MERGER POLICY: WHY DID THE COONEY COMMITTEE ANSWER THE TRADE PRACTICES COMMISSION'S PRAYERS?

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In this article, the author argues that the Cooney Committee of enquiry into merger policy reached an unsubstantiated conclusion in recommending a return to the "substantial lessening of competition" test for Australian merger law. The author argues that the Committee reached this conclusion largely because it uncritically accepted the submissions put to it by the Trade Practices Commission. The Commission's submissions, argues the author, were themselves based on logical inconsistencies, a "rewrite" of history and a somewhat misguided acceptance of the relevance of the views of Harvard academic, Professor Michael Porter, in the context of Australian merger policy.

THE EXPONENTIAL EXPLOSION OF COMMITTEES OF ENQUIRY

There are any number of governmental committees which have recently reviewed various aspects of commercial policy. In particular, this is so in relation to trade practices issues where recently we have had the Griffiths

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Committee Report[1] on misuse of market power; the Lee Committee[2] looking into print media; the Martin Committee[3] looking into banking; the Cooney Committee,[4] with very similar terms of reference to those of the Griffiths Committee, looking into mergers and misuse of market power; and a Senate Committee looking into superannuation issues.[5] Parliamentary committees seem to have been recently established at a rate of growth which one can only describe as exponential.

THE COMMON THEME OF TRADE PRACTICES COMMISSION SUBMISSIONS TO COMMITTEES OF ENQUIRY

The one common thing in all these committees is that the Trade Practices Commission ("TPC") has made submissions to them. The one common theme of the TPC submissions is that the merger test should be reduced from one of dominance to one of substantially lessening competition and that section 50 of the Commonwealth Trade Practices Act ("TPA") needs amendment to effect this result. The TPC failed to score before the Griffiths Committee in this area in 1989, but it managed to convince the Cooney Committee ("the Committee") in its December 1991 Report to adopt its views. The Committee's recommendations have since been adopted by the Government and a Bill to implement them is to be introduced in the next session of Parliament.[6]

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1. House of Representatives Standing Committee *Report on Mergers, Takeovers and Monopolies* (Chair: A Griffith) (May 1989).
2. House of Representatives Select Committee on Print Media *Report on News and Fair Facts* (Chair: M Lee) (March 1989).
3. House of Representatives Standing Committee on Finance and Public Administration *Report on A Pocket Full of Change* (Chair: S Martin) (November 1991).
4. Senate Standing Committee on Legal and Constitutional Affairs *Report on Mergers, Monopolies and Acquisitions - Adequacy of Existing Controls* (Chair: Senator B Cooney) (December 1991).
5. Senate Select Committee on Superannuation *First Report on Safeguarding Super* (Tabled in Parliament: 4 June 1992). Senate Select Committee on Superannuation *Second Report on Safeguarding Super* (Tabled in Parliament: 18 June 1992).
6. Since the writing of this article, such a Bill has been introduced into the House of Representatives (3 November 1992) and passed by it (12 November 1992).

THE TPC HAS PERFORMED A PRODIGIOUS FEAT IN HAVING THE COMMITTEE ACCEPTS ITS VIEWS

The TPC has achieved an astonishing feat in having its prayers answered by the Committee. This is because the dominance test adopted in 1977 for merger legality has been blessed by both the Liberal-Country Party Government and by the Labor Party Government. The dominance test was adopted as Labor Party policy in 1986. In 1989, the Griffiths Committee recommended against any change in the test and in August 1991 the Federal Attorney General accepted that the merger dominance test was appropriate for Australia's needs.[7] The Committee thus recommended against previous evaluations and against previous bipartisan policy. Its recommendations were also against the views of the two immediately previous Chairmen of the TPC (Mr Bob McComas and Professor Bob Baxt), the Law Council of Australia and the Business Council of Australia.[8]

I gave evidence to the Committee at its invitation.[9] It struck me that there were certain things of interest which should be said about that Committee's recommendations and the role of the TPC in its representations to it. The TPC did not seem to bring much new to the Committee in its evidence or its representations. It is thus a matter of considerable interest as to how the TPC won the day before the Committee. It is this question which forms the subject matter of this article.

The subject is also of interest on a wider front for there are certainly broader ramifications in looking at how the TPC achieved its result. This is especially so because most punters would have believed that the TPC's horse would come in carrying a lantern long after all others had passed the finishing post, so slight was its chance of bolting home. But bolt home it did!

The TPC now believes the "substantial lessening of competition" test is what is appropriate for merger legality. It now sees this as the appropriate test notwithstanding the fact that its prior two Chairmen argued for retention of the dominance test. Consistency of approach between administrations clearly is not a strong point in the TPC's views as to legally desirable tests. This all

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7. House of Representatives Standing Committee on Legal and Constitutional Affairs - Government Response (No 13 1991) (22 August 1991).

8. Only Senator Kemp thought that the views of the two immediately preceding TPC Chairmen were persuasive. Part of the reason for his dissent was his conclusion that:

> [T]he concern expressed by the Trade Practices Commission at the effect of the threshold was not shared by either of its previous two Chairmen or a previous Commissioner: supra n 4, 141.

9. *Report of Evidence before the Cooney Committee* (6 November 1991).

causes me to wonder why the change of outlook.

IS OUR COMPETITION LAW A REGULATORY LAW?

One of my disappointments in the development of the TPA is that what was initially conceived as a competition law is rapidly becoming, or perhaps has become, a regulatory law. Competition is, in my view, the antithesis of regulation. It is thus sad to see a competition law turned into a regulatory law by administrative attitudes.[10] Unfortunately, I believe that a considerable amount of the TPC's representations to the Committee were based on the fact that the present dominance test is an inhibition on regulatory power, and therefore a limitation on regulatory effectiveness, rather than that the dominance test is inherently defective.

