

CONCENTRATION IN AUSTRALIAN INDUSTRY — HAS IT GONE TOO FAR?

By

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An Emerging Debate

In common with the United Kingdom, the United States and Canada,¹ Australia in the middle years of the current decade experienced a crescendo of takeover activity which gave rise to a number of issues of interest to lawyers. It would be idle to expect agreement on whether particular takeovers are desirable but there was a reaction to the mergers and attempted mergers of 1984-7 which questioned whether existing controls on mergers were adequate, and whether Australian industry was becoming too concentrated, with control passing to a small band of players who were, perhaps, engaged in an elaborate game of marshalling assets and companies simply for what could be made by way of profits in the process, rather than in the longer term interests of those companies' businesses or of the wider community.

The stock market crash of October 1987 imposed a brake on much of that activity, but the concern remained that acquisitions by competitors were being permitted too readily and that something should be done.

The acquisitions which had caused the greatest concern were Bond Corporation's acquisition of Castlemain Tooheys Ltd. (1985), G.J. Coles & Co. Ltd.'s acquisition of Myer Emporium Ltd. (1985), News Ltd.'s acquisition Herald & Weekly Times Ltd. (1987), the Feltex New Zealand Ltd. bid for Email Ltd. (1986), and the News/TNT acquisition of East-West Airlines (1987). Other major acquisitions during the period² included Fielder Gillespie Davis Ltd.'s acquisition of Allied Mills Ltd. and Goodman Group Ltd. (1985), Unilever Australia Securities Ltd.'s bid for Bushells Holdings Ltd. (1987), ANI Corporation Ltd.'s acquisition of Comsteel Vickers Ltd. (1985), the partnership between Pacific Dunlop Ltd. and Goodyear Tyre & Rubber Co. (Australia) Ltd. (1987), News Ltd's proposed acquisition of AAP and Australian Newsprint Mills Ltd. (1987) and Fletcher Challenge Ltd.'s acquisition of 50% of the later company (1988).

Of course, the same period saw the two bids by Bell Resources Holdings Pty Ltd for the Broken Hill Proprietary Company Ltd., Australia's largest company which, although it did not seem to raise competition issues, provoked a storm of opposition, intervention by the Trade Practices Commission ("TPC"), and a special piece of legislation.³

The TPC has published guidelines on mergers in 1986⁴ but these only formulated a position which the TPC had taken for some time, that s.50 of the Trade Practices Act (the "Act") permitted mergers to the point of duopoly, and that it would be futile for it to intervene in the courts where the merged entity would face a viable competitor or significant competition from imports. This interpretation was based on the decision in *TPC v. Ansett*

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1. Department of Trade & Industry, United Kingdom *Mergers Policy*, HMSO, 1988 at 2.
2. See generally TPC Annual Reports 1984/85, 1985/86, 1986/87.
3. Trade Practices (Transfer of Market Dominance) Act 1986.
4. TPC, Guidelines for the Merger Provisions of the Trade Practices Act 1974, October 1986.

*Transport Industries (Operations) Pty Limited & Ors.*⁵, until recently the only decided case on mergers, and one which the TPC had lost.

A review of the Act in 1984 had recommended that the test for prohibiting a merger should revert to what it had been before 1977,⁶ namely, substantial lessening of competition, but the predominant view was that this was too low a threshold and, in any event, the Government was persuaded not to change the test in the Trade Practices Revision Act 1986.

The TPC had over this period developed a process of private consultation with parties to a merger whereby, if the TPC decided it would not intervene in a merger after gathering information sufficient for it to make such a decision, it would inform the parties who could then proceed with reasonable confidence that their plans would not be upset. The TPC has defended this process as "a more efficient means of giving certainty and achieving a reasonable commercial result than to engage in long and costly court proceedings".⁷ On occasions the proponents of a takeover have been unable to agree with the TPC and the TPC has moved the Federal Court for an injunction (APM, Goodman, News Ltd. AAP), or the acquirer has agreed to dispose of certain assets as the price for being permitted to proceed with the acquisition.

