundaries of such a sub-market may be determined by examining such practical indicia as industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices. . . .[18]

In that case the Court accepted that the relevant lines of products were three—men's, women's and children's shoes.

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[12] (1975) T.B. 8,904.
[13] *Id.* 8,906.
[14] (1975) T.B. 8,845-27.
[15] (1964) 378 U.S. 441.
[16] *U.S.* v. *E.I. Du Pont De Nemours* (1955) 351 U.S. 377.
[17] (1962) 370 U.S. 294.
[18] *Id.* 325.

In Australia the Commission handed down a useful decision in the case of *Associated Products and Distribution Pty Ltd*[19] where A.P.D. sought clearance to acquire the ETA potato chip operations of Marrickville Holdings Ltd. In that case A.P.D. submitted that the product market was potato crisps, all snack foods of the extruded rice and nut type, ice cream and allied products, aerated soft drinks, and some, if not all, of general confectionery lines.

If the Commission had applied the end use interchangeability criterion alone, it would no doubt have accepted that submission. The Commission thought however that "such a market would cover an immense range of products that are processed for eating or drinking. The Commission does not regard potato crisps as falling within the same market as aerated soft drinks".[20] The Commission was prepared to accept that because both parties (who dealt and competed in each others' products) were nevertheless prepared to separate potato crisps, potato sticks and straws as the subject matter of sale, those products could be regarded as a separate market. Indeed, the Commission thought that "perhaps, in many ways, the best indication of the market is that market delineated by the parties in their actions".[21] That, of course, is an approach similar to the U.S. Supreme Court's views in *Brown Shoe*,[22] and is a view which the Commission has applied more than once. See, for example, *Sims Consolidated Ltd* clearance decision,[23] and the authorisation decision in *Coca Cola Operations Pty Ltd.*[24]

The Commission's attitude in those decisions is difficult to reconcile with its own decision in the application by the Sydney brewer, *Tooheys Ltd*, for clearance to acquire 40% of the issued capital of Guiness (Australia) Pty Ltd;[25] Guiness produced stout. The Commission thought the applicable market to be the Australian market for beer and stout. "In reaching this conclusion, the Commission has had regard to the fact that Guiness stout is a premium product, marketed nationally and is reasonably substitutable by beer and other brands of stout."[26] It granted a clearance.

The substitutability test received an interesting twist in the recent *Howard Smith* decision,[27] where the Tribunal saw an indication of a

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[19] (1975) T.B. 8,825.
[20] *Id.* 8,827.
[21] *Ibid.*
[22] *Supra* n. 17.
[23] (1975) T.B. 16,107.
[24] (1975) T.B. 8,904.
[25] (1975) T.B. 8,809.
[26] *Id.* 8,811. Further examples are *The Land Newspaper* (1975) T.B. 8,832, 8,834; *Tubemakers of Australia Ltd* (1976) T.B. 16,132, 16,133, and the fresh application 16,150; *Siddons Pty Ltd* (1976) T.B. 16,164; *Grosby Footwear Pty Ltd* (1976) CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 16,111; and *Coca Cola Operations Pty Ltd* (1975) T.B. 8,904, 8,906.
[27] *Supra* n. 10.

nation-wide market in the applicant's capacity to move tug boats from one port to another. The tug owners could easily move a tug (especially a new one) to a different port, and so provide in that port a service to shipowners of a kind different from that provided by the existing tugs in the port.

There can, of course, be a market for services as well as for goods. A case before the Commission where the relevant market was found to be both is that of *L.G. Abbott & Co. (A.A. Ceramic Tiles Pty Ltd)*.[28] In that case the Commsision found the product market to be the wholesale and retail supply and fixing of floor and wall tiles.

The Commission has indicated[29] that the products of one supplier alone might constitute the product market for the purposes of clearance (which are no longer obtainable) or authorisation. The Commission thought that such a situation could arise in circumstances where one or more of the parties to an agreement held a patent or other legal monopoly giving the sole right to supply a product for which there were not close substitutes.

In an action brought in 1975 involving allegations of restraint of trade and monopolisation, the Commonwealth Industrial Court held that such a market existed. In *Top Performance Motors* v. *Ira Berk*[30] the Court held that Datsun cars constituted the relevant product market. That, of course, was a case where there was a close substitute for the product, namely other light cars in the same price range.[31]

Vertically Related Product Markets

A merger may affect markets on more than one level. A merger between companies operating both on the manufacturing and retail level is an example. The merger would affect the markets at both the manufacturing and retail levels. That occurred in the *Nationwide Funeral Merchandise* decision.[32] The markets were the manufacture of funeral requisites and the retail market of funeral direction. Each party operated mainly in one of those markets, but only to a small extent in both. The Commission thought the acquisition would substantially lessen competition in both markets and it denied clearance.

At the manufacturing level, the Commission thought that the integration of the leading manufacturer of funeral requisites with a

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[28] (1975) T.B. 8,845-4.

[29] *First Annual Report of the Trade Practices Commission—Year ended 30 June 1975* 62.

[30] (1975) 24 F.L.R. 286. Criticised (1975) 50 A.L.J. 89.

