Trade Practices in 2003 and a spotlight on the Dawson Inquiry
College of Law
Mergers and Acquisitions Under Section 50 of the Trade Practices Act 1974 (Cth)
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27 February 2003

1. Introduction

Section 50 of the Trade Practices Act 1974 (the Act) regulates arrangements under which assets or shares are acquired.

This section provides that a corporation must not, directly or indirectly, acquire shares in the capital of a body corporate or acquire any assets of a person if the acquisition would have the effect or be likely to have the effect of substantially lessening competition in a market.

Section 50(3) of the Act sets out a non-exhaustive list of matters which ‘must be taken into account’ in determining whether an acquisition is likely to substantially lessen competition in a market.¹

When assessing a merger the Australian Competition & Consumer Commission (ACCC) will:

(a) define the relevant market(s);
(b) determine the market shares;
(c) if the market shares are close to or breach the thresholds set out in the ACCC’s Merger Guidelines², look at the level of actual and potential import competition;

¹ These matters are:

(a) the actual and potential level of import competition in the market;
(b) the height of barriers to entry to the market;
(c) the level of concentration in the market;
(d) the degree of countervailing power in the market;
(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
(f) the extent to which substitutes are available in the market or are likely to be available in the market;
(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
(i) the nature and extent of vertical integration in the market.
(d) if imports are not an effective constraint, examine the height of barriers to entry; and
(e) if barriers to entry are high, examine the other factors in s50(3).

This paper aims to provide some guidance on the ACCC’s processes and requirements regarding mergers (formal and informal) and examine what the ACCC has been focussing on recently and some ACCC trends. The paper will also consider the circumstances when one would apply for informal clearance and authorisation and discuss the benefits and weaknesses of each process. The paper will conclude by looking at some of the suggestions for reform of mergers made to the Dawson Review.

2. Dealing with the ACCC

There are a number of options for dealing with the ACCC in relation to a proposed merger or acquisition.

2.1 Do nothing

If there are clearly no competition issues arising out of the merger or acquisition, the parties may decide not to inform the ACCC. Unlike some overseas jurisdictions, there is no pre-merger mandatory notification requirement in Australia. The purpose of notifying the ACCC is normally to avoid queries that might otherwise delay the deal or to obtain its informal assurance that it does not intend to take any action against a proposed acquisition.

Alternatively, the parties may wish to send a short letter to the ACCC by way of courtesy informing them about the arrangement but assuring them that there are no competition concerns due to this lack of overlap. It would be better for such a letter to contain a brief description of the markets and market shares to demonstrate this. The parties may indicate that they do not require a response from the ACCC but are simply informing them as a matter of courtesy about the arrangement.

If the acquisition potentially gives rise to competition concerns, however, these approaches involve considerable risks. The ACCC may become aware of the acquisition from FIRB or media reports. There is also the likelihood of complaints by customers, suppliers or competitors, particularly in sensitive industries.

If the ACCC believes the acquisition is likely to substantially lessen competition in a market in Australia, it has wide powers to apply to the Federal Court to stop the merger or acquisition from proceeding. In particular, the ACCC can apply to the Federal Court for:

- an injunction preventing the merger or acquisition from proceeding or completing\(^2\);

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\(^2\) The ACCC will investigate a merger or acquisition in the following circumstances:

- if the post-merger market shares of the four major participants in the relevant market (CR4) is greater than 75% and the market share of the merged entity is greater than 15%; or
- if the CR4 is less than 75% and the market share of the merged entity is greater than 40% (ACCC Merger Guidelines, 1999 at ¶5.95).

\(^3\) Section 80 of the Act
• remedial relief such as orders for divestment of shares or assets\(^4\); or
• pecuniary penalties to be imposed against all those involved with the acquisition\(^5\).

Because of the damage an acquisition is likely to suffer in any court proceedings, it is usually sufficient, however, for the ACCC simply to threaten to take such action.

### 2.2 Informal clearance

Parties may voluntarily seek ‘informal clearance’ from the ACCC in relation to a proposed merger or acquisition. It is certainly prudent to seek informal clearance if it is likely that the merger or acquisition will breach (or come close to) the competition thresholds. It is also prudent in sensitive industries or where the parties require more certainty.

In any event, the ACCC encourages parties to approach it, on an informal basis, once there is a real likelihood that a merger or acquisition may proceed. The ACCC should be notified at least three to four weeks before the proposed completion date of the acquisition (longer if the matter is more complex).

A submission to obtain informal clearance should set out:

• background information about the parties;
• the structure of the relevant market, including any relevant information about other major market participants;
• the structure of the merger or acquisition and its commercial rationale; and
• an analysis of the proposed acquisition in terms of the relevant market(s), market shares and the relevant factors referred to in section 50(3) of the Act.