As has been stated by the Attorney-General's Department:⁸

Disquiet has been expressed regarding the effects of the TPC's consultative approach to merger regulation. The commercial sensitivity of such discussions, the criteria utilised in such discussions and the terms of the resulting settlement inevitably lead to speculation and uncertainty regarding the TPC's merger enforcement policy.

Since the 1977 amendments to the Act, only the Minister or the TPC has had standing under s. 80 of the Act to seek an injunction to prevent a merger.⁹ On at least two occasions injunctions have been granted on the basis of the Federal Court's inherent jurisdiction where divestiture was sought.¹⁰

The lack of information about merger cases decided by this consultative process has caused concern. The then Chairman of the TPC, Mr W.R. McComas, before his retirement in February 1988 expressed some of these concerns but defended vigorously the TPC's performance in enforcing the Act, especially in the News/HWT takeover.¹¹ Subsequently the House of Representatives Standing Committee on Legal and Constitutional Affairs announced that it would undertake an inquiry into the adequacy of Australia's merger, takeover and monopoly laws in protecting the public interest. The Committee called for written submissions and has more recently been holding public hearings.

Although the Act provided the authorisation mechanism as a means of gaining exemption from s. 50 it has never been particularly attractive. In the period 1979/80 to 1987/8 only seven authorisations were sought, of which all but one were granted on the merits.¹² However in at least a couple of cases they were granted subject to conditions. With the change in Chairman of the TPC, a new emphasis was announced in relation to the enforcement of

5. [1978] ATPR 40-071.

6. Trade Practices Review ('Swanson') Committee, Report, 1977.

7. TPC Annual Report, 1986-87 at 5.

8. Attorney-General's Department : Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Mergers, Takeovers and Monopolies, July 1988 at 43.

9. TPA, s. 80 (1A).

10. *Brisbane Gas Co. Ltd v. Hartogen Energy Ltd & Anor* [1982] ATPR 40-434, *A. Goninan & Co. Ltd v. ANI Corporation Ltd.*, January 1985, unreported.

11. Various speeches in 1987 and 1988.

12. R. St. John and M. Keehn "Authorisations in Australian Competitive Law" (unpublished, 1987); since the paper three further authorisations have been granted, as discussed below.

s. 50. In its May 1988 statement the TPC suggested that it would not so readily agree to voluntary divestiture as a means for an otherwise objectionable merger complying with the section, and it would encourage greater use of the authorisation procedure.¹³

It was against this background that there occurred two significant acquisitions which have, to a degree, breathed life back into the existing law, and encouraged those who advocate its retention substantially in its present form.

Australia Meat Holdings

The TPC in its 1985-86 Annual Report referred briefly to the formation of a consortium called Australia Meat Holdings Pty. Limited ("AMH"):

3.10.34 Media Reports and complaints indicated a likely rationalisation in the Queensland meat processing industry. In May 1986 the Commission took the matter up with those involved, namely SCI Meat and Paper Pty Ltd., Tancred Brothers Pty. Limited, Metro Meat Limited and Elders IXL Limited, who it was alleged were planning to combine their Queensland meat processing operations by forming a joint venture company and taking over the Queensland plants of Thomas Borthwick & Sons (another meat processing company) at Bowen and Mackay.

3.10.35 The Commission was concerned about some of the consequences of the proposed combination; in particular, in significantly diminishing the saleyard competition for livestock which arose not so much from the merging of the meat processing plants as from other arrangements which the parties wished to make.

3.10.36 Following the Commission's discussions with the parties some modification of the proposal was made. The arrangements provided that some of the parties will retain independent processing plants in Queensland and will operate them outside the combined plants. Each party retaining independently operated plants will now purchase cattle in its own right up to a maximum level. The Commission was aware that the arrangements now agreed might result in some lessening of competition in cattle acquisition. However, with the parties operating independently at saleyards (for their independent operations) and the independent acquisition of cattle by competitive processors — particularly Angliss — there remains scope for effective competition in the acquisition of cattle in Queensland. On balance, the Commission decided not to take any action against the proposal.

