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Antitrust Merger Policy
Lessons from the Australian Experience

Philip L. Williams and Graeme Woodbridge

2.1 Introduction

Antitrust policy is one branch of public policy that may be used to limit the market power of deregulated and privatized public utilities. The experience over the last two decades or so of the telecommunications and airlines industries in the United States and of many of the deregulated utilities in the United Kingdom is that the opening to competition of monopolies that were previously protected by statute or regulation led initially to entry; but, after a period of a few years, there were strong incentives for these new enterprises to merge. This experience suggests that countries contemplating privatization and deregulation of public utilities should consider whether their antitrust regimes (and, in particular, their merger policies) are appropriate to the period of privatization and deregulation.

The current provisions of Australia's antitrust merger regime have remained virtually unchanged since 1974. Australia's experience with these provisions in the subsequent quarter of a century yields some useful lessons for countries that are contemplating the introduction, or reform, of their antitrust policies in preparation of greater reliance on market constraints on their public utilities. This paper assesses the Australian experience and

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argues that certain features of the Australian regime are useful contributions to the international stock of regulatory design, whereas other features of the Australian regime are best not replicated.

Any assessment of public policy must ultimately depend on the social welfare function that one adopts. This paper will adopt as a definition of *value* the difference between willingness to pay and opportunity cost; and anything that enhances value will be regarded as good. Like much economic activity, mergers are undertaken because they enhance the value that accrues to the parties to the merger. But value may accrue to a person either because more value has been created or because he or she is able to gain a larger share of the value that exists. It is common to label behavior that creates value as *efficient,* and to label behavior that merely enhances bargaining power as *monopolization* or *rent seeking.*[1] If we adopt the value standard in assessing public policy, monopoly is neither uniformly good nor uniformly bad. Nevertheless, antitrust policy carries a general presumption against monopoly because one classic way in which a monopolist increases its bargaining power with respect to its customers is by limiting the amount of output it is prepared to supply. That is, the monopolist deliberately destroys value in order to increase its bargaining power with respect to its customers. This paper accepts this presumption. It accepts that a public policy motivated by the maximization of value will seek to prevent mergers that enhance monopoly power because, in general, the enhancement of monopoly power will diminish value.

Mergers and takeovers involve the sale of assets. Like other forms of trade, mergers occur because the buyer's willingness to pay for the assets exceeds the seller's opportunity cost of the sale. The gains from trade can derive from three principal sources: an increase in economic efficiency, an increase in monopoly power, or an increase in the scope for rent seeking more broadly. The increase in economic efficiency can take many forms; but these generally can be classified as either identifying assets that the market has previously undervalued, or taking advantage of some type of synergy that can better be realized within a merged entity than by means of trade between the activities of the two enterprises. The increase in monopoly power is generally a result of an increase in concentration in a particular market, which may lead to problems of monopoly either because of increased likelihood of collusion (see Stigler 1964; Green and Porter 1984) or because of independent behavior (Cournot 1929; Cowling and Waterson 1976). In addition to seeking monopoly rents, mergers and acquisitions can be motivated by other forms of rent seeking. For instance, parties

1. According to Buchanan (1980), economic rent "is that part of the payment to an owner of resources over and above that which those resources could command in any alternative use" (3). As monopoly profits are payments above opportunity costs, they are economic rents. They are not the only form of economic rents, however. For instance, economic rents can be achieved by those favored by government licences or from favorable government contracts.

with close alignments with the government may find it profitable to acquire a firm whose profits are driven by success in gaining government contracts.

Antitrust merger policy that aims to maximize value should distinguish between mergers with these motivations. Putting the matter crudely, it should allow to proceed those mergers that are motivated by economic efficiency and it should disallow those mergers that are motivated by an increase in monopoly power or rent seeking. In practice, a particular merger can rarely be placed neatly into these boxes. For instance, real-life mergers have the uncomfortable habit of straddling efficiency and monopoly power—with one foot firmly in one box and the other foot more or less firmly in the other. The task of the regulator or the court is to decide what is going on. If the merger is clearly all about increasing the monopoly power of the parties or rent seeking, it should be stopped. If there are clear efficiency advantages or if it is not clear which of the considerations predominates, the merger should be allowed to proceed on the ground that regulators and courts should place the onus of proof (as a lawyer would put it) on the party that is advocating interference in the freedom of the market.

This paper will return to the point of onus of proof toward the end. It is clearly important in the rules and operation of any antitrust policy. It also biases many judgments within transition economies as to whether antitrust policy should be adopted. Even if one adopts the standard of value as one's standard of public policy, one may still be opposed to antitrust policy on the ground that the overwhelming majority of all mergers are value enhancing. This presumption would have particular appeal in an economy, such as Hong Kong, where international trade and investment flows are relatively free. But even in Hong Kong one can readily observe economic activities, such as rail links and transport tunnels, where monopoly power might be used to destroy value. It is appropriate to ask how antitrust policy might be structured so as to enhance the value that is created by industries such as these. That is the question that is addressed by this paper: If a nation is contemplating antitrust merger policy, does the experience of Australia offer any guidance as to how value might be maximized? In drawing on Australia's experience we primarily focus on the success of Australian policy in distinguishing between mergers that enhance efficiency and mergers that enhance monopoly power. Although mergers may be enhanced by rent seeking, this is currently not a major driver of mergers or acquisitions in Australia. We do, however, make some comments at the end of the paper on how changes in the Australian merger laws could reduce the incentive for rent seeking.

The distinction between conduct prompted by economic efficiency and conduct prompted by monopoly power is fundamental to antitrust policy. But merger policy has a very particular set of issues that sets it apart from other elements of antitrust policy: timeliness and secrecy are most often crucial for its successful implementation. Timeliness is related to secrecy in

some obvious ways: The longer the regulator delays dealing with a confidential matter, the greater is the danger that information will leak to the market. The leaking of information may raise the price of the target and thereby reduce the gains to the bidder (Schwert 1996). If gains to the bidder are reduced by the processes of the law, there is a danger that the incentives for enterprises to seek out efficiency-enhancing mergers will be reduced. Even in a public process, such as a trial, timeliness is related to efficiency, not via secrecy but through the spread of information. A long trial may make efficiency-enhancing opportunities disappear because the world changes or because a more attractive bidder may appear, or because the second most attractive bidder loses interest. To repeat, the danger with these happenings is not that they discourage mergers that are motivated by increasing monopoly power. The danger is that delays and consequent flows of information may discourage enterprises from searching out efficiency-enhancing merger opportunities. This is not to imply that process must be kept secret once the merger has been made public. To do so runs the danger of undermining confidence in the decision-making process.

These reflections lead us to propose that two criteria are necessary if antitrust merger policy is to enhance value. In the first place, the criteria for assessing mergers should direct the regulators or the courts to allow those mergers that promote economic efficiency and to disallow those mergers that promote monopoly power. Second, the process of assessment should be able to be conducted in a way that maintains confidentiality (until the merger is made public by the firms involved) and is speedy.

This paper explains the formal processes of Australian antitrust merger policy and how it performs against these twin sets of criteria. The experience over the last quarter of a century is that Australia's formal, statutory processes have been quite unsuitable when assessed against these criteria. The paper explains why the delay and public nature of these processes have made them quite unsuitable. These problems with the formal, statutory processes have led to the evolution of a process of confidential, informal clearance of mergers. This process has no basis in any Australian statute. Confidential, informal clearance of mergers has satisfied the criterion of a speedy and confidential process, but it has not enabled the proper weighing of efficiency and monopoly. The process of informal clearance of mergers has led, in turn, to two other problems: a lack of formal guidance by means of precedent, and the assumption by the antitrust regulator of an unhealthy degree of power to extract concessions from the enterprises that wish to merge. In brief, Australia's reliance on discretion over rules has limited the extent to which its merger policy has been able to enhance the value generated by the Australian economy.

This criticism applies to antitrust merger policy in other jurisdictions. Antitrust merger policy in both the United States and Europe has become an administrative rather than a court-centered process. This has caused

lawyers to raise questions about appropriate processes and the development of the law. As noted by Sims and Herman,

> [B]ecause . . . most merger objections are resolved by consent decree; merger litigation (at least outside the hospital industry) has become a rare beast. Given that consent decree negotiations are private, and confidentiality rules (and sometimes agency prudence) limit what can be disclosed about why the agency did what it did, it is increasingly difficult for those who are not interacting regularly with the agency and other merger lawyers to be fully informed about how the agencies (and, to an even greater degree, particularly staffers) are approaching specific types of problems. (1997, 883)

2.2 Proscribed Behavior

2.2.1 The Wording of Section 50

The principal proscription of mergers in Australia's antitrust law is to be found in s. 50 of the Trade Practices Act. Its present wording is (in part) as follows:

> s. 50 Prohibition of acquisitions that would result in a substantial lessening of competition
>
> (1) A corporation must not directly or indirectly:
> (a) acquire shares in the capital of a body corporate; or
> (b) 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.
>
> (2) A person must not directly or indirectly:
> (a) acquire shares in the capital of a corporation; or
> (b) acquire any assets of a corporation;
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
>
> (3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:
> (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;
(i) the nature and extent of vertical integration in the market.

The principal mergers that have been dealt with under s. 50 are listed after the references and summarized in the appendix to this paper. The appendix summarizes the cases in diagrams that have been constructed similar to the trees used in the extended form of game theory for games that take place over time. The decisions closer to the top of the page occurred prior to the decisions lower on the page. At any moment, the player who has to make the decision is confronted with the options that are outlined. The option that was, in fact, selected is that which is indicated by an arrow.

Some of the cases summarized in the appendix were dealt with under a version of s. 50 whose criterion differed from that which is quoted above. The original proscription was similar to the present. The first merger that came before the courts was the attempted acquisition of Avis Rent-a-Car by Ansett Transport Industries (*Ansett Avis*). This was tried following the amendments to the Trade Practices Act in 1977 in which the test of substantial lessening of competition was amended to that of an acquisition by a corporation that would be, or would be likely to be, in a position to control or dominate a market. The trial judge in *Ansett Avis* considered the phrase "control or dominate." He found "that the word 'dominate' is to be construed as something less than 'control'" (*Ansett* Avis at 17717) and, because of this, the word "control" was redundant. It was removed.