[31] In that case the distributor, Ira Berk, terminated the Datsun franchise of its dealer, Top Performance Motors. While, when a consumer is choosing a purchase, other light cars are no doubt substitutable for Datsuns, a dealer may find it very difficult to obtain a franchise from another manufacturer, and so to him a Toyota or a Mazda may not be at all readily substitutable for a Datsun. Perhaps it could be argued that the distributor was monopolising the market for *Datsun dealerships* rather than Datsun cars themselves.

[32] (1975) T.B. 8,839.

consortium of funeral directors who each controlled a substantial proportion of each of the three retail markets, represented a significant change in the structure of the manufacturing market. It noted that a significant share of manufacturing was already undertaken by funeral directors for their own use, and the acquisition would considerably increase this proportion. The effect of the increase, about 7% in New South Wales and Victoria and about 11% in Queensland, was to reduce substantially the share of total sales for which non-integrated suppliers could compete.

In the retail market, the market for funeral direction services, the Commission looked at the likely competitive effect of the acquisition, rather than the effect on the structure of the market which was slight. The Commission thought that the acquisition would have removed from the market a funeral director who had had a significant competitive influence in the Melbourne market.

Definition of the Geographic Market

It is common for the Commission to see a market as being State-wide or Australia-wide. In the *Tooheys Ltd* clearance decision,[33] the Commission took the applicable market to be the Australian market for beer and stout. In the *Land Newspaper Ltd* decision,[34] the Commission said:

> On the basis of the fact that main sales for each publication are in New South Wales, the Commission regards the geographic market as being limited to the State of New South Wales.[35]

It hardly needs to be said that it is vital for companies and their advisers to choose the right market (or at least the same one as the Commission chooses). The competitive effect of a merger for example, might well be very diluted if it were looked at in the context of an Australia-wide market. Yet, if the Commission chose to regard the relevant markets as a series of State or other local markets, the effect might in each market or some of the markets be more concentrated and destructive of competition, leading to a refusal of authorisation by the Commission.

A good illustration is the *A.R.C. Industries Ltd* clearance decision.[36] A.R.C. wished to acquire shares in the Cyclone Company. In denying clearance the Commission said that:

> although there are indications that the market may be national (*e.g.* pricing policy, advertising and sales promotion, innovation and investment decisions are co-ordinated on a national basis) the Commission takes the State markets as the relevant basis for assessing the effects of the proposed acquisition on competition.[37]

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[33] *Supra* n. 25.
[34] (1975) T.B. 8,832.
[35] *Id.* 8,834.
[36] (1975) T.B. 8,845-9.
[37] *Id.* 8,845-13.

Although the Commission does not expressly say so, it appears that it looked at separate State markets rather than the national market because the competitive situation was different in each State.

The outer limits of a market may be determined because of the existence of freight charges which can operate as a barrier to entry. That criterion was employed by the Commission in the *Bunge Industrial Ltd* decision.[38] The latter was a case involving flour products, and the geographic markets were thought to be the State of Victoria and the contiguous Riverina district of New South Wales. The Commission thought that freight charges operated as a barrier to entry for New South Wales millers (except for those in the Riverina) and Queensland millers selling into Melbourne. It reached a similar decision in the *Pak Pacific Corporation Pty Ltd* decision,[39] noting that "transport costs are such that major sales interstate are not commercially viable".[40]

An important criterion in determining the geographic market will be whether or not both the acquiring company and the company to be acquired operate in the area in question. In the case of the acquisition of the issued shares of South Australia Perpetual Forests Ltd by Softwood Holdings Ltd[41] the Commission said:

> the relevant market is considered to be that in which the target company is operating, and of that market both the acquiring and target companies control a substantial share. The Commission therefore considers the acquisition would be likely to have the effect of substantially lessening competition in the market.[42]

A similar view was taken by the United States Supreme Court in *U.S.* v. *Philadelphia National Bank*[43] where the Court held the market to be Philadelphia and the three adjacent counties, these being: "the area of competition overlap, within which the effect of the merger on competition will be direct and immediate".[44]

Lessened Competition

Having determined the relevant market, the next step is to consider what will be the competitive effects in that market of the acquisition in question.

For authorisations the test under the 1974 Act was a little different from the present test. Under the Act introduced in 1974, to gain an authorisation, a substantial public benefit had to be shown to result, which was not otherwise available, and it had to be shown that in all

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[38] (1975) T.B. 8,847-9.
[39] (1975) T.B. 8,841.
[40] *Id.* 8,842.
[41] *Softwoods Holding Ltd* (1975) T.B. 8,805.
[42] *Id.* 8,806.
[43] (1963) 374 U.S. 321.
[44] *Id.* 357.

the circumstances that public benefit justified an authorisation. In practice, one of the factors that had to be considered in weighing up the benefits and detriments was the effect on competition. But there was no need to show any "substantial" effect on competition. Any effect at all would be relevant.

