

Antitrust Merger policy: Lessons from the Australian Experience

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1.0 Introduction

Mergers and takeovers involve the sale of assets. Like other forms of trade, mergers occur because the willingness to pay for the assets by the buyer exceeds the opportunity cost of the sale to the seller. The gains from trade can derive from two principal sources: an increase in economic efficiency or an increase in monopoly power. 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 realised 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; and Green and Porter 1984) or because of independent behaviour (Cournot 1838; and Cowling and Waterson 1976).

Antitrust merger policy should aim to distinguish between mergers with these two 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. In practice, a particular merger can rarely be placed neatly into one of these two boxes. Real-life mergers have the uncomfortable habit of straddling the two boxes – 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 the question that Maureen Brunt has always urged upon her students: what is going on here? If the merger is clearly all about increasing the monopoly power of the parties, it should be stopped. If there are clear efficiency advantages or if it is not clear which of the two 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 which is advocating interference in the freedom of the market.

This 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.

These reflections lead us to propose that two criteria are necessary for effective antitrust merger policy. 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. Secondly, the process of assessment should be able to be conducted in a way that maintains confidentiality 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 which wish to merge.

2.0 The Proscribed Behaviour

2.1 The Wording of the Section

The principal proscription of mergers in Australia's antitrust law is to be found in s50 of the *Trade Practices Act* (the Act). Its present wording is (in part):

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;

se 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 & Sons (*AMH*), the attempt by Arnotts to acquire the biscuit business of Nabisco Australia (*ARNOTT’S*), 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 led to judgment. The reasons for the lack of litigation under the section will be explored in section 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 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 s47 involving exclusive dealing: the decision of the Full Federal Court in *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd*. In that decision, the Full Federal Court held 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 behaviour than would be the structure of the market without the conduct in question:

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.ⁱⁱ

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 and Defiance Holdings* which has as one of its sub-headings '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 Pty Limited v Bunbury Port Authority*ⁱⁱⁱ

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; (182) 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 *QCMA* and by the Full Federal Court in *Outboard Marine v Hecar* to the primacy of the condition 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) as follows:^{iv}

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 s50 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 s50. In section 1.0 above, we argued that mergers could be motivated either by prospective enhancements in economic efficiency or in prospective increases in monopoly power. The words of the test as set out in s50 make no explicit reference to economic efficiency. So the extent to which argument over economic efficiency would be relevant to a case tried under s50 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*:^v

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

If a merger enhances economic efficiency, that may be relevant to argument under s50 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 s50. Until the courts consider more cases, many questions of this kind will remain unresolved. Certainly, it is not clear whether and in what way efficiency arguments can be considered by the courts under s50. 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 s50 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^{vi}, the High Court (per Gallen J. 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 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; p 515; p 17,246, and further quotation is unnecessary.”

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 Act, only four mergers have been litigated to judgment. Although private parties have the right to issue proceedings for breach of s50, 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 s50. 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 s50 when it was faced with the unwanted attention of Davids Holdings and the Australian Competition and Consumer Commission (the Commission)^{vii} 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.

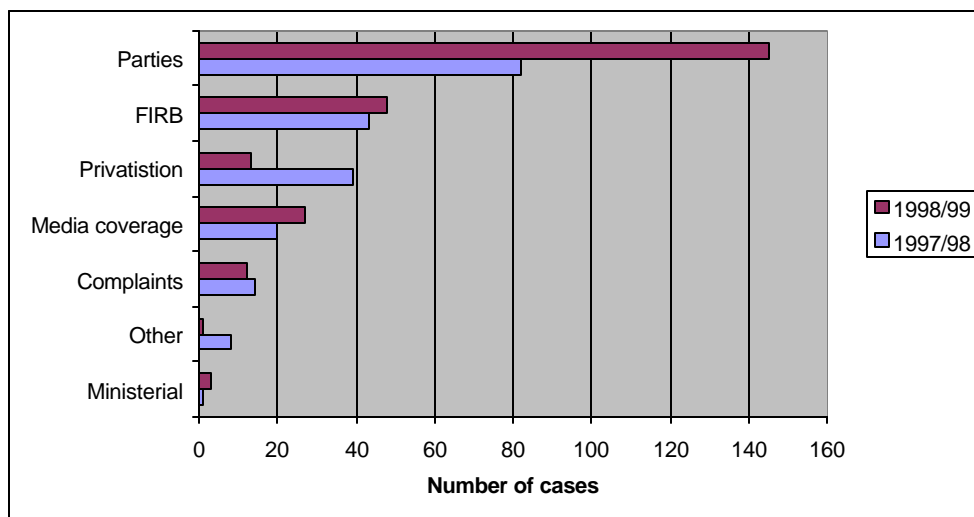
Apart from the possibility of an application for a declaration, the only action a private party can take to obtain an injunction to prevent a merger is to lobby the Commission or the Attorney-General to apply for an injunction. All four mergers that have been litigated to a decision under s50 have involved applications by the Commission or (in the case of *QIW v Davids*) by the Attorney-General for injunctions or orders to divest. In the cases of *AMH* and *Arnotts* 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 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 authorisation (see section 3 below) 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 of compulsory notification. It appears that the Commission gets to hear of all significant mergers prior to their consummation.