The only other three mergers to be tried under the section—Australian Meat Holdings' attempt to acquire Thomas Borthwick and Sons (*AMH*), the attempt by Arnotts to acquire the biscuit business of Nabisco Australia (*Arnotts*), and the attempt by Davids Holdings to take over QIW Retailers (*QIW v. Davids*)—were assessed according to the criterion of dominance of a market.

The present section came into effect on 21 January 1993. Although proceedings have been issued under the current section, no cases have resulted in judgment. The reasons for the lack of litigation under the section will be explored in section 2.2.2 of this paper.

The current (and original) test of substantial lessening of competition uses words that appear elsewhere in the antitrust provisions of the Trade Practices Act. This means that we are able to speak confidently of the meaning of the test without the aid of a decision in a trial under the section. The seminal authority for the phrase is to be found in a case under s. 47 involving exclusive dealing: the decision of the full federal court in *Outboard Marine v. Hecar* appeal. In that decision, the full federal court held

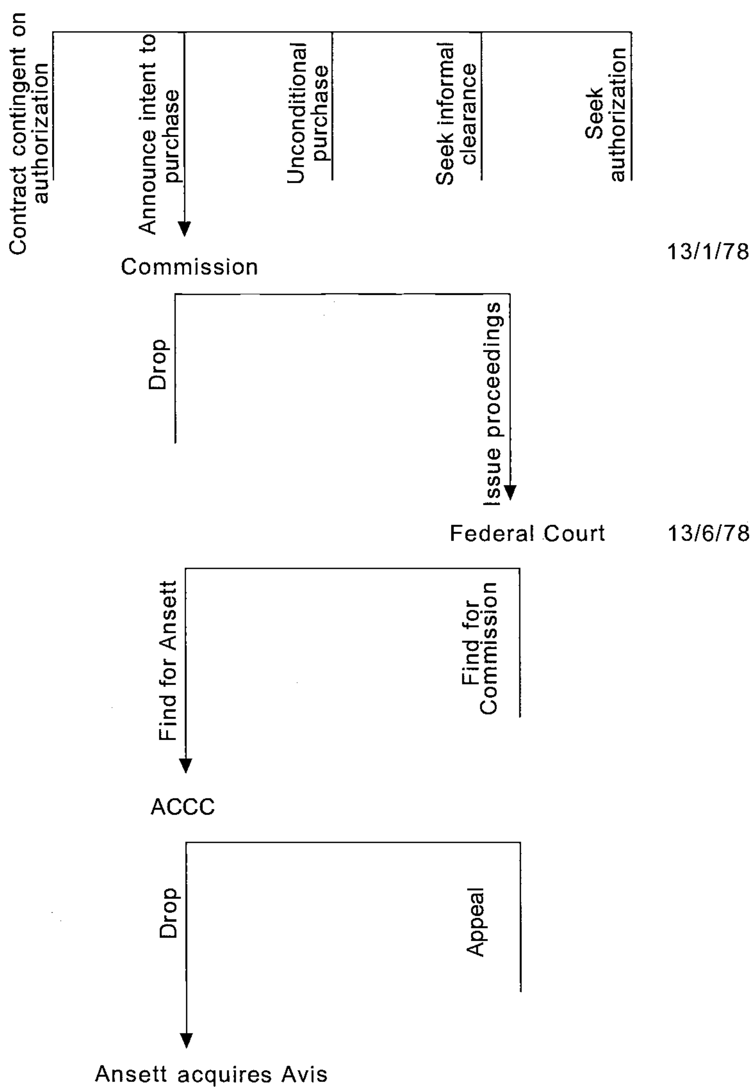

Fig. 2.1 *Ansett Avis*

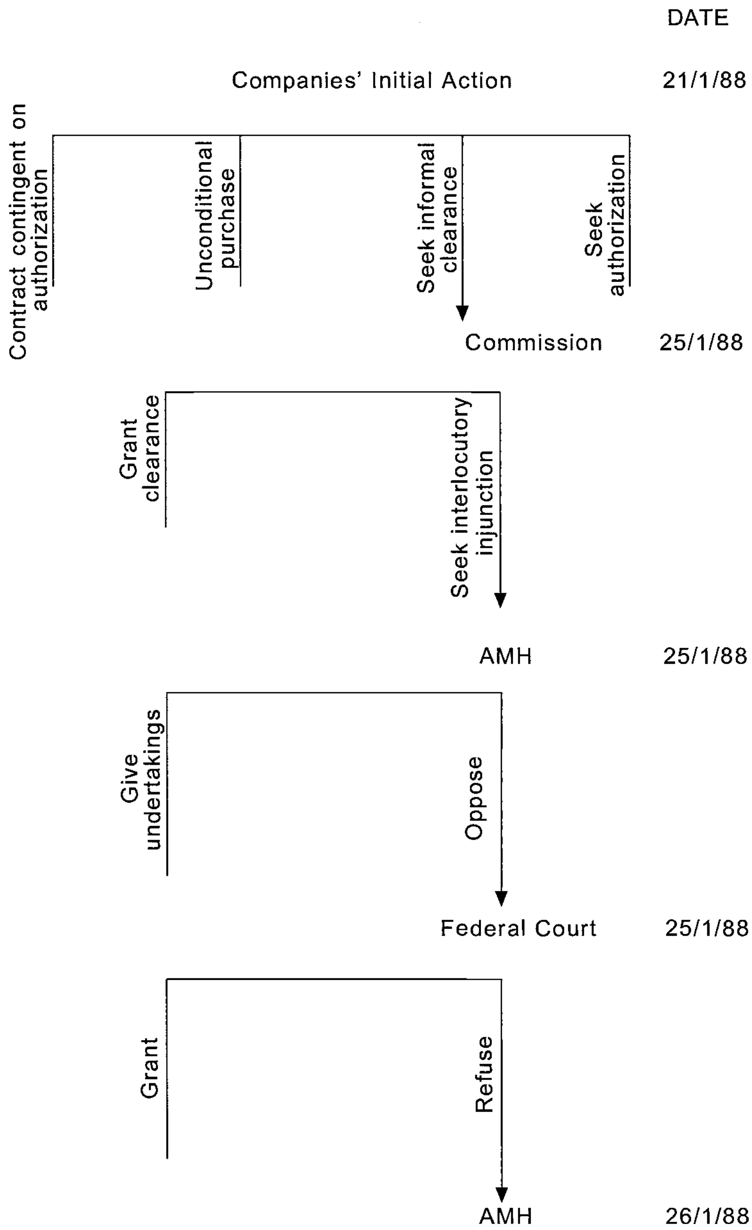

Fig. 2.2 *AMH*

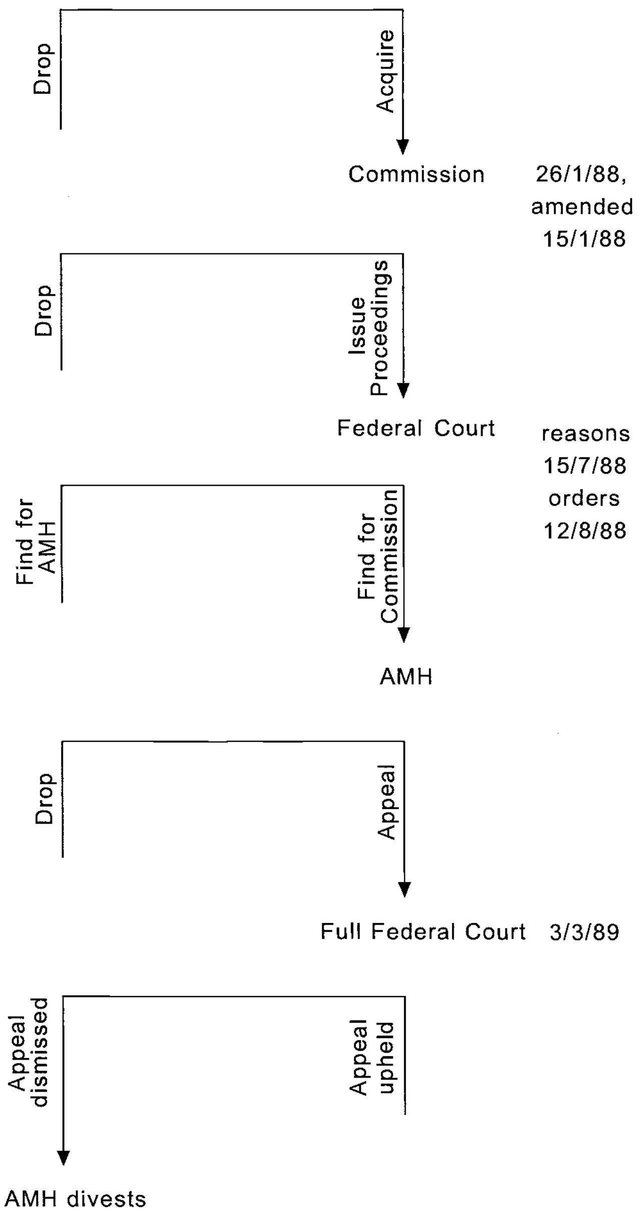

Fig. 2.2 (cont.)