The view has been put at the beginning of this article that it is still of critical importance in merger authorisation cases to determine the seriousness of the effect on competition. In attempting that prediction the following factors are likely to be found relevant. In most cases one or more will be decisive. As already mentioned, the first two are in the usual case by far the most important.

- The effect of the proposed acquisition on market concentration levels;
- its effect on barriers to entry into the market;
- its effect on potential competition;
- whether it involves vertical integration, especially if that means control over competitors' supplies of materials;
- whether it amounts to market sharing;
- whether it is likely to lead to reciprocal dealing, commonly called "reciprocity".

The following further factors are also relevant, less predictable in their results, but often tell in favour of an acquisition:

- whether the acquisition will produce economies of scale or consolidation, including rationalisation of plant *etc.*;
- whether it will strengthen an existing competitor;
- whether its effect is merely to replace one competitor with another;
- whether it involves a joint-venture;
- whether the target company is a "failing" company;
- the effects of other proposed mergers;
- the effects of government price controls;
- advertising and promotion and product differentiation;
- restrictive agreements.

Each of these factors will now be considered in turn.

Market Concentration

The degree of market concentration[45] and likely increase in market concentration as the result of a merger, are matters to which the Commission has paid much attention.[46] It will be remembered that the Tribunal in the *Queensland Flour* decision[47] criticised the Commission

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[45] Concentration levels in Australian industry are very high. Various studies are collected by Santow, "Mergers and the Commonwealth Trade Practices Act 1974" (1975) 49 A.L.J. 52.

[46] In *Dairy Vale* (1975) T.B. 8,807, and *Associated Products & Distribution Pty Ltd* (1975) T.B. 8,825.

[47] (1975) 25 F.L.R. 169.

for being overly concerned with likely increases in market concentration. Nevertheless, the concentration level of the market was one of the five important matters of market structure which the Tribunal thought should be scanned in the case of most mergers. In its 1976 Annual Report[48] the Commission reacted to criticisms that it has been unduly concerned with the structure of the market, declaring that it would continue to have regard to market structure.

Calculation of concentration levels is an exercise that must be done. Given, moreover, that it is usually much easier to rely on that calculation and an estimate of changes which the acquisition would bring about, than to attempt an often difficult assessment of whether, despite high concentration, the companies in the market would nevertheless continue to compete vigorously, it must be expected that the Commission will place great weight on concentration level changes. Commission staff after all are human and especially when working on clearance applications under the 1974 Act, which had to be decided within thirty days, the easy option of reliance on concentration levels to determine competitive effect was inevitable in many cases. Clearances can no longer be obtained, but authorisations must now be decided within four months.

United States cases have shown that in an already highly concentrated market, even a slight increase in concentration may affect competition. In *U.S.* v. *Aluminum Co. of America*[49] an additional 1.3% in concentration was held to be too much because the market was already highly concentrated. Other United States cases concerned with this factor have been *Brown Shoe* v. *U.S.*[50] and *U.S.* v. *Philadelphia National Bank.*[51] In Australia the Commission has taken a similar view. In the case of *Plaster Glass Pty Ltd*[52] clearance was denied for a distribution agreement between Australian Consolidated Industries Ltd ("A.C.I.") and the Federation of Wall & Ceiling Contractors, under which the former would supply a glass fibre called "plasterglass" only to members of the federation. Clearance was denied, partly on the grounds that a high degree of concentration existed in the glass fibre manufacturing market.

Yet another example is the *South Australian Gas Company* decision,[53] where the Commission found that the applicant's share of the market outside Adelaide would rise from 75% to 85% if the acquisition took place. Clearance was denied, and although the Commission did not expressly say so, it must be assumed that its reason was chiefly the existing high level of concentration. Other examples of the same

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[48] *Second Annual Report of the Trade Practices Commission—Year ended 30 June 1976* para. 1.21.

[49] (1964) 377 U.S. 271.

[50] (1960) 370 U.S. 294.

[51] (1963) 374 U.S. 321.

[52] (1975) T.B. 8,604.

[53] (1975) T.B. 8,812.

approach are the decisions in *Pak Pacific Corporation Ltd*[54] and *St. Regis-A.C.I.*[55]

Caution should be exercised, however, in assuming that simply because there will be an increase in an already highly concentrated market, the Commission will decide against a merger authorisation application.

In the *Plaster Glass*[56] decision, the Commission noted a number of other factors that influenced its decision. One of these was that in the Commission's view A.C.I. was clearly a dominant supplier. On the other hand, the Commission has granted clearance, even where existing concentration levels are high, where it has thought that the market was not likely to become less competitive.[57]

In *Queensland Flour*,[58] the Tribunal, although affirming the Commission's refusal of authorisation, suggested that the Commission had paid too much regard to concentration levels, and it can be expected that the Commission in assessing competition effects will in future rely less heavily on likely concentration level changes and have more regard to market behaviour.

Moreover, the Commission will often be swayed by past concentration trends in the market, as much as by the actual shares which the participants hold or are likely to hold. In the *Associated Products & Distribution Ltd* decision,[59] A.P.D. sought clearance for its proposed acquisition of the ETA potato chip operations of Marrickville Holdings Ltd. A.P.D.'s history of similar acquisitions counted against the clearance application when the matter came before the Commission, the more so because the industry was one in which the limits to the economics of scale were reached comparatively early, and one in which the expected growth of demand made unnecessary a rationalisation of the kind proposed by A.P.D.