From Figure 1, 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.

Figure 14: Merger and acquisition matters referred to the Commission



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 necessary information to enable it to perform its task. However, the parties are prepared to approach the Commission because of the development of the non-statutory 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 anti-competitive 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 being able to use its systems to identify under-performing assets in other banks. If a lengthy court process occurs prior to the consummation of the merger, the problem of the under-performing 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 recognised by the courts. This was the subject of comment by Wilcox J in his decision in *AMH*^{viii}:

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 *Trade Practices Commission v Santos LTD (1992)* ATPR 41-195, Hill J said (at 40,637) 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 *Trade Practices Commission v Rank Commercial LTD (1994)*, Davies J observed:^{ix}

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 Watty^l 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 their offer and sell their 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 that these mergers were not consummated. However, this characterisation may be a distortion. Litigation is expensive and the prospects of victory in complex commercial litigation are always uncertain. An alternative characterisation 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.

3.0 Authorisation

3.1 The System

Authorisation is a process by which the parties to a merger or acquisition may be granted immunity for breaching s50 or s50A of the Act. This immunity is given if the Commission^x forms the view that the merger or acquisition will be of net benefit to the public – s90. In considering net benefits, the Commission can consider efficiencies. So, in contrast to the process of a trial under s50, the process of authorisation explicitly allows for the consideration of efficiencies. Authorisation is initiated by one of the parties to the merger. It is not initiated by the Commission.

An authorisation decision by the Commission can be appealed to the Tribunal.^{xi} A review by the Tribunal is a re-hearing of the matter. Whereas the 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 is a person with business experience.

Once a merger or acquisition has been authorised (by either the Commission or, on appeal, by the Tribunal), parties to the merger or acquisition are granted immunity from breaching s50 so long as the conditions pertaining to the authorisation are not breached.

Section 90 purports to limit the time that the Commission has to determine applications for authorisation. Section 90 (11) states that, if the Commission does not determine an application for authorisation within 30 days from its receipt, the Commission shall be deemed to have granted the application. However, s90 (11A) provides that this period may be extended to 45 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 their application to succeed is unlikely to refuse such a request.)

Section 102 imposes a 60-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 60 days.

Applications for authorisation 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 above, the 'future with and without' test was first formulated explicitly by the Tribunal. This implies that it was first explicitly formulated in the context of an appeal from an authorisation 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 authorisation 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 authorisation 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 authorisation includes, of course, the consideration of economic efficiency. Although the Commission has, on occasions 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 whom they accrue to, should be counted as benefits to the public for the purpose of consideration of an application for authorisation.^{xii}

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? ... we 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.

3.2 Applications for Authorisation 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 authorisation, one might predict that parties would far prefer to apply for authorisation than to risk litigation in the courts. However, their revealed preferences are that they avoid applications for authorisation as much as they avoid the courts. [Table 1](#) shows the number of applications lodged during the

last six years for authorisation of mergers and acquisitions recorded in the public register of the Commission.

Table 11: Applications for authorisations 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 website (www.accc.gov.au).

Table 11 suggests that very few parties apply for authorisation 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 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*. As was noted in section 2 above, immediately prior to this application for authorisation QIW was a party to s50 litigation, when it successfully used the courts to thwart the unwanted advances of Davids Holdings (*QIW v Davids*). The authorisation was an attempt by Davids to clear the way for its acquisition of Composite Buyers Limited. Davids clearly reasoned that, unless the acquisition was authorised, it would run the risk of a private application for divestiture for breach of s50 immediately the acquisition had been consummated. The Commission granted the authorisation; 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 counter-offer are two respects in which the process of authorisation is similar to that of litigation under s50. 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 which has no foundation in the antitrust statute. This process is generally known as the process of informal clearance.