Frequently regulators do not recognise their own hidden agendas even though those who are not regulators often regard such agendas as quite transparently obvious. But, in all its representations, the TPC has not considered the possibility that, in the overall scheme of things, the fact that some mergers may escape the regulatory net may not be much of a tragedy at all. In fact, it may be a contemplated and accepted risk, with far fewer anti-social results than sweeping an over-abundance of mergers into the bucket of bureaucratic evaluation.

Perhaps, therefore, the TPC genuinely believes that it is contributing to the good of Australia in seeking a changed merger test. Regulators often act from the best of motives but I think the worst regulation is perhaps the most moral. Regulators who are cynics are often tolerant, sensible and humane. But when moralists are on top, there is no limit to oppression in the enforcement of their causes. In the merger area, I fear the TPC is a moralist and I fear the oppression to which its cause will give rise.

THE DIFFERING ENFORCEMENT PHILOSOPHIES OF "LAWYER-REGULATORS" AND "ECONOMIST-REGULATORS"

The question of the appropriate merger test is exacerbated by the fact that the TPC is now run by economists. Of course, I have nothing against

10. This point is far too complex to argue here. However, the gist of the writer's arguments is set out in W J Pengilley "Competition Law and Voluntary Codes of Self Regulation: An Individual Assessment of What has Happened to Date" (1990) 13 UNSWLJ 212-301. The proposition is there discussed in the context of competition policy becoming "regulatory" through the TPC's administration of "Codes of Conduct".

economists and their training is valuable in the competition area. However, I think that most lawyer administrators adopt the view that their task is to apply or administer a particular statute according to its language. Economist administrators do not, in my view, feel so constrained. They are thus seeking a result which they believe should eventuate in accordance with economic theory and, if the law stands in the road of this, then such law must be changed. I think a good deal of this is evident in the TPC's representations to the Committee.

In my view, the TPC did not put before the Committee impartial material and ask the Committee to draw a conclusion. It put before the Committee such evidence as would advance its own merger agenda. This merger agenda happens to coincide with the fact that:

1. More mergers will come under TPC regulation if such agenda is adopted; and
2. If the TPC's agenda is adopted, the economists' ideal will be advanced.

One of the greatest frustrations of the TPC's evidence to the Committee was that the TPC never stipulated what it meant by a "substantial lessening of competition" in the merger context. Present guidelines on dominance specify criteria by reference to market share and, generally speaking, are to the effect that a merger will not be regarded as creating dominance unless it results in a 45 per cent market share of the largest competitor or in a competitor having a market share of 15 per cent or more greater than its nearest competitor.[11] No inkling, in these terms, was given by the TPC before the Committee as to what it meant by a substantial lessening of competition. The TPC merely mouthed the test. Undoubtedly the substantial lessening of competition test was seen as having one desirable attribute. It would bring more mergers into the regulatory net and enhance the TPC's authorisation role.

THE TPC WON THE DAY BY TECHNIQUES OF DEBATE AND ARGUMENT

It is, I think, notable that the TPC's submissions to the Committee were not sheeted home to anything too practical. These submissions did, however, employ very interesting techniques of debate and argument. In the end, it was these techniques which won the day. Some of these techniques are very interesting and deserve comment.

11. See "Trade Practices Commission Merger Guidelines" Vol 3 Australian Trade Practices Reporter para 55-040.

1. Technique one: develop a "catch cry" and repeat it until it obtains credibility

The first of these techniques is the TPC's concept of singling out a simplistic "catch cry" and repeating it until it obtains credibility. The TPC said that it was inconsistent that most conduct in the TPA is governed by a substantial lessening of competition test whereas mergers are governed by a less rigorous dominance test. Thus, says the TPC, with disarming simplicity, all the tests should be the same. The TPC says that it is conceptually wrong that two companies can engage in substantially anti-competitive conduct yet they can merge with impunity unless dominance is created, notwithstanding the fact that because of the merger there may be a serious diminution of competition.[12]

This was the TPC's "catch cry". It was undoubtedly a winner with the Committee. But it has a significant number of flaws. The first of these flaws is that, if it is illegal in all circumstances for competitors to fix the price of goods (as it is), it follows in logic that it should be similarly illegal in all circumstances for competitors to merge. Not even the TPC argues for this result yet it is just as logical as the TPC's general argument in relation to a "substantial lessening of competition".

Secondly, there is nothing inherently wrong with a legislature treating different conduct or arrangements in different ways for different policy reasons. For this reason the consistency "catch cry" is, in reality, quite irrelevant to principles of legislative policy. Some practices (for example, price fixing, resale price maintenance and third line forcing) are illegal regardless of their effect on competition. Presumably, in these areas the legislative judgement has been that legal certainty is more important than having each case obfuscated by differing views of economists as to what constitutes "a substantial lessening of competition". Specifically, in the policy area, all other sections of the TPA relate to *conduct*. Merger provisions relate to *structure*. There is nothing illogical at all about treating conduct

12. This point was made so frequently by the TPC that citations to all of the TPC's submissions on it would involve a footnote of great prolixity. It is, for purposes of the present discussion, sufficient to cite the TPC's submission to the Committee infra n 13, para 1.9. The TPC there stated that it was inconsistent for two firms to agree to conduct which substantially lessens competition and for this to result in a contravention of the Act but yet:

> [T]hey can merge and unless this results in dominance or increased dominance, the acquisition would not be caught by the Act even if there is a serious diminution of competition.

matters differently from structural matters. Indeed, this is what is done in most countries. Some jurisdictions with quite strong controls over anti-competitive conduct are quite weak in the merger area because of the different policy considerations applicable.

