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CORRESPONDENCE

*From **Jill Walker** and **Luke Woodward***

IN her article 'Australia's Merger Policy and the Caltex/Ampol Merger Case' (*Agenda*, Volume 3, Number 3, 1996, pages 305-316), Sandra Navalli suggests that the administration of merger policy by the Australian Competition and Consumer Commission (ACCC) is inappropriate and that its analysis of the potential consequences of the Caltex/Ampol merger was flawed. These suggestions seem to be based on the Industry Commission's submission on the ACCC's Draft Merger Guidelines, and its general report in relation to the petroleum industry, rather than on any independent assessment. A number of points need to be made.

First, Navalli confuses the law with its administration. Section 50 of the Trade Practices Act (the Act) prohibits mergers and acquisitions which substantially lessen competition. This is a consumer welfare standard, not a total welfare or efficiency standard. Some may consider that an efficiency standard is more appropriate, but this is not the law and it would be inappropriate for the ACCC to administer it as if it were. Australia is not alone in adopting a consumer welfare standard for merger law: it is the norm around the world. Adoption of the alternative total welfare standard is not as clearly preferable as might appear. Recent hearings before the Federal Trade Commission (FTC) in the United States indicate the complexity of the issues:[1] for example, whether efficiencies are otherwise achievable, whether efficiencies are real or pecuniary, whether efficiencies are likely to be sustained, and the impact of a lessening of competition on dynamic efficiency generally. Indeed, one submission to the FTC suggested that the Australian law is more advanced than other countries' in its consideration of efficiencies due to the availability of the authorisation provisions and the 'public benefit' test (see Griffin & Sharp, 1996).

Second, Navalli suggests that the legislative factors in s.50(3) are similar to those considered by the Tribunal in determining cases under the 'dominance' test. The reference is to *Re Queensland Co-operative Milling Association Ltd*, but this case was in fact considered under the 'substantial lessening of competition' test during its previous life. In relation to the ACCC's application of the statutory factors in its Merger Guidelines, a more critical review of the Office of Regulation Review's work would have revealed a highly selective and inaccurate reading of the relevant literature in relation to critical concentration ratios. This is discussed further in Anderson et al. (1996).

Third, in relation to the Caltex/Ampol merger, Navalli states that 'How the ACCC applied the five-step approach to this merger is unclear' (p. 309). It is unfor-

[1] See a report by the FTC staff, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Antitrust & Trade Regulation Report Special Supplement, Vol. 70, No. 1765, 6 June 1996.

tunate that Navalli did not read Walker and Woodward's (1996) analysis of the merger and the role of enforceable undertakings in its resolution. She states that 'Few commentators expected that the proposed rationalisation would breach the "substantial lessening of competition" test or that the IC (1994) report confirming the competitiveness of the petroleum industry would apparently be ignored' (p. 309). Any commentator who did not consider such a likelihood could not have looked at the ACCC Merger Guidelines. It was quite clear that the proposed merger exceeded the concentration thresholds and that, at the very least, there would be a strong argument that import competition was not an effective discipline on the market and that barriers to new entry were substantial. Any such merger must run a very high risk of breaching the merger law. In addition, conditions in the industry were such that the proposed merger would increase the likelihood of successful coordinated conduct between the remaining four major players after the merger. It is not sufficient simply to dismiss these factors one by one, as Navalli does. Rather, one must consider an integrated analysis of the likely extent of competition in the market pre- and post-merger. The ACCC did not ignore the IC's report. It was a general report on the industry, not an analysis of the impact of a particular merger on competition. However, some of the market characteristics discussed were relevant to the ACCC's analysis: for example, lack of excess capacity and inelastic demand.

Finally, contrary to what Navalli claims, the ACCC cannot require merger parties to give enforceable undertakings under s.87B of the Act. Undertakings must be offered by the parties. As such, undertakings provide an alternative flexible solution to potentially anti-competitive mergers. In this case, the undertakings offered by the parties allowed them to preserve the efficiency benefits of the merger while maintaining competitive pressures in the market, so ensuring that consumers did not suffer higher prices and that efficiency gains are more likely to be sustained.

References

Anderson, W., T. Grimwade, J. Walker & L. Woodward (1996), 'Merger Misconceptions: The Industry Commission's Paper on the ACCC's Draft Merger Guidelines', *Competition and Consumer Law Journal* 4(2): 128-53.

Griffin, J. & L. Sharp (1996), 'Efficiency Issues in Competition Analysis in Australia, The European Union and the United States', *Antitrust Law Journal* 64: 649-82.

Walker, J. & L. Woodward (1996), 'The Ampol/Caltex Australia Merger: Trade Practices Issues', *Trade Practices Law Journal* 4(1): 21-48.

***Sandra Navalli** responds:*

WALKER and Woodward's first point is that consumer welfare is the aim of s.50 of the Trade Practices Act. This conflicts with the arguments of the Australian Competition and Consumer Commission (ACCC) for strengthening the merger laws. The ACCC relied heavily on Michael Porter's arguments that industry would be the prime beneficiary with the creation of internationally competitive companies through strong domestic competition. Little emphasis was placed on consumer welfare. As well, the then Attorney General, Michael Duffy, said when introducing the amendments to s.50:

> Part IV, which contains the restrictive trade practices provisions, is designed to facilitate and promote competition. This is based on the premise that competition will yield the best allocation of economic resources, the lowest prices to consumers, the highest quality of goods and services and the greatest national progress.[2]

Thus, if competition is a means to achieve a number of goals, the question arises as to why the ACCC has decided to focus mainly on consumer welfare. Arguably, the test in s.50 is vague, and, given the non-exhaustive list of factors in s.50(3), a number of factors could be taken into account. The ACCC does give consideration to efficiency arguments if companies apply for authorisation; but how is this weighed against consumer welfare? Normative arguments to the effect that efficiency (and hence total welfare) should be the goal are relevant.

Second, although *Re Queensland Co-operative Milling Association Ltd* was decided under the 'substantial lessening of competition' test, it is generally regarded as the first Australian case to discuss the factors that were subsequently applied under the dominance test in other cases, and adopted into legislation. The essential point is that these factors have remained the same under both tests and hence do not provide guidance as to how the two tests differ.

Third, my claim that it is unclear how the ACCC applied the five-step approach was based on the information released by the ACCC at the announcement of its merger decision, and was intended to highlight the lack of clear and broad indicators that the business community can rely on. No one is able to foretell whether the ACCC will block a particular merger by applying the guidelines, unless the ACCC indicates to the media its approach to particular industries such as banking. Walker and Woodward say that the ACCC's reasons are spelt out in their article. Does this mean that we must always wait for the ACCC's official reasons to be explained at a later date? They also object to the factor analysis used in my paper; but what they describe as an 'integrated analysis' could also be interpreted as vague reasoning, unsupported by any specific facts.

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[2] Second Reading Speech, Australia, House of Representatives 1992, *Debates*, vol. HR103, p. 2405.

Finally, Walker and Woodward say that the ACCC cannot require parties to give undertakings. Not legally perhaps, but if the ACCC threatens to block the merger, parties have little choice. Legal proceedings are time-consuming and costly. Parties have to satisfy the ACCC in this informal negotiation process. These tactics force the parties to offer undertakings.