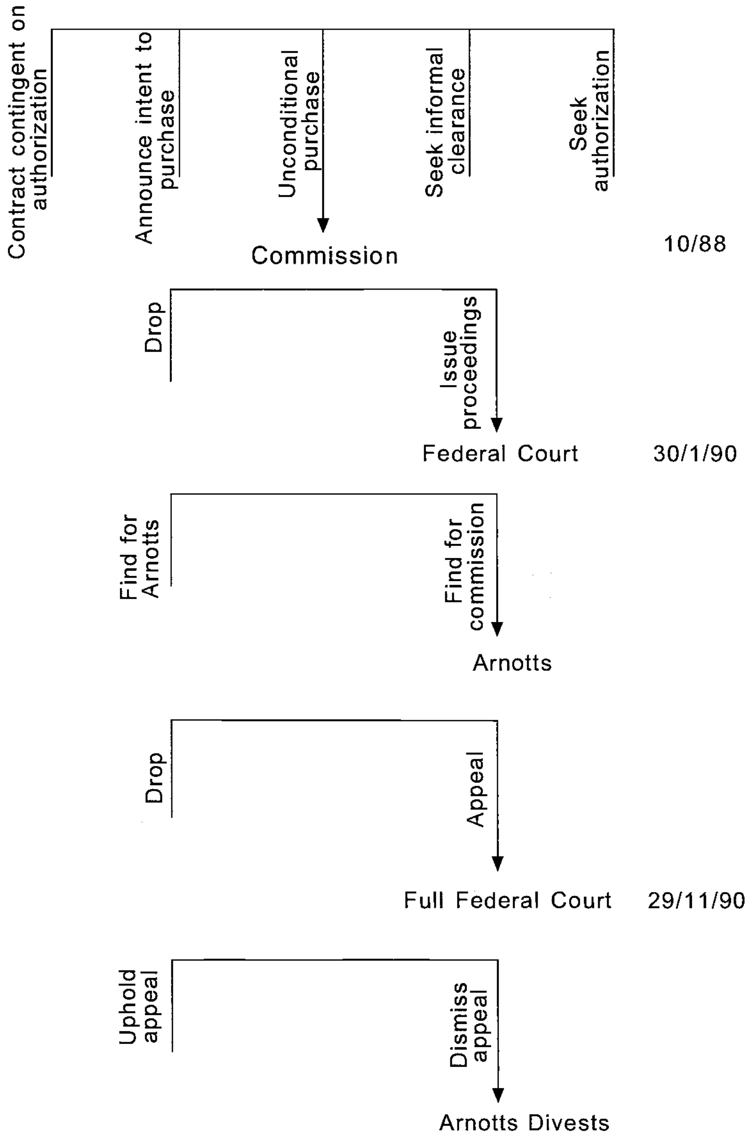

Fig. 2.3 *Arnotts*

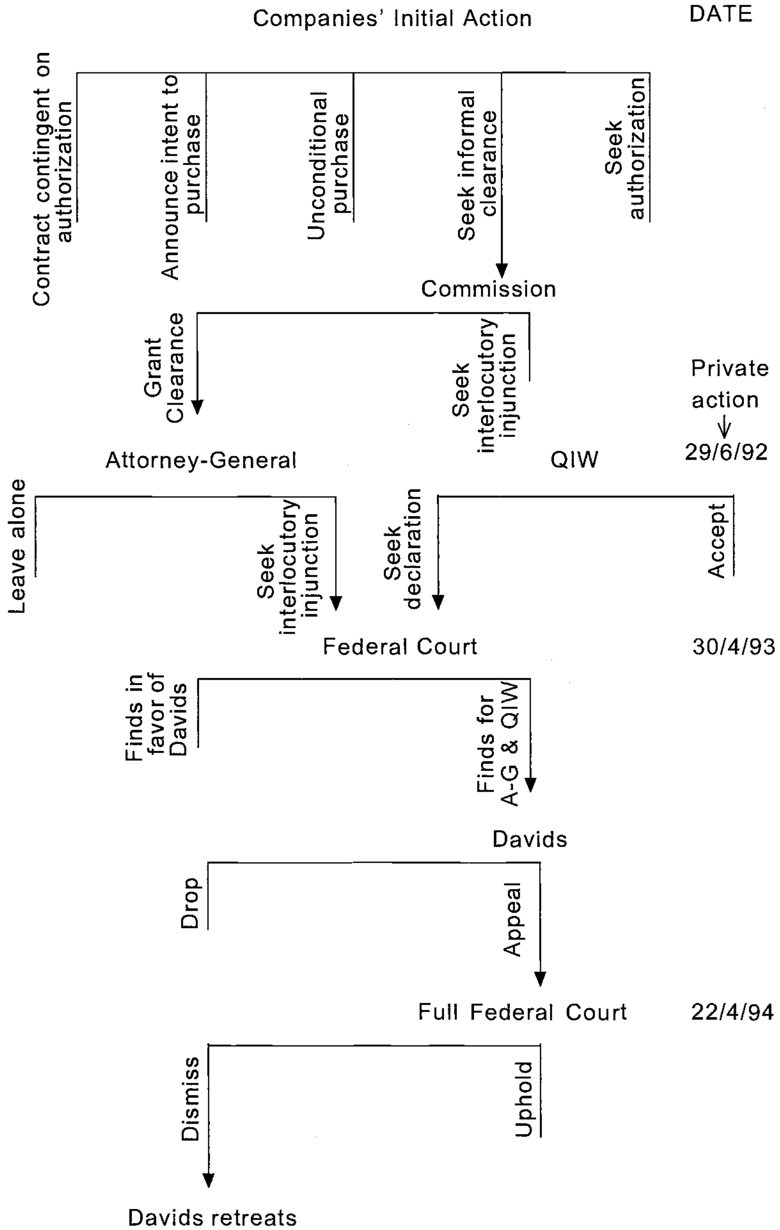

Fig. 2.4 ***QIW v. Davids***

that the state of competition depended on the structure of the market, so a substantial lessening of competition involved a change in the structure of the market. To prove a substantial lessening of competition, one had to prove that the structure of the market with the conduct in question would be less conducive to competitive behavior than would be the structure of the market without the conduct in question. The full court put it in these words:

> More assistance [in defining competition] can be gleaned from the decision of the Trade Practices Tribunal with Woodward J. presiding, in *Re Queensland Co-Operative Milling Association Limited; Re Defiance Holdings Limited* (1976) ATPR 40-012; (1976) 8 A.L.R. 481. There an economic concept of competition was adopted. Five elements of market structure were noted by the Tribunal as being relevant to the determination of the state of competition in a market. Of those, the most important factor was said to be the height of barriers to entry, that is, the ease with which new firms might enter and secure a viable market. . . .
>
> It would seem that "competition" for the purposes of sec. 47(10) must be read as referring to a process or state of affairs in the market. In considering the state of competition a detailed evaluation of the market structure seems to be required. In the *Dandy* case *Smithers J.* regarded as necessary an assessment of the nature and extent of competition which would exist therein but for the conduct in question, the operation of the market and the extent of the contemplated lessening.
>
> Two other decisions of the Trade Practices Tribunal are relevant here—*Ford Motor Co. of Australia Limited v. Ford Sales Co. of Australia Limited* (1977) ATPR 40-043; and *Southern Cross Beverages Pty. Limited* (1981) ATPR 40-200. In both cases, the Tribunal undertook a detailed analysis of the market, the state of competition therein and the likely effect of the conduct upon competition in the market. In our opinion, the same type of approach should have been adopted in the present case. (*Outboard Marine v. Hecar* appeal at 43983).

A further gloss on the notion of substantial lessening of competition has been the gradual emergence of the future-with-and-without test. The test makes it clear that the substantial lessening does not involve a comparison of the future with the past. Rather, it is a forward-looking test. In particular, it involves a comparison of the future state of competition in the market if the merger were to occur with the future state of competition in the market if the merger were not to occur.

The future-with-and-without test is at least implicit in the tribunal's decision of *Re QCMA,* which has as one of its subheadings "The Future of Barnes without Merger." The test has been quite explicitly adopted by the full court of the federal court in *Stirling Harbour Services* appeal (at 41267):

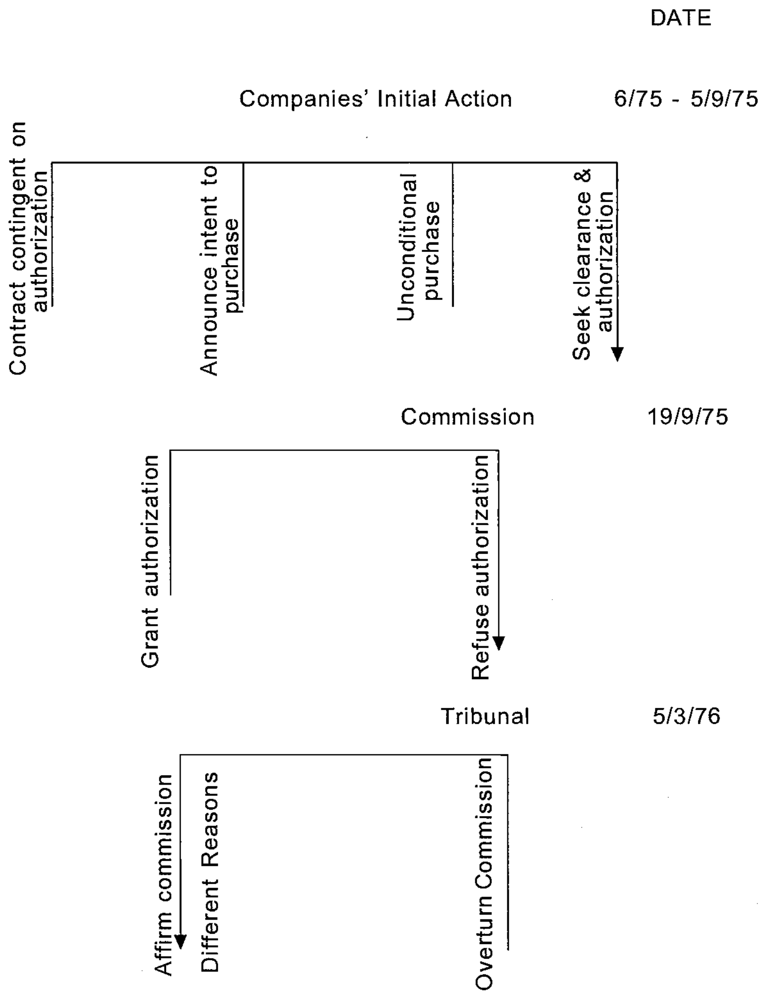

Fig. 2.5 ***Re QCMA***

There was no dispute but that in determining whether the proposed conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in the relevant market, the Court has to:

- consider the likely state of future competition in the market "with and without" the impugned conduct; and
- on the basis of such consideration, conclude whether the conduct has the proscribed purpose or effect

Dandy Power Equipment Pty Limited v Mercury Marine Pty Limited (1982) ATPR 40-315 at 43,887; (1982) 64 FLR 238 at 259; *Outboard Marine Australia Pty Limited v Hecar Investments No 6 Pty Limited* (1982)

ATPR 40-327 at 43,982; (1982) 44 ALR 667 at 669–670. The test is not a "before and after" test, although, as a matter of fact, the existing state of competition in the market may throw some light on the likely future state of competition in the market absent the impugned conduct.