The ACCC will generally require a written submission from the parties before it commences examining a merger so it is best to have one ready as soon as possible.

Once it has received a submission for informal clearance, the ACCC will usually take about 4 weeks to conduct market enquiries and determine the competitive effect of the proposed merger or acquisition (6 to 8 weeks in more complicated matters)\(^6\). The ACCC is likely to consult with competitors, suppliers, customers, industry associations, government agencies and any other affected groups. The timeframe may be shorter if the ACCC is familiar with the relevant market or longer if the matter is more complex.

The ACCC will be reluctant to give an informal clearance where it has not had the opportunity to make market enquiries\(^7\). If the parties require that the proposed acquisition be kept confidential, the ACCC is therefore unlikely to be in a position to provide the parties with a finalised view about the acquisition. If the ACCC is prepared to provide the parties with an initial view, it will either be a rejection or is likely to be qualified, depending on the outcome of market enquiries undertaken after the merger is made public. This can be a

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\(^4\) Section 81 of the Act.
\(^5\) Section 76 of the Act.
\(^6\) ACCC Merger Guidelines at ¶ 4.14
\(^7\) ACCC Merger Guidelines at ¶ 4.7
difficult issue for trade sales where confidentiality is often paramount but the parties want an early indication of the ACCC’s view. In particular, overseas clients used to compulsory notification regimes are often risk adverse and wish for a level of certainty.

If there is a risk that the ACCC may determine that the merger has a likely anti-competitive effect, the parties would therefore be advised to include ACCC informal clearance as a condition precedent to completion.

2.3 Authorisation

Where an acquisition has anti-competitive effects, formal authorisation may be sought under the Act if there are clear public benefits which outweigh these anti-competitive effects.

The ACCC has the power under section 88(9) of the Act to ‘authorise’ a merger or acquisition that will substantially lessen competition in a market if 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.

Authorisation will only be granted if the ACCC receives an application for authorisation from the merging parties or the acquirer prior to the acquisition being completed. Authorisation cannot be granted once the acquisition has already occurred.

Authorisation effectively grants immunity, on public benefit grounds, for mergers and acquisitions which would or might otherwise contravene section 50.

The paper further discusses authorisations and the recent authorisation applications by API/Sigma and Qantas/Air New Zealand below.

3. Recent ACCC trends

3.1 Statistics

Before analysing the ACCC process in more detail, we thought we should examine some ACCC trends in mergers over the past few years.

The following table summarises statistics published by the ACCC.

<table>
<thead>
<tr>
<th>Year</th>
<th>Matters Decided</th>
<th>Matters not Opposed</th>
<th>Matters resolved with Undertakings</th>
<th>Matters Opposed</th>
</tr>
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<td>226</td>
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</tr>
<tr>
<td>2001-2002</td>
<td>231</td>
<td>228</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

Source: ACCC Annual Report 2001-2002 (p 72)
In addition, during July to December 2002 the ACCC considered 135 merger matters (of which over half it has completed). Of those it has completed, 74 were not opposed, 10 were withdrawn and 3 were opposed.

Of the merger matters that were opposed by the ACCC in the last 18 months⁸:

- the mergers were generally characterised by high market shares post acquisition (60-80%);
- a regional market was relevant in at least one matter (Transfield Galvanising/Industrial Galvornisers – see below);
- barriers to entry were high in most matters;
- imports were found not to be a constraint in most matters (see further discussion below); and
- other competitive constraints such as countervailing power were absent.

In that time the ACCC allowed several mergers or arrangements to proceed on an informal basis on the basis of undertakings.

In all of those mergers, the ACCC thresholds were breached and, indeed, most created monopolies or near monopolies that were nevertheless allowed to proceed by the ACCC. In a number of them, failing firm was a motivating factor (see below) and efficiencies appear to have been important although this is not clear. The undertakings included both structural undertakings and behavioural undertakings. Behavioural undertakings included undertakings relating to price monitoring, dealings with agents, access to facilities, price caps and provision of information including publication of prices.

3.2 ACCC Trends

Some trends that can be gleaned from the statistics are:

**Narrow Markets**

The ACCC continues its trend of defining product and geographic markets narrowly. Following the introduction of sub-section 50(6)(d) of the Act⁹ the ACCC is focussing more on regional markets. The ACCC expressly stated that it is required to consider the impact of proposed mergers and acquisitions on regional markets in the proposed merger between Industrial Galvanisers and Transfield’s Brisbane galvanising business, which the ACCC opposed on the basis that it was likely to substantially lessen competition in the south-east Queensland galvanising services market.¹⁰

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⁸ API/Sigma (informal clearance and authorisation), IPMG/PMP, Transfield Galvanising/Industrial Galvornisers, AWB/Milling Australia.