Certainly in none of the decisions to date has the Commission decided that increased concentration of a slight degree will of itself always involve a substantial lessening of competition simply because of existing high concentration levels. It has often granted clearance however on the ground that the markets in question were structurally competitive. An example is the *V.I.A. Limited* decision.[60]

Barriers to Entry

It will be recalled that in the *Queensland Flour* case, the Tribunal thought that ease of entry was the most important single factor to be considered when analysing market structure:

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[54] (1975) T.B. 8,842.
[55] (1976) T.B. 16,156.
[56] *Supra* n. 52.
[57] *E.g. Riverfruit Industries* (1975) T.B. 8,845-5.
[58] *Supra* n. 47.
[59] (1975) T.B. 8,825.
[60] (1974) T.B. 8,804.

> no doubt the most important [element of market structure] is the condition of entry. For it is the ease with which new firms may enter which establishes the possibilities of market concentration over time; and it is the threat of the entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct.[61]

The Commission also has paid great attention to entry barriers. In the case of an application for clearance by *Farmers' Co-operative Executors and Trustees Co.*,[62] clearance was granted partly on the grounds that, although it was unlikely that new entrants would appear in the trustee company areas, there was constant entry into the professions which competed with the trustee companies for the business of administering deceased estates.

By contrast, where the conduct the subject of the authorisation application had a tendency to strengthen barriers to entry, the Commission has proved less likely to approve it. An example is the acquisition by Comeng Holdings of Bradken Consolidated[63] which would have resulted in heightened barriers to entry in the railway rolling-stock market. That factor counted against the granting of clearance, although it was not the major factor.[64]

Limited markets can be a practical barrier to entry. If the market volume is small prospective entrants may well be deterred. Although the Commission has expressly declined to have regard to this factor,[65] the Tribunal has recently shown a willingness to take it into account, in the *Howard Smith* decision,[66] when the Tribunal regarded not only the limited size of the market but also its limited growth prospects as constituting formidable barriers to entry.

Potential Competition

An impact on potential rather than existing competition may determine whether a merger or other conduct will be granted authorisation. In *U.S.* v. *El Paso Gas Co.*[67] the United States Supreme Court struck

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[61] *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1975) 25 F.L.R. 169, 189.

[62] (1975) T.B. 8,816.

[63] *Comeng Holdings* (1975) T.B. 8,813, 8,845-8.

[64] Other examples are *Austral Mining (Holdings) Pty Ltd* (1975) T.B. 8,825; *Pak Pacific Corporation Pty Ltd* (1975) T.B. 8,841, 8,842; *Scovill Australia Pty Ltd* (1975) T.B. 8,845-7, 8,845-8; *Howard Smith Industries Pty Ltd* (1975) T.B. 8,845-14, 8,845-16; *Kiwi Australia Ltd* (1975) T.B. 16,101, 16,102; *Ampol Petroleum Ltd and Newbold General Refractories Ltd* (1975) T.B. 16,104; *Clements Marshall Consolidated Ltd* (1976) T.B. 16,117; *Peninsular Group Holdings Ltd* (1976) T.B. 16,163; *L.G. Abbott & Co.* (1975) T.B. 8,845-4; *Riverfruit Industries* (1975) T.B. 8,845-5; *Williams the Shoeman Pty Ltd* (1975) T.B. 8,845-30.

[65] *Sims Consolidated Ltd* (1975) T.B. 16,107, 16,109. In *Regal Industries Pty Ltd* (1976) T.B. 16,106, 16,107, Commissioner Venturini took into account that, although entry into the drycleaning business was not difficult, new entry on a meaningful scale was not likely. Clearance was denied.

[66] *Supra* n. 64.

[67] (1964) 376 U.S. 651.

down a merger between El Paso and Pacific which precluded a potential competitor (Pacific) from entering the California market. Even though Pacific was not a competitor in that market, its potential to enter was a significant element of the market.

Impact on potential competition was a vital factor in the decision of the Australian Tribunal in *Howard Smith.* There was in the Tribunal's view considerable pressure on tug boat owners to keep their fleets up to date with modern technology, pressure springing from the constant threat of entry from owners in other ports who were waiting in the wings to pounce on any port where the standard of towing services had declined.[68]

In 1975 the Commission denied clearance to Associated Products and Distribution Ltd,[69] for its proposed acquisition of the ETA potato chip operations of Marrickville Holdings. One of the reasons was that, even if ETA's operations were closed down, in the absence of the acquisition, ETA would remain as a potential entrant, and that threat of re-entry operated as "an effective pro-competitive influence".[70] A similar decision was *Nationwide Funeral Merchandise Pty Ltd.*[71] Contrast, however, the Commission's decisions in *Bowater-Scott Ltd,*[72] and *Tubemakers of Australia Ltd.*[73]

Integration—Control of Competitors' Supplies of Materials

It will be recalled that integration was one of the elements which the Tribunal in *Queensland Flour* thought should usually be looked at.