The reference by the tribunal in *Re QCMA* and by the full federal court in *Outboard Marine v. Hecar* to the primacy of the condition of entry in considering the extent to which a market is competitive gives a clear hint as to the time horizon over which competition is to be assessed. If one gives primacy to the condition of entry, there is a clear indication that one is assessing competitive forces over a long time horizon. The point is made in Brunt (1990, 96) as follows:

> Competition is a process rather than a situation. Dynamic processes of substitution are at work. Technological change in products and processes, whether small or large, is ongoing and there are changing tastes and shifting demographic and locational factors to which business firms respond. Profits and losses move the system: it is the hope of supernormal profits and some respite from the "perennial gale" that motivates firms' endeavours to discover and supply the kinds of goods and services their customers want and to strive for cost-efficiency. Such a vision tells us that effective competition is fully compatible with the existence of strictly "limited monopolies" resting upon some short run advantage or upon distinctive characteristics of product (including location). Where there is effective competition, it is the on-going substitution process that ensures that any achievement of market power will be transitory.

The paucity of litigation under s. 50 has meant that there are many questions over which the courts have given companies and their legal advisers little guidance—simply because the issues have not arisen during the course of litigation. One such area of uncertainty is the relevance of arguments to do with efficiency under s. 50. In section 2.1 of this chapter, we argued that mergers could be motivated either by prospective enhancements in economic efficiency or by prospective increases in monopoly power. The words of the test as set out in s. 50 make no explicit reference to economic efficiency, so the extent to which argument over economic efficiency would be relevant to a case tried under s. 50 has not been decided.

The issue did arise in the *Arnotts* litigation. Both the judgment at the trial and the full court on appeal make the point that there are substantial economies of scale in the production and distribution of biscuits. The courts found the point to go to market power; but it could have been interpreted as an efficiency explanation of the merger. The appeal judgment was in no doubt as to the importance of economies of scale for Arnotts Limited:

> Arnotts' economies of scale flow, of course, from its market share. Once again, more detail would have been helpful. But it is clear that Arnotts does enjoy substantial economies of scale. Its volume provides flexibility

> in the use of factory ovens and warehouses and unit economies in advertising, with emphasis upon the name and tradition of Arnotts. Its great product range minimises seasonal sales fluctuations, with resulting benefits to cash flow, the efficient use of manufacturing and distribution resources and retention of supermarket shelf space allocations.
>
> Similarly, there are economies of scale in distribution costs. A company which accounts for 65% of all biscuit sales must have a marked advantage, in terms of unit distribution costs, over companies which have only 13% or 8% of the market. All three companies distribute directly to the retail stores but the Arnotts' truck must be off-loading many more biscuits at each stop. Again, there must be an advantage to Arnotts in spreading the cost of a sales representative's visit to a store amongst 65 units, as against Weston's 13 units or Nabisco's 8. (*Arnotts* appeal, at 51791–92).

If a merger enhances economic efficiency, that may be relevant to argument under s. 50 because the enhancements may enhance the ability of the merged entity to survive in a competitive market. Alternatively, arguments and evidence concerning economic efficiency could be introduced under the rubric of substantiality. For example, a merger may lessen competition, but may enhance efficiency. The efficiency considerations may be relevant to a court's consideration as to whether the lessening of competition is substantial.

To repeat, these arguments have not been considered by a judge in proceedings under s. 50. Until the courts consider more cases, many questions of this kind will remain unresolved. Certainly, it is not clear whether or in what way efficiency arguments can be considered by the courts under s. 50. To the extent that there is uncertainty, the principal issues that, as a matter of economic policy, should be considered in the antitrust treatment of mergers may not be able to be considered by the Australian courts. The principal issues should be whether the merger is primarily motivated by increases in economic efficiency or by increases in monopoly power. To the extent that s. 50 makes it likely that these issues cannot be considered, the Australian model provides a lesson as to what other jurisdictions should avoid.

The courts in New Zealand have had more opportunities to consider the relevance of efficiency to the ways in which mergers might result in the lessening of competition. In an unreported case involving a strike-out application,[2] the high court (per Justice Gallen and Dr. M. Brunt) had this to say:

> In applying s. 27, counsel for Clear invites us to disregard any positive contribution that efficiencies may make to the competitive process. He

2. *Clear Communications Limited v. Sky Network Television Limited and others* (1996, 66–67), High Court of New Zealand CP.19/96. Judgment of 1 August 1997.

says the existence of authorisation in the New Zealand Act makes efficiencies relevant only in so far as they give rise to heightened barriers to entry and hence an enhancement of market power.

We cannot accept this contention. It is contrary to a well-established line of authority in New Zealand law that receives its latest statement in *Port Nelson Limited v Commerce Commission* (1996) 7 TCLR 217 in relation to s. 27 (at p. 228):

> "The relevant inquiry is as to substantially lessening competition. That is not the same as substantially lessening the effectiveness of a particular competitor. Competition in a market is a much broader concept. It is defined in s. 3(1) as meaning 'workable and effective competition.' That encompasses a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency. There appears to have been consistent acceptance of the elements of competition in *Re Queensland Co-operative Milling Association Limited; Re Defiance Holdings Limited* [(1976) 25 FLR 169; 8 ALR 481, 517; 1 ATPR 40-012, 17, 247] at p188; p515; p 17,246, and further quotation is unnecessary."

2.2.2 Reasons for Lack of Litigation

As was noted in the preceding section of this paper, in the first quarter of a century of the Trade Practices Act, only four mergers have been litigated to judgment. Although private parties have the right to issue proceedings for breach of s. 50, private parties cannot apply for an injunction to prevent a merger from occurring. However, a company that is faced with an unwanted offer of takeover can apply for a declaration that the takeover would infringe s. 50. Broken Hill Proprietary Co. Ltd. (BHP) made an application of this type when faced with the unwanted attentions of Robert Holmes a Court's Bell Resources Group. Similarly, QIW made an application for a declaration of breach of s. 50 when it was faced with the unwanted attention of Davids Holdings, and the Australian Competition and Consumer Commission (ACCC)[3] was reluctant to apply for an injunction. However, even in this situation, QIW managed to persuade the commonwealth attorney general to apply for an injunction to prevent the merger.

Apart from the possibility of an application for a declaration, the only action a private party can take to obtain an injunction to prevent a merger is to lobby the commission or the attorney general to apply for an injunction. All four mergers that have been litigated to a decision under s. 50 have involved applications by the commission or (in the case of *QIW v. Davids*

3. The Australian Competition and Consumer Commission is the general antitrust regulator in Australia. In addition to its roles in mergers and acquisitions, the commission has roles in a range of antitrust matters, including anticompetitive conduct, consumer safeguards, and the regulation of access to essential facilities.

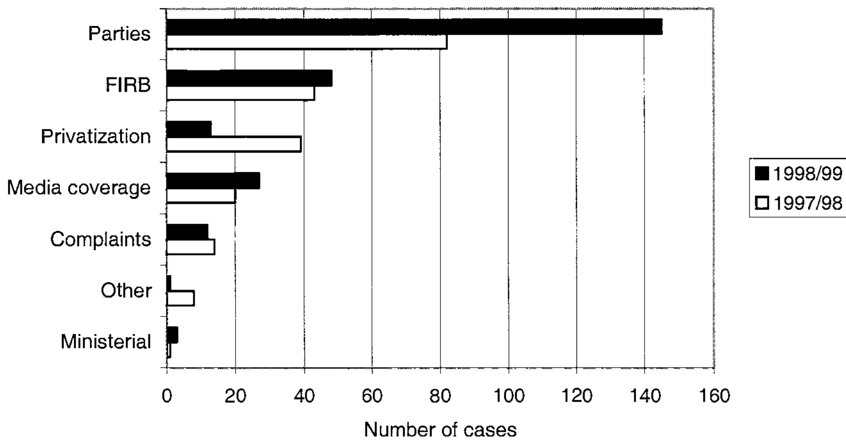

Fig. 2.6 Merger and acquisition matters referred to the commission
Source: ACCC (2000, 73).

trial) by the attorney general for injunctions or orders to divest. In the cases of *AMH* trial and *Arnotts* trial, the application had to be for divestiture because the acquisition had been already been undertaken.

Unlike some other jurisdictions, Australia does not compel parties to a merger to notify the regulator of their intentions. In its first three years, the Trade Practices Act provided for the clearance of mergers. This was abolished from 1 July 1977. Since then, the act has provided for two ways in which parties contemplating a merger may deal with the commission: they may apply for authorization (see section 2.3) or they may consummate the merger and dare the commission to litigate. Between 1 July 1977 and the development of the present system of informal clearances, parties had little incentive to notify the commission of their intentions, so there was much discussion of a system of compulsory notification. Indeed, New Zealand (which incorporated Australia's antitrust provisions into its Commerce Act pursuant to the Australia–New Zealand Closer Economic Relations Agreement of 1983) added a compulsion to notify.

In recent times, there has been little or no discussion in Australia of compulsory notification. It appears that the commission gets to hear of all significant mergers prior to their consummation.