⁹ 50(6) In this section: market means a substantial market for goods and services in:

(...d) a region of Australia.

¹⁰ ACCC Media Release, 10 January 2002.
Imports

The ACCC’s Merger Guidelines state that if comparable and competitive imports have held a sustained market share of 10% or more for at least 3 years, the ACCC is unlikely to intervene in the merger.\(^\text{11}\)

Imports are becoming increasingly important in the ACCC’s assessment of mergers, with the ACCC showing an increased willingness to allow mergers with very high market shares to proceed where actual or potential imports can be demonstrated to be a real constraint. A few recent examples are:

- In the Newfarm/Monsanto distribution arrangement the ACCC found that despite high market shares in glyphosate, imported glyphosate played a key role in providing effective price competition for glyphosate supplied to farmers in Australia and “reaffirms the ACCC’s position that it is unlikely to oppose transactions where imports exercise a credible competitive constraint on domestic prices”.\(^\text{12}\)

- The ACCC also allowed the merger of Astrazeneca’s dental injectable anaesthetic assets by Dentsply despite the fact that the concentration thresholds were exceeded, due in part to the existence of high levels of new imports (as well as a likelihood of new entry and the countervailing power of customers).\(^\text{13}\)

- The ACCC allowed a merger between Incitec and Pivot “despite the merger leading to the merger party having very high market shares in some product categories”, on the basis that “the importation of fertiliser products is likely to operate as an effective competitive constraint on the merged entity, thereby thwarting any attempt to raise the price of fertiliser to farmers.” Importation was fairly routine and independent imports represented well in excess of 20% of all fertiliser products used by Australian farmers.\(^\text{14}\)

- The ACCC is currently considering a proposal in which CSR and Hanson will merge their jointly owned cement operations (Australian Cement Holdings) with international company Holcim (Queensland Cement). Despite potentially high market shares, CSR, Hanson and QCL argue that the availability of imports constrains the pricing of cement domestically. Media reports suggest, however, that the ACCC is concerned about the low level of importing by independent producers.\(^\text{15}\) This acquisition is the latest in a long line of acquisitions aimed at rationalising the cement market, and the ACCC has previously been involved in authorisation applications.

Failing Firm

Traditionally, there has been a very high threshold for the ACCC to allow a merger to proceed on the basis that one of the firms would otherwise fail. As well as being convinced

\(^{11}\) ACCC Merger Guidelines ¶5.111.
\(^{12}\) ACCC Media Release, 3 May 2002.
\(^{13}\) ACCC Mergers Public Register, 31 May 2002.
\(^{14}\) ACCC Media Release, 16 October 2002.
of the likelihood of failure or exit by the firm, the ACCC must be convinced that acquisition is preferable to the failing firm going into receivership and the assets of the firm being picked up by new entrants or divided between a number of players. The ACCC also compares the likely effect of the acquisition on competition with the effect of the target’s assets exiting the market altogether.

An acquisition of this sort always lessens competition to an extent and there is a tension with the usual economic outcome of market failure - that high cost operators are unresponsive to consumer demand and should be replaced by more efficient entrants. In a market failure scenario, companies compete in a receivership for the failing firm’s customer base which will be divided between them on the basis of market forces. The ACCC compares this with a request to deliver those customers to the acquiring firm and must be convinced that there are no alternative buyers for the assets or investors to put in additional funding.

The ACCC must also be convinced that failure is imminent - lack of profitability or falling share price is not sufficient.

It has therefore historically been very difficult to convince the ACCC to accept a failing firm argument and the ACCC has in the past preferred that firms go out of business (ie favouring natural market failure) rather than allowing another player to acquire them (eg FOXTEL/Australis).

However, recently the ACCC has accepted the failing firm argument in connection with 4 mergers:

- **Ansett/Hazelton** - the ACCC allowed the acquisition upon the giving of undertakings including slots for new entrants.\(^\text{16}\)

- **Qantas/Impulse** – the ACCC conducted an independent audit of Impulse and concluded that withdrawal of support by certain investors had prevented Impulse from remaining viable. There was therefore a likelihood of failure and a lack of alternative buyers to Qantas. The ACCC concluded that it was better in the long term to allow Qantas to buy Impulse than for Impulse to go into receivership on the basis of undertakings given by Qantas to improve the competitive position of other firms.\(^\text{17}\)

- **Woolworths/Franklins** – the ACCC required financial information from Franklins and on the basis of that information, accepted that the Franklins’ business was in rapid decline and that withdrawal of key stakeholders’ support was imminent. The ACCC was concerned that an uncontrolled collapse of the chain would see many more stores go to the major supermarket chains with fewer stores available for independents and new entrants. The ACCC therefore allowed some of the Franklins stores to be sold to Woolworths on the basis of undertakings which included divestiture as well as behavioural undertakings, facilitating the entry of two new players and making independent stores more viable.\(^\text{18}\)

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\(^\text{17}\) ACCC Media Release, 18 May 2001.