Integration of supplier and customer can often mean control over competitors' supplies of raw materials. This consideration was one of the reasons which led the Commission to deny clearance to Pioneer Concrete Services Limited for its acquisition of the assets of Riverina Sand and Aggregate Pty Ltd.[74]

As well as selling in the Wagga market for sand and aggregate, Pioneer is also a seller in the pre-mixed concrete market. If the acquisition had taken place its competitors in that market would have become totally dependent on it for their supplies of sand and aggregate, a factor that the Commission thought would inhibit competition.

In the *Nationwide Funeral Merchandise* decision[75] the Commission thought that integration would weaken the competitive structure of the industry, and it reached a similar conclusion in the *Actrol Ltd* decision.[76]

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[68] CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 17-324, 17,340.
[69] *Associated Products Distribution Ltd, supra* n. 59.
[70] (1975) T.B. 8,829.
[71] (1975) T.B. 8,839.
[72] (1975) T.B. 16,106.
[73] (1975) T.B. 16,132, 16,135.
[74] *Pioneer Concrete Services Limited* (1975) T.B. 8,830.
[75] (1975) T.B. 8,839.
[76] (1975) T.B. 8,845-22, 8,845-26.

It is apparent from those decisions that a vertical acquisition which gives substantial control over the raw materials supplies of competitors will be seen as lessening competition. But it should be remembered that a vertical merger may well be anti-competitive whether it has that effect or not. That is usually because it will foreclose a share of the market, something that has been especially condemned in the exclusive dealing context.

Foreclosure must be kept clearly separate from the related concept of market concentration. The difference can be appreciated from the following example. If company A, a toy manufacturer, with 50% of the market acquires company C, with 40% of the market, the merged entity will have 90% of the market. In other words the concentration level has been increased. But if A were to acquire B, a company operating a large chain of toyshops, while there would be no increase in concentration in either the manufacturing or retail market for toys, there would be a considerable section of the retail market foreclosed to other toy manufacturers. For that reason the Commission might well have denied clearance for such an acquisition, although the writer has been unable to discover any Commission decisions where foreclosure has played a part.

Market Sharing

The Commission has set itself against agreements which are or have the effect of being market sharing agreements. In the *First Annual Report*,[77] the Commission indicated that in its view market sharing agreements could be even more anti-competitive than price-fixing agreements. Merger agreements can have this effect just as much as other agreements, and indeed in the *Land Newspaper* decision,[78] the agreement for acquisition by the Land group of assets of the Country Life Newspaper was condemned by the Commission as having just that effect, an effect which the Commission thought inevitably has a substantial lessening effect on competition.

Reciprocity

Reciprocity is the practice by which a firm buys only from those who buy from it.[79]

A merger may assist a firm to bring about reciprocal dealing, such as where A takes over B, a company which makes a product used by A's suppliers. A is then in a position to condition its purchases from those suppliers on their buying all such products exclusively from B.

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[77] *First Annual Report of the Trade Practices Commission—Year ended 30 June 1975* 68.

[78] (1975) T.B. 8,832, 8,836.

[79] Areeda, *Anti-Trust Analysis* (2nd ed. 1974) 680.

Although some writers[80] have argued that reciprocal dealing does not adversely affect competition and should therefore be permitted, the United States courts have always opposed it. A prime example is *FTC v. Consolidated Foods*.[81] There the District Court had ordered Consolidated to divest itself of its acquisition, Gentry Inc., and the order was upheld by the Supreme Court.

Consolidated was in a position to exert pressure. It attempted to force other corporations to buy from Gentry, but the Supreme Court declined to be concerned with the success or otherwise of these attempts. It agreed with the Federal Trade Commission that the mere possibility of such pressure being exerted created an "anti-competitive obstacle" in a highly concentrated market.

Santow suggested that because such arrangements might have violated section 45, (which at the time he wrote prohibited anti-competitive agreements in restraint of trade), there was no need to ban the merger.[82] Section 45 was drastically amended in 1977, but it would probably still apply to such arrangements. The present writer agrees with Santow's comment that:

> . . . the mere potential for a reciprocal dealing ought not to result in the banning of the relevant merger since this is to assume not only that the companies concerned will breach section 45, but also that section 45 will not be policed or enforced effectively to prevent this.[83]

Economies of scale or consolidation

Economies of scale achieved by a merger might be thought to be "public benefits" relevant to an authorisation argument as public benefits but not to the effect on competition. The Commission, however, has treated economies of consolidation as going to show a likely increase in effective competition.[84]

In the *Adelaide Permanent Building Society* decision,[85] the Commission granted clearance to Adelaide Permanent to merge with Town and Country Permanent Building Society, because of the economies which would be achieved from a consolidation of the two.[86]

Cost savings effected by rationalisation of company resources constituted one of the reasons for the Commission's decision granting clearance to Sims Consolidated Ltd.[87] Sims wished to acquire 87.6%

