Piper Alderman

Welcome to Piper Alderman's bulletin looking at competition and consumer law. In this bulletin we seek to inform on developments in these areas of law and trade practices generally.

October 2014

Court's free range decision may impact pricing

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ACCC gets tough with company officers following section 155 Notices

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Half pregnant: an "effects" test with a "purpose" defence?

There has been controversy concerning the submission of the ACCC to the Competition Policy Review that section 46, the abuse of dominance provision, should be amended to introduce an "effects" test. In the Review's draft report it is proposed that an "effects" test be introduced, subject to a new defence if the conduct has a rational business purpose and is in the interests of consumers. Partner, George Raitt discusses the issues concerning the existing and proposed tests.

Merger clearance proposals: should process determine outcome?

In the recent MacGen case, the intending acquirer successfully applied to the Australian Competition Tribunal for authorisation after the ACCC announced it would oppose the merger. Subsequently, the ACCC submitted to the Competition Policy Review that the Tribunal should not have jurisdiction unless and until the ACCC has made a determination under the formal authorisation process (which has not to date been used). Partner, George Raitt discusses the Review Panel's draft report, which adopts the ACCC recommendations, and the practical implications of differences of opinion that have emerged between the ACCC and the Tribunal on key principles.

National champions: the global economy and Australian consumers

The ACCC has been unconvinced by arguments that Australia needs to allow mergers to create "national champions" that are able to compete in the global economy. The Competition Policy Review has broadly accepted the ACCC's view by recommending that competition laws remain focussed on protecting Australian consumers in Australian markets and that the competition regulator (currently the Australian Competition Tribunal) has adequate powers to authorise mergers to create a "national champion" if it considers that to be in the public interest. Partner, George Raitt discusses the issues.

Court's free range decision may impact pricing

The Federal Court recently found that Pirovic Enterprises misled or deceived consumers by representing eggs as "free range" and with its egg cartons portraying free roaming chickens. Pirovic's laying hens actually endured a much more confined lifestyle. The Court provided clarification on the meaning of "free range" eggs. The result could mean that businesses currently marketing their eggs as free range will have to change their packaging and the pricing for their goods. Senior Associate, Bill Fragos reviews the decision.

Over the last few years, the ACCC has been proactive and has focussed resources on the accuracy of credence claims made by businesses. Matters have involved examination of wifi and 4G, 3D televisions, Australian made, as well as specific regions including Barossa, King Island and Byron Bay. There have also been a number of matters considering food, including "freshly baked", "open range", "free to roam" and "berkshire pigs". Such representations are made to provide a point of distinction from other similar products and generally at a mark-up on the price. Consequently, if a business provides an inaccurate representation, this may lead to a competitive advantage to that business over competitors which otherwise are compliant and accurate with their respective claims.

Pirovic's representations conveyed that the eggs were produced by laying hens that were able to move freely in open pasture each day. However, Pirovic admitted in Court that most of its laying hens did not move freely on most days.

The Court considered the following factors as relevant:

- the stocking densities of the barns
- the flock sizes in the barns
- the number, size, placement and operation of the physical openings to the open range reducing the ability and propensity of the laying hens to exit the barns and move about freely.

The Court also indicated that there were a number of farming conditions that impacted on whether the laying hens were able to, and did, move freely on an open range each day. Whilst these farming conditions could be considered relevant to most situations, the Court was clear that conditions and their impact would vary between producers and no single condition of itself was conclusive. In addition to the previously identified factors, further relevant conditions included:

- the conditions of the barns the hens are housed in
- the time of the day and how regularly the openings are opened
- the size and condition of the outdoor area, including any shaded areas, the presence of food, water and different vegetation and ground conditions
- the stocking density of any outdoor area
- whether the hens have been trained or conditioned to remain indoors.

The court imposed a penalty of Pirovic $300,000, equivalent to nearly a full year's profit of Pirovic's sales of free range eggs to Woolworths, IGA and others. However, also relevant is the fact that Pirovic's most recent annual profit on all sales was $4.6 million, on sales of $28.7 million.