4.0 Informal Clearances

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 process 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 consist 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 Act to notify the Commission of their proposal. However, many do. As shown in [Figure 1](#) above, 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 both a public and 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(s) to explore with the Commission options for changing the proposed acquisition to address the competition concerns. This process enables the Commission to make the party(s) aware of its view of an acquisition and merger before the matter reaches the court.

The informal processes 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 section 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*:

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. (page..)

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 behaviour of the Commission is readily explained: if, for reasons of secrecy, they are unable to make any enquiries 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 enquiries.

The criteria employed in the process of informal clearance, while set out in detail in the *Merger Guidelines*, are the Commission's own interpretation of s50. The process of informal clearance refers to s50 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 s50 should the proposed merger proceed. Accordingly, the Commission must satisfy itself that the merger will not breach s50.

One important feature of the Commission's interpretation of s50 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 s50 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 Guidelines read in part:

5.159 As discussed in paragraphs 5.19-5.20, 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 relevant 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.

5.160 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.

5.161 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.

5.162 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 5.160 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*, 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 authorisation – 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 authorisation 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* (MEG) of the Commissioner had indicated that the effects of an anti-competitive 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 (*The Commissioner of Competition v Superior Propane Inc. and ICG Propane Inc* 2001 FCA 104) makes it clear that this approach is incorrect. Effects on the distribution of wealth were ignored under the approach that the Commissioner had previously adopted. This was, in effect, to disregard some of the possible effects of the lessening of competition that may result from a merger. 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 authorisation 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.

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 party(s) agree to certain conditions or to act in a certain manner;
- indicate it will oppose the merger or acquisition under any conditions.

As shown in ~~Table 2~~~~Table 3~~~~Table 2~~, the majority of matters that reach a final decision by the Commission are not opposed. A range of other proposal are withdrawn before the Commission reached its final view.

Table 232: Outcomes of mergers before the Commission

	<i>Matters decided</i>	<i>Matters not opposed</i>	<i>Matters resolved with conditions</i>	<i>Matters opposed</i>
1993-94	77	71	1	5
1994-95	113	101	5	7
1995-96	117	105	3	9
1996-97	147	140	2	5

1997-98	176	165	6	5
1998-99	185	168	10	7
1999-00	208	199	5	4

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(s) to significantly alter the form of the proposal or to impose conditions on the party(s) 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 party(s) have a number of options:

1. proceed with the proposal and most likely contest the matter or an injunction before the Court;
2. seek authorisation 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 anti-competitive consequences of the merger or acquisition by making undertakings under s87B of the Act; or, finally
5. decide not to proceed with the proposal.

The first and second options follow the statutory processes described in the previous sections. The third and fourth options are informal processes that give the Commission significant discretion. The major difference between these options is whether or not the altered proposal is subject to legally enforceable undertakings.

4.3 s87B Undertakings

Under s87B of the 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 party(s) 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 (post merger) 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 acquisitions 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 s50. 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 6 years, to offer at least 1,000 megalitres of petrol to independents each year on reasonable terms;
- during the first 2 years, to use its best endeavours to sell on reasonable terms 35 retail sites in metropolitan areas with an aggregate volume of 50 megalitres...and so on.

In short, Caltex and Ampol felt that they could only prevent the Commission from initiating proceedings under s50 by offering to sell quite substantial assets by which the Commission could pursue a re-structuring of Australia's wholesaling and retailing of petrol. The Commission has substantial power in its granting of informal clearances.

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 statutory constraints on the processes that the Commission can use following an application for an informal clearance.

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.

Finally, it provides the Commission with significant discretion and bargaining power to extract concession from the parties. These problems create a risk that efficiency-enhancing mergers will be unnecessarily altered or deterred.

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 provides 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 3~~~~Table 5~~~~Table 3~~ points to the popularity of the process of informal clearance compared with authorisation or litigation. It also points to the speed of the process compared with the processes set out in the statute.

Table 353: Duration of matters informally assessed by the Commission

	<i>1997-98</i>	<i>1998-99</i>
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

5.0 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.

The principal suggestions we would offer for reform of Australia’s legislation would be:

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;
3. Require the Commission to publish its reasons as soon as the merger is public.

The key lessons from the Australian experience that might be drawn for other jurisdictions are:

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.