[80] *E.g.* Anderson, "Reciprocal Dealing" (1967) 76 Yale Law Journal 1020.
[81] (1965) 380 U.S. 592.
[82] Santow, *op. cit.* 67.
[83] *Ibid.*
[84] *Photola Pty Ltd* (1975) T.B. 8,831.
[85] (1975) T.B. 8,823.
[86] Rationalisation arguments were also considered in *Howard Smith, supra* n. 64, but a different approach seems to have been taken in *Cottees General Foods Ltd* (1975) T.B. 16,143, 16,145.
[87] *Sims Consolidated Ltd* (1975) T.B. 16,107, 16,108.

of the issued capital of Napier Bros Ltd. Napier was unable to meet the demand for tillage implements which it manufactured while Sims had idle capacity which could be converted to the production of tillage implements. While other reasons dominated the decision, it does appear from the published reasons for decision that the rationalisation factor played an important part.[88]

In the view of the present writer it is an argument that could well carry the day in an appropriate case. Rationalisation may well increase the efficiency and hence the competitiveness of both the target company and the acquiring company.[89] In the writer's view the argument is really just a particular aspect of the argument that an acquisition may strengthen the competitivenss of an existing competitor. That argument is discussed below.

In 1975 the Commission granted authorisation to Dairy Vale Co-operative Ltd, Southern Farmers Co-operative Ltd[90] to acquire the ordinary shares of Myponga Co-operative Dairying Society and Jervois Co-operative Dairying Society and the whole issued capital of Jacobs Dairy Produce Co. Ltd on the ground that the acquisition would permit rationalisation and consequent savings. It imposed conditions that the applicant report to the Commission on the steps taken to achieve rationalisation and other matters.

As a general rule the Commission will not, however, grant an authorisation on this ground unless it is satisfied that the cost savings achieved will be passed on to the public and not simply retained within the company as increased profits.[91]

Yet the Commission will not always insist on proof that cost savings affected by rationalisation will be passed on to the public, at least not in the form of immediately lower prices. In the *I.C.I. Australia Ltd* decision,[92] the Commission accepted that the rationalisation to be achieved by the acquisition would produce, amongst other things, a lower unit cost, and went on to say:

> the Commission accepts these as being a substantial benefit to the public even though these benefits may not be directly passed on to consumers in the form of lower prices.[93]

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[88] Possibilities of rationalisation were also a factor in the clearance granted to Cottees General Foods Ltd, *supra* n. 86.

[89] Increased efficiency of the target company flowing from the acquisition was the chief reason that the Commission granted clearance to Pronto Mixed Concrete Co. Pty Ltd to acquire Concrete Sand Pty Ltd (1975) T.B. 8,806.

[90] *Dairy Vale Co-operative Ltd, Southern Farmers Co-operative Ltd* (1975) T.B. 8,913.

[91] *The Land Newspaper Ltd* (1975) T.B. 8,915; *Clements Marshall Consolidated Ltd* (1976) T.B. 16,903.

[92] (1975) T.B. 16,901.

[93] (1975) T.B. 16,902.

This ambivalent attitude was also adopted by the Tribunal in *Howard Smith*,[94] although the Tribunal warned that a merger which benefited only small numbers of shareholders of the applicant corporations through higher profits and dividends might well be seen as not sufficiently spreading its benefits among members of the community generally.

Strengthening Existing Competitor

Brambles Industries Ltd and Brink's Incorporated received clearance in 1974 for a proposal to acquire the shares and activities of Wells Fargo-Wormald Armoured Express Pty Ltd.[95] Clearance was granted even though the acquisition would reduce the number of competitors in the New South Wales market from four to three, because the companies involved had only a minor share of the market, and the acquisition would strengthen the hand of one of the smallest competitors in dealing with the dominant Mayne Nickless Limited. The argument has proved decisive, or at least a material factor, in a number of clearance decisions[96] and in appropriate cases should continue to prove a potent weapon in the hands of the company seeking to persuade the Commission to authorise an acquisition.

One way in which an existing competitor's hand may be strengthened is through its acquisition by a company which has access to foreign technology otherwise outside the reach of the company being acquired. That consideration was uppermost in the mind of the Commission when it granted clearance to the U.S. based Applied Power Australia Ltd to acquire Vane Instruments Pty Ltd.[97]

Replacement of one Competitor with Another

In 1974 clearance was granted to Otis Elevator Company to acquire the assets of a small specialist manufacturer of electro-hydraulic and service lifts, Arnold Engineering & Lifts Pty Ltd.[98] Otis did not itself

[94] CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 17,324, 17,334.

[95] *Brambles Industries Ltd and Brink's Incorporated* (1974) T.B. 8,802.

