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Business and Mergers Law in Australia: Never the Twain Shall Meet

Alistair Davey

Abstract

This paper provides an historical overview of attempts to enact mergers law in Australia and finds that there has always been business opposition to the imposition of such laws. Such opposition has traditionally been based around the proposition that in a small economy such as Australia, firms need to rationalise in order to achieve efficiency and drive domestic and international competitiveness. The present policy debate over mergers law has witnessed a revival of industry rationalisation arguments in addition to concerns that mergers law was turning Australia into a branch office economy. The paper finds that such concerns are lacking in evidence.

Introduction

The regulation of mergers for competition purposes in Australia is governed by section 50 of the Trade Practices Act (TPA) that generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services within Australia. Responsibility for the administration and enforcement of section 50 resides with the Australian Competition and Consumer Commission (ACCC), formerly the Trade Practices Commission (TPC), which is an independent statutory authority.

Mergers law is an attempt to preserve competitive market structures. This is predicated on the belief that market competition is the principal means for achieving an efficient allocation of scarce resources throughout society. The principal objective of mergers law is to prevent the accumulation of market power ultimately resulting in higher prices and/or lower quality goods and services for consumers, and thus ensuring economic efficiency.

The present policy debate over the appropriate setting for mergers law in Australia has resulted in the Government establishing a major inquiry into the TPA. However, this debate appears to be merely the latest instalment in a saga spanning over 80 years since Australia's first competition statute was effectively stymied through judicial...
interpretation. Australian business has a long history of opposing government moves to impose and tighten controls over mergers on competition grounds.

**The Industry Rationalisation Argument**

A recurring and pervading theme in business opposition to effective mergers law has been the argument that in a small economy such as Australia, economies of scale make it necessary for an industry to have few players or even to be a monopoly. The policy implications of this argument is that mergers law prevents an industry from maximising its efficiency and achieving economies of scale because it inhibits mergers resulting in industry rationalisation. This argument was later extended to assert that industry rationalisation was necessary if Australian industry was to compete successfully against overseas competitors in both domestic and overseas markets.

The industry rationalisation argument, or 'national champions' thesis as it has become known overseas and more lately here, is not unique to Australia. Porter observes:

> It is often argued that domestic competition is wasteful, because it leads to duplication of effort and prevents firms from gaining economies of scale. The right solution is seen as nurturing one or two firms who become 'national champions,' with the scale and strength to compete against foreign rivals or, alternatively, to promote interfirm cooperation. Some also take the related view that domestic rivalry is unimportant in global industries. (Porter 1990, p. 117)

The introduction of mergers law in Australia was first mooted by Attorney-General Barwick in a statement to the House of Representatives in December 1962. The general attitude of Australian business to Barwick's proposals could be summarised as an 'unwarranted interference with the spirit of free enterprise.' (Special Correspondent 1963, p. 202)

In February 1964 four of the largest producer associations made representations to the Government suggesting amendments to mitigate against the rigours of Barwick's draft legislation (Walker 1967, p. 5). By the time that the Menzies Government introduced the first trade practices legislation into the Commonwealth Parliament in 1965, moves to enact a mergers law had been abandoned.

According to Nieuwenhuysen, the legislation presented to the Parliament in 1965 when compared to Barwick's original proposals, 'appeared to be a compromise and watered-down version which had yielded to business and political pressures.' (Nieuwenhuysen 1976, p. 32)

Further attempts to enact mergers law in Australia by the McMahon Government in 1972 and by the Whitlam Government in 1973 and 1974 also met with strong business resistance.