• **Val Morgan** – The ACCC allowed a joint venture owned and operated by Hoyts, Greater Union, Village and Val Morgan to acquire Val Morgan despite the fact that Val Morgan is the only national cinema advertiser and the joint venture parties control about 75% of cinema revenue. The joint venture parties gave various undertakings (including that 2 of the acquiring entities will divest their stake within 18 months). It was noted, however, that without the acquisition it was likely that Val Morgan would be placed into administration which would remove an important source of revenue for cinema operators.19

**Vertical Mergers**

The ACCC in its Merger Guidelines states that vertical relationships and vertical mergers “will raise concerns only if there is a concentrated industrial structure at one or more of the related or integrated stages of production or distribution”.20 The ACCC indicates that it is necessary to consider whether rivals are vertically independent of the merged firm ie they can obtain essential inputs from an independent firm. The ACCC recognises that vertical integration by a firm with market power at one stage of production or distribution can enable an extension of market power and reduction of competition to occur in a vertically related market which may involve foreclosure of supply or customers to rivals in the vertically related market.

Vertical integration may also enable a firm to increase monopoly profits through price discrimination.

The ACCC has recently considered these issues when assessing the proposed sale of Milling Australia by Goodman Fielder. Goodman Fielder initially proposed to sell Milling Australia to the Australian Wheat Board Limited (AWB). However, the ACCC blocked this acquisition, finding that it would be likely to substantially lessen competition in the markets for flour milling and mixing across Australia and in grain trading in Queensland.21

In particular, the ACCC was concerned that the market power that AWB derives from its strong position in grain acquisition (through its monopoly over the export of wheat and its leading position in the domestic trading market), would enable it to substantially lessen competition in the market for flour milling and mixing were it to acquire a flour milling and mixing business. The ACCC was concerned that AWB would be able to and would have an incentive to use this market power to raise rival flour millers’ costs were the acquisition to proceed.

However, the ACCC did not block the acquisition of Milling Australia by a GrainCorp/Cargill joint venture.22 The ACCC found that despite GrainCorp’s position in grain handling, there were constraints on its ability to discriminate against particular customers as it would not know who the grain was destined for when it enters its storage facilities. The ACCC

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20 ACCC Merger Guidelines at ¶5.151.
21 ACCC Media Release, 16 August 2002.
22 ACCC Media Release, 16 August 2002.
therefore concluded that the proposed acquisition would be unlikely to lead to a substantial lessening of competition in the market for flour milling and mixing.

Earlier this month the ACCC also announced that it would not oppose the proposed acquisition of Goodman Fielder by Burns Philp, despite the strong vertical links between Burns Philp’s market power in yeast and Goodman Fielder’s bread baking business. Competition in yeast production by Bakels-Lesaffre, the other fresh yeast manufacturer in Australia, was the major reason for the ACCC’s decision to allow the merger. 23

The ACCC also recently expressed concerns about the increasing level of vertical integration in the Val Morgan acquisition (see above) although it allowed the merger to proceed on the basis of various undertakings (including divestiture by two of the joint venture parties). It is interesting though, that one of the cinema operators will be allowed to retain Val Morgan despite the vertical link – presumably because the requisite degree of market power in the downstream market would not exist for the vertical integration to be a concern.

These cases show the ACCC’s willingness to intervene in a vertical merger where it is concerned about the level of market power that the firm may have at one level and the ability of the firm to leverage this market power into another level of production or distribution.

4. Authorisation or Informal Clearance?

An important issue to consider at the outset is whether, if there are competition concerns or potential issues, informal clearance of the merger by the ACCC or formal authorisation should be sought.

4.1 Pros and Cons of Informal Clearance

Whilst informal clearance is the best indication that the ACCC will not intervene in the transaction and prevent it by obtaining an injunction, it does not prevent third parties from challenging the merger after the event as anti-competitive under section 50. Whilst third parties cannot apply for an injunction, they can apply for an order that the merger be undone, with a claim for damages for harm resulting out of the merger.

However, informal clearance is quicker (most of the time), cheaper and even where the ACCC may initially have concerns with the merger, it is becoming more and more inclined to accept undertakings under s 87B of the Act (both structural and behavioural) to overcome these anti-competitive concerns. Unlike authorisation, there is also no third party appeal to the Australian Competition Tribunal or the Court for a decision of the ACCC to grant informal clearance, except for judicial review proceedings 24 or by seeking a declaration that the merger is anti-competitive.