[96] *Swift & Company Ltd* (acquisition of the issued shares of Monosteel (Newcastle) Pty Ltd) (1975) T.B. 8,838; *T.A.A.-Mayne Travel Industries Pty Ltd* (1975) T.B. 8,845-32; *Bunge (Industrial) Ltd* (application for clearance to acquire 50% of the shares of H.P. Products Pty Ltd, (1975) T.B. 8,847-9, 8,847-10; *Cottees General Foods Ltd* (proposed joint venture with Henry Jones (IXL) Ltd) (1976) T.B. 16,143. Contrast however *Allied Mills Industries Ltd* (proposed acquisition of the W.A. flour miller, Peerless Roller Flour Mills Pty Ltd) (1976) T.B. 16,112. The Commission appears to have thought that the giant Allied Mills group would have exerted too strong an influence in a highly concentrated market (para. 26 of the decision). It denied clearance. That type of argument is well recognised in the United States. It was successful in the United States Supreme Court's decision in *F.T.C.* v. *Proctor & Gamble* (1976) 386 U.S. 568. Compare also the Commission's decision in *St. Regis-ACI Pty Ltd* (1976) T.B. 16,156, 16,158.

[97] *Applied Power Australia Ltd* (1975) T.B. 8,825.

[98] *Otis Elevator Company* (1974) T.B. 8,801. A similar result was reached in *Diverse Products Ltd* (1975) T.B. 8,845-27, 8,845-29 and in *Brown & Dureau Ltd*

make those kinds of lifts. One reason for the decision was that the acquisition would simply replace an existing competitor with a different one. This argument, of course, will only be successful if the replacement of one competitor with another does not affect the competitive balance.

Joint Ventures

Joint ventures will often be found to be pro-competitive. In *Consolidated Goldfields Australia Limited and Others*[99] the Commission granted a clearance for a joint venture acquisition. Explaining its view of the competitive effect of the acquisition the Commission said:

> The parties to the proposed joint venture are not in actual competition and it is unlikely that without the joint venture they would enter the industry separately. . . . Most of the production of the joint venture company will be exported, but to the extent that it does supply the local market its effect will be pro-competitive. . . .[1]

Another example of a joint venture found to be pro-competitive is the application by Cabal Pty Limited and Besselink Bros Pty Ltd[2] who wished to form a company to be called Petrel Pty Limited, for the purpose of constructing the roof of the National Art Gallery in Canberra.

But if the parties to the proposed joint venture are already in competition with each other, and especially if the venture would increase concentration in the market or raise the height of barriers to entry, clearance is likely to be denied. Clearance was in fact denied for those reasons in the *Howard Smith* decision.[3] Despite the presence of those factors however, clearance might still have been granted if competition was likely nevertheless to remain vigorous, as was found to be the case in the *Cottees General Foods Ltd* decision.[4] Clearances are no longer available but the argument should prove equally successful in an authorisation application.

(1975) T.B. 8,847-2; *T.A.A.-Mayne Travel Industries Pty Ltd* (1975) T.B. 8,847-5; *Scovill Australia Pty Ltd* (1975) T.B. 8,845-7; and *Canada Dry Corporation* (1975) T.B. 16,105.

[99] (1975) T.B. 8,805.

[1] *Ibid.* Where, but for the joint venture, either participant might have entered the market the result could well be different. In *U.S.* v. *Penn-Olin Chemical Co.* (1964) 378 U.S. 158 the United States Supreme Court seems to have held that even the mere possibility that one of the participants might have entered the market alone was enough to condemn the joint venture, because its effect would be to eliminate that potential competition.

[2] *Cabal Pty Limited and Besselink Bros Pty Ltd* (1975) T.B. 8,838. Another example is *Australian Wire Weavers Pty Ltd* (1976) T.B. 16,140.

[3] (1975) T.B. 8,845-14, 8,845-16.

[4] (1976) T.B. 16,143, 16,145.

Failing Company

In the *Queensland Flour* case,[5] the Tribunal said that it was left with the impression that the target company, Barnes Milling Ltd, was a failing company "not in terms of liquidity, but in terms of the will to compete, the absence of managerial skills at board level and the inability of the few remaining profitable ventures to support the loan commitments and the overheads of the company and still show a normal return on capital".[6]

The Tribunal is clearly prepared to regard as "failing" companies organisations which are liquid but only marginally profitable. Although in its clearance decisions the Commission has referred to the failing company concept from time to time,[7] it has not said what a failing company is. In the *Tubemakers* decision, however, Commissioner Pengilley said:

> It is apparent that Amcast [the target corporation] is far from a failing company. Hence, I cannot accept, on present profit trends, that Amcast will necessarily leave the market if the acquisition is not approved.[8]

That view, like that of the Tribunal, seems to regard a failing company as one which, in the absence of an authorisation, would depart the markets in which it has been operating. It is submitted that any company which is failing in that sense would secure authorisation, although it must be conceded that there is little guidance available on this important question. In *Construction Materials (Aust.) Pty Ltd*[9] the Commission (Dr Haddad) granted clearance where the insolvent target company would otherwise have been forced to cease operations. Contrast the decision in *Allied Mills Industries Ltd.*[10] It should be noted that the notion of a failing company in the United States is quite a different one, so that U.S. decisions should be treated with caution. In the U.S. it must be shown that the acquiring company is the only available purchaser.[11]

Effect of Other Proposed Mergers

The Commission will consider the effect of another merger on the competitive situation, even though it is only a proposed merger. It did so, in the *Dairy Vale Co-operative Limited* decision:[12]

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[5] *Supra* n. 61.