Approximately 40 percent of eggs sold in supermarkets are sold labelled as "free range". Generally, compared to caged eggs, a premium of 100 per cent on price applies to free range eggs. Given the decision, many producers may need to change their practices to ensure compliance with the Court's observations and considerations as to "free range". The Court noted, for example, that Pirovic's practices with respect to their "free range" laying hens appeared to be consistent with their competitors' practices. The decision means that the price of eggs that would have otherwise been labelled as free range would need to be reduced on existing stocks about to be or currently being sold.

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Section 155 CCA

The ACCC has broad powers under section 155 of the *Competition and Consumer Act* (CCA) to require the furnishing of information, production of documents or giving evidence where it has reason to believe that the person to whom the notice is directed can do so in relation to a matter which constitutes or may constitute a contravention of the CCA, amongst other things. It is an offence to refuse or fail to comply with a notice or to knowingly furnish information or give evidence that is false or misleading.

Criminal Proceedings Commenced

In October 2014, the ACCC commenced criminal proceedings in the Federal Court in Brisbane against Robert Davies, the sole director of Natural Food Vending Pty Limited (Natural Food), alleging that he had aided and abetted the failure by Natural Food to comply with a section 155 notice. The notice had been issued in 2010 as part of an investigation by the ACCC as to whether Natural Food had made false or misleading representations in the promotion and sale of vending machine business opportunities.

The company appointed a liquidator on the date that the response to the section 155 notice was due, and the company did not respond to the notice.

It is alleged by the ACCC that Mr Davies failed to inform the liquidator of the notice or of the investigation. In that respect, the ACCC says that Mr Davies aided, abetted, counselled or procured the failure by Natural Foods to comply with the notice.

The prosecution closely follows another set of criminal proceedings also commenced by the ACCC in the Federal Court in Brisbane against Michael Boyle for allegedly providing false or misleading evidence in an examination pursuant to a section 155 notice.

The notice had been issued in 2011 as part of an investigation into Sensaslim Australia Pty Limited (Sensaslim). That investigation led to civil proceedings against Sensaslim and some of its officers, alleging that the company and the relevant officers had engaged in misleading and deceptive conduct and made false representations in relation to the identity of Sensaslim officers, the Sensaslim Spray and the business opportunities offered by Sensaslim, including:

- failure to disclose the involvement of notorious businessmen, Peter Foster, in the business
- falsely representing that the Sensaslim Spray was the subject of a large worldwide clinical trial when such trial was conducted
- falsely representing that Mr Boyle was managing the business of Sensaslim
- failing to disclose that Mr Boyle was intending to resign as Director immediately following the launch of Sensaslim
- falsely representing that Sensaslim franchisees were already participating in and profiting from the Sensaslim franchise, that the franchise had a certain earning potential and that there was a "money back guarantee".

The ACCC alleges that at the examination of Mr Boyle, he knowingly gave false or misleading evidence about his knowledge of the involvement of Mr Foster with the business.

The penalties which can be imposed if the offence is proved are a fine of up to $3,400 or up to 12 months' imprisonment.

The prosecutions serve as a warning to companies and officers that the ACCC takes compliance with section 155 notices seriously, and is willing to bring criminal proceedings some years after the notice is issued.

By way of postscript, the Harper review has in its draft report recommended that the ACCC review its guidelines regarding responses to section 155 notices, and that the obligations of a person to produce documents to the ACCC in answer to a notice should be modified so that the obligation is to undertake a "reasonable" search of documents. That recommendation is designed to reduce the burden of compliance with production notices, given the burdens of documentary searches in the digital age.

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Half pregnant: an "effects" test with a "purpose" defence?

There has been controversy concerning the submission of the ACCC to the Competition Policy Review that section 46, the abuse of dominance provision, should be amended to introduce an "effects" test. In the Review's draft report it is proposed that an "effects" test be introduced, subject to a new defence if the conduct has a rational business purpose and is in the interests of consumers. Partner, George Raitt discusses the issues concerning the existing and proposed tests.