Finally, however, the TPC's argument that all things should be the same is flawed within its own submissions. Thus, notwithstanding its consistency argument, the TPC advocated to the Committee that Government should be able to refer to it for evaluation mergers involving industries which are socially, economically or politically sensitive.[13] It also recommended mandatory authorisation for mergers in which the target company assets exceeded five hundred million dollars.[14] If one looks at the submissions of the TPC to other committees, one finds that in the TPC's submission to the Lee Enquiry on Print Media, it advocated that all mergers of metropolitan and major country newspapers should be examined by it.[15] In short, whilst the TPC's advocacy of the consistency theory is put as being logical, it is nothing of the sort. The TPC itself argues that "mergers are different" because it has, in fact, argued for a different treatment of mergers. George Orwell's Animal Farm[16] was based on the concept that "all animals are equal", except that "some animals are more equal than others". One could be forgiven for thinking that the TPC has an akin approach when it articulates its policy on mergers.

2. Technique two: rewrite history

A second interesting approach of the TPC has been to rewrite history. This technique is, of course, not unique to the TPC but something common to all who wish to draw conclusions from the past in their favour where such conclusions do not run. In particular, the TPC parades three merger chestnuts before the Committee as the embodiment of the reasons why the merger dominance test should be changed. These chestnuts are, of course:

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13. Trade Practices Commission Submission to the Cooney Committee *Report on Mergers, Monopolies and Acquisitions - Adequacy of Existing Controls* (August 1991) para 8.8-8.9. The TPC suggested that such industries could include "media, banking, insurance and aviation". The government could add to or delete from the list over time. The TPC could also monitor industry generally and make recommendations as to whether industries should be added or deleted from the list of sensitive industries.
14. Ibid, para 8.5.
15. These submissions are not here considered in detail. For the TPC's summary of its merger submissions see Trade Practices Commission Bulletin (no 62, Sept-Oct 1991) 49.
16. G Orwell *Animal Farm: A Fairy Story* (London: Penguin Books, 1951).

1. The Coles-Myer Merger;[17]
2. The News Limited-Herald and Weekly Times Merger;[18] and
3. The Ansett-East West Airlines Merger.[19]

I am not being selective in choosing these three mergers. They are described by the TPC itself as being "the three earlier mergers that have caused the greatest amount of public comment and concern".[20] I am thus taking the worst three mergers that the TPC sees. I want to comment upon what the TPC says about these three chestnuts. In my view, what the TPC claims in relation to these mergers and the dominance test does not stand scrutiny.

(a) The Coles-Myer merger

The TPC firstly parades Coles-Myer. There are a number of issues in this merger. The prime issue probably is that of market definition. In the retailing industry, the market definition must be extremely wide. It is, of course, in the context of market definition that anti-competitive effects must be evaluated. In relation to the Coles-Myer merger the TPC did in fact engage an economist to advise on market definition. However, the TPC has not released this analysis and it remains as guarded as any state secret. Until the TPC lets us have some material in relation to its market analysis, it seems to me quite improper that it should snipe for years at Coles-Myer from behind secretive rocks.

The Coles-Myer merger may well not have infringed a substantial lessening of competition test. As stated, the essential issue is that of market analysis and we are left in ignorance of this. The best that the TPC could say to the Committee was that the merger had resulted in the *possible* exclusion of another competitor *in the short term*. If the best the TPC can do is talk about *possible* exclusion *in the short term*, then I would suggest that it certainly does not follow at all that a substantial lessening of competition has resulted from this merger. It is further to be noted in any event that the TPC had previously advised Coles of its view that section 50 would be infringed if it took over Woolworths. Further, the TPC did require a share divestiture in order to permit Coles to take over Myer. The TPC noted in its 1985-1986 Annual Report that there was still competition from others in the market.[21] It is also

17. Supra n 13, para 4.4-4.7.
18. Ibid, para 4.8-4.9.
19. Ibid, para 4.10-4.13.
20. Ibid, para 4.3.
21. Trade Practices Commission Annual Report (1985-1986) para 2.37.

relevant that the Coles-Myer submission to the Committee said that its current market share of retail sales is 15.7 per cent and that its share of the grocery/food market is 22 per cent. Indeed, Coles-Myer noted that vigorous competition had in fact resulted in a decline in its market share.[22]

A further matter noted in relation to the TPC's failure to take action was the fact that "at that time . . . industry was unwilling to assist despite extreme concerns expressed later".[23] In simple terms this means that the TPC lacked the evidence with which to go to court even if it wanted to.

How all of this fits in with a condemnation of the dominance test in relation to the Coles-Myer merger is something that I do not quite understand. The TPC insisted on a share divestiture and obviously treated the merger as a potential breach in this regard. The TPC did not have the evidence to go to court. The TPC does not release its market analysis and hence retains to itself the real element in the case, that is, the relevant market definition. In retailing, this must be very wide and it may well be conjecture as to whether the Coles-Myer merger would have resulted in a substantial lessening of competition. The TPC, however, despite all these things, puts it to the Committee that the Coles-Myer merger is sinful and a changed test is the only way to enable this merger to be thwarted. It simply does not add up at all logically.

(b) The News Ltd-Herald and Weekly Times merger

A similar picture is given in relation to the News Limited-Herald and Weekly Times merger. The fact is that this merger was treated as a breach of section 50 of the TPA and independent entities were set up in Adelaide and Brisbane for this reason. The TPC subsequently investigated allegations that these entities were not, in fact, genuinely independent. In the TPC's words, "after spending an enormous amount of time and effort"[24] in unravelling the situation, it concluded that such entities were in fact operating independently. This, too, was regarded by the TPC as a breach of the dominance section and the TPC applied an administrative solution. How does the case show that the dominance test is inadequate? The TPC in fact thought that the dominance test prevented the merger - not that it was powerless to act against the merger.