The consortium proceeded without Thomas Borthwick & Sons ("Borthwick") as a participant. Borthwick was incorporated in the United Kingdom but had conducted abattoirs in Queensland and Victoria for many years. Late in 1987 an agreement was entered into between Borthwick's parent and Teys Bros. (Holdings) Limited for the sale of the whole of the issued share capital of Borthwick and certain other assets for a consideration of \$25 million. Teys was the operator of two abattoirs in Southern Queensland. A condition of the sale was that it be approved by the shareholders of the Borthwick parent company. The directors of the parent company convened a meeting to be held in London on, of all days, 26 January, 1988. Towards the middle of January representatives of AMH approached Borthwick with an offer of \$29 million for the shares. Borthwick approached the Commission, concerned about the trade practices implications of the AMH offer, and were informed on 21 January that the Commission considered the acquisition by AMH would contravene s. 50 and that it was writing to AMH expressing that concern and seeking an assurance not to proceed. The directors of Borthwick accordingly took the view that they

13. TPC, Objectives, Priorities and Work Program for 1988-89, May 1988.

could not proceed with the AMH offer. However, on 25 January the TPC, having not received the assurance requested of AMH, sought an interlocutory injunction from the Federal Court. This was denied on the basis that to restrain the offer at that stage would have denied AMH the opportunity to have its proposal considered by the Borthwick parent company's shareholders. Counsel for AMH informed the Court that AMH was well aware of the divestiture remedy and would take the consequences if its bid were successful and the Court ultimately found a breach of s. 50.

At the meeting in London the following day the shareholders voted to accept the AMH offer and the Teys offer lapsed. Shortly afterwards the TPC sought to join the Borthwick parent company in the proceedings and to seek against it an order under s. 81 (1A) of the Act which had been introduced in 1986 and which provides that if the Court finds that a vendor of shares or assets was involved in a contravention of s. 50 the Court may declare the acquisition void and the vendor shall refund to the acquirer any amount paid in respect of the acquisition.

The case was heard in March and April and judgment handed down on 15 July, 1988.¹⁴

The Reasons for Judgment contain an interesting and very practical discussion of the relevant product and geographic markets for the slaughter of livestock in Queensland. The Court found that there was a separate market in Northern Queensland for fat cattle. Borthwick conducted two abattoirs, one at Mackay and one at Bowen. The dividing line for the northern market was drawn just north of Mackay. Justice Wilcox adopted the approach taken by Northrop J. in relation to the meaning of the word "dominate" and applied the five criteria laid down in the *Ansett-Avis* case.¹⁵ On the basis of this, his Honour held that the acquisition would enable AMH to dominate the northern fat cattle market.

He considered the jurisdiction to grant relief under s. 81 (1A) and declined to do so on several bases. One was that although he considered that, by reason of the actions of Borthwick in approaching the Trade Practices Commission there had been relevant conduct in Australia which meant that the Company was involved in the contravention, the TPC had done nothing to intimate to the Borthwick companies that it intended to seek relief under the section prior to the meeting on 26 January. Further, on the basis of expert evidence, an English Court would not have enforced an order made under the section, and moreover the British Government had made an order under the Protection of Foreign Trading Interests Act (blocking legislation similar to Australia's¹⁶) prohibiting any Court in the United Kingdom entertaining proceedings for the recovery of any sum payable under a judgment made under s. 81 (1A). Finally, his Honour felt that the alternative of divestiture was preferable. His Honour concluded that it was appropriate to seek an undertaking that AMH dispose of the Bowen and Mackay abattoirs. His Honour considered that the Mackay abattoir was influential in respect of the northern market although not within it. There was evidence of a leakage of sales between the two geographic markets of something of the order of 20%. AMH has so far resisted giving such an undertaking and has lodged an appeal from the judgment. It has offered to divest itself of two or three other abattoirs which are not currently operating.