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Endnotes

- At 17,717.
- ⁱⁱ At 43,983.
- ⁱⁱⁱ At 41,267.
- ^{iv} At 96.
- ^v At 51,791-2.
- ^{vi} Clear Communications Limited v Sky Network Television Limited and others (1996), High Court of New Zealand CP.19/96. Judgment of 1 August 1997.
- ^{vii} The Australian Competition and Consumer Commission is the general anti-trust regulator in Australia. In addition to its roles in mergers and acquisitions, the Commission has roles in a range of anti-trust matters including anti-competitive conduct, consumer safeguards and the regulation of access to essential facilities.
- ^{viii} At 49,479.
- ^{ix} At 42,499.
- ^x The Australian Competition and Consumer Commission was known as the Trade Practices Commission until 1995.
- ^{xi} The Australian Competition Tribunal was known as the Trade Practices Tribunal until 1995.
- ^{xii} At 17,242.

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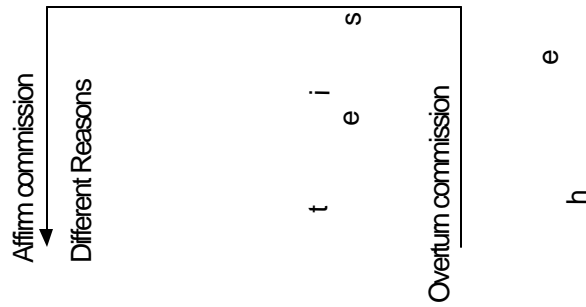
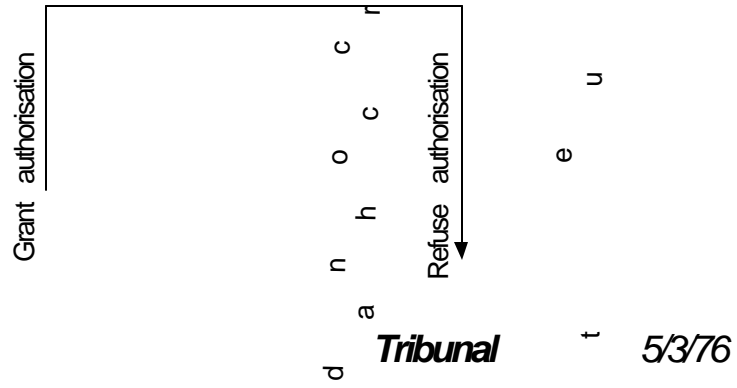
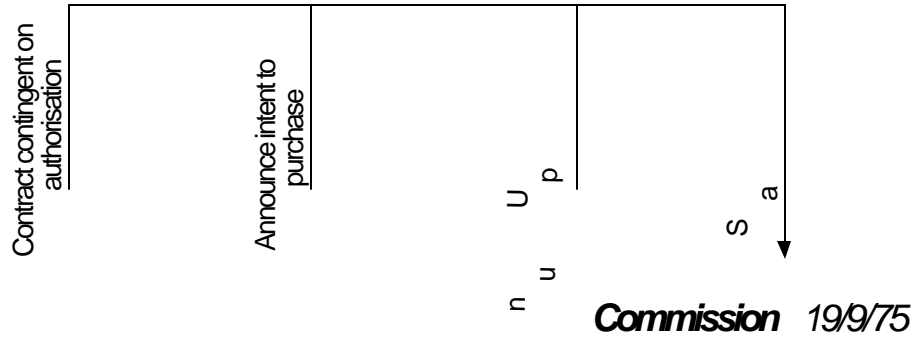
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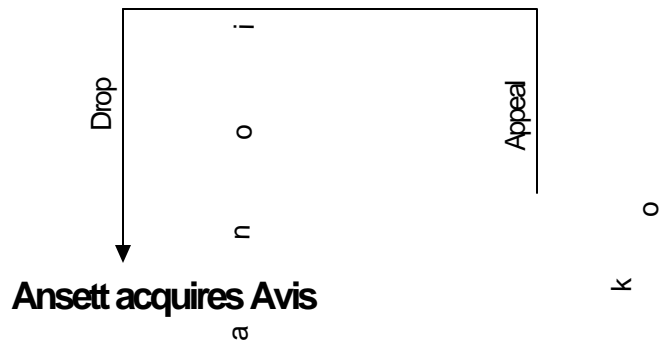
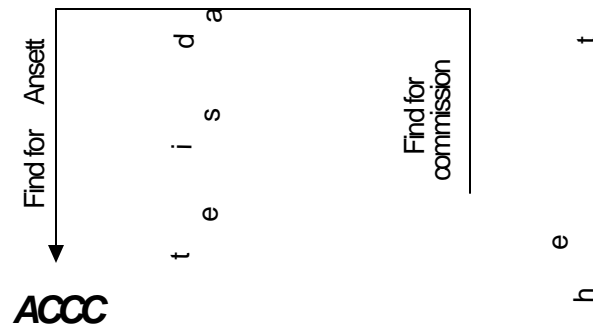
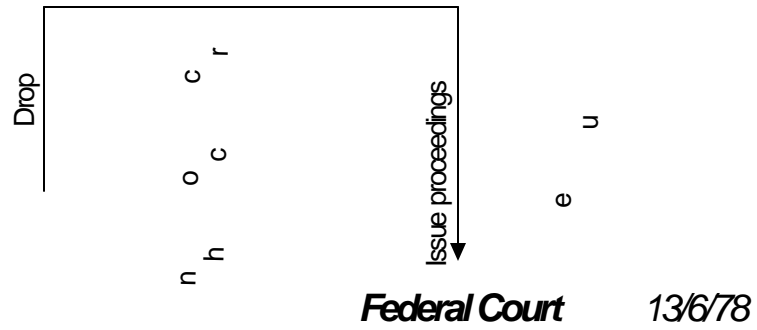
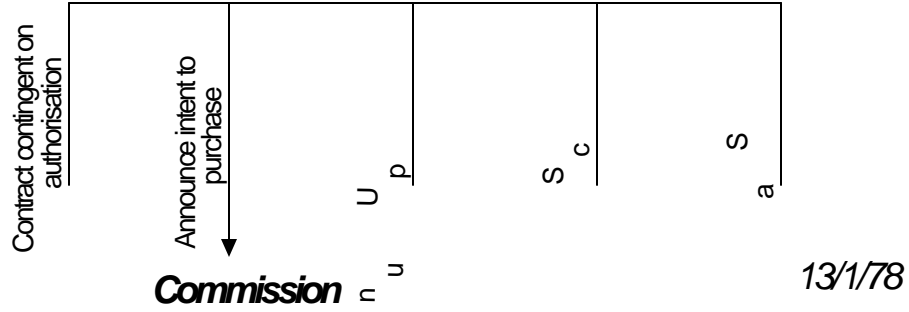