The Review's issues paper released in April this year observes that distinguishing between a dominant firm's unilateral conduct which is a normal incident of competition, and conduct which should be treated as an unlawful abuse of market power, is internationally recognised to be one of the most complex and controversial areas in competition policy. However, the Review's draft report does not engage in any meaningful way with the international controversy or the differences between Australia's current law and major trading partners.

Perhaps the Review considers it desirable to simplify the issues for an audience that does not enjoy legal and economic expertise. Certainly the public debate on the "effects" test has been simplistic. Nevertheless, it is desirable that the analysis of the problem, the policy issues and consequences of any change in the law should be credible in the international context.

The current law, section 46 of the *Competition & Consumer Act*, prohibits a corporation having a substantial degree of power in a market from taking advantage of that power to deter or prevent competitive conduct. In its submission to the Review, the ACCC argued that the law should be changed to prohibit a corporation having a substantial degree of power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition. The ACCC put the case for an "effects" test on several bases. First, the ACCC says it has long argued that the failure to have an "effects" test is a gap in the law. As the Review notes, there has been a long history of reviews which have recommended against an "effects" test, so the long standing nature of the debate is not productive to elucidate reasons which can be critically assessed in the current context.

Second, the ACCC says it has experience of serious complaints where anti-competitive effects have been alleged by market participants but the ACCC considered that there was not a prohibited purpose. No details are provided to support this suggestion of mischief occurring beyond the reach of the current law. Proponents of the "effects" test believe it is obvious that big business is exploiting its market power to the detriment of consumers, and argue that it is necessary to introduce an "effects" test to make it easier for the ACCC to successfully prosecute dominant firms. To develop "evidence-based" policy requires some validation of the "mischief" beyond a conscientious belief held by advocates.

Third, the ACCC states that the omission of an "effects" test is inconsistent with international trends, citing an apparently unpublished working draft paper concerning New Zealand's competition law. Again, there is no acknowledgement of the international controversy and divergence in laws and decisions of courts and tribunals around the world. For example, reference could be made to the US Antitrust Modernisation Commission report of 2007, or the European Commission guidance on single firm conduct of 2008, or the US Department of Justice report on single firm conduct of 2009 (subsequently withdrawn), to indicate that this is not a harmonious area of competition law or policy.

Fourth, the ACCC considers that the problem with the current law is the drafting which has lent itself to unduly narrow interpretation by the courts. The reality of our legal system is that the legislature enacts laws whose meaning is determined by the courts (based on the presumed intent of the legislature). It seems to be a common complaint of the executive branch of government that laws and decisions of courts fail to live up to their expectations. It is fundamentally a good thing that those who enforce the law are accountable not to themselves but to the public and other institutions of government. The ACCC considers that such problems of interpretation will not occur if the law is changed, because the legislation is an "economic statute", and this will guide the court's interpretation. This is ironic given past experience, and overlooks the often stated view of the courts and judges that they are *applying the law* to determine the rights and liabilities of parties – they are not applying economic theory or, much less, the opinions of economists (which typically differ). The US Antitrust Modernisation Commission recently took a similar view that the opinions of economists are not sufficiently certain and predictable to form a basis for legal regulation.

Fifth, to exemplify the second and fourth arguments, the ACCC cites recent court decisions in which it says there was a clear anti-competitive purpose and significant anti-competitive effect but, under current law, the section 46 case failed because it could not be demonstrated that anti-competitive harm was the result of the dominant firm exercising its market power. In the most recent such case, *Cement Australia*, the ACCC successfully proved its case that the corporation entered into and gave effect to an agreement having an anti-competitive purpose in contravention of section 45. It is noteworthy that section 45 has an "effects" test, but the court considered that any anti-competitive effect of the exclusive supply contract was dissipated by market factors. Thus there was a break in the chain of causation between the anti-competitive agreement and any anti-competitive effect. Unlike many areas of law where "causation" is a well-established requirement, the "effects" test that appears in section 45 refers to "effects or likely effects". It has been held that a "likely effect" is one which has "real chance or possibility" of occurring. That is, it is not necessary than any actual effect occur, or if it does, that it be caused by the anti-competitive conduct. It may well be doubted that the law should be changed to endorse a policy that legal liability attach to a dominant firm without the need to demonstrate that anti-competitive harm was caused by the exercise of its market power.