(c) The Ansett-East West Airlines merger

In Ansett-East West Airlines, the TPC negotiated a divestiture of certain

22. Supra n 4, para 3.54.
23. Supra n 13, para 4.6.
24. See Trade Practices Commission Media Release (29 August 1989).

East West routes as a condition of permitting the merger to proceed.[25] This also surely is a recognition by the TPC that it regarded the merger as being in breach of the dominance test. The TPC, however, put to the Committee that it could do nothing about this merger because of the dominance test and that "a substantial lessening of competition test" was needed so that such a merger would not be able to occur in future.

(d) Conclusions in relation to these mergers

These three mergers, at least on the material submitted to the Committee and on such other public material of which I am aware, do not lead to the conclusion that the dominance test is inadequate. All three mergers were properly scrutinized. All of them were modified under the dominance test. All that follows from a study of the three mergers is that the TPC perhaps thinks, with hindsight, that it should have administratively handled such mergers differently. If this is so, then, of course, it is appropriate for the TPC, like everybody else, to learn from prior mistakes. It is not appropriate for the TPC to argue that, because of its own administrative treatment of certain mergers, the legislative merger test should be radically changed.

3. Technique three: draw analogies where these cannot be drawn

The TPC also had a technique of argument before the Committee which involved the drawing of analogies where analogies could not be made. In particular, this was so in relation to its request for pre-notification of certain mergers. The TPC relied heavily upon the United States Federal Trade Commission and its pre-notification programme.[26] The TPC argued that any such pre-notification in Australia, as administered by it, would not be administratively burdensome to the business community.[27]

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25. For Report of the TPC's initial decision in this matter see Trade Practices Commission Annual Report (1987-1988) 13-14. For subsequent developments see Trade Practices Commission Annual Report (1988-1989) 16-17; Trade Practices Commission Media Release (88/1, 26 February 1988) and Trade Practices Commission Media Release (88/15, 28 September 1988).
26. See supra n 4, 57 citing TPC submission. The TPC submission cites the US Federal Trade Commission as saying that its pre-merger notification programme had been a success.
27. The TPC in its submission states that a reasonable pre-notification period should not prove onerous to merger parties: supra n 13, 10.21. The TPC states that:

> Administrative costs to the Commission in merger pre-notifications and the compliance costs of business could be expected to be small, with the benefits of early warning exceeding the relatively low costs

If the TPC wished to argue from United States experience that a pre-notification system would be a success in Australia, the TPC should also have taken as a basis for comparison the whole of the United States system as it actually operates. The United States Hart Scott Rodino Act provides that the Federal Trade Commission, with the consent of the Justice Department, may prescribe rules "necessary and appropriate" to carrying out the purposes of the Act. The TPC has fulfilled this regulatory task by prescribing rules which cover 101 triple column pages of the United States Federal Register.[28] It is somewhat inappropriate to argue that the United States system is a success and at the same time sever from the discussion the whole administrative procedure upon which such system is based. Yet this is exactly what the TPC did in its representations to the Committee. Perhaps the lesson we should learn from the United States is that, once there is a requirement to identify complex economic issues in writing, it can hardly follow that the task is administratively simple or cheap. The 1989 Griffiths Committee of Enquiry thought that merger pre-notification would involve a substantially increased administrative burden for the TPC which would have significant resource implications and could impact on the effectiveness of administration of the trade practices law.[29] It therefore recommended against merger pre-notifica-

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of compliance: supra n 13, 10.21.

28. US Federal Registrar (43, 1978) 33,450-33,557. In a somewhat fewer number of pages, the requirements for US Federal Trade Commission pre-merger notification are reported in Topical Law Reports relating to pre-merger notification rules, 42401-42434; Notification and Report Form, 42501-42422; Filing Fee Procedure, 42541-42542 and Pre-Merger Notification FTC Staff Interpretation, 42601-42609. The pre-merger notification rules are currently under review and public comment is being sought on 5 alternative proposals to amend them.

29. The *Griffiths Committee* supra n 1, para 5.3.14 and 5.3.15 concluded in 1989 as follows:

> The Committee is not convinced of the need for a scheme of pre-merger notification. There is little evidence to suggest that the Trade Practices Commission would be unaware of significant mergers before they are effected or that the problem of midnight mergers is widespread. The Trade Practices Commission has expressed confidence in its ability to take immediate action to prevent a merger where such action is necessary . . .
>
> The introduction of mandatory pre-merger notification may involve a number of difficulties including a substantially increased administrative burden for the Trade Practices Commission . . .
>
> The Committee considers that it would not be prudent to introduce a scheme of pre-merger notification which would have significant resource implications for the Trade Practices Commission and could impact on the effective administration of trade practices law in

tion. In 1989, the TPC itself did not see the need for pre-merger notification.[30] What has changed? In my view, all that has changed is an increased desire to regulate.

4. Technique four: give solace — the TPC can always fix it up by authorization and guidelines

The TPC further argued that there would be no difficulties with legal uncertainty in the changed merger threshold test because the TPC could fix it all through Authorisation[31] or through a TPC Guideline process.[32] This argument turns the concept of regulation on its head. One might well think that the true test of the need for regulation is that one should not have to approach the regulator at all unless one's transaction results in detriment or is in a class of transaction which may be presumed to cause detriment. However, the TPC submitted to the Committee that, unless the TPC authorised certain "neutral" mergers, these should be disallowed even if there was no public detriment in them.[33] Many of these mergers will not, of course, be

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> Australia. The objectives of such a scheme are already capable of being achieved through existing procedures . . .

