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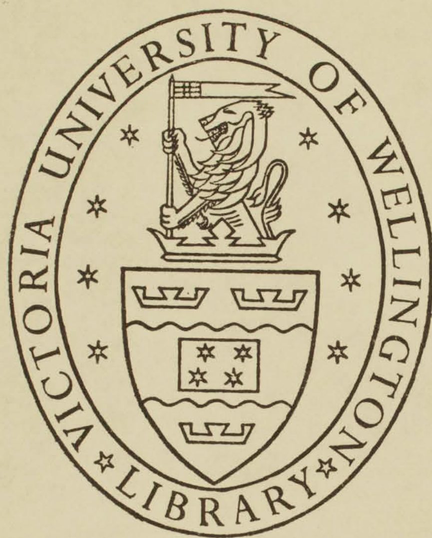
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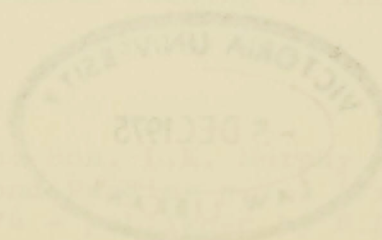
MONOPOLY AND MERGER CONTROL :

A comparative study of the approach taken in Australia and New Zealand.

D. G. DUNBAR.



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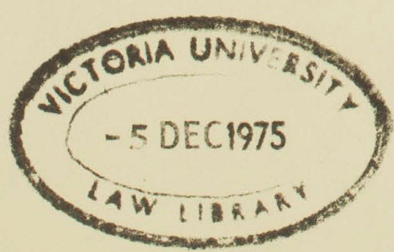

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INTRODUCTION

This topic has been dealt with in three parts.

Part (A) looks at the need for control of monopoly and mergers in modern society, ending with a brief examination of the background to the Australian Trade Practices Act.

Part (B) is concerned with merger control; the first section deals with Australian methods of control, the second part examines regulations in New Zealand.

Finally, Part (C) deals with the complex question of monopoly control and the closely related question of authorization and clearance in Australia, and "the public interest" in New Zealand.

PART A.

WHY THERE IS A NEED FOR CONTROL

The evils of Monopoly and Mergers according to Senator L. Murphy, Q.C. are clear. (1) "Most of them" he said, "are undesirable and have served the interest of the parties engaged in them irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse ... they allow for discriminatory action against small business, exploitation of consumers and feather bedding of industry."

(1) Speech by Senator the Hon. L.K. Murphy Q.C. on Trade Practices Bill, Second Reading p.1-2 (From the 'Parliamentary Debates' 30 July 1974 - published by F.D. Atkinson, Government Printer, Canberra.

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A competitive market is characterised by impersonal market control. Firms in a competitive market are compelled to follow economically feasible lines of trading due to constraints of the market that are imposed upon them. Ultimately continuous downward pressure is exerted on prices, lowering the margin of profit until it is just sufficient to induce entrepreneurs to remain in the market. (2) But in a market dominated by one firm or a small number of firms in which there are high barriers to entry there is no such pressure. Apart from the fear of attracting competitors, through high profit returns there is nothing theoretically to constrain a monopolist or dominant firm from charging a price well in excess of marginal cost or from restricting his output, things which firms in a competitive market cannot do, and thus reaping monopoly profit. Besides the effect on prices and profits there may be other consequences of anti-competitive structure, for example, whenever a firm is large in relation to the industry in which it operates, it has the power to change its own market environment and hence to regulate to some extent the kinds of competition to which it may be subject.

Secondly, where a firm is sheltered by a monopolistic position in a market it has no need to produce novel or innovative goods. The absence or weakening of competition means that there will be little market pressure on the monopolist firm to be as economical and feasible, i.e., to keep down costs. Wasteful costs can be reflected in higher prices just as much as monopoly profits can. But perhaps the most obvious result of a monopoly or near monopoly is that the monopolist can kill competition if

(2) For a fuller discussion see Kaysen and Turner Anti Trust Policy (1959) pp15-16.

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he fixes prices which drive his competitors out of business and leave him in sole control of the market; with nothing to stop him rising prices at will; to the ultimate disadvantage of the consumer.

In conclusion, monopolisation appears to ensure that consumers have less choice in buying, that the monopolist has no pressure to cut costs by efficiency because of a lack of competition, for consumers will depend on the firm decisions, not only as regards prices but also on such matters (3) as the amount and directions of research and development in the relevant industry, the services offered and continuity of supply, with the result of inevitable governmental intervention against monopoly and mergers flowing from a recognition that automatic control once thought to be implicit in laissez-faire competition will fail. Why? Because of the encroachment on the freedom of the market place by bigger and bigger enterprises resulting in the control of the market slipping into the hands of fewer and fewer enabling these enterprises to attain positions of economic dominance in a market which to use the words of Senator Murphy "are susceptible to abuse"(4).