1 Australia's first competition statute was the 1906 Australian Industries Preservation Act. Only one failed prosecution action was ever mounted under this Act and it languished on the statute books until 1965.
The Evolution of Mergers Law in Australia

Australia's first mergers law came into being on 1 October 1974 with the passage of the *Trade Practices Act* 1974. Under section 50 of the new Act, a company may not acquire shares or the assets of another company where the acquisition 'is likely to have the effect of substantially lessening competition.' According to Attorney-General Lionel Murphy:

> Anti-competitive mergers between companies will be prohibited, for the first time in Australia, under the provisions of clause 50. Legislation controlling anti-competitive practices is incomplete if it does not also provide for the control of anti-competitive mergers. (Murphy 1974, p. 1477)

The mergers test as originally applied in Australia of substantial lessening of competition (SLC test) was inspired by section 7 of the Clayton Act of the United States. However, the public interest test approach applied to the regulation of mergers in the United Kingdom at that time was also incorporated into Australia's mergers law regime. The TPA allowed for authorisation of mergers and acquisitions, which is the granting of immunity, on public benefit grounds, for mergers and acquisitions which would otherwise contravene section 50. The authorisation regime for mergers could possibly be viewed as an attempt by the Whitlam Government to accommodate the views of Australian business in regard to the benefits of industry rationalisation.

In May 1977 the Fraser Government introduced legislation to amend the TPA and change the SLC test to a prohibition on acquisitions which resulted in the acquirer dominating a market (dominance test). In justifying the Government's actions, the Minister for Business and Consumer Affairs, John Howard, said in his second reading speech that:

> The Government has decided that the categories of merger to be subject to the Act should be quite limited. There should be no unnecessary impediment, legislative or administrative, to the attainment of rationalisation of Australian industry. It is in Australia's best interest to achieve economies of scale and improved international competitiveness. (Howard 1977, p. 1477)

The main difference between the SLC test and the dominance test is that an SLC test allows for the consideration of both unilateral and coordinated market power whereas the dominance test only allows for the consideration of unilateral market power. Unilateral market power refers to the ability of a firm to raise its prices and the inability of other competitors to constrain it and make such a move unprofitable.

The concept of coordinated market power flows from oligopoly theory. The underlying premise is that in a concentrated market with few firms, firms may be more inclined to adopt cooperative strategies towards one another and thus lessen competition through collusion. This could be in the form of an explicit agreement, or take on a more subtle form known variously as tacit collusion or conscious parallelism.

Although the dominance test could prevent the emergence of monopolies and the continued expansion of the dominant firm in a market, it could not act to prevent the
emergence of duopolies and other market structures conducive to conscious parallelism.

In 1984, a Hawke Government green paper canvassed changes to the TPA including a change to the mergers law arguing that:

The appropriate test for mergers should be based on the likely competitive effect of the merger in the market, rather than solely on market structure. (Evans et al. 1984, p. 11)

The newly formed Business Council of Australia (BCA) was scathing in its assessment of the proposal. According to the BCA:

[A]n anti-merger provision inhibits rationalisation and is not consistent with the Government's objectives for restructuring Australian industry which emphasise the need for industry to adjust to meet the challenge of low cost overseas competition. (BCA 1984, p. 13)

[T]he size and nature of Australian markets differ from other markets (eg, US markets) and high concentration is a necessary part of Australian markets if there is to be effective competition with overseas companies. (BCA 1984, p. 13)

The rationalisation and restructuring of Australian industry is widely accepted as a necessary economic process which should be encouraged in the interests of providing a more effectively competitive industry environment both in terms of domestic competition and in ability to compete internationally. (BCA 1984, p. 19)

At this time, the BCA's preferred stated position was for the complete abolition of any controls over mergers.

The BCA succeeded in its efforts to thwart the green paper proposal. The Hawke Government appeared to accept the BCA argument on industry rationalisation as Attorney-General Bowen announced that:

The Government is firmly committed to the encouragement of efficient Australian industry and to increasing our competitiveness on world markets. It has been decided that the existing 'dominance' test in section 50 should remain essentially unchanged. (Bowen 1986, p. 1627)

However, debate over the appropriate setting for the mergers test continued during the 1980s due to three mergers which attracted adverse public comment for their perceived impact on competition (Johns 1994). These mergers were between retailers Coles and Myer to form Australia's largest retailing group; the acquisition of East-West Airlines by Ansett, one of Australia's two major domestic airlines; and the acquisition by News Ltd of the Herald and Weekly Times newspaper group.

Responding to adverse public comment about the adequacy of existing mergers law in 1988, the Hawke Government referred the issue to the House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee). In its submission to the inquiry, the BCA vigorously defended the dominance test (BCA 1994).
1988). In its report in May 1989, the Griffiths Committee concluded there was insufficient justification to recommend any amendments to the dominance test.