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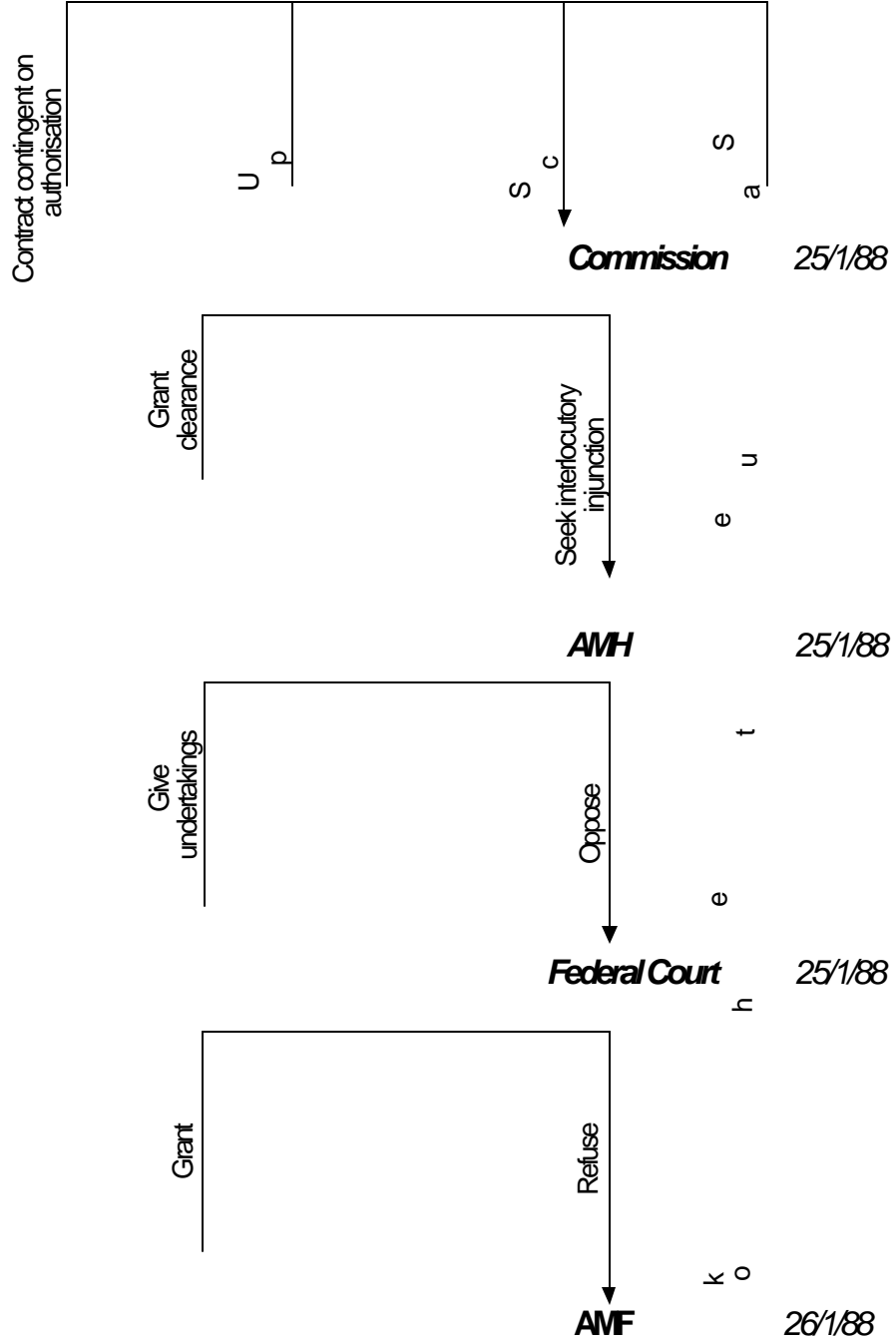