30. In 1989, the TPC expressed confidence in its ability to take immediate action in respect of mergers and stated that the problem of midnight mergers was not significant: supra n 29.

31. See TPC submission to the Committee, supra n 13, para 3.5:

> [A]rguments that a less stringent test for mergers is needed in a small open economy like Australia overlook the fact that the authorisation process in the Australian Trade Practices Act permits a thorough evaluation of the public benefits that would arise from a merger, including the benefits that may arise form greater economies of scale. Hence a merger test based on substantial lessening of competition would still permit a proper balancing of the alleged public benefits of the merger against any anti-competitive effects.

32. The TPC offered to issue Guidelines in relation to the effect of a "substantial lessening of competition test". The Committee recommended that such Guidelines be issued, supra n 4, para 3.132-3.133. The TPC's offer was, however, made in its Supplementary Submission after the Committee's public hearings had closed: see Trade Practices Commission (Supplementary Submission) to the Report on Mergers, Monopolies and Acquisitions - Adequacy of Existing Controls (November 1991). There was one sitting of the Committee on 2 December 1991 but this was convened without notice to interested parties for the express purpose of permitting only Senator Ron Boswell, Leader of the National Party in the Senate, to give evidence.

33. The TPC relied upon a Bureau of Industry Economics Study ("BIE Study") which it cited in its submission to the Committee. Dr Bill Beerworth in a submission to the Committee pointed out that the TPC's citation of the BIE Study was selective and misleading - in particular that the qualifications to the BIE Study were substantial and omitted in the

able to be legalised by the Authorisation process as, in order to obtain Authorisation, a positive public benefit must be shown. In view of the equivocal evidence as to the effect of mergers in Australia, it is difficult indeed to see the logic of banning lower threshold mergers. Many may have no positive detriment, but they cannot be blessed by the TPC through the Authorisation process because they lack public benefit. The lower threshold will make them illegal; one wonders why this should be so. The TPC's argument that the Authorisation procedure will be the saviour if there is a reduced merger threshold test thus does not run.

The position in relation to Guidelines is somewhat akin. The law may take a decade in which to develop into some semblance of certainty. That this is true is indicated by the fact that the cases of *Trade Practices Commission v Meat Holdings*[34] and *Trade Practices Commission v Arnotts*[35] were finally decided in 1989 and 1990 respectively, under a merger test which came into effect in mid 1977. These cases lay down the relevant principles applicable to dominance. Such principles are based on sound economic reasoning. Undoubtedly uncertainty will occur if a substantial lessening of competition test replaces dominance.

The TPC says it can solve any uncertainty problems by issuing a merger Guideline. But, in order to be worthwhile, Guidelines have to satisfy one or both of the following conditions - they must be likely to be accepted by people to whom they are addressed or they must be likely to stand up in court proceedings. Thus, they have to be based on experience. Guidelines do not overcome the uncertainty of a new test - especially in an area as controversial as merger policy. The prior TPC Guidelines[36] were based on experience of ten years under the dominance test. Perhaps this indicates the sort of necessary experience "lead time" required before a Guideline can be usefully produced.

TPC's citation of it. The TPC's response was to state that even if all the mergers referred to in that study had been disallowed under a substantial lessening of competition test, there would not have been any loss of public benefit: ibid, para 10. But this surely turns the concept of regulation on its head. Surely the proper philosophical approach should be that transactions should be permitted unless they cause detriment or are of a class which might be thought to do so. The TPC's approach on the basis of its 1991 submission is that a far greater class of mergers should be prohibited unless public benefit can be demonstrated. This is so even though the extended category of mergers may not have any public detriment, either actually or presumptively.

34. *Trade Practices Commission v Australian Meat Holdings Pty Ltd* ("*Meat Holdings*") (1988) 10 ATPR para 40-876 and 40-893.

35. *Trade Practices Commission v Arnotts Ltd* ("Arnotts") (1989) 11 ATPR paras 40-930, 40-941 and 40-979.

36. Supra n 11, (1990) ATPR paras 41-003, 41-010, 41-002 and 41-062.

The TPC, notwithstanding this, undertook to the Committee to issue detailed merger Guidelines as a matter of priority. One's comment is that such Guidelines will be little more than an abstract thesis in economics unless backed up by experience or by court decisions.[37] Further, it is strange to me that such Guidelines will, according to the TPC, be able to be issued expeditiously yet the TPC did not before the Committee give any indication as to what a "substantial lessening of competition" test meant and did not even venture a prima facie market share threshold pursuant to which such a test might be activated.

Regrettably, neither the substance of the TPC's mooted Guidelines, nor the difficulty in issuing them as promised, could be debated before the Committee because the TPC's offer to issue Guidelines was made in a written submission *after* the Committee's hearings had closed.[38]

5. Technique five: argue no impact on resources

A most important aspect of the TPC's submissions relates to use of resources. The TPC does not seem to think that a lower threshold test, more authorisation applications and mandatory merger pre-notification arrangements will result in a demand for a significant increase in TPC resources and so stated to the Committee.[39] I personally believe this is wishful thinking. The result of all of this must be a demand for more resources. Alternatively, the result will be a diversion of resources from areas where I believe the "real action" is (that is, in price fixing and boycott enforcement) into the area of merger enforcement. The TPC denied that there would be any such diversion.

There are some interesting views set out in the TPC's submission on resources and funding. One thing business may be interested to know is that the TPC thinks it reasonable that there should be a "user pay" arrangement in relation to mandatory pre-notification and Authorisations. It did not

37. The TPC cited the Canadian Merger Guidelines (1991) as the type of Guidelines it envisaged. This model may well have been chosen because Associate Commissioner Hank Speir participated in an executive interchange programme pursuant to which he headed the newly established Canadian mergers investigation branch in Ottawa. The fact that Guidelines can only usefully be based on experience is borne out in the Canadian experience itself. The Canadian Merger Guideline threshold test has recently been amended in the light of Canadian experience: see Trade Practices Commission Bulletin (No 62, 1991) 18.