However, before the Government had time to respond to the Griffiths Committee report, the Senate initiated its own inquiry. In May 1991, the Senate referred the issue of mergers law for investigation to the Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee).

By the time the Cooney Committee came to examine the appropriate setting for mergers law, two important developments had occurred. The first was that the TPC now actively supported a return to the original SLC test and asserting that the Coles/Myer, News Ltd/Herald & Weekly Times, and Ansett/East –West mergers 'would have been handled differently had there been a different threshold test.' (Trade Practices Commission 1991, p. 10)

The second was that research by Harvard Professor Michael Porter on national competitiveness directly challenged the Australian business community's proposition that in a small economy like that of Australia, impediments to industry rationalisation prevent efficiency enhancing mergers and stifle international competitiveness. According to Treasury's submission to the Cooney Committee:

Porter questions the view that domestic firms must be large relative to the size of the domestic industry to gain economies of scale in order to be internationally competitive. In his industry studies he found that creating a dominant domestic firm rarely results in an internationally competitive advantage. He concluded that the need for economies of scale is tempered by the importance for competitive advantage of the rate of innovation. Economies of scale, he argues, are best achieved by exporting, not by dominating the domestic market. (Department of the Treasury 1991, p. 25)

Although Porter had not conducted any research into Australia, his conclusions reached in a study on New Zealand, Australia's smaller trans-Tasman neighbour, directly contradicted the BCA view.

It is often argued in New Zealand and elsewhere that domestic competition is undesirable, particularly in a 'small country'. The belief that competition leads to duplication of effort and prevents firms from gaining economies of scale misses the fact that competition tends to force firms to improve and upgrade. Concentration is not the best way to achieve scale in small countries, export is …

New Zealand lacks a tradition of strong competition policy… The alleged 'economic efficiency' of market concentration has been used to justify a policy of 'non-intervention' towards concentrations of market power. This reflects a fundamentally static view of the world that does not take into account the gains in dynamic efficiency that result from vigorous rivalry. (Croome et al. 1991, p. 19)

Perhaps realising that the intellectual basis of its main argument against a tougher mergers law regime was under serious challenge, the BCA argued that Porter's work had been misinterpreted and that his general thesis 'requires some adaptation in applying it to Australia.' (Senate Standing Committee on Legal and Constitutional Affairs 1991, p. 20)

Putting considerable weight on the research of Porter, the Cooney Committee recommended that the mergers law should revert back to the original SLC test. The
Keating Government accepted the recommendation of the Cooney Committee to change the mergers law and legislated in 1992. According to Attorney-General Duffy's second reading speech:

After much consideration the Government has decided to amend section 50 to prohibit mergers or acquisitions which are likely to substantially lessen competition and which have not been authorised by the Commission. In an Act which seeks to preserve competition it is appropriate that the merger test should focus on the effect on competition in a market rather than on the dominance of a particular firm. The effect of the amendment will be to broaden the range of transactions which can be examined under section 50. This can only be procompetitive. (Duffy 1992, p. 2404)

Arguments about the need for industry rationalisation in order to achieve efficiency and international competitiveness appear to have been successfully employed by the business community for at least around 30 years in thwarting government moves to impose tougher restrictions over merger activity. As Ransom and Pengilley observed in 1985, 'the business community has traditionally been able to sell the virtues of industry 'rationalisation'. ' (Ransom et al. 1985, p.922)

The industry rationalisation argument only appears to have finally come unstuck once a credible source of empirical evidence suggested that it was fundamentally flawed. As the Cooney Committee observed '[t]he thrust of Professor Porter's work supports a change in section 50.' (Senate Standing Committee on Legal and Constitutional Affairs 1991, p. 51)

After the 1992 changes, mergers law dissipated as a controversial issue for the rest of the decade. However, several contentious merger decisions by the TPC, and its successor, the ACCC, regularly brought it back into the public spotlight.