From figure 2.6, it is clear that, although the vast majority of matters are referred to the commission by the parties, there is a range of other avenues, including other regulators (such as the Federal Investment Review Board [FIRB]), the selling of public assets (such as electricity generators), media reports, and complaints by affected parties. In a number of cases, matters are referred to the commission by more than one source.

From the preceding discussion, it should be clear that the Australian experience yields few lessons as to the need for a system of compulsory notification. Under the present Australian system, there is no need for compulsory notification. The regulator gains the information that it needs to enable it to perform its task, and the parties are prepared to approach the commission because of the development of the nonstatutory process of informal clearances.

It is hardly surprising that litigation as a means of implementing antitrust merger policy is unpopular with the regulator and with the parties. It is time consuming and it involves considerable uncertainty. The processes of litigation may discourage and ultimately prevent anticompetitive mergers and acquisitions; but they may also delay or discourage efficiency-enhancing mergers and acquisitions. This is particularly the case for mergers and acquisitions for which the window of opportunity is small or the major efficiency benefits are immediate. Litigation may deter efficiency-enhancing mergers and result in economic loss in a number of different ways.

Delay probably constitutes the most significant potential for economic loss. In some mergers and acquisitions the economic synergies are of most value in the current market environment. Delay, by reducing these efficiencies, may destroy the economic gains from the acquisition. The window of opportunity may pass during the process.

Even if the acquisition ultimately does proceed, the economic benefits of the acquisition may not accrue to the offeror. For example, it is commonly said that many mergers between banks are motivated by a more-efficient bank's ability to use its systems to identify underperforming assets in other banks. If a lengthy court process occurs prior to the consummation of the merger, the problem of the underperforming assets may have been addressed so that the bank that identified the problem is unable to gain a return for its efforts.

The cost of delaying a merger or acquisition has been recognized by the courts. This was the subject of comment by Justice Wilcox in his decision in *AMH* trial (at 49479):

> It is for me a matter of concern that the crucial determination of the limits of a market—about which question I assume commercial people frequently make almost intuitive judgements—should be seen as requiring the time, effort and expense involved in this case. My concern is intensified by the circumstances that, almost by definition, proceedings to prevent a breach of sec. 50, or to reverse the effects of an antecedent breach, will always involve a measure of urgency.

The courts have made similar remarks when assessing the balance of convenience relevant to applications for interlocutory injunctions in merger cases. In *Santos* (at 40637), Justice Hill said that a court must

> weigh up the real consequences to each party, taking in mind not only the public interest but also the private interests involved. There is, in my view, no presumption that an interim injunction should be granted.

Similarly, in *Rank Commercial,* Justice Davies observed the following:

> A court cannot hold the underlying commercial situation in a state of status quo during the lengthy period in which preparation for a trial might ordinarily be expected to take. In this period the facts, including share values, will change.

Furthermore, delay combined with the publication of the proposed acquisition may allow a competing bidder to acquire the target firm. The recent proposed mergers between Taubmans and Wattyl, on the one hand, and Santos/Sagasco, on the other, show that the delay caused by the processes of litigation may enable a rival suitor to appear and so the proposed acquirer may withdraw the offer and sell the shares to the new suitor.

It may be argued that the delay did no harm—that the delay enabled the appearance of a new suitor that enabled the generation of more efficiencies or less monopoly power than would have been generated by the original proposal of marriage. It may be thought that this is the explanation as to why these mergers were not consummated. However, this characterization may be a distortion. Litigation is expensive and the prospects of victory in complex commercial litigation are always uncertain. An alternative characterization would be that an offeror enmeshed in complex litigation might prefer to accept the certain money offered by the new suitor to the prospect of pursuing the uncertain prize of consummation of its original desires.

2.3 Authorization

2.3.1 The System

Authorization is a process by which the parties to a merger or acquisition may be granted immunity for breaching s. 50 or s. 50A of the Trade Practices Act. This immunity is given if the commission[4] forms the view that the merger or acquisition will be of net benefit to the public—s. 90. In considering net benefits, the commission can consider efficiencies. So, in contrast to the process of a trial under s. 50, the process of authorization explicitly allows for the consideration of efficiencies. Authorization is initiated by one of the parties to the merger. It is not initiated by the commission.

An authorization decision by the commission can be appealed to the tribunal.[5] A review by the tribunal is a rehearing of the matter. Whereas the

4. The ACCC was known as the Trade Practices Commission until 1995.

5. The Australian Competition Tribunal was known as the Trade Practices Tribunal until 1995.

commission is an administrative body, the tribunal is a quasi-judicial body. It is chaired by a judge of the federal court, who sits with two other members, one of whom is usually an economist and the other, a person with business experience.

Once a merger or acquisition has been authorized (by either the commission or, on appeal, by the tribunal), parties to the merger or acquisition are granted immunity from breaching s. 50 so long as the conditions pertaining to the authorization are not breached.

Section 90 purports to limit the time that the commission has to determine applications for authorization. Section 90 (11) states that, if the commission does not determine an application for authorization within thirty days from its receipt, the commission shall be deemed to have granted the application. However, s. 90 (11A) provides that this period may be extended to forty-five days if the commission notifies the applicant that it considers the matter to be complex. Furthermore, the period can be extended if the commission requires extra information, if a person (such as an objector) wishes the commission to hold a conference, or if the applicant agrees to a request by the commission to an extension of time. (It may be supposed that an applicant who wishes an application to succeed is unlikely to refuse such a request.)

Section 102 imposes a sixty-day limit on the tribunal in its review of determinations by the commission. But this period can be extended at the discretion of the tribunal if the tribunal considers that, for reasons such as the complexity of the matter, the matter cannot be dealt with properly within the period of sixty days.

Applications for authorization are not only time consuming, they are also public. In processing applications, the commission feels the need to undertake research, and the commission's research generally involves asking competitors, suppliers, and purchasers what they think of the proposed merger. Furthermore, those who have been notified of the merger by the commission may request a conference, which provides extra publicity.

As was noted in section 2.1, the future-with-and-without test was first articulated by the tribunal. This implies that it was first articulated in the context of an appeal from an authorization decision of the commission. So in weighing the benefit to the public against the detriment caused by the lessening of competition, the tribunal (and the commission) compare the future with and without the merger.

Like the process of litigation, the process of authorization is public and, although there are time limits as explained above, both processes are relatively time consuming. A key difference between the two processes is that the process of authorization explicitly allows for the weighing of detriment caused by any lessening of competition against any offsetting benefit to the public.

The explicit consideration of benefits to the public under the process of

authorization includes, of course, the consideration of economic efficiency. Although the commission has, on occasion, demanded that benefits be "passed on" to final consumers if they are to be considered (see Officer and Williams 1995) this is not because of the wording of the statute.

Indeed, in the seminal decision by the tribunal, in the merger case of *QCMA,* the tribunal went out of its way to state that all benefits, no matter to whom they accrue, should be counted as benefits to the public for the purpose of consideration of an application for authorization:

> One question that arises is whether by the public is meant the consuming public. One submission to us was that, in the context of the objectives of the Act, we should direct our attention to that part of the public concerned with the use or consumption of flour in the Queensland market. This would be to interpret the phrase as pointing to much the same considerations as those raised by sec. 21(1)(b) of the British *Restrictive Practices Act* 1956, which asks whether withholding approval would "deny to the public as purchasers, consumers or users . . . specific and substantial benefits or advantages . . .". However this is not what the Australian Act says; and we cannot but think that the choice of a wider expression was deliberate, as pointing to some wider conception of the public interest, though no doubt the interests of the public as purchasers, consumers or users must fall within it and bulk large.

> Another question raised is whether public benefit must be contrasted with private benefit. Can a benefit to some of the private parties to the merger—for example the shareholders of Barnes—be claimed as a public benefit? . . . [W]e would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. (*Re QCMA,* at 17242)

2.3.2 Applications for Authorization of Mergers

Given the clear mandate of the commission to consider the key issues of both the increase in monopoly power and the effects of the merger on efficiency following an application for authorization, one might predict that parties would far prefer to apply for authorization than to risk litigation in the courts. However, their revealed preferences are that they avoid applications for authorization as much as they avoid the courts. Table 2.1 shows the number of applications lodged during the last six years for authorization of mergers and acquisitions recorded in the public register of the commission.

Table 2.1 suggests that very few parties apply for authorization of mergers. Given the open process and its time-consuming nature, perhaps the real puzzle is why there are any applications at all. The explanation lies in

Table 2.1 **Applications for Authorizations of Acquisitions Registered with the Commission**

Year	No. of Applications
1995	3
1996	2
1997	1
1998	0
1999	2
2000	0
2001 (to date)	0

Source: Public Register of Applications for Authorisation, Australian Competition, and Consumer Commission Web site (www.accc.gov.au).

the features of any particular merger that distinguish it from the vast majority of mergers for which applications are not made. An example may be found in *Re QIW* decision. As was noted in section 2.2, immediately prior to this application for authorization QIW was a party to s. 50 litigation, when it successfully used the courts to thwart the unwanted advances of Davids Holdings (*QIW v. Davids*). In that litigation, the courts found in favor of QIW that the product dimension of the relevant market was confined to the wholesaling of groceries to independent retailers—that is, that the integrated grocery chains were not participants in the relevant market. That finding, if it were transported to other factual situations, would effectively have precluded further mergers among specialist grocery wholesalers. The authorization was an attempt by Davids to clear the way for its acquisition of Composite Buyers Limited (CBL). Davids clearly reasoned that, unless the acquisition was authorized, it would run the risk of a private application for divestiture for breach of s. 50 immediately after the acquisition had been consummated. The commission granted the authorization; and this decision was upheld (in its principal elements) on appeal by the tribunal.

An interesting feature of the merger was that Davids did not proceed to acquire CBL. QIW was also interested in acquiring CBL. Immediately prior to the decision of the commission, QIW increased its offer for CBL and succeeded in acquiring a controlling interest in CBL.