The decision was a significant endorsement of the TPC's view that the dominance test in s. 50 is effective and it seems to be the case that the Courts are able to apply it without as much difficulty as seems to be encountered in applying the lessening of competition test which previously applied and which is to be found in other sections of the Act.

14. *T.P.C. v. Australia Meat Holdings Pty Limited & Ors* [1988] ATPR 40-876.

15. *Supra* n.5.

16. Foreign Proceedings (Excess of Jurisdiction) Act 1984.

Australian Newsprint Mills

Australian Newsprint Mills Holdings Ltd. ("ANM") was a company formed in the 1930's by most of the Australian publishers as a joint venture to operate a newsprint plant at Boyer in Tasmania. In 1979 the publishers had entered into agreements with ANM at the insistence of its bankers under which the publishers were required to take their proportion of newsprint produced by ANM at a price which would secure a certain return to it by way of profit over its operating costs. John Fairfax & Sons Ltd. and associated companies held 50% of the shareholding in ANM with News Ltd. holding 38.4% and Western Australian Newspapers (Bell Group) holding 11.6%. When News Ltd. attempted to acquire the Fairfax holding in ANM and in Australian Associated Press the TPC obtained an injunction from the Federal Court under s. 50 restraining the acquisition. Negotiations then commenced with Fletcher Challenge Ltd. ("FCL"), New Zealand's largest company, which had newsprint interests in New Zealand and British Columbia, for the acquisition of the Fairfax holding. In discussions with the TPC early in 1988, FCL was unable to persuade the TPC that the acquisition would not breach s. 50. It argued strongly that there would be no dominance because the other shareholders were customers whereas FCL was not a publisher. FCL also argued that there was significant import competition and the potential for further import competition in the future, there being no tariff on newsprint and there being a history of Australian publishers, to the extent that they were able under the existing supply contracts, purchasing from overseas sources and preferring to have at least two sources of supply for reasons of security. The TPC eventually agreed to FCL acquiring 25% of ANM and placing the other 25% with a trustee pending an application for authorisation. FCL lodged a very extensive application for authorisation and agreed to an extension of time for the TPC to consider the application. Although there is no provision for a pre-determination conference in relation to a merger authorisation, a conference of the parties was held and other interested parties were invited, and this took a full day in Canberra.

The TPC granted authorisation in a determination dated 14 June, 1988.¹⁷ It held that the acquisition by FCL of 50% of ANM would result in FCL dominating the Australian market for the production and supply of newsprint. ANM was the sole Australian producer supplying some 65% of the total market. FCL was the next most significant source of supply of newsprint into Australia supplying some 23%. However, the TPC recognised significant public benefits in terms of greater efficiency of operation of the ANM plants, additional technology and management involvement and the injection of new capital for expansion. There would be an improvement in the quality of newsprint produced. FCL also advanced the Closer Economic Relations ("CER") arrangements with New Zealand as a consideration on the basis that the investment would promote the objectives of CER such as rationalisation of industry, increased efficiency flowing from economies of scale, optimal use of natural resources and improvement in the two countries' balance of trade and export markets.

This decision, taken with those in relation to *Henderson's Springs*¹⁸ and *Ardmona*¹⁹, seem to suggest that authorisation on public benefit ground still has a significant role to play in the application of s. 50.

Griffiths Committee Inquiry

The Inquiry has received submissions from a number of individuals, government departments, industry bodies, and interest groups, including Coles/Myer Limited, the Trade

17. *Fletcher Challenge Limited* [1988] ATPR (Com.) 50-077.

18. *Henderson's Federal Spring Works Pty. Limited* [1987] ATPR (Com.) 50-054.

19. *Ardmona Fruit Products Co-op Ltd* [1987] ATPR (Com.) 50-065.