Freedom of competition is accepted in the mainstream of contemporary economic thinking as a highly desirable objective because competitive markets:

(a) Most efficiently allocate resources to the uses for which they are best suited;

(b) Encourage efficiency, progressiveness and innovation in the use of resources; and

(3) ibid
(4) Speech by Senator the Hon. L.K. Murphy Q.C. on Trade Practices Bill, Second Reading p.1-2 (From the 'Parliamentary Debates' 30 July 1974 - published by F.D. Atkinson, Government Printer, Canberra.

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(c) Contributes to the equitable redistribution of wealth among consumers and factors of production. (5)

Some Comments on the Approach taken in the Australian T.P.A.

The prohibition contained in Part IV (Restrictive Trade Practices Act) (for our purposes Section 46 and Section 50) are based in a large part on the United States Sherman and Clayton Acts. The Sherman Act of 1890 aimed at restraint of trade and monopolies, the Clayton Act 1914 (but subsequently amended) regulates several kinds of anti-competitive transactions and mergers. If the Australian Act met with the same degree of success as the American legislation has, what was said by the U.S. S.C. in North Pacific Rail Co v. US (6) sums up well the long term results of such legislation. The Court said: "The Sherman Act was ... aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest price, the highest quality and the greatest material progress while at the same time providing an environment conclusive to the preservation of our democratic, political and social institutions." This is perhaps going a little too far in that there is nothing in the Sherman Act provisions to ensure that it operates to produce optimum economic results. On the contrary, the Courts have consistently refused to take economic consequences as the criterion of right and wrong - even first class economic performance is no defence once an intent to monopolize is established.

(5) See for example - Report of the Australian Attorney-General's National Committee to Study the Anti-Trust Law (1955)pp317-319.
- Kaysen and Turner, Anti-Trust Policy pp 11-19.
- H. Blake and W. Jones, In Defence of Anti Trust (1965) 65 Colum. L. Rev. 377 at 381-384.
- Brunt, Legislation in Search of an Objective (1965) 41 Econ. Rec. 357 at pp 363-364.
especially V. Korah Monopolies and restrictive practices at p.20-28.

(6) 356 US 1 4 (1958)

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Likewise it can be inferred from the Australian Act that its purpose is to maintain and foster competition. And it must ensure that competition is not eliminated or reduced by monopoly, (and its main method of development, mergers,) in short the objective is to create conditions that ensure there are enough participants in a given field so viable competition can exist. In view of these desirable results it might seem feasible to simply crack down on monopoly as it appears and stamp it out like a disease. But this method has its problems. The mere acquisition of a monopoly position may be blameless - it may be the result of successful inovation; or the outcome of the type of efficient competitiveness that anti-monopoly is designed to encourage.

The United States has avoided this problem by taking "intent to monopolize" as a yard stick. Monopoly power as such is no offence; it is either to exploit monopoly power or to build and maintain it. The offence lies in conduct which reveals that a firm likes to have, and means to keep, its power.

Yet as R. Baxt and M. Brunt point out (7) "the Act is Australian and not American." For Part IV (dealing with restrictive Trade Practices) together with Part VI (enforcement and remedies) must always be read in conjunction with Part VII (on authorizations and clearance). For unlike the American approach, anti-competitive mergers prohibited by the language of Section 50, are offered the possibility of protection by way of prior authorization. The Australian Act attempts to combine a general legislative prohibition enforced by the Court with an administrative procedure for authorization of non-competitive conduct in certain areas.

(7) Writing in Australian Business Law Review Vol. 2 No. 1 (April 1974)

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One of the main advantages of the Australian approach will be the establishment of specific prohibitions and presumptions in relation to monopolies and mergers which will be known with reasonable certainty and will be to a considerable extent self-enforcing.

As A.D. Neale wrote (8) there are two advantages about clear exceptionless provisions:

(a) They ensure that the law will be enforced by the lawyers advising businessmen so the bulk of the enforcement problem is overcome this way;

(b) These clear and easily understood prohibitions are fair to the business community which knows where it stands and what are the limits which must not be overstepped. No economic inquiry or administrative tribunal can be expected to provide a basis for general rules of this kind.

PART B

THE AUSTRALIAN METHOD OF MERGER CONTROL

The aim of Section 50 is to control the following types of mergers.

Section 50 Mergers - (Types of Merger.)

(a) The evils of Horizontal Mergers (where one company acquires all or part of the stock or assets of another company offering the same goods in the same market) are obvious - the removal of a competitor and thus a lessening of overall competition with the possible result in inefficiency and the opportunity for market domination by one firm.

(8) A.D. Neale, Anti Trust Laws of the United States (2nd Ed. C.U.P. 1970)

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(b) Vertical Mergers occur where one company takes over a present customer, or supplier. The effects are a possible foreclosure of competitors from a market or access to suppliers with the result that the integrated firm can impose a "supply squeeze" or a "price squeeze" on non-integrated suppliers.

(c) Conglomerate Mergers - which are of three kinds.

(i) market extension mergers, the result of a merger between companies selling the same product in two different geographic markets.