The delay, and the subsequent possibility of a counteroffer, are two respects in which the process of authorization is similar to that of litigation under s. 50. The public nature of the process is another. The delay and lack of secrecy of these two statutory processes explain their lack of appeal to merging parties and, one may guess, to the commission. The result has been the development in Australia of a quick and secret process that has no foundation in the antitrust statute. This process is generally known as the *process of informal clearance.*

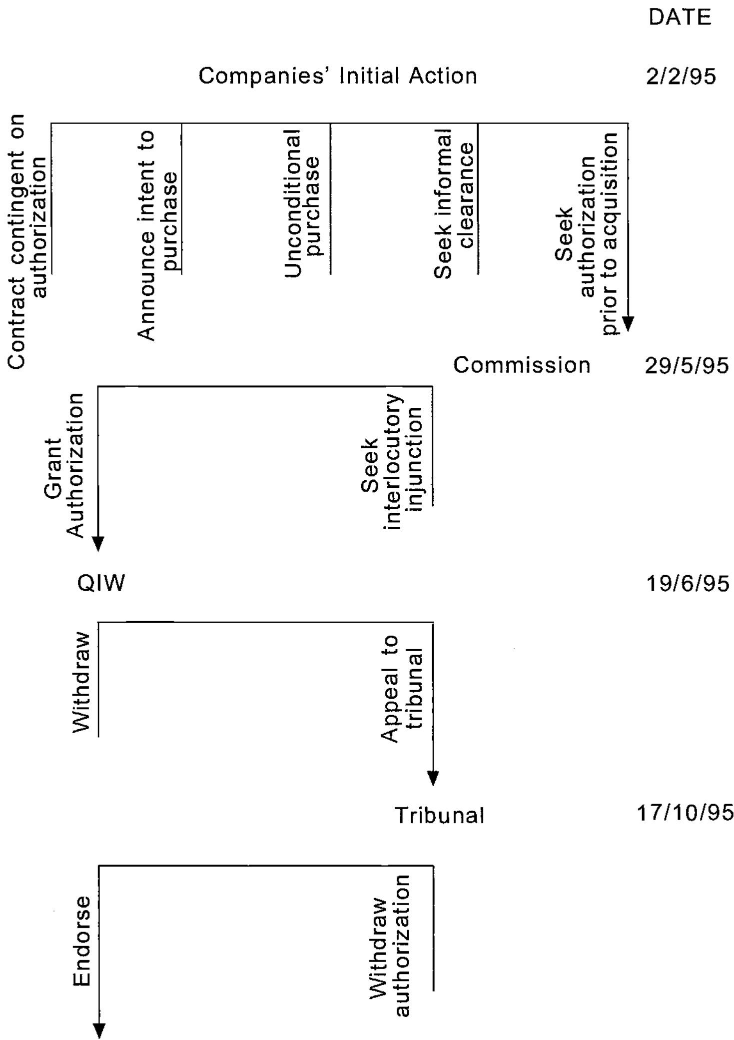

Fig. 2.7 ***Re QIW***

2.4 Informal Clearances

2.4.1 The Process

The costs and risks associated with the statutory processes combined with the powers of the commission to seek an injunction to prevent a merger or acquisition have seen an informal notification and clearance process develop in Australia. The informal notification and clearance pro-

cess is not based in the statute. Although the commission has published *Merger Guidelines,* which inform parties of the informal process, the guidelines have no statutory basis. As a result, the commission has significant discretion in how it goes about assessing proposed mergers and acquisitions and the conditions it endeavours to impose on the acquirer. The informal clearance process consists of three major parts:

- Notification,
- Assessment; and
- Outcome.

As was noted in section 2.1 above, parties to a proposed merger or acquisition are not obligated under the Trade Practices Act to notify the commission of their proposal. However, many do. As shown in figure 2.1, well in excess of half of the mergers and acquisitions notified to the commission over the last two years have been notified by the parties. This is done on either a public or a confidential basis.

The reason parties notify the commission is to gain some comfort as to whether the commission will seek an injunction if they proceed with the acquisition. If the commission indicates it will seek an injunction if the acquisition proceeds, the notification process allows the party or parties to explore with the commission options for changing the proposed acquisition to address the competition concerns. This process enables the commission to make the parties aware of its view of an acquisition and merger before the matter reaches the court.

The informal process by which the commission assesses merger and acquisitions is described in its *Merger Guidelines.* The process aims to consider the matters a court would consider under s. 50.

A major issue affecting the process and how the commission conducts its investigation is whether the merger or acquisition is notified to the commission on a confidential basis. Maintaining confidentiality restricts the commission's ability to seek the views of, and to acquire information from, other parties such as competitor suppliers and buyers—that is, the confidentiality limits the commission's opportunity to conduct market inquiries.

In some cases this may not matter. For example, the commission has indicated that it will not oppose mergers and acquisitions that fall below a certain concentration threshold. As noted by the commission in its *Merger Guidelines* (ACCC 1999, 44):

> The Commission has adopted concentration thresholds below which it is unlikely to intervene in a proposed merger. The thresholds have been established on the basis of the Commission's historical experience of mergers and knowledge of current market structures. . . .
>
> If the merger will result in a post-merger combined market share of the four (or fewer) largest firms (CR4) of 75 per cent or more and the merged

> firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition. In any event, if the merged firm will supply 40 per cent or more of the market, the Commission will want to give the merger further consideration. The two thresholds reflect concerns with the potential exercise of both coordinated market power and unilateral market power.
>
> Below these thresholds, the Commission is unlikely to take any further interest in a merger.

In other cases, especially where the likely effects of a merger or acquisition are complex, the commission's market inquiries may be extremely important. As a result, the commission may not be able to form a final view on the matter until the proposal has been made public.

In the case of the merger proposed between Santos and Sagasco, the commission granted an informal clearance and then changed its mind. The behavior of the commission is readily explained: If, for reasons of secrecy, they are unable to make any inquiries other than of the parties, the information they may be relying on may be biased, partial, or even misleading. In such circumstances, it is clear that the commission must be able to change its mind when it is able to make open inquiries.

The criteria employed in the process of informal clearance, while set out in detail in the *Merger Guidelines,* are based on the commission's own interpretation of s. 50. The process of informal clearance refers to s. 50 in that, if the applicant is given an informal clearance, it is given an assurance that, on the basis of the information available to it, the commission will not issue proceedings for breach of s. 50 should the proposed merger proceed. Accordingly, the commission must satisfy itself that the merger will not breach s. 50.

One important feature of the commission's interpretation of s. 50 in its processing of informal clearances is the very limited role it allows for consideration of economic efficiency. As was noted in section 2.1 above, the place of efficiency arguments under s. 50 has never been explicitly considered by the courts—because it has not arisen in any of the four cases that have run to judgment.

The extent to which the commission is prepared to consider economic efficiency within the context of an informal application for clearance is set out in paragraphs 5.159 and following of the commission's *Merger Guidelines.* There is a marked similarity between these provisions and those of the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. The ACCC (1999, 59–60) guidelines read, in part:

> 5.171 As discussed in paragraphs 5.16–5.17, although s. 50 is concerned with the level of competition in markets and not the competitiveness of individual firms, and while efficiencies are more generally rel-

> evant in the context of authorisation, the extent to which any efficiency enhancing aspects of a merger may impact on the competitiveness of markets is relevant in the context of s. 50.
>
> 5.172 Where a merger enhances the efficiency of the merged firm, for example by achieving economies of scale or effectively combining research and development facilities, it may have the effect of creating a new or enhanced competitive constraint on the unilateral conduct of other firms in the market or it may undermine the conditions for coordinated conduct. Pecuniary benefits, such as lower input prices due to enhanced bargaining power, may also be relevant in a s. 50 context.
>
> 5.173 If efficiencies are likely to result in lower (or not significantly higher) prices, increased output and/or higher quality goods or services, the merger may not substantially lessen competition.
>
> 5.174 While recognising that precise quantification of such efficiencies is not generally possible, the Commission will require strong and credible evidence that such efficiencies are likely to accrue and that the claimed benefits for competition are likely to follow.

Paragraph 5.172 indicates that the role of any consideration of economic efficiency within the context of an application for an informal clearance is highly circumscribed. In particular, if a firm with a large market share believes that it can gain access to efficiencies through merger, that consideration will be ruled by the commission to be irrelevant to an application for informal clearance. Indeed, the commission may well follow the lead of the full federal court in *Arnotts* appeal, as quoted above, and say that to the extent that a merger enhances the efficiency of a firm with a large market share, it is likely to lessen competition.

This interpretation by the commission means that the commission elects to rule as irrelevant many arguments of economic efficiency in the context of applications for informal clearance. The commission will normally respond to such arguments by informing the parties that, if they wish to put such arguments, they must submit an application for authorization—with its attendant delays and publicity. This response is usually sufficient to persuade the parties to drop the submissions.

It is clearly unsatisfactory that issues of economic efficiency cannot be fully considered under the procedure by which the mergers are dealt with by the Australian antitrust authority. This problem could be remedied if s. 50 were to be amended to invite the courts and, therefore, the commission in its processing of applications for clearance, to consider the trade-offs between considerations of competition and efficiency. Such a change would enable the efficiency implications of a merger to be considered. Under the present Australian arrangements they are only considered very rarely because the statutory option of an application for authorization is no real option for the great bulk of mergers.

One model as to how the Australian statute could be changed is provided

by Canada's Competition Act (1985). The principal merger provision is found in s. 92(1), which proscribes mergers that prevent or lessen competition substantially. This is qualified by s. 96(1), which provides an efficiency defence. It is worth quoting in full (in its English version):

> 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 be likely be attained if the order were made.

From 1991 until very recently, the *Merger Enforcement Guidelines* of the Canadian commissioner had indicated that the effects of an anticompetitive merger were to be assessed by estimating the aggregate effect of the merger on social surplus. A recent decision on appeal from a decision of the tribunal (Superior Propane) makes it clear that this approach was an incorrect interpretation of the law. Under the previous approach of the commission, it had focused solely on aggregate surplus and had ignored other factors, such as the distribution of the surplus. The court found that the correct approach is not to disregard any of the effects of the lessening of competition that would be likely to result from a merger.