Practices Commission, the Consumers Association of Victoria, the Treasury, Australian Chamber of Commerce, Australian Consumers Association, National Consumer Affairs Advisory Council, NCSC, Australian Stock Exchange, Australian Federation of Consumer Organisations, the Attorney-General's Department, Department of Industry, Technology and Commerce, the Australian Press Council and the Law Council of Australia. The Committee has held public hearings in Canberra, Melbourne and Sydney and has sought further submissions from some parties appearing before it. The submissions range from those which support the present legislation and its interpretation (Department of Industry Technology and Commerce, Treasury, Coles/Myer) through to those which generally support the present form of the section but question some of the decisions made under it (Law Council) to those which suggest that there should be a "public interest test" in relation to all mergers. The Australian Consumers Association, for example, suggests that s. 50 should be re-written to prohibit acquisitions which have "significant social or economic consequences". Presumably, the Association would prohibit mergers irrespective of whether these social or economic consequences were good or bad. It is quite extraordinary the way some of these bodies invoke the "public interest" without any attempt at defining what they mean by this expression. One is left with the impression that the public interest is what the particular proponent itself sees as being its objective for society. No one is suggesting that such groups are not entitled to their views, however they seem to be incapable of articulating how such a public interest test should be formulated or applied in particular cases. The logic of their submissions is that Parliament should repose in some regulatory body a total discretion to determine whether particular acquisitions are desirable or otherwise according to that body's own interpretation of "the public interest". This would seem to be an abdication of Parliamentary responsibility.

Some of the key issues which arise in relation to the Committee's inquiry are the following:

1. Should the Trade Practices Act and TPC be the only regulatory bodies in relation to acquisitions? In my view it is preferable that there be one body of competition law and one administrator of it. It is not desirable that, for example, the Treasury takes a different view under the Foreign Takeovers Act of what is desirable in the interests of competition policy from that taken by the TPC under the Act. While it is appropriate to have special legislation dealing with such things as banking, civil aviation and the media, this legislation should address the special needs of those industries and leave the Trade Practices Act to deal with competition within them.
2. There have been suggestions that there should be some form of compulsory pre-merger notification such as exists in New Zealand and the United States. The experience in those jurisdictions is that pre-merger notification is onerous on the parties and involves the waste of enormous resources by the monitoring bodies which have to review a large amount of material concerning acquisitions which have no affect on competition at all. It is suggested by some proponents of pre-merger notification that it would prevent "midnight mergers" which involve scrambling of assets before effective remedial action can be taken. It seems obvious to me that if someone is going to ignore s. 50, they will also ignore any legislation requiring that they give notice of their intention to ignore it.
3. Should the informal consultative process with the TPC continue? This process has many practical advantages for the parties and is efficient and speedy. Its main disadvantage is that the demands of confidentiality dictate that after making a decision the TPC can only publish a brief press release as to its reasons. This makes it extremely difficult for an objective assessment to be made as to the merits or otherwise of the proposal. It may be that some procedure for more detailed reporting, even if at some time removed from the decision, would alleviate this concern.

4. Should a private right of action to seek an injunction be re-installed? The Law Council has suggested that a case can be made out for the restoration of standing to "any person" to move for an injunction to prevent a merger. It would to some extent relieve the pressure on the TPC and perhaps provide further opportunities for court interpretation of s. 50. The disadvantages are that actions may be brought by target companies or their management simply in a bid to frustrate the takeover and cause unnecessary cost and delay. While it is possible to consider some exceptions to the right of standing, these would be difficult to draft and the answer probably is that there are already a number of avenues available to targets to delay and frustrate an acquisition such that the addition of one more would not be a major concern.
5. What about a "public detriment" test? It has been suggested by the former Chairman of the TPC, Mr W.R. McComas, that in certain instances where a market is particularly concentrated, an acquisition should have to pass an additional test to that presently set out in s. 50. This test would require that the acquisition does not result in any public detriment particularly in terms of competition. While initially appealing, this proposal has a number of disadvantages as outlined by the Attorney-General's Department in its submission to the Griffiths Committee.²⁰

On balance, there seems to be much to be said for leaving the section as it is with a greater emphasis on the evaluation and publicity surrounding the "informal clearance" procedure.