In August 1999, the ACCC opposed the proposed acquisition of the Sydney Futures Exchange by the Australian Stock Exchange (ASX). ASX Chairman Maurice Newman commenced a regular series of attacks on Australia's mergers law regime and the ACCC in the aftermath of that decision based on the industry rationalisation argument. Newman argued that Australia's mergers law prevented the creation of companies with sufficient size to compete on a global basis. According to Newman:

I am on the public record many times now, as pointing to the inadequacy of our trade practices laws. … By any measure, the Trade Practices Act is outdated and in urgent need of reform. Unfortunately, the regulator is not always the best placed to judge the issues of globalisation, and, while well meaning, continues to impose costs on the Australian economy by undermining our international competitiveness and entrenching outdated ideas. (Newman 2000)

The Present Policy Debate

The present policy debate over Australia's mergers law probably commenced in the aftermath of the BCA's annual Strategy Forum for 2001 when it declared that:

The Forum recognised that the existing Trade Practices Act, which was enacted in the early 1970s in very different circumstances, had failed to take account of international trends and needed to be modernised to ensure Australian companies are able to compete. (BCA 2001b)
BCA President Dr John Schubert conducted a series of television interviews in which he specifically focused upon the application of mergers law. In particular, Schubert argued that because mergers law prevented Australian companies from growing through acquisition domestically, it was forcing such companies overseas in the search for new investment opportunities. (Schubert 2001a)

Similar to the Newman-chaired ASX, Schubert as a company managing director had been subject to an adverse decision by the ACCC under section 50. Schubert was managing director of Pioneer International in December 1996 when the Federal Court awarded penalties and costs totalling $5 million against Pioneer International and a subsidiary company for acquiring the assets of a vigorous competitor in the south Queensland concrete masonry market in breach of section 50 in litigation initiated by the ACCC.

After Schubert's initial foray, attacks on Australia's mergers law and the ACCC from prominent business figures occurred repeatedly. In April 2001, Newman told a gathering that trade practices law threatened to block Australia's corporate expansion and expose Australian companies as 'cheap targets to foreign investors.' (Seeder 2001) He continued:

> It is vital … to achieve a critical mass which will enable it to compete on a world stage. [But] these businesses are increasingly finding themselves caught between a regime which is largely unsympathetic to global market arguments and an undervalued currency which make foreign expansion uneconomic. (Seeder 2001)

In June 2001, two members of the BCA's Regulatory Reform Task Force, CSR managing director Peter Kirby (Kirby 2001), and ASX managing director Richard Humphry (Humphry 2001), added their voices to the mounting chorus of business criticism with both questioning the relevance of policy prescriptions that had been drawn from Porter's research.

During the 2001 federal election campaign Prime Minister Howard announced an 'independent review of the competition provisions of the Trade Practices Act and their administration, to establish whether they continue to encourage an environment where Australian businesses can grow and compete internationally.' (Howard 2001)

In May 2002 Treasurer Costello announced the membership and terms of reference for a committee of inquiry into the competition provisions of the TPA and their administration. The Government appointed former High Court Judge Sir Daryl Dawson to chair the review. In his press release, the Treasurer commented that '[t]he terms of reference enable the Inquiry to consider whether the Act provides sufficient recognition for the globalisation factors and the ability of Australian companies to compete globally.' (Costello 2002)

Although the BCA had been vocal in its criticism of Australia's mergers law, up until the release of its initial submission to the Dawson review it had failed to provide a comprehensive exposition of its concerns. The closest the BCA had previously come to providing a detailed critique and exposition was in its 2001 Annual Review, with a key complaint being that the law was essentially out of date and in need of an overhaul (BCA 2001a, p. 19).
Overseas comparisons, however, reveal that Australia's mergers law regime is consistent with best international practice. The SLC test applied in Australia has almost universal coverage throughout the English speaking world. Australia joins the United States, Canada, Ireland and New Zealand in applying an SLC test. Furthermore, in June 2001 the British Government announced its intention to apply the SLC test to regulate merger activity in the United Kingdom.

Most member countries of the European Union along with the European Union (EU) itself apply a dominance test in regard to mergers. However, the dominance test as applied by the EU is remarkably similar to an SLC test in its practical application. Unlike the dominance test that applied in Australia, the EU variant allows for the consideration of coordinated market power through the concept of 'collective dominance.'