Sixth, both the ACCC and the Review point out that section 46 refers to the purpose of harming competitors or deterring competitive conduct by competitors. Courts have observed that the purpose of the legislation is to protect competition rather than individual competitors. However, as competition is intangible and forensically difficult to observe, if not unobservable, the words used in section 46 seem to be a reasonable drafting technique to identify a proxy for "competition". In proposing to change the subject matter from harm to competitors to harm to competition, the Review raises a significant point: it is anomalous that the legislation give competitors a civil action. Many cases under section 46 concern competitors using the provision not for altruistic purposes but for strategic competitive or commercial advantage. Litigation of this kind bears a significant responsibility for the tortured interpretation of the law by the courts.

The Review adopts much of the ACCC's submission with, however, the addition of the following: the accused corporation would have a defence if it proves that the conduct in question would be rational for a corporation that did not have substantial market power and the conduct would be likely to have the effect of advancing the long-term interests of consumers. The "rational decision" defence does not compensate for the lack of clear causal nexus between the anti-competitive harm and the exercise of market power. Further, it re-opens the question of the hypothetical standard by which conduct is assessed under the current "taking advantage" requirement, i.e. is the conduct possible in a hypothetical competitive market in which market power is absent? The reverse onus of proof is abhorrent given that the matters which must be proved are virtually incapable of proof, presumably intentionally so.

We are finally left to wonder whether sensible law reform can occur in the current politically charged climate, without verifiable data concerning the "mischief" to be addressed and solid comparative analysis to address the consequences of changing the law. A new law along the lines advocated by the ACCC and proposed by the Review would be novel. We may well doubt that it will be productive to create further divergence in international competition laws applying to dominant firm conduct, and to repeat the years of testing of a new law in the courts that the current provisions have undergone. The Review's draft report is open for submissions until 17 November 2014 and the final report is due by March 2015.

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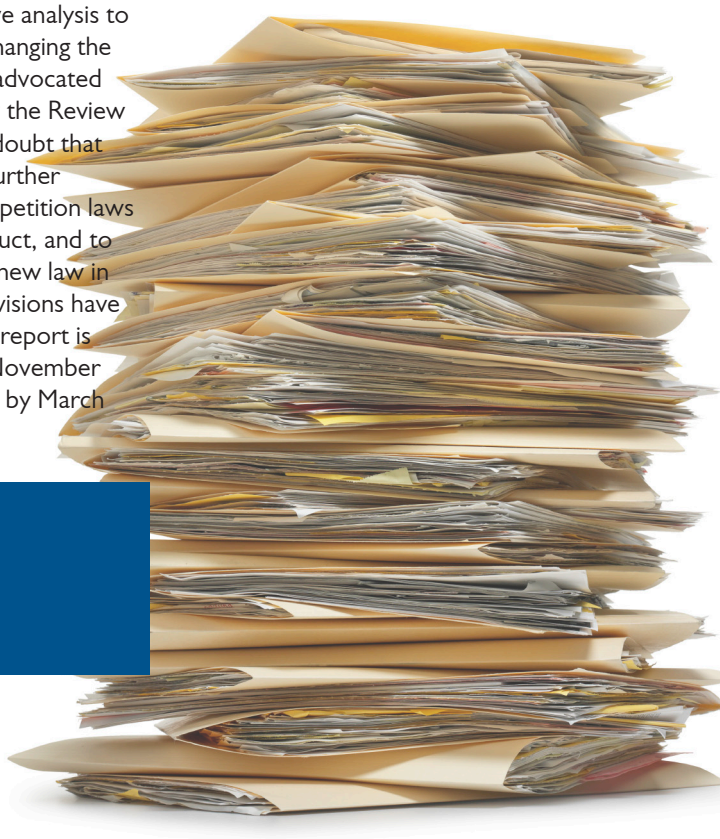

Merger clearance proposals: should process determine outcome?