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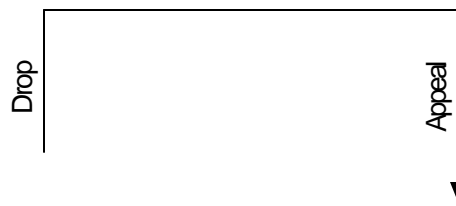


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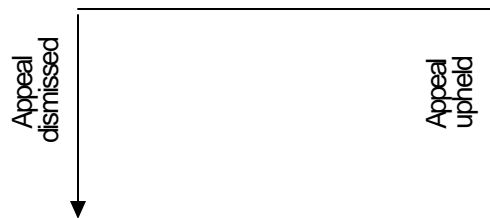


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Full Federal Court

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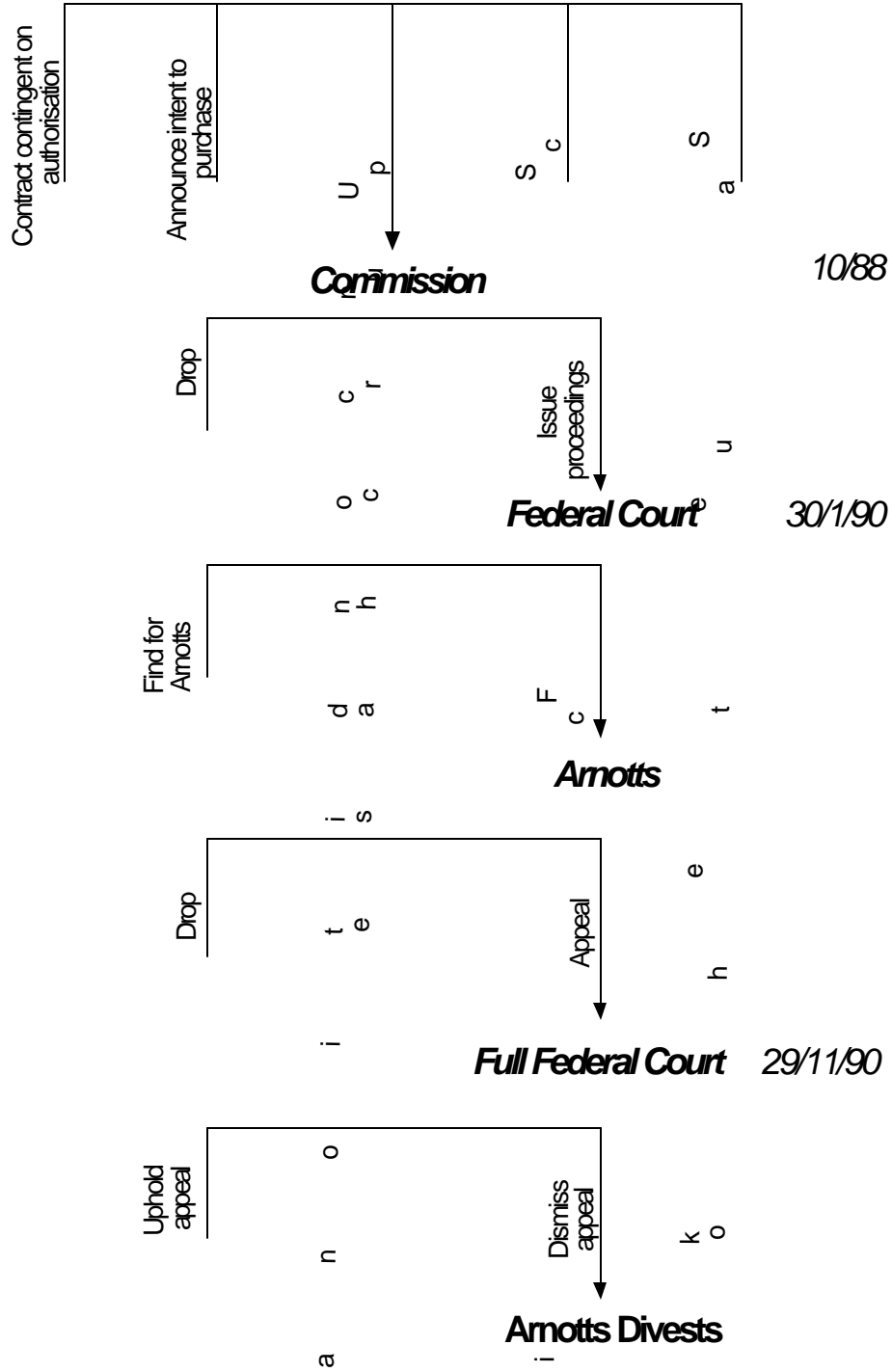
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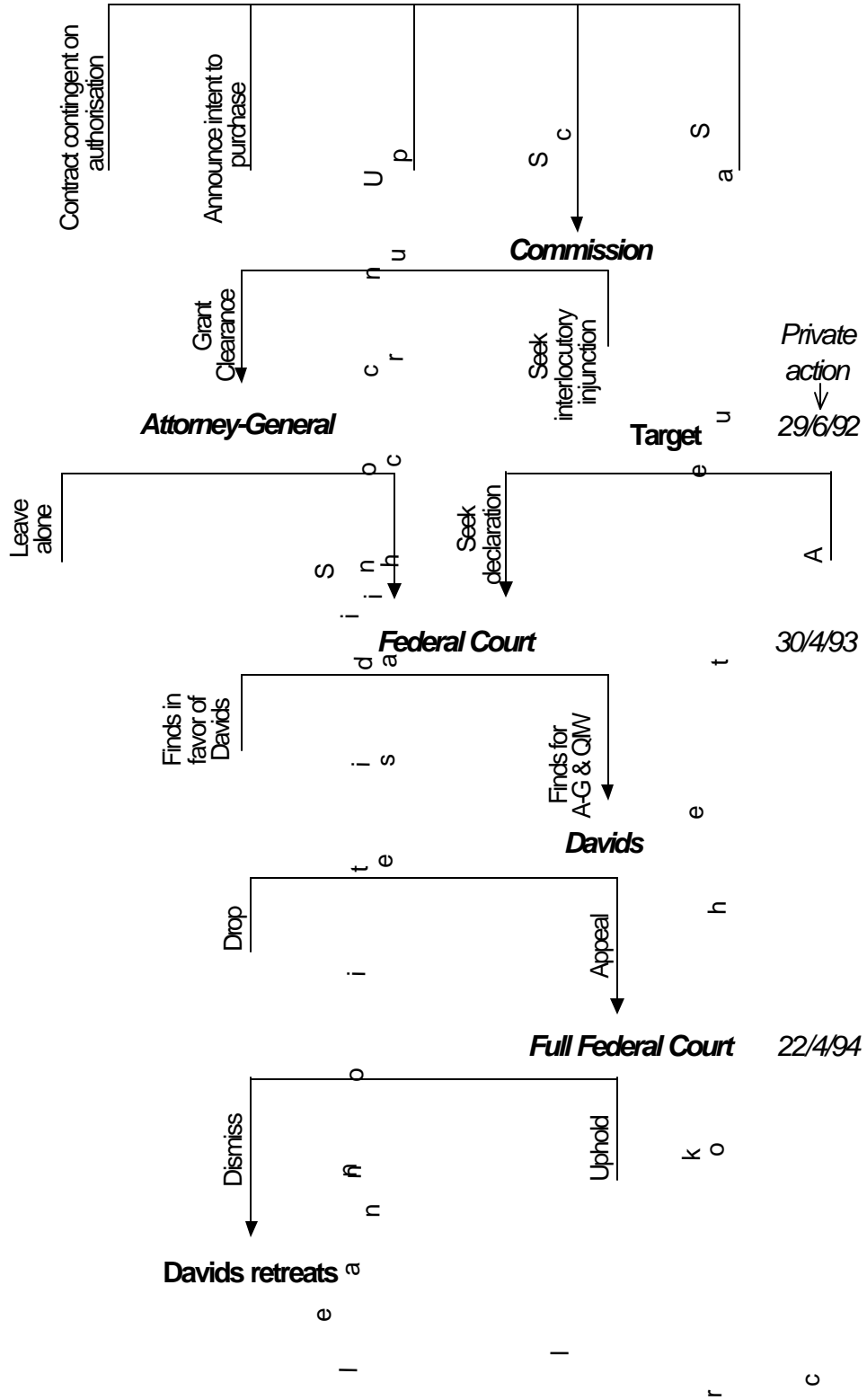
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5. QIW v Davids