[6] CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 17,223, 17,258. It should be noted that this portion of the judgment is not reproduced in the report of the decision in (1975) 25 F.L.R. 169.

[7] *Tubemakers of Australia Ltd* (1976) T.B. 16,132, 16,135.

[8] *Ibid.*

[9] (1976) T.B. 16,137.

[10] (1976) T.B. 16,112.

[11] *U.S.* v. *Greater Buffalo Press Inc.* (1971) 402 U.S. 549.

[12] *Supra* n. 90.

> . . . the Commission could not ignore the fact that another and similar proposed merger in the same industry is currently before it for consideration. Both mergers, if they were to take place, would effectively leave only three competitors in the market with significantly larger shares of the market, and consequently in the Commission's view there would be a substantial lessening of competition in the market.[13]

Government Price Controls

In the *Dairy Vale* decision the Commission took the view that the absence of price competition due to government regulation only heightened the importance of other forms of competition:

> Moreover, the restriction on price competition imposed by the regulations makes it all the more necessary that other forms of competition (on the basis of quality . . . service and brand loyalty) should be free of restrictions.[14]

Advertising and Product Differentiation

In *Queensland Flour* the Tribunal considered one of the matters to which regard should normally be had when assessing the effect of a proposed acquisition on competition was "the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion".[15]

The application of that test would probably tend to show only the present state of competition rather than provide any guidance as to the state of competition in the future. The tests set out by the Tribunal were in fact all put forward rather more as indicators of the present level of competition than anything else. Nevertheless, because the Tribunal regards the test as important, some attempt should be made when applying for authorisation to produce evidence of the degree of product differentiation and sales promotion.

Restrictive Agreements

Yet another aspect of market structure which the Tribunal in *Queensland Flour* suggested needs to be scanned is the nature of any restrictive agreements. That is, to use the Tribunal's words, "the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities".[16]

In the *Queensland Flour* case itself, such agreements existed in the form of "ties"—contracts by which a miller lent money to a bakery in

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[13] (1975) T.B. 8,806, 8,807.

[14] *Ibid.*

[15] (1975) 25 F.L.R. 169, 189; CCH Australia Ltd, Trade Practices Reporter, Vol. 2, 17,223, 17,246.

[16] *Ibid.*

return for a promise to buy flour from the lender. Nor were the ties confined to loans. In some cases the bakery was a subsidiary of the miller and was obliged to take his flour. In others the miller owned the freehold on which the bakery was located, and was thus able to exert pressure on the bakery.

Although such agreements will often contravene section 45, which prohibits anti-competitive agreements and boycott agreements, they will continue to be a factor in merger cases because their continuance can be ensured by simply lodging with the Commission applications for their authorisation, when they will almost certainly receive interim authorisation. Until the applications are considered on their merits the Commission will regard the ties as valid[17] and they will therefore be a factor to consider in a merger authorisation application.

The relevance of restrictive agreements will vary, depending on their nature. In *Queensland Flour*, for example, it was argued that a separate market did not really exist for flour in the case of that percentage sold to tied bakeries. The end product was argued to be bread, and it was thought pointless to look at flour when it was tied to a particular bakery. That argument did not carry the day, but it can be seen how the existence of restrictive agreements, whether they be ties or something else, may throw a different light on a merger, or require that it be argued in a particular way. No better guidance can be offered than that each type of agreement be examined carefully to assess its effect on the state of competition in the market and likely competitive effects in the event of the acquisition taking place.

Conclusion

Corporate acquisitions are unlikely to receive authorisation if they will have a serious detrimental effect on competition. They may receive authorisation if they result in an overall benefit to the public, but if a merger or acquisition is strongly anti-competitive an applicant will find it difficult to secure an authorisation.

A question frequently asked is whether a confident prediction can ever be made that the Trade Practices Commission will or will not grant an authorisation in a particular case.

In the writer's view the answer to that question must be yes. Most authorisations will turn on the effect of an acquisition on competition. This article has discussed that effect. It seems clear to the writer that an acquisition will be regarded as badly affecting competition if it is likely either to raise barriers to entry into the market or to increase concentration levels. These are the twin tests which have dominated the decisions of the Commission and the Tribunal. A number of other

[17] It did so in *Queensland Flour* and doubtless will do so in future cases.

important tests have also been considered and may be decisive in a particular case.

What if an acquisition does not seem to attract any of the tests so far considered? Could an applicant then be confident that the acquisition would have little serious effect on competition? The answer again will be yes, but with one qualification. The chief officer of the applicant company will know his industry, his markets and his competitors. He will know, if he examines his conscience honestly, whether the acquisition might have a serious effect on competition. Doubtless he will have already calculated the advantages to his company. If he is at all competent he ought to be able to make a very shrewd assessment of the effect of the acquisition in the market place.

If he is wrong and the acquisition is refused authorisation, he must then decide whether to go ahead and risk contravening section 50. Such a contravention might well attract a fine of a quarter of a million dollars and even divestiture, not to mention damages suits from injured competitors. The Act has sharp teeth!