In the recent MacGen case, the intending acquirer successfully applied to the Australian Competition Tribunal for authorisation after the ACCC announced it would oppose the merger. Subsequently, the ACCC submitted to the Competition Policy Review that the Tribunal should not have jurisdiction unless and until the ACCC has made a determination under the formal authorisation process (which has not to date been used). Partner, George Raitt discusses the Review Panel's draft report, which adopts the ACCC recommendations, and the practical implications of differences of opinion that have emerged between the ACCC and the Tribunal on key principles.

The majority of merger cases are considered under the informal clearance process promulgated by the ACCC. These are, in the first instance, confidential and relatively speedy. Should the ACCC not be convinced by a confidential merger proposal, it may conduct a public inquiry before deciding to oppose or not oppose. Under current law, an intending acquirer then may choose to apply formally to the ACCC for a determination that the merger would not be likely to substantially lessen competition. Due to the inherent improbability of the ACCC changing its mind, this process has not to date been used. The intending acquirer may alternatively elect either to apply to the court for a declaration that the merger is not anti-competitive or to appeal to the Tribunal for a merits review. However, under current law neither the ACCC nor the court has power to undertake a policy consideration whether on balance there are net benefits to the public of the merger proceeding. Only the Tribunal can do that.

Two recent Tribunal decisions reveal a fundamental difference of opinion between the ACCC and the Tribunal as to the principles to be applied in determining public benefits and weighing up any net benefit that may justify the merger. The ACCC is not bound by the Tribunal's approach (unless endorsed by a court as a matter of law) and remains opposed to it. This suggests the likely outcome will differ if the legal process is changed, as recommended by the Review, to require that only the ACCC may make the first instance decision (and that it be permitted to weigh up public benefits). The Review's draft proposal imposes relatively short timeframes on the formal authorisation process, however, as the ACCC would be unlikely to change its mind following any informal review, the process in reality is always headed for appeal to the Tribunal for an independent determination. While there is the prospect of the Tribunal overturning the ACCC on appeal, due to time factors in the context of contested takeovers, it is likely that the first instance decision will finally dispose of the matter. In fact, contested acquisitions are time-sensitive and an announcement of opposition by the ACCC following informal review is often enough to dispose of the matter.

It seems inappropriate for the ACCC to be both advocate and decision-maker under a formal process since, on general principles, any person or body having both roles lacks the independence of mind necessary to critically question its own views.

AGL is the second intending acquirer in recent years to be attracted by the possibility of obtaining authorisation from the Tribunal. The Tribunal's power to authorise an acquisition is stated in the negative, i.e. it must not authorise the acquisition unless it is satisfied that the acquisition would be likely to result in such a benefit to the public that it should be allowed. It is implicit, however, in the 'public benefit' test that the acquisition would fail the 'competition test' and so the Tribunal weighs up anti-competitive detriment against public benefits. AGL argued that the acquisition would not have the likely result of substantially lessening competition. In theory this could have been validated by declaration of the court, however, the Tribunal has the advantage of weighing up public benefits and detriments rather than simply considering the narrow legal question.

The difference of opinion between the ACCC and the Tribunal concerns the weight to be given to merger efficiencies to neutralise perceived anti-competitive detriment. The ACCC Merger Guidelines acknowledge that efficiencies may be 'taken into account', but the ACCC in the *MacGen* case argued that benefits would not be passed on to consumers but would be 'private benefits' enjoyed by AGL in the form of, e.g. lower costs and higher profits. It is unclear whether an Australian court would take these effects into account when determining whether a merger would contravene the competition test, i.e. would be likely to substantially lessen competition in a relevant market. The Tribunal, on the other hand, has power to take such considerations into account. The Tribunal in *Qantas Airways* (2004) was of the view that efficiency gains realised by the merger parties could constitute a public benefit without necessarily being passed on to consumers.