24 Such as Virgin Blue’s application for judicial review of the ACCC’s decision to approve the Qantas/Impulse merger on the provisions of undertakings.
Generally, the ACCC prefers undertakings which address structural issues (for example, the divestiture of part of the business being acquired) to behavioural undertakings (for example, undertakings about pricing or ring fencing of the acquired business). However, more recently, the ACCC is becoming more and more prepared to accept behavioural undertakings to address anti-competitive concerns, particularly where the ability to give structural undertakings is limited. Whilst the FOXTEL/Optus supply arrangement is not considered in detail in this paper as it was not a merger, it is evidence of the increasing willingness of the ACCC to accept complex behavioural undertakings in order to address competition concerns.

The ACCC takes the view that parties are free to apply for informal clearance and that, if undertakings address the ACCC’s concerns, the acquisition should be allowed to proceed on that basis. The ACCC will not force the parties into authorisation for contentious mergers, as the authorisation route is only appropriate where there are public benefits that the parties can identify.

There are, however, shortcomings with the informal clearance process as well:

- It is very informal and proceeds without the benefit or constraint of any regulatory regime. It is, in reality, an exercise by the ACCC of informal administrative powers.
- Practically speaking, given the shortcomings of judicial review, the ACCC is not constrained in the way in which it exercises that power and the Business Council of Australia (BCA) has suggested that this has enabled the ACCC to use the informal clearance process as a forum for accepting undertakings that potentially go beyond overcoming any anti-competitive effects of the merger or acquisition.
- Unlike authorisations, there is no opportunity to seek review of ACCC decisions in the informal clearance process, aside from applying to the Federal Court for judicial review of an ACCC decision.\(^{25}\)
- The informal clearance process can be lengthy in extremely complex cases (such as consideration of the FOXTEL/Optus arrangement) and is more uncertain in terms of timing than the authorisation process.

### 4.2 Pros and Cons of Authorisation

Although authorisation gives the parties immunity from legal action by the ACCC and others, authorisation is usually not regarded as an attractive option for dealing with an acquisition for a number of reasons.

The onus is on the applicant to establish the “public benefit” arising from the acquisition. It is often difficult to identify public (eg consumer) as opposed to private (eg internal efficiencies) benefits arising from acquisitions.

Authorisation is an extremely time consuming and public process which can take up to 6-12 months. Although normally the ACCC has only 30 (or, in complex cases, 45) days in

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\(^{25}\) It is not possible to obtain effective declarations from the Court that a merger or acquisition does not substantially lessen competition whilst there is doubt that the Federal Court has jurisdiction to grant a third party an interlocutory injunction to support the declaration. See Heerey J in *QIW Retailers Limited* (1992) ATPR ¶ 41-178 at page 40,433.
which to make a decision in a section 50 matter, the ACCC may, by making information requests to the applicant, extend that period considerably.\(^{26}\)

If authorisation is granted, an interested person may appeal to the Australian Competition Tribunal. The risk of appeal adds greatly to the risks associated with authorisation and the length of time that may be involved.\(^{27}\)

As a consequence, it is unusual for parties to apply for authorisation in relation to an acquisition, at least in the first instance. Applications for authorisation tend to be made where:

- the ACCC has refused to provide informal clearance eg Wattyl/Taubmans and API/Sigma and the parties then seek to argue that the acquisition is likely to generate public benefits: or
- are made in relation to joint ventures and other arrangements which may involve a breach of one of the per se prohibitions of the Act (such as the prohibitions on price fixing or exclusionary provisions).

Both of the two section 50 authorisation applications made in the past year fall into one of these categories and a further examination of each of them is informative.

**API/Sigma**

API and Sigma are wholesale distributors of pharmaceutical and related products to retail pharmacies and hospitals.

The parties initially applied to the ACCC for informal clearance of the proposed acquisition on the basis that it did not substantially lessen competition (including with undertakings), but were denied clearance on the basis that the merger would reduce the number of full-line wholesalers from 3 to 2 and the merged entity would have 60-70% market share, giving it the ability to increase prices.\(^{28}\) The ACCC also found that barriers to entry were high and that supply by full-line wholesalers (as opposed to niche wholesalers) was necessary.

The parties then applied for authorisation on the basis of public benefits arising out of the merger. The public benefits claimed by the parties included increased community access to pharmaceuticals, increased community health services, regional and rural support, innovation, reduction in Government expenditure, small business support, export enhancement and industry efficiencies.

Whilst the ACCC acknowledged that the merger would result in some public benefits and, in particular, accepted that it would achieve efficiency gains for the merger parties, the ACCC found that many of those public benefits were occurring anyway and that the loss of

\(^{26}\) The ACCC took 48 days to determine the API/Sigma authorisation application, although it is interesting to note that this was in the context of the Dawson Review and at the time the ACCC was being publicly criticised for the length of time it took to dispose of authorisation applications.