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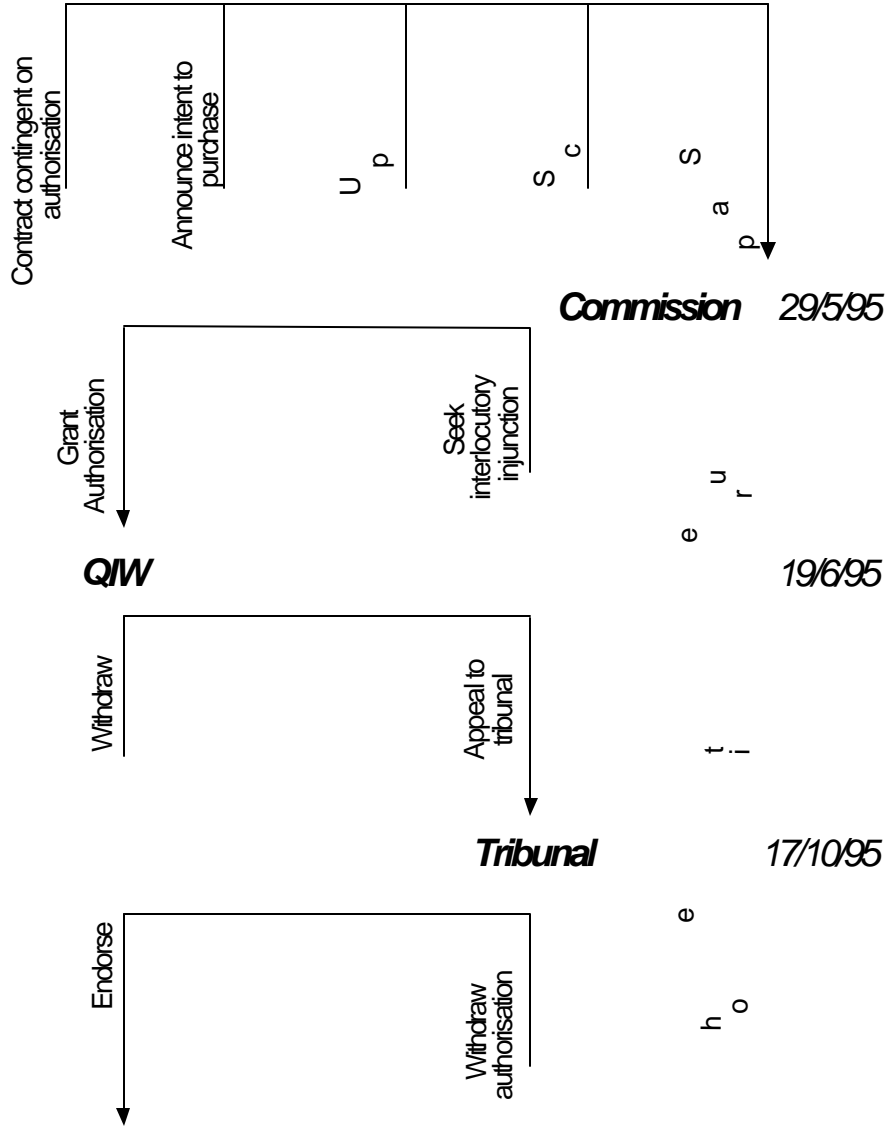


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