The ACCC disagreed in that case, and still disagreed in *MacGen* (2014), submitting in its report to the Tribunal that efficiency gains that may be made by AGL are not a public benefit but a private benefit. The contrary reasoning accepted by the Tribunal in *Qantas* is that efficiency gains contribute to GDP and should be given 'appropriate weight' in the Tribunal's deliberations. Until ruled on by a court, the ACCC may be unlikely to accept this reasoning, which is fundamental to the purpose and effect of competition laws. The Tribunal in *MacGen* found it unnecessary to decide the issue, given its view of the over-riding public benefits. The Tribunal did, however, stand by the view it had expressed in *Qantas* and commented favourably on efficiency gains which it accepted would be generated by AGL. The Tribunal suggests that these efficiency gains would create a public benefit through 'more vigorous competition', i.e. the logical consequence of this finding, in other contexts, is that efficiency gains counteract alleged anti-competitive effects.

The ACCC's public statements shortly before the Tribunal delivered its decision in the *MacGen* case, and the ACCC's recommendation to the Competition Policy Review that the Tribunal's role in merger authorisations be limited, suggests that the ACCC's position is unchanged. It seems reasonable to predict, therefore, that the change in *process* recommended by the Review is likely to change the *outcome* of merger applications.

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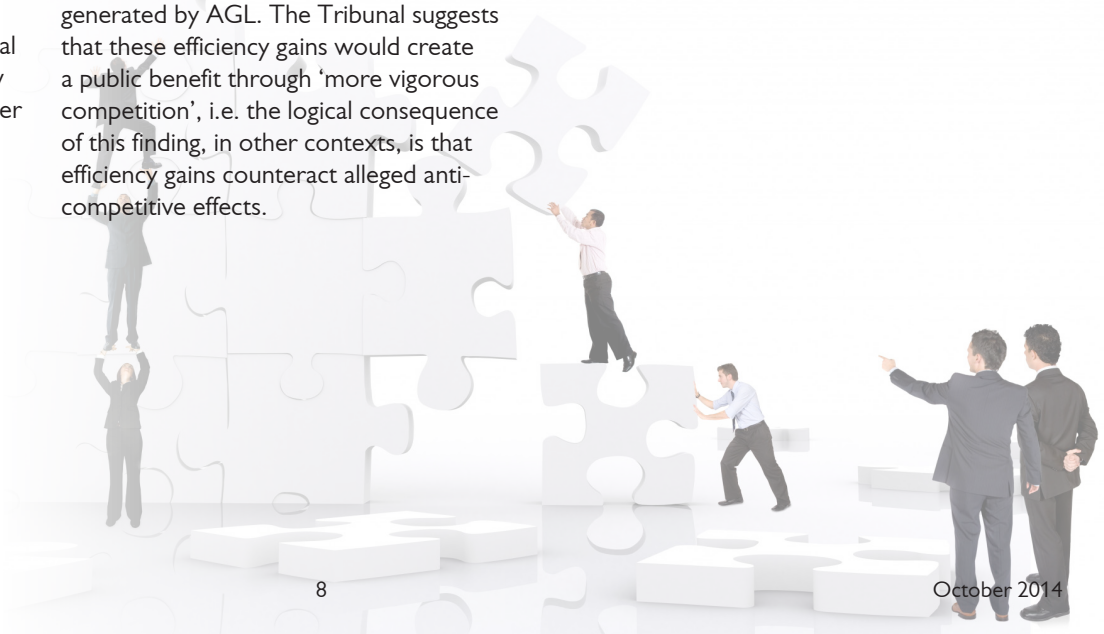

National champions: the global economy and Australian consumers

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The Review's draft report notes the recent debate regarding "national champions". It is said by business groups that competition law is too focussed on competition in the domestic market and does not pay sufficient attention to the benefits of mergers between Australian companies that operate in the global traded goods sector. The Review notes several responses to this criticism. First, many mergers in Australia which generate scale efficiencies may not adversely affect competition because the markets in Australia are subject to import competition. However, this focus on markets and competition in Australia again does not address the desirability of Australian business being able to compete in global markets.