\(^{27}\) For this reason both the BCA and the Law Council recommended to the Dawson Committee that the Act be amended to allow an applicant for an authorisation to apply directly to the Tribunal.

\(^{28}\) ACCC Media Release, 17 April 2002.
competitive tension was actually more likely to lessen those benefits. The ACCC also found that efficiency gains were more likely to be retained by the merged entity and its shareholders rather than passed on to the public. The ACCC was of the view that the parties were not in a position to give undertakings that would shift the balance in favour of public benefit and the authorisation was denied.29

This case starkly demonstrates the difficulties in proving public benefits under an authorisation process (even though informal clearance was also not successful). Before that authorisation, there had been only 3 merger authorisation applications since 1995:

- Bristile Holdings Pty Ltd, seeking to acquire assets from Pioneer International Limited, in 1997 (denied).
- Wattyl, seeking authorisation for the acquisition of Taubmans, 1996 (denied).
- Adelaide Brighton Cement, seeking authorisation for the acquisition of the remaining shares in Adelaide Brighton & Cement Limited, 1999 (authorised).

In addition to the difficulties of establishing a public benefit in an authorisation, another reason why parties are loathe to apply for authorisation is its public and time-consuming nature, particularly when there are usually commercial pressures applying to the deal, which means it must be consummated quickly or abandoned, as happened in relation to the Wattyl authorisation attempt.

**Qantas/New Zealand**

In December 2002, Qantas and Air New Zealand applied for authorisation of:

(a) the acquisition by Qantas of ordinary shares comprising up to a 22.5% voting equity interest in Air New Zealand; and

(b) collaborative arrangements between the parties.30

As the proposal relates to an arrangement between competitors (involving elements of price fixing and exclusionary arrangements prohibited *per se* under the Act), authorisation was a necessary route. The parties also accept that there is a potential for the arrangements to lessen competition in the relevant markets. However, they argue that the public benefits arising out of the arrangements outweigh any detriment.

The public benefits which are claimed include:

- cost efficiencies;
- scheduling efficiencies;
- increased tourism to Australia;
- improved freight operations;
- increased international competitiveness of Qantas and Air New Zealand;
- preservation of a commercially viable full service Australasian airline and network; and

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• furtherance of the national interest.

The application also points to the difficulties facing the airline industry at present (both in Australia and overseas) and the threat of “value based airlines” such as Virgin Blue which “cherry pick” the most profitable routes and, with very low costs, compete with the incumbent “full service airlines” such as Qantas and Air New Zealand. These full service airlines rely on the profitable core routes to balance the less profitable fringes. The applicants claim that there is not room for two “full service airlines” in Australia.

The parties have also stated their intention to offer undertakings to the ACCC to:

• facilitate and protect new entry on Trans-Tasman and domestic New Zealand routes including (if necessary) access to terminals, ground services and engineering facilities;
• ensure that the arrangement does not result in unreasonable actions regarding capacity and prices;
• ensure the delivery of certain public benefits identified.

4.3 Efficiencies

Both of these cases highlight the difficulties in proving a public benefit that is distinct from the efficiencies that will accrue to the merged entity or industry.

In Canada, efficiencies are now expressly included in the competition test so that if the merger brings about a gain in efficiency that will be greater than, and will off-set, the effects of any lessening of competition, the merger must be allowed to proceed\(^31\). Recently, the Canadian Competition Tribunal for a second time allowed the merger of two companies that would result in 95% market share and price increases of 7-11% on the basis that the efficiencies were likely to exceed and off-set the effect of any lessening of competition\(^32\). This was despite the Federal Court of Appeal setting aside an earlier decision of the Tribunal to allow the merger and directing the Tribunal to consider the broader definitions of anti-competitive effects. The Competition Bureau has appealed the decision.

Efficiencies are not expressly included as a factor for the ACCC to consider when assessing section 50. Nevertheless, the ACCC’s Merger Guidelines state that whilst efficiencies are more relevant in the context of authorisation “the extent to which any efficiency enhancing aspects of a merger may impact on the competitiveness of markets is

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\(^{31}\) Canadian Competition Act, s 96: “(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in:

(a) a significant increase in the real value of exports; or

(b) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.”

\(^{32}\) Commissioner of Competition v Superior Propane Inc (2002-04-04) CACT CT1998002).
relevant in the context of section 50."\textsuperscript{33} For example, where a merger enhances the efficiency of the merged firm, it may create a new or an enhanced competitive constraint on the unilateral conduct of other firms. If efficiencies are likely to lead to lower prices, increased output or higher quality of goods or services, the merger may not substantially lessen competition.