Although some may consider this judgment a setback for the cause of economic efficiency, the decision in *Superior Propane* merely brings the Canadian standard into line with the standard applied by the Australian tribunal in merger cases. As the tribunal has said since the earliest of cases, the public interest is sufficiently broad to enable all considerations to be argued before the tribunal. In effect, the decision in *Superior Propane* establishes that Canada has a statutory standard that is very similar to that which would be applied by the tribunal in its consideration of the authorization of a merger—if such a case were to come to it for consideration. If the statute is to reflect a proper weighing of competition and efficiency considerations, the same standard should be incorporated in s. 50.

2.4.2 Outcomes of an Informal Clearance

The commission has a number of options after it has assessed a proposed merger. It can

- indicate that it will not oppose the merger or acquisition,
- indicate that it will oppose the merger or acquisition unless the or parties agree to certain conditions or to act in a certain manner, or
- indicate it will oppose the merger or acquisition under any conditions.

As shown in table 2.2, the majority of matters that reach a final decision by the commission are not opposed. A range of other proposals are withdrawn before the commission reaches its final view.

Table 2.2 **Outcomes of Mergers before the Commission**

	Matters Decided	Matters Not Opposed	Matters Resolved with Conditions	Matters Opposed
1993–1994	77	71	1	5
1994–1995	113	101	5	7
1995–1996	117	105	3	9
1996–1997	147	140	2	5
1997–1998	176	165	6	5
1998–1999	185	168	10	7
1999–2000	208	199	5	4

Sources: ACCC (2000) and Section 50 Mergers and Acquisitions Register, Australian Competition and Consumer Commission Web site (www.accc.gov.au, http://accc.gov.au).

The table suggests that the commission imposes, or attempts to impose, conditions on a number of mergers. These are the circumstances in which efficiency-enhancing acquisitions are most likely to be inhibited. The commission has significant bargaining power to "encourage" the party or parties to significantly alter the form of the proposal or to impose conditions on the parties if the proposal proceeds.

If the commission indicates that it is likely to seek an injunction from the courts if the proposal proceeded in its submitted form, the parties have a number of options:

1. Proceed with the proposal and most likely contest the matter or an injunction before the Court.
2. Seek authorization of the proposed merger or acquisition from the commission, and if rejected, appeal to the tribunal.
3. Alter the proposal in a manner to address the concerns of the commission.
4. Address any anticompetitive consequences of the merger or acquisition by making undertakings under s. 87B of the Trade Practices Act.
5. Decide not to proceed with the proposal.

The first and second options follow the statutory processes described in the previous sections of this chapter. The third and fourth options are informal processes that give the commission significant discretion. The major difference between these options is whether the altered proposal is subject to legally enforceable undertakings.

2.4.3 Section 87B Undertakings

Under s. 87B of the Trade Practices Act, the commission, subject to the approval of the courts, is allowed to accept written undertakings in connection with its power and functions under the act. Undertakings are legally enforceable guarantees that the parties will or will not undertake certain actions following the merger or acquisition.

For instance, say the commission is concerned that a merger will substantially lessen competition in some geographic markets, but not others. The commission may accept undertakings by the merged entity to divest itself (postmerger) of certain assets in those markets.

Undertakings also provide the parties with some flexibility where the timeliness of the merger or acquisitions is paramount. Undertakings have been used by parties to guarantee divestiture if the commission forms the view that the merger or acquisition would substantially lessen competition. In this case, undertakings have allowed the transaction to proceed while giving the commission time to assess the transaction.

Probably the most detailed undertakings to be given by parties during a merger application to the commission were those given to the commission by Pioneer International Limited, Caltex Australia Limited, and Ampol Limited on 28 March 1995. On 3 November 1994, the parties informed the commission that they were considering a merger. This was announced to the public on 14 December 1994. The commission quickly formed the view that the merger was likely to infringe s. 50. The parties disagreed. Nevertheless, they gave numerous undertakings to address the concerns raised by the commission. These undertakings were clearly directed to ensure that independent oil companies prospered. The merged entity undertook

- to sell particular terminals to independents by particular dates;
- to facilitate access by independents to the terminals that were retained;
- during the first six years, to offer at least 1,000 megaliters of petrol to independents each year on reasonable terms;
- during the first two years, to use its best endeavors to sell on reasonable terms thirty-five retail sites in metropolitan areas with an aggregate volume of 50 megaliters; and so on.

In short, Caltex and Ampol felt that they could prevent the commission from initiating proceedings under s. 50 only by offering to sell quite substantial assets by which the commission could pursue a restructuring of Australia's wholesaling and retailing of petrol. The commission has substantial power in its granting of informal clearances.

2.4.4 Shortcomings of the Informal Process

Although this informal process has the scope to reduce some of the delay and publicity associated with a proposed merger, it has three major problems.

First, the informal processes are not based in the statute. Although the commission's *Merger Guidelines* inform parties of the informal process, the guidelines have no statutory basis. This creates uncertainty: There are no rules governing the processes that the commission can use following an application for an informal clearance.

Table 2.3 Duration of Matters Informally Assessed by the Commission

	1997–1998	1998–1999
Less than 2 weeks	36	48
2–3 weeks	57	56
4–6 weeks	22	41
7–9 weeks	3	11
More than 9 weeks	18	22

Source: ACCC (2000, 70).

Second, the process lacks formal guidance by means of precedent. As the commission does not publish the reasons for its decision, there are no formal precedents to guide future decisions and to subject the decisions to peer review. This lack of precedent is another factor that increases the discretion that is exercised by the commission in any particular case. The corollary is that the uncertainty confronting the parties to a merger is increased.

Finally, it provides the commission with significant bargaining power to extract concession from the parties. These problems create a risk that efficiency-enhancing mergers will be unnecessarily altered or deterred. Noah (1997) characterises this behavior as "administrative arm-twisting."[6]

It might be thought that the need for confidentiality and for speed mean that the process cannot be combined with review processes. This is not the case—providing the commission gives reasons for its decisions and any reviews occur after the merger has been announced. This could be provided for in legislation. Any review on the merits would clearly be problematic if the commission has been unable to gather information. However, if the process were governed by statute, parties would be able to appeal if the commission violated the requirements of the statute.

The number of matters dealt with in table 2.3 points to the popularity of the process of informal clearance compared with authorization or litigation. It also points to the speed of the process compared with the processes set out in the statute.

2.5 Lessons from the Australian Experience

Lessons can be drawn from the Australian experience both for how Australia should reform its own statute and procedures, and for other jurisdictions that may be reconsidering their own commitment to antitrust merger policy if those countries wish to maximize value.

6. Noah (1997, 874) defines administrative arm-twisting as "a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a regulated entity." We are indebted to Robertson (2001) for this reference.

The key lessons from the Australian experience that might be drawn for other jurisdictions that wished to maximize value are the following:

1. The criteria for assessing mergers must explicitly provide for an assessment as to whether the merger is primarily motivated by an increase in monopoly power or an increase in economic efficiency.
2. The process must be quick and must allow for secrecy (up the point that the merger is made public by one of the parties).

If the Australian legislature wished to maximize value, it should

1. give the present clearance process a statutory basis, so that parties can go to the commission with the knowledge that there are some constraints on what it may do;
2. legislate by amending to provide that the commission weighs up monopoly and efficiency considerations in considering whether it should grant a clearance; and
3. require the commission to publish its reasons as soon as the merger is public.

If applied in less developed countries, these principles will increase the prospect that the regulator will allow value-enhancing mergers. Furthermore, by increasing the transparency of the decisions of the regulator, they will minimize the scope for mergers or acquisitions motivated by rent seeking and improve certainty in the regulatory processes.

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Comment Charles W. Calomiris

The paper by Williams and Woodbridge provides a useful review of antitrust law as it is practiced in Australia. The authors begin by positing two criteria that are necessary "if antitrust merger policy is to enhance value." First, mergers that promote efficiency must be permitted and those that promote monopoly power disallowed. Second, the merger approval process should be speedy and confidential. They then hold up the experience of Australia to the mirror of their two-part objective function. They find Australian practice wanting in important respects and propose some modifications that they believe would improve regulatory performance.

It is hard to find fault with the twin objectives the authors propose, except in the incompleteness of the list of objectives, and in the failure to fully consider ways in which broad differences in approach to regulation might affect the likelihood of meeting either the objectives they propose or others that might be added to their list. In my comments, I will add a third criterion to the Williams-Woodbridge list—a criterion that is already implicit in their discussion of the flaws of the current system—and propose changes in regulatory process that would likely improve performance according to all three criteria. Specifically, I will argue that an approach to antitrust regulation that relies more on specific rules defining the criteria for permissible mergers, and that provides prospective merger counterparties with clear safe harbors from regulators' blocking mergers, would improve regulatory performance in comparison with the current approach, which relies almost entirely on discretionary, case-by-case judgments in the form of "informal notifications and clearances."

The objective I would add to the Williams-Woodbridge list for measuring regulatory performance is avoiding "stealth regulation." Stealth regulation refers to the practice of using antitrust authority as an extortionist device for coercing firms to do things that they are not legally required to do, but that the bureaucrat entrusted with regulating them wishes them to do. Stealth regulation is a serious problem in the United States, especially in the regulation of telecommunications and banking.[1] In telecommunications and banking, permission for acquisitions are withheld on flimsy legal

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1. "Separate Statement of Commissioner Harold Furchtgott-Roth Concurring in Part, Dissenting in Part" Re: Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141.

grounds, including alleged antitrust concerns, until firms "voluntarily" offer to institute new policies, which are touted as providing some program alleged to benefit the "community." Given the legal costs and time lost in fighting the regulators, firms often give in to this extortion, which, of course, encourages it. In some cases, regulatory extortion serves the political goals of ambitious bureaucrats; in other cases, it has a corrupt purpose, as money is channeled to favored recipients. Whatever its purpose, stealth regulation is a highly inappropriate use of regulatory discretion. I do not know the extent to which this problem is present in Australia, and the evidence in table 2.2 on the use of conditions in the merger approval process suggests that stealth regulation is less a problem in Australia than in the United States (at least so far). But, assuming that the dictum "power corrupts" applies around the globe, it should also be a policy concern there. Williams and Woodbridge seem to agree that this has been a problem in Australia, when they write that "Australia's reliance on discretion over rules" has granted the antitrust regulator "an unhealthy degree of power to extract concessions from the enterprises that wish to merge." That is the sense in which their discussion implicitly recognizes the need to avoid regulatory abuse; but they should elevate this concern to the status of an important and explicit goal for the regulatory process.