In its 2001 Annual Review, the BCA also took up the national champions thesis commenting that:

Inappropriate regulation has the capacity to impede industry restructuring and rationalisation, making the Australian economy less adaptable and denying efficiency and scale gains that would deliver greater international competitiveness and through that, more jobs and a higher standard of living. (BCA 2001a, p. 19)

No empirical evidence has yet been produced in support of the national champions thesis. In his 1990 work, The Competitive Advantage of Nations, Porter found a strong empirical association 'between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry.' (Porter 1990, p. 117)

In a detailed examination of the international competitiveness of Japan, Sakakibara and Porter found robust evidence to support the proposition that domestic rivalry is positively associated with international trade performance (Sakakibara et al. 2001, p. 205).

Based on his many years of research, Porter has come to a damning overall assessment of the national champions thesis:

When local rivalry is muted, a nation pays a double price. Not only will companies face less pressure to be productive, but the business environment for all local companies in the industry, their suppliers, and firms in related industries will become less productive. This demonstrates the danger in arguments about the creation of 'national champions' in an industry in the home market in order to gain the scale to compete internationally. Unless a firm is forced to compete at home, it will quickly lose its competitiveness abroad. (Porter 2001, p. 142)

Recent empirical work lends further weight to Porter's conclusions on national champions. In a study on manufacturing industries across seven countries, Hollis found that 'the higher the concentration in an industry within a country, the lower its share of world output and of net exports.' (Hollis 2003, pp. 103-104) In an Australian study on manufacturing firm size and export performance, Gabbitas and Gretton found that their study did 'not support the proposition that to succeed internationally a firm will typically need to first secure a large domestic-sales base.' (Gabbitas et al. p. XII)
A further criticism made by the BCA and some of its members during 2001 was the assertion that mergers law was a significant contributing factor behind turning Australia into a ‘branch office economy’ – that is, an economic backwater. The concern over a branch office economy is the replacement of companies headquartered in Australia by branches of foreign owned multinational corporations based in the centres of world economic power such as Europe and the United States with critical decisions being made far from Australian shores.

In relation to mergers law, the branch office economy argument appears to have two main tenets. The first is the contention that because mergers law prevents domestic industry consolidation, Australian assets are being acquired at bargain basement prices by foreigners. According to the BCA:

Inconsistencies between the regulation of domestic mergers and of foreign investment may expose Australian companies to foreign takeovers that undervalue those companies. (BCA 2001a, p. 19)

However, it could also be argued that a takeover target is always worth more to a potential monopolist than anyone else – that companies may be willing to pay a premium for the assets of company in the expectation of being able to exercise market power post-acquisition.

The second tenet of the branch office economy argument is that because mergers law prevents Australian companies from engaging in further domestic consolidation, they are forced instead to look abroad for investment opportunities which will ultimately lead to the relocation of their operations and headquarters overseas. According to Schubert:

It's going to be a trade-off between having larger Australian companies which can stay headquartered in Australia, versus a view on whether that reduces competition and which is the more beneficial for Australia. (Schubert 2001b)

A survey on offshore investment by Australian firms conducted by the Productivity Commission concluded that mergers law 'did not rate as a major influence on respondents' decisions to produce or relocate offshore'. (Productivity Commission 2002, p. X) The survey found that 'Australian merger law was ranked lowest among commercial and government-related factors identified in the questionnaire as likely to influence decisions about headquarter relocation.' (Productivity Commission 2002, p. XV)

The BCA has also criticised Australia's mergers law regime as inadequate because it did not give due regard to efficiencies achieved through mergers. In its first submission to the Dawson review, the BCA proposed that efficiency gains be included as one of the factors that should be taken into account when assessing the competitive impact of a merger (BCA 2002a).