In the context of assessing authorisation applications, the ACCC expressly recognises that "public benefits in the form of increased efficiency and better resource usage, resulting in lower unit costs, are most important in the consideration of application for the authorisation of mergers."\textsuperscript{34} These efficiencies must result in a real resource saving for the community not just the merged entity. Lower prices and lower input costs for businesses are clearly public benefits. However, the ACCC's Merger Guidelines state that it does not always require the passing on of immediate cost savings to consumers, "as the community at large has an interest in resource savings, releasing those resources for use elsewhere."\textsuperscript{35} For example, in Du Pont (Australia) & Ors (1996) ¶ ATPR 50-231, the ACCC accepted that improvements in the efficiency of sodium cyanide production resulting in resource savings such as capital and electricity constituted a public benefit, although consumers were unlikely to benefit from lower prices.

Whilst this is the ACCC's stated position, in practice, however, as seen in the API/Sigma matter, it is extremely difficult to claim public benefits arising out of efficiencies unless those efficiencies are passed onto consumers in a tangible way, such as with lower prices. The Qantas and Air New Zealand application is yet to be determined by the ACCC. However, Professor Fels has already indicated that it will come under close scrutiny and require a very detailed investigation as it "appears to include strong elements of anti-competitive arrangements including price fixing and route sharing". In the ACCC media release following receipt of the application for authorisation, Professor Fels stated:

"[A]uthorisation is not granted lightly. Authorisation can only be granted where the ACCC is satisfied that the public benefit arising from the conduct outweighs any public detriment."

5. Dawson Review

The Dawson Review was widely seen as a response to criticism, particularly from the BCA, concerning the ACCC's approach to merger enforcement.

5.1 Terms of Reference

The terms of reference of the Dawson Review affecting section 50 were that the Dawson Review was to:

"review the competition and authorisation provisions of the Act to determine whether they:

\textsuperscript{33} ACCC Merger Guidelines, ¶5.171.
\textsuperscript{34} ACCC Merger Guidelines, ¶6.39.
\textsuperscript{35} ACCC Merger Guidelines, ¶6.43.
• inappropriately impede the ability of Australian industry to compete locally and internationally;

• provide adequate protection for the commercial affairs and reputation of individuals and corporations”.

Submissions to the Dawson Review have focussed primarily on amendments to the criteria to be taken into account in assessing mergers in section 50(3) and the process for both informal clearance and authorisation, rather than advocating any change to the substantial lessening of competition test.

In particular, amendments were suggested to deal with some of the inadequacies of both the informal clearance and authorisation processes discussed above and the issue of efficiencies.

5.2 Amendments to section 50(3)

The BCA proposed that section 50 be amended to allow early consideration of the public benefits of a merger proposal by introducing a provision to the effect that an acquisition would not be prohibited if the public benefits (including efficiency gains) of the acquisition would, or would be likely to, outweigh any public detriment arising, or likely to arise, from the substantial lessening of competition. 36

The BCA also submitted that sub-section 50(3) should include, as matters to be taken into account when assessing the competition implications of a merger, efficiency gains, impact on Australian jobs and failing companies. 37

The BCA said that these proposed changes would “ensure that the full range of public benefits likely to arise from a merger could be taken into account simultaneously and early in the process of considering merger proposals.” 38 The BCA pointed to the limitations in the way in which the ACCC currently assesses efficiencies and public benefits in both the informal clearance process and for authorisations. 39 The BCA did not suggest that public benefits need to be considered for all mergers but that where proposed benefits outweighed the public detriment of any lessening of competition, this should be considered up front by the ACCC in considering whether there is a breach of section 50. 40

The Law Council of Australia (LCA) expressed the view that its greatest concern was the lack of transparency and accountability associated with the informal clearance process administered by the ACCC. 41 It submitted that the lack of merger authorisations and case law on s50 has meant that the ACCC has not been subject to appropriate checks and balances. 42

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36 BCA Submission to the Dawson Review (July 9 2002) at page 72
37 BCA Submission to the Dawson Review (July 9 2002) at page 72
38 BCA Submission to the Dawson Review (July 9 2002) at page 73
39 BCA Submission to the Dawson Review (July 9 2002) at page 74
40 BCA Submission to the Dawson Review (July 9 2002) at page 73
41 Submission of the LCA to the Review Committee at page 53
42 Submission of the LCA to the Review Committee at page 60
Presently, there is no assurance that mergers will be assessed strictly in accordance with the Act, although the LCA believes that the *substantial lessening of competition* test is adequate, if administered properly.\(^\text{43}\) However, the LCA proposed that the *public benefits* test be incorporated into s50 so that the ACCC will be forced to consider public benefits, in particular the ability of Australian firms to compete overseas, efficiency factors and whether the target firm could fail if the merger does not proceed.\(^\text{44}\)

### 5.3 Proposed Amendments to Process

#### (a) Reasons for informal clearance decisions

The BCA proposed that to address the uncertainty and imbalance that exists in relation to the informal clearance process, the ACCC should be required to give substantial reasons for its decision to clear or oppose a merger.\(^\text{45}\) The LCA recommended that the ACCC should be required to give reasons where:

- informal clearance is refused; and
- (in the context of the introduction of an independent review panel) where informal clearance is granted or a no action letter is provided subject to section 87B undertakings or other conditions.