Market Definition

In most merger cases the issue of dominance turns on the definition of the relevant market. Thus in the *News/Herald & Weekly Times* case, the TPC adopted a market definition of "newspapers" on a State rather than a national basis. This led to the conclusion that there was competition with the News publications in each capital city but tended to ignore the apparent dominance of News nationally and its influence on media other than newspapers. In *Coles/Myer* the TPC seemed to concentrate on the demand side of the market, that is the market in which Coles and its customers operated rather than the supply side and Coles/Myer's purchasing power. Understandably, the TPC was unable to find any supplier who was prepared to come forward and assert that it was concerned about the power that the combination would have as a major purchaser.

The definition of market is an exercise which frequently gives rise to difficulty. The practice of calling economists as experts to give economic evidence has developed over the years in trade practices cases, but the precise way in which they can be of assistance has been a matter for debate. In the *AMH* case, Wilcox J. expressed concern that "the curial determination of the limits of market — about which questions I assume commercial people frequently make almost intuitive judgments — should be seen as requiring the time, effort and expense involved in this case". He criticised the practice of economists to give evidence, based on the evidence of others, as to the definition of the market which, his Honour said, was entirely a matter of fact to be determined by the Court, although economists could assist the Court in relation to economic principles.²¹

The curial process of establishing the relevant market has notoriously caused concern in cases such as *Top Performance Motors Pty Ltd v. Ira Berk (Qld.) Pty Limited*²² and *TPC v. TPC Management Pty Limited & Ors.* (the "Tradestock" case)²³. Various suggestions

20. *Supra* n.8.

21. *Supra* n.14 at 49, 479.

22. [1975] ATPR 40-004.

23. [1985] ATPR 40-512.

have been made, including the use of a court-appointed economist, the use of assessors on the bench, and the modification of the rules of evidence. It should be noted that New Zealand has adopted the last two of the measures, and that s. 79 of the Commerce Act 1986 provides that the Court may "receive in evidence any statement, document, or information that would not be otherwise admissible that may in its opinion assist it to deal effectively with the matter". It is also worth noting that s. 3 (1) of the same Act defines a market as "a market for goods or services within New Zealand that may be distinguished as a matter of fact and commercial common sense".

A further difficulty encountered in some merger cases is the reference in s. 50 (3) to a market in Australia. The TPC takes the view, no doubt correctly, that, regardless of the facts, it has to find a market within Australia in order to apply s. 50. This may result in a quite artificial limitation of the competitive forces at play in a particular situation. As has been pointed out by the Attorney-General's Department in its submission to the Griffiths Committee, the provision may give rise to the conceptual difficulties in dealing with certain international services provided to customers in Australia.²⁴ Moreover, with increased emphasis on the objectives of CER and the effort to rationalise competition laws of the two countries, some account needs to be taken of the Australian market where trans-Tasman commerce is involved.

I am conscious of the fact that I have reached the end of this paper without providing an answer to the question expressed in the title. The starting point for arriving at an answer necessarily involves a series of value judgments. Like the debate about the public interest, many sections of the community and individuals will have their own views based on philosophical prejudices or sectional interest. So far as I can ascertain, no one has yet developed an acceptable methodology for evaluating the effects of mergers, and the attempts which have been made to conduct surveys comparing companies before and after acquisition are based on limited samples which offer a poor and inconsistent basis for comparison.²⁵

Whatever the answer to the question, 1988 has clearly been a significant year so far in the development of competition law in this country in relation to mergers.

24. *Supra* n.8 at 69.

25. S. Bishop, P. Dodd, R.R. Officer *Australian Takeovers: the Evidence 1972-1985*, 1987; F.M. McDougall and D. Round *The Effects of Mergers and Takeovers in Australia*, 1986; and see *Mergers Policy — supra* 1 at 36.