Let me turn to the question of how the extent of regulatory discretion affects regulatory performance according to all three criteria. First, as the authors note, the legal standard used to judge whether a merger is appropriate is quite vague—whether competition in the relevant market would be worsened by the merger, based on the "future-with-and-without test." That vagueness, and the desire to preserve confidentiality during the merger approval process, has encouraged the reliance on informal, secret regulatory deliberations to decide whether to permit or to challenge a merger. But as the authors recognize, this informality (especially when combined with the admitted necessity of secrecy) invites ineffective and abusive policy, and it may not be sufficiently speedy in reaching a result. That is, there is no reason to believe that the efficiency criterion is being satisfied or that the process is sufficiently speedy, and there is great opportunity for abuse.

How could speed and confidentiality be preserved while also ensuring greater effectiveness and less abuse? Williams and Woodbridge suggest that the answer is to mandate that regulators weigh efficiency and monopoly when deciding whether to approve a merger. No doubt the authors are right to argue that it is appropriate to weigh efficiency gains against lessening of competition. But, as a recipe for reform, this is a thin gruel. Their proposed criterion is still extremely vague. And it accomplishes little in the way of making the merger approval process predictable to prospective counterparties, which Williams and Woodbridge rightly emphasize as desirable. I see no reason to believe that this new mandate will add rationality or predictability to the process, hasten regulatory action, or avoid

stealth regulation. All it would likely accomplish is the relabeling of the jargon used by bureaucrats to explain their protracted, results-oriented, discretionary decisions. Requiring that the Australian Competition and Consumer Commission publish its reasoning sounds like a good idea, but published opinions are not necessarily clear or defensible ones.

Ideally, to make antitrust adjudication more effective, speedy, and predictable, one would bind the commission's decisions so that they were derived in predictable ways from observable criteria. Furthermore, one would put in place firm time deadlines for first- and second-stage decisions by the commission (i.e., first, with respect to the decision to hear a merger case, and second, regarding the time before a decision must be reached). The ideal rules-based approach would have two parts. First, it would establish safe harbor rules. A good starting place would be to offer safe harbor to all mergers unless they are challenged by a third party. Challenged mergers should also enjoy safe harbor if, according to some prespecified set of objective, quantifiable criteria, a merger does not violate a given threshold of anticompetitiveness. Mergers enjoying safe harbor would be protected from regulatory risk by being automatically approved. For firms that fail the automatic approval test, the commission's deliberations should also be transparent, predictable, based on objective preannounced criteria, and subject to hard time limits.

With respect to safe harbor, the concentration ratio could serve as a possible criterion. Any mergers that would result in small industrial concentration or little price impact would not be subject to further review by the commission. Enforcing even this simple first-stage rule would require that the commission explicitly define the industry for which the calculation is relevant. This is tricky, but it could be handled in various ways. One possibility would be assigning all firms, ex ante, to an industry, so that the combination resulting from any proposed merger would have a predefined effect on the concentration in one or more industries. Another possibility would be allowing the commission to define the relevant industry concept ex post, but require that this definition be defensible on objective grounds.[2] Whatever the safe harbor rule chosen, it is essential that it be observable and known to all participants ex ante. I rely on concentration ratios in my example of a proposed safe harbor rule not because they are precise measures of market power but because a minimal degree of market concentration is a necessary condition for market power, and because they are relatively easy to define. Of course, even this simple approach to a safe harbor rule must admit some discretion, if only because statistical data and econometric estimation will always permit some manipulation. Nevertheless, this approach would be a huge step in the right direction.

2. For example, if the firms placed in the industry concept do not exhibit sufficiently positive cross-price elasticities, the definition would not be deemed acceptable.

For firms that do not receive automatic safe harbor, a second, more complicated set of rules would apply to the process for considering the merger. It would be useful here to vary the burden of proof according to prima facie evidence about some criteria. For example, for firms that have concentration ratios only slightly above the safe harbor maximum, the burden of proof would be on the commission, and the criteria that would have to be satisfied to bar the merger would be relatively demanding. The commission would have a specific evidentiary burden. The criteria for the decision would, as before, be prespecified and quantitative. For mergers that would result in substantial industrial concentration, the burden of proof would shift to the firms, in the sense that the criteria necessary for denying the merger would be less demanding. As before, the rules would be prespecified, including rules that determine the means of weighing the estimated monopoly costs and efficiency gains from the merger. With such rules in place, the job of the commission largely would be (1) to refine the rules over time, and (2) to ensure that the rules are executed properly. Discretion on a case-by-case basis would be kept to a minimum.

Of course, some discretion would remain no matter how one tried to limit it. But if the commission were subject to specific evidentiary burdens, and were required to prespecify detailed empirical criteria for denying mergers, the opportunities for delay and abuse would be substantially reduced. Furthermore, being forced to adopt specific criteria and to announce objective functions that weigh the estimated effects of the merger on efficiency and monopoly power, improves the likelihood that the decisions will do a better job balancing opposing considerations.

None of this would be easy to implement. Besides the tricky technical issues of deciding on reasonable criteria and weights to attach to them, there is an even bigger impediment to this sort of reform. Politicians tend not to like proposals like this, partly because such folk tend to overvalue the benefits of discretion and undervalue the benefits of predictable rules and constraints on the abuse of power. For Australia, the United States, and other countries to arrive at this sort of rational process it may be necessary for power to be placed more in the hands of people who think like economists. We can all look forward to that distant happy day.

Comment   Chong-Hyun Nam

This paper is very informative and is useful for policymakers both in Australia and in many other countries. The paper addresses at the outset a sort of ideal set of criteria under which antitrust merger policies should be

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formed and operated. In brief, it states that antitrust merger policies should be designed in such a way as to allow those mergers and acquisitions (M&As) that promote economic efficiency while discouraging those M&As that promote monopoly power. At the same time, it says that the process of assessing M&As needs to be conducted in a speedy and confidential manner so that social costs involved with the M&As can be minimized. In light of these criteria, the paper then makes a very careful review of Australian antitrust laws and their applications in practice for recent years.

To summarize the highlights of the paper: The most important finding is that the antitrust laws, as set out in s. 50 of the Trade Practice Act, are grossly inadequate to deal with mergers because they make no explicit reference to economic efficiency. The paper also finds that the authorization process seems a little bit better than the litigation process based on s. 50, since it allows the commission to make decisions based on net economic benefits, which means that economic efficiency can be taken into consideration in the decision-making process.

Both litigation and authorizing processes, the two statutory processes, suffer, however, from delay and lack of secrecy, and therefore have been least popular among parties to the mergers. As a natural consequence, parties to the mergers relied heavily on a more quick and secret process, namely, the informal clearance process. As was already discussed by the authors, the informal clearance process has no foundation in the antitrust statute, and hence cannot be used as a precedent: the reasons for its decision cannot be made public. Moreover, there is a danger that the commission may exercise too much discretionary or bargaining power to extract concessions from parties to the mergers.

In the end, the paper suggests three major reform agendas for possible legislation. They are as follows: (1) give the present informal clearance process a statutory basis; (2) require the commission to access potential efficiency gains from the mergers, and use them in weighing trade-offs between efficiency gains and monopoly-power increases when considering whether to grant a clearance; and (3) require the commission to publish its reasons for decision as soon as the merger becomes public. Among these three points, I have no disagreement with the first and the third, but I have some reservations about the second.

I think it is too tall an order—if not an impossible task—for the commission to measure economic efficiency gains from the mergers. It will be not only time consuming but also inaccurate, at best. Further, I am not sure if it is necessary for the commission to assess the efficiency gains in order to be able to make the right decision when granting a clearance. What I have in mind is that most of the merger cases are likely to be efficiency enhancing. Otherwise, they would not have been tried in the first place.

However, the economic efficiency gains should by no means be used as

compensation for the negative effects that may result from increased monopoly power. In other words, the negative effects originating from increased monopoly power should be prevented in any circumstance, regardless of the magnitude of expected efficiency gains from the mergers. From the social welfare point of view, the negative effects of increased monopoly power can best be assessed in terms of price changes of the concerned products, not by changes in the number of firms or by changes in their market shares. As long as prices of concerned products remain unchanged, or are lower than before the mergers take place, there is no reason for the commission not to grant a clearance.

Therefore, I think, the commission's effort needs to be focused on the price effects of the mergers, and that should be used as a major criterion when considering whether to give a clearance. If we accept this simple principle, the antitrust merger rules and the commission's duty can be made a lot simpler than they are now. For example, the commission does not need to intervene at all in private M&A activities as long as international competition is guaranteed for the concerned products, which are tradable goods in nature. Parties to the mergers do not even need to notify the commission under these kinds of circumstances. However, the commission needs to intervene in private M&A activities when the concerned products are characterized by nontradable goods, or when natural or artificial trade barriers are so high that effective competition cannot be guaranteed simply by exposing them to international competition only. Even in this case, the commission's burden can be reduced substantially if the commission makes use of price-undertakings whenever it seems appropriate. When granting a clearance, the commission needs to make sure that domestic prices of the concerned products do not rise as a result of M&As. In any event, making rules and regulations simpler and clearer is a job best left for economists, not for lawyers.