38. Supra n 32. It was thus not possible for anyone to comment on the utility or practicality of the TPC's offer.

39. The TPC stated to the Committee that it would "be able to handle the additional work load with a small increase in resources, perhaps in the order of two or three staff": supra n 13, para 14.5.

highlight this aspect but dealt with it in one paragraph of its submission.[40] The TPC thinks that the current New Zealand fees are reasonable. These are $2 250 for a mandatory pre-notification and $22 500 for an Authorisation application.[41] The present fee in Australia is zero. These fees seem to be something beyond the productivity increase which any business in the land can expect in this day and age. No doubt Professor Fels, in his capacity as Chairman of the Prices Surveillance Authority, would give a decision which would make interesting reading if such fees were referred to him for evaluation as to their reasonableness.

I think there may be a certain reluctance by business to accept that it may be required by law in the future to lodge various documents with the TPC and, for the privilege, to pay fees which by any measure must be regarded as generous to the Government and far exceeding anything payable in like circumstances (for example, to a court). Whether the TPC's views will be accepted by those responsible for setting fees remains to be seen. However, it does give some idea as to how the TPC thinks on these matters. The issue is even more important when the TPC believes that, throughout the TPA, the general threshold test should be changed to one of "substantially lessening competition" and that the TPC should have power to authorise all practices, including those non-authorisable at the present time. The fee impact of this may well be quite dramatic. Perhaps the TPC will be able to afford the new staff it will no doubt require if fees of the magnitude envisaged are involved whenever one makes an application to it.

In any event, there are considerable inconsistencies in what the TPC says on the resources issue. The TPC argued before the various committees of enquiry that, even if everything it sought were granted, the impact on resources would not be substantial.[42] Now that the dust has settled, perhaps a more sober assessment of the impact on resources may be that contained in the TPC's May-June 1992 Bulletin. There the TPC, in noting its priorities, says that:

> [C]hanges in Government Policy such as the proposals made by the Cooney, Martin, Lee and Griffith Enquiries, if adopted (as have been the merger recommendations made by the Committee) will have a *major impact* on the Commission's work.[43]

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40. Supra n 13, para 14.6.
41. Supra n 13, para 14.6. The TPC also noted UK fees as being from £5 000 to £15 000 depending upon the size of the acquisition. The TPC thought the NZ fee was appropriate for Aust.
42. For example, supra n 39.
43. Trade Practices Commission Bulletin No 66 (May-June 1992) 1 (emphasis added).

Further, it is a matter of concern to see the TPC seeking tasks requiring additional resources when one reads that it has apparently claimed in relation to the New South Wales Royal Commission Building Enquiry that it had "for years suspected collusion among builders and material suppliers but had not the resources to investigate".[44]

The TPC's resources statements to the Committee, and other Governmental committees of enquiry, do not seem to reflect the actuality and they are inconsistent with the TPC's own subsequent statements on the point. Where should priorities lie? For my money, the prosecution of price fixing (the universally recognised "No No" of competition law) is far more important than the expansion of the merger regulation fiefdom.

6. Technique six: play Michael Porter as the ace of trumps when he is a lower honour card in the pack

The TPC's trump card in the whole debate, however, was the work of Professor Michael Porter of Harvard University entitled *The Competitive Advantage of Nations*, published in 1990.[45] Professor Porter is a believer in strong internal competition. He advocates strong internal competition as being the key to export effectiveness. He argues that co-operation between competitors, whether in the form of collusion or merger, should be discouraged. His book on this subject hit the deck slightly more than a year before the Committee's hearings and his views have been avidly embraced by the TPC. I have read the whole of the 830 pages of Professor Porter's work. In view of some of the conclusions others draw from it, I often wonder if they have done the same. Obviously it is not an appropriate place here to attempt to dissect his treatise. Suffice it to say that Professor Porter's argument is undoubtedly an interesting and informative one. His populist style of writing together with the almost evangelical fervour of his presentations have predictably created for him an international band of disciples. But Professor Porter's work, even accepting it on its face, does not stand for all the propositions which the TPC enthusiastically sees as self-evidently emanating from it.

One point which is self-evident to me but will, no doubt, upset economists, is that the ideas of economists, as those of everybody else, have a sociably acceptable time span. So in the United States, Joe Bain carried out

44. Australian Financial Review 25 September 1992. It is assumed that this Press Report accurately states the TPC's view. No independent check by the writer as to the accuracy of the Report has been undertaken.

45. M E Porter *The Competitive Advantage of Nations* (London: MacMillan, 1990).

a number of studies on the period 1936-1940 which led to acceptance in that country of the view that significant mergers led to higher corporate profits and consumer detriment.[46] In the 1950's, the United States merger law, based on Bain's studies, was given real teeth.[47] In the 1980's, the major economic shift in thinking in the United States has been from market dominance problems towards a concern with the large market shares held by leading firms.[48] Anti-trust enforcement policy has also cyclically fluctuated. I share the view of Professor Barry Hughes, Professor of Economics at Newcastle University and one-time adviser to Paul Keating when he was Treasurer, that:

> All theories come a cropper at some time or other. That's why economics is devoted to fashions.[49]

Professor Porter may be leading a new trend. This does not necessarily mean that he is correct. Neither does it mean that his thoughts should be embraced with such enthusiasm that all else that has gone before is forgotten. I think it reasonable to express a view that to jump overboard and drown with Professor Porter may not be a sensible policy. Even if one makes the jump with Professor Porter, a life jacket would be a useful article in order to permit one's pre-Porter life to be revived if the Porter waters turn out to be too chilly an experience.