Second, the Review quotes Michael Porter's 1990 classic, Competitive Advantage of Nations, to the effect that the best preparation for overseas competition is exposure to intense domestic competition. This would be valid if the domestic market is large enough to sustain viable businesses. Clearly there is no question of this for the US economy (although the same criticisms of US anti-trust law arose during the 1970s when US businesses felt they were hampered by anti-trust laws in their response to international competitors entering the US market). However, the Australian economy is about half the size of the State of California. Whatever might have been the position in the US up to 1990, it is unlikely to assist the Australian policy debate in 2014-2015.

Experience of that last 25 years in fact indicates that Australian start-up businesses in innovative technologies will not justify the required return on capital by carrying on business in the Australian market, i.e. in order to raise the necessary capital, they must focus on global markets to be viable and to generate the return required to raise capital. Increasingly, in addition, these Australian businesses have recognised that:

- Australian capital markets (including venture capital markets) do not have the depth required to raise necessary capital
- to develop a successful business often requires locating where the customers are, typically in European, US or Asian markets
- to raise capital often requires locating in the markets where investors carry on business, i.e. Europe, US or Asia. Increasing globalisation and increasing focus on high technology products changes the focus from traditional manufactured and traded goods, which may be developed in the domestic market, and from that base may launch into overseas markets, where scale economies are critical.

The traditional traded goods sector is the focus of the Review's analysis of the subject of "national champions" (arising largely from a recent case in point concerning the acquisition of an Australian dairy company by an overseas acquirer after the ACCC opposed a takeover by an Australian would-be acquirer). However, this analysis is not quite so relevant in the "new" global economy of high technology products, where success requires not an understanding of Australian consumers but of overseas consumers and their needs informed by their particular cultural and market issues.

Third, the Review notes that the legislation is concerned with the "economic welfare of Australians, not with citizens of other countries". This statement skates over the central paradox of competition laws: there is a trade-off between the interests of Australians as producers, who must respond to the needs of consumers in their global marketplace to succeed and generate income; and the interests of Australians as consumers, whose needs are satisfied by both Australian and overseas produced goods and services. The Review quotes the Productivity Commission to suggest that "there is no a priori reason why growth in exports or the substitution of domestic production for imported products or services increases (or decreases) public welfare", and that to encourage same may in fact lead to a misallocation of Australia's resources and "ultimately reduce community incomes". This reasoning may well miss the point that in an increasingly global economy the nexus between the welfare of Australian consumers and the allocation of Australia's productive resources becomes more and more tenuous. While the Review's discussion of the "national champions" issue seems to dispose of the concerns of industry, the discussion may well lack the depth necessary to do so convincingly.

One consequence of the continued focus on "markets in Australia" appears to be an odd tilting of the playing field that disadvantages Australian companies in merger cases compared to their global competitors. Taking the recent dairy industry experience, for example, an Australian would-be acquirer having a substantial competitive overlap with the takeover target in Australia may be precluded by our merger law from the acquisition, whereas its overseas competitors in global markets may not be so precluded. The Review states that "allowing mergers to create a national champion may benefit the shareholders of the merged businesses but could diminish the welfare of Australian consumers". This statement seems to reflect the rather narrow views of the ACCC regarding "public benefits" (which have been rejected by the Tribunal – see separate article in this issue regarding the Review's proposed reforms of the merger clearance process).

As the Tribunal pointed out in the Qantas case (2004), increased profits of the merged entity contribute to GDP, and so serve the interests of Australian consumers, i.e. the paramount interest of Australian consumers is to have an income with which to consume. Certainly the differing views playing out in the Review's draft report have the potential to affect the national interest one way or the other.

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