Williamson (Williamson 1968) postulated that in some circumstances the benefits of improved productive efficiency created by allowing a merger to proceed could outweigh the loss of allocative efficiency due to the merged firm raising prices to customers. Although Williamson recognised that his trade-off model had limited application, it has been used by some to argue for a more lenient approach to mergers law, and for the adoption of a so-called 'efficiency defence'.
In the BCA's *Aspire Australia* publication, Burn and Munchenburg criticised the TPA because:

> in the actual application of the legislation, the regulator gives undue weight to consumer welfare, particularly as measured by prices. For example, this appears to be the approach taken by the ACCC in its public pronouncements, particularly where it seeks to put itself against major corporations on behalf of the general community. (Burn et al. 2002, p. 146)

The implied message from this sort of criticism is that the increased productive efficiency achieved through allowing an anti-competitive merger to proceed, outweighs and justifies the anti-competitive detriment to the community caused through the loss of allocative efficiency and the imposition of higher prices to customers post-merger.

The available empirical evidence analysis demonstrates that mergers are far from being always efficiency enhancing (Rouller et al. 2001). Based on studies of mergers in the United States, Mueller has concluded that the damage wrought to efficiency through mergers is not simply through reductions in the level of competition, but more often the result of a loss of productive efficiency within merged firms: 'the main social cost of many mergers is the damage to the efficiency of the firms themselves brought about by their merging.' (Mueller 1997, p. 680)

There are several problems with an efficiency defence approach. One problem is the information requirements for applying such an approach could prove problematic if not insurmountable. A further problem is that it is difficult to take account of changes in factors such as standards of service or quality as well as allow for the possible loss of productive efficiency due to increases in managerial slack and x-inefficiency arising from a loss of competitive pressures. As Adam Smith observed as far back as 1776, 'monopoly … is a great enemy to good management.’ (Smith 1961, p. 165)

Another problem with an efficiency defence approach is that it generally treats as benign the income transfers from consumers to producers and ultimately to shareholders. This problem is further exacerbated in the case of foreign ownership as an efficiency defence approach may facilitate an income transfer from Australian consumers to foreign shareholders. The adoption of an efficiency defence may have important income distribution and equity considerations which its Australian proponents have not addressed.

In its first submission to the Dawson review, the BCA dropped most of its previous stated concerns about the perceived deficiencies of Australia's mergers law regime. This may have been prompted given the paucity of material available in support of its earlier contentions. The BCA made only veiled reference to concerns regarding industry rationalisation, national champions and the branch office economy.

This turnaround by the BCA prompted Bartholomeusz to comment that:

> For years, a succession of high-profile executives have complained that the prohibition on mergers that could result in a 'substantial lessening of competition', as outlined in section 50 of the [TPA], was damaging the national interest and undermining their ability to compete on the international stage by preventing 'national champions' from emerging.
In the flurry of positioning that occurred after the review was announced, section 50 was the focus of discussion. The BCA believed it had a great chance of weakening the test.

Conspicuous by its absence from the BCA submission, however, is any reference to ‘national champions’ or the ‘branch economy’ used to buttress the attack. Instead, the BCA is now advocating retention of the ‘substantial lessening of competition’ test. (Bartholomeusz 2002)

Rather than focusing on its previous stated criticisms, the BCA decided instead to highlight what it considered to be procedural and analytical failings in the application of Australia’s mergers law regime in its submissions to the Dawson review.

The major structural reform proposed by the BCA in its initial submission to the Dawson review was for the upfront consideration of public benefits through section 50 of the TPA rather than by consideration through the authorisation process. Under the BCA proposal, considerations of public benefit would override the SLC test, thereby allowing an anti-competitive merger to proceed on the basis of a net public benefit.

Interestingly, the BCA condemned a similar proposal for the inclusion of a public interest test into the mergers law back in 1988. According to the BCA’s submission to the Griffiths Committee inquiry:

   The Council believes that any public interest test creates enormous uncertainty. (BCA 1988, p. 12)

In contrast is its view in 2002, put to the Dawson review, that:

   Adding public benefit considerations to the current merger test … would increase the certainty about the considerations that should be properly taken into account in assessing the public benefits of merger proposals. (BCA 2002a, p. 73)

**Conclusions**

Business opposition to mergers law in Australia is not new. The recent campaign waged by the BCA is just the latest manifestation of long-standing business antipathy towards the application of mergers law in this country. Perhaps the next time arguments about the need for industry rationalisation to create national champions get dusted off, there will be a little more evidence available in support of them.

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