It is, nonetheless, appropriate to comment shortly on some of the Professor Porter's points. The first comment one would make is that the countries Professor Porter studied were large economies. In smaller countries, his studies were not of the economies as a whole but of specific industries within them. He argues from his study that competition in internal

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46. See for example, J Bain "Relation of Profit Rate to Industry Concentration: American Manufacturing" (1936-40) 65 Quarterly Journal of Economics 293-324; J Bain *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge, Harvard University Press, 1956). The qualifications to Bain's works appear to have been largely overlooked by policy makers and were not re-emphasised for at least 15 years after publication of his works. See for example, Y Brozen: "Bain's Concentration and Rates of Return Revisited" (1971) 14 Journal of Law & Economics 351-369.
47. (US) The Celler-Kefauver Anti-Merger Act 1950.
48. There is a veritable barrage of literature on economics and merger control. A lot of this literature is conveniently reviewed in an article by P A Paulter "A Review of the Economic Basis for Broad Based Merger Policy" (1983) Vol XXVIII The Antitrust Bulletin 571-651. The conclusions reached in the literature appear to be:
    (a) Market dominance is a more important consideration than market share;
    (b) Barriers to entry are a major factor to be recognised in competition law; and
    (c) Poor performance due to market concentration is not a serious problem if the size of the leading firms is not too large.
49. "Don't Blame me - I'm an Economist" Sydney Morning Herald 18 January 1992.

economies gives benefits to exports and innovation. No one can argue with this purely because of the size and sophistication of the overall economies which he studied.[50] In talking about populations and economies we simply cannot apply what Professor Porter has found in relation to the United States economy in the Australian context without substantial modification. It is a simple fact that the population of the whole of Australia does not equal that of the State of New York. California is the seventh largest economy in the world in its own right. Conclusions cannot be drawn from the United States without considerable modification to Australian circumstances. The same observation applies to other large economies studied by Professor Porter. Having said that, Australia's TPA as a whole would probably receive accolades from Professor Porter as to its fundamental thrust. Indeed, in many areas, the Australian legislation is stronger than comparable legislation elsewhere. Moreover, Professor Porter sometimes talks about "vigorous competition" when there are but two domestic firms in the market - a fact which, not surprisingly, was not given any prominence by the TPC in its submissions to the Committee.

Finally, there are ways of creating competition other than under the TPA. Competition can be achieved through tariff reductions and removal of barriers preventing import entry. Australia may offer scope for only one or two domestic producers on a world scale but force competition on such producers because of other industrial policies. Regulations surely ought not to be aimed at avoiding a small number of competitors because of some type

50. Professor Porter subsequently, however, made a study of the economy of NZ which the TPC cited to support its case. See evidence of Professor Fels, TPC Chairman, and Evidence of Professor Johns, TPC Deputy Chairman, to the Cooney Committee 6 November 1991. Professor Porter's NZ study can, however, be persuasively criticised, as has been done by Professor Scobie, Professor of Economics at the University of Waikato: see Professor G Scobie "Competitive Advantage: Porter's Path to Prosperity" in "Policy" (1991) Vol 7 No 4 Journal of the Centre for Independent Studies. Professor Scobie makes, amongst others, the following points in relation to Professor Porter's NZ study: (i) The "diamond" which Professor Porter puts into his case studies can hardly satisfy those looking for a theoretical base from which to describe, assess or test hypotheses about national competitive advantage; (ii) Professor Porter's conceptual framework does not lend itself to either identifying or testing the factors that underlie competitive advantage; (iii) Nowhere does the book set out what is meant by the term "NZ's competitive advantage"; (iv) With no clear vision as to what is meant by competitive advantage, it is difficult to see how to upgrade it; (v) Professor Porter's claims stem from case studies which consist of a selected group of countries and industries from which it is both difficult and dangerous to generalise; (vi) There is only a sentence or two on (amongst other things) the legal and regulatory system of allocating natural resources; and (vii) The need for a major overhaul of Government policy in a substantial number of areas does not even rate a mention.

of pre-judgement that a larger number is desirable. Concentration is primarily a matter of concern only where there are barriers to entry inhibiting competition from other world sources.

In fact, in the ultimate analysis, Professor Porter says nothing about the type of legislation which will bring about the strong domestic competitive situation in which he believes. A merger provision may be based on a dominance test and still deliver the effective competition which Professor Porter advocates - especially if other barriers to entry are small or non-existent.

Further, Professor Porter's work says nothing which necessitates the conclusion that the Australian merger test should be changed from dominance to that of a substantial lessening of competition. Nonetheless, the TPC was able to argue that Professor Porter was a respectable authority for the view that a lowering of the merger competition test was of the essence of export innovation and industry efficiency. The TPC convinced the Committee to this effect. In my view, such a result simply does not follow. Professor Porter cannot be cited as the Bible, Koran and "Confucius says" for implementing a lower threshold test under section 50. Nonetheless, his then year-old treatise was accepted as being just that.

WHAT DO I CONCLUDE OVERALL IN RELATION TO THE COMMITTEE OF ENQUIRY PROCESS?

1. The TPC has its own agenda in making submissions

The first point which we should all realise is that the TPC has its own agenda when it makes submissions to committees of enquiry and, of course, puts before these committees such material as will show its agenda in the best light. This is, of course, a quite general point in submissions made by any regulatory authority. It is an important point deserving recognition by such of us who have different views as to the proper function of such authorities in presenting information to parliamentary committees.