The LCA proposed that the ACCC should have a discretion to issue reasons in other cases but does not advocate a requirement for the ACCC to provide reasons in all cases because of “the increased administrative burden and the potential for the ACCC analysis to stagnate.”\(^\text{47}\)

#### (b) Review of informal clearance decisions

The BCA submitted that an alternative impartial and timely decision-making process be introduced through allowing merger opponents to elect to take an application to approve a merger directly to the Tribunal.\(^\text{48}\)

As an alternative to the involvement of the Tribunal, the BCA suggested establishing a Competition Panel (based on the successful Takeovers Panel) to arbitrate a disputed merger or acquisition proposal.\(^\text{49}\)

Where proponents elect to go to the Tribunal, the BCA suggested that the ACCC’s role would effectively be to act as *amicus* to the Tribunal and present to the Tribunal its views on the proposed merger’s implications for competition and on any arguments put for public benefits. This would assist the Tribunal to be adequately equipped (as well as improving

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\(^{43}\) Submission of the LCA to the Review Committee at pages 53-54

\(^{44}\) Submission of the LCA to the Review Committee at page 55

\(^{45}\) BCA Submission to the Dawson Review (July 9 2002) at page 78

\(^{46}\) Supplementary Submission of the LCA to the Review Committee at page 12

\(^{47}\) Supplementary Submission of the LCA to the Review Committee at pages 11-12

\(^{48}\) BCA Submission to the Dawson Review (July 9 2002) at page 79

\(^{49}\) BCA Submission to the Dawson Review (July 9 2002) at page 80
its resources) to undertake decision-making applications. The Tribunal would be subject to strict time limits.\textsuperscript{50}

The BCA argued that these proposed changes would go someway to addressing the major shortcomings of the current informal clearance process and the lack of scrutiny of the ACCC’s analysis, while retaining the flexibility and informality of the ACCC’s current clearance process.\textsuperscript{51} It would place a check on the ACCC’s powers and offer further recourse for merger proponents who disagree with the ACCC’s rejection of a merger.

The LCA also recommended that the ACCC should be subject to an independent review panel to review its informal clearance process and to ensure that pro-competitive, efficient mergers are allowed.\textsuperscript{52} It proposed that the independent review panel would have the power to send the decision back to the ACCC for re-consideration.\textsuperscript{53} However, the LCA did not agree that parties should be able to apply directly to the Tribunal for an informal clearance.\textsuperscript{54}

(c) Appeal of authorisation decisions

The LCA submitted that parties should be allowed to apply directly to the Tribunal for merger authorisations in order to improve the efficiency of the authorisation process and that meaningful time limits should be imposed on consideration by the Tribunal and ACCC.\textsuperscript{55}

The Dawson Report was provided to the Treasurer on 31 January 2003 and is not likely to be released to the public before the end of February. The Report is expected to make some changes to the process although it is unlikely to change the test and import efficiencies and public benefit into section 50.

6. Conclusion

The increasing willingness of the ACCC to accept comprehensive and complex undertakings to address competition concerns as part of the informal clearance process and the difficulties of considering internal efficiencies in authorisations makes it unlikely that the number of merger authorisation applications will increase. It is likely, however, that the Dawson Committee will recommend changes to both the informal clearance process and the need for a review of that process as well as the timeliness of the authorisation process which may result in the authorisation process becoming a more viable option for some merger applications. It is not clear whether the Dawson Committee will recommend changes to deal with the concerns expressed about efficiencies and this may need to be resolved by case-law or a change in approach by the ACCC.

\textsuperscript{50} BCA Submission to the Dawson Review (July 9 2002) at page 80
\textsuperscript{51} BCA Submission to the Dawson Review (July 9 2002) at page 81
\textsuperscript{52} Submission of the LCA to the Review Committee at page 63
\textsuperscript{53} Supplementary Submission of the LCA to the Review Committee at page 21
\textsuperscript{54} Supplementary Submission of the LCA to the Review Committee at page 19
\textsuperscript{55} Submission of the LCA to the Review Committee at page 65