2. Persons appearing before enquiries have to commit themselves to the task

The second point which has to be recognised is that any concerned individual, or community group opposing the TPC in future enquiries will have to match the TPC in terms of commitment. This means seeing and commenting on all the submissions received and evaluated by any committee of enquiry. Only in this way can TPC submissions, presented in some cases

after the close of a committee's public hearings, and relied on by the committee, be answered. Such group or individual will have to seek the right to give evidence as frequently and, if necessary, with as many people present as does the TPC. The TPC fronts up to these hearings with five or six people representing it and it is quite obvious that, if interruptions to evidence are permitted, this will favour the TPC debating team quite disproportionately.

The TPC devoted considerable resources to all the committees to which it made representations. It was heard more than once by the Committee. It lodged seven submissions with that Committee. Others, if they are to be successful, must be able to do the same.

3. Parties have to be able to uncover the TPC's "hidden agenda"

Above all, bodies opposing the TPC must have the expertise to uncover the TPC's hidden agenda. The representatives of any such body must show themselves as being as knowledgeable as the TPC. Such representatives must also have the ability to query the TPC and, if necessary, to ask for information to be provided by it. They must ensure that such information is, in fact, received and put before the relevant inquiry. Further, any persons involved must be prepared to devote the necessary resources to the task.

CONCLUSIONS AS TO COMMITTEE FINDINGS AND TPC REPRESENTATIONS TO IT

The result is that the Committee has made a recommendation as to dropping the merger test largely because of the submissions to it by the TPC. The TPC does not discuss the inadequacies of the present dominance test nor the inadequacies of the court holdings under it. It simply repetitively asserts that such test is inadequate.[51] By doing this, it has convinced the Committee

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51. In 1989, the TPC asserted that the result in *Meat Holdings* supra n 34 accorded with:

> [T]he Commission's own view that the dominance test could be effectively applied in the Australian context: supra n 25, Trade Practices Annual Report (1988-1989) 2-3.

The *Arnotts Case* supra n 35 also having been won by the TPC, can only have reinforced this view. However, when it was suggested to the TPC before the Committee that the principles in these two decisions gave rise to a workable merger law, the TPC merely repeated its prior view that a substantial lessening of competition test was needed. It declined to given any analysis as to why the principles expounded in *Meat Holdings* and *Arnott* were deficient, preferring instead to repeat, without analysis, that the dominance test was "simply inadequate": supra n 32, para 56.

by a process of "argument" which it would itself totally reject if put to it for an Authorisation on public benefit grounds.

The TPC has given no idea of the market thresholds on which it sees a substantial lessening of competition test as operating. It has managed to cite Professor Porter for propositions which, in my view, do not flow from his work or, at least, do not flow in the same manner as the TPC asserts. The TPC has avoided a number of issues and has succeeded before the Committee by rewriting history, drawing inadequate analogies, and singling out a simplistic "catch-cry" and repeating it until it obtained credibility. All of this is defensible if one regards the TPC's real task as being to be "paid by results" and that it is proper for it to be rewarded to the extent that it achieves its agenda. For my money, I believe that the role of the TPC is to research and place impartial material before a parliamentary committee rather than to push its own case.

THE RESULTS OF A CHANGED MERGER TEST

Though the TPC has used illogical argument, it has been impressively persuasive. Convincing the Committee to change the merger threshold test is all the more impressive when the Committee itself found no material which would compel it to come to a conclusion, on the evidence, one way or another. Despite this fact, the Committee recommended change.[52]

Legislation implementing the Committee's findings will result in a lower merger test. It will also, in my view, result in the intrusion of the dead hand of regulation into areas where it is not needed in the Australian context. There

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52. The Committee concluded on this crucial issue as follows:

> The Committee finds that the empirical evidence on the effect of mergers is conflicting and not conclusive . . .: supra n 4, 3.25 and 3.112.
>
> [and]
>
> There is a poor bank of available studies based on empirical research into the Australian economy. There is no work of which the Committee has been made aware which would compel it to come to a particular conclusion: supra n 4, 3.124.

In view of the above, one might think that the Committee might well have come to the conclusion that a change to the merger test was not justified. However, the Committee recommended a change to the test. The major reasons for the Committee's conclusions were its view of Professor Porter's work: supra n 45 (in which regard the writer believes the Committee uncritically accepted incomplete and erroneous TPC submissions) and the fact that the TPC lacked "the authority to carry out its function in a way most beneficial to the community" and that it should be given such authority: Supra n 4, para 3.123.

is little doubt that a lower test will mean fewer Australian companies will achieve economies of scale which, to date, have been regarded as an important factor in competing in the world market.[53] This is so, notwithstanding the brandishing by the TPC of its ability to bless mergers on public benefit grounds.[54] Delays in the Authorisation process - especially the possibility of an appeal to the Trade Practices Tribunal - mean that only parties to non-urgent and friendly mergers have confidence in applying for a public benefit tick. In any event, a number of lower threshold "neutral" mergers will not obtain Authorization because it will not be possible to prove a positive public benefit in relation to them.

The purpose of this article has been to discuss how the changed merger test came about. The TPC convinced the Committee to recommend a changed test even though the Committee could itself find no evidence justifying such a change.[55] Is this not a strange approach for a committee of enquiry to take? Is this not simply confusing progress with movement?

What is fascinating is to see how the Committee reached its conclusion. All too often conclusions are debated without it being recognised that they are reached pursuant to a procedural process. The examination in this article teaches that we should look far more closely than we currently do at the procedural enquiry process. For this is just as important as to look at any results achieved pursuant to that process.

53. This is because mergers will be illegalised at a lower threshold level and it will be very difficult for a number of such illegalised mergers positively to demonstrate "public benefit" in order to obtain Authorisation.
54. See supra n 31.
55. See supra n 52.