(ii) product extension mergers - between companies selling related or complementary products (e.g. the purchase by a soap powder manufacturer of a company manufacturing liquid bleach).

(iii) and pure conglomerate mergers (9).

Section 50 on the face of it, applies to all three types of merger. But Section 50 does not apply to acquisition by a person or entity which is not a corporation as defined in Section 4, and acquisition by an individual would not come within Section 50. The proposed Clause 60 in the Commerce Bill definitely applies to the three types of merger outlined above - the opening words read: "subject to Section 60A of this Act written notice of every proposed merger or takeover shall be given to the examiner." (Clause 60A lists the types of merger to which Clause 60 does not apply.)

Also the entity whose shares or assets are acquired must under Section 50 "be a body corporate" and there is no extension to include individuals.

(9) based on classification of J.R. Levine writing in The Australian Law Journal Vol 47 p.679 at p.707

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A merger is prohibited by Section 50 if its likely effect will be to substantially lessen competition in a market. The clearance procedure in Section 94 will enable parties to a proposed merger to obtain the Commission's opinion on the application of Section 50 to their merger. Where a marger is covered by Section 50 it will be possible for the parties to seek an authorization from the Commission to proceed with their merger if it is justified (these provisions contained in Part VII will be examined in more detail later). Generally speaking, an authorization depends on proof that the proposed course of action will result in a substantial benefit to the public, being a benefit that would not otherwise be available. It is interesting at this point to note that New Zealand has adopted a similar approach as can be seen from examining Clause 60 of the Commerce Bill. For in determining whether any proposed merger or takeover is likely to be contrary to the public interest, as in Australia, regard is to be had to any economic effects which any proposed merger or takeover are likely to have on the well-being of New Zealand, which would not take place in the absence of the merger.

The difference between a "clearance" and an "authorization" is ~~that~~ as Senator Murphy has pointed out (10) ~~is~~ that a clearance results in the Act being treated as inapplicable, while the latter assumes the Act to be applicable but grants a dispensation." To put it another way, the effect of an authorization is to permit persons to engage in conduct otherwise prohibited, a clearance protects persons from enforcement action.

(10) Speech by Senator the Hon. L.K. Murphy Q.C. on Trade Practices Bill, Second Reading at p.3 paragraphs 8-10 (From the 'Parliamentary Debates' 30 July 1974 - published by F.D. Atkinson, Government Printer, Canberra.)

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What constitutes a merger within Section 50.

If the Australian Trade Practices Commission follows the approach of the American Court, Section 50 will cover the acquisitions of intangible property such as patents, trade marks, or contract rights of the acquisition substantially lessening competition. (11)

Secondly, the words "directly or indirectly" would serve to catch an acquisition effected through the medium of some other entity. It is clear that the Australian Act covers takeovers by means of shares purchased on the Stock Exchange, as for example in the recent case of Vavasseurs bid for N.M.A.

Thirdly, the method of one company purchasing the assets of another company leaving the company whose assets have been purchased in the form of a hollow shell is clearly within Section 50.

But it is far from clear whether notification of this type of merger need be given under Clause 60 of the New Zealand Commerce Bill. Clause 60 reads "Subject to Section 60A of this Act written notice of every proposed merger or takeover shall be given" - valid arguments could be made out based in the word every for and against its application to such takeovers. Clause 59 1(a) defines a merger as a transaction which results in any two or more enterprises ceasing to be distinct enterprises. The problem is that such a takeover would be the result of a series of share-purchasing transactions from many separate shareholders in the Company. Clause 59 1(a) merely talks of "a transaction which results in .....".

(11) See US v Lever Bros Co 216 F.Supp (C.S.D.N.Y.) 1963

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But takeovers by means of share purchasing on the stock exchange would require notification if Clause 59 1(a) is to be read in conjunction with Clause 59 1(b) which defines the word enterprise as used in Clause 59 1(a). Two or more enterprises are to be treated as ceasing to be distinct if ... they are brought by any means <u>whatsoever</u> under common ownership or control.

The phrase in Clause 60A Subsection (2) "The Minister (of Trade and Industry) may from time to time by notice in the Gazette specify any class of merger or takeover as a class ... to which Section 60 shall apply," is of more help, for there is nothing to stop the Minister making use of the power conferred on him by this Sub-section to require notice to be given pursuant to Section 60 of these types of takeovers. Secondly, it would be possible for the Minister under Clause 60B to control takeovers via these methods by requiring (as he is empowered to do) the Commission to conduct an enquiry into the merger or takeover and its likely effect on the public interest. This provision authorises such a course of action where Clause 60 does <u>not</u> apply (should this be ever established) provided that:

(a) The Minister considers that the merger or takeover may be contrary to the public interest; and

(b) 24 months has not elapsed since the merger.

(These two criteria are the main limitations to the use of this provision.)

Upon the Commission finding such a takeover, using these methods, to be contrary to the public interest the Minister may, irrespective of whether the takeover has resulted in a monopoly or partial monopoly, make an order in Council under Clause 56 (2) - one such result that can follow from such an order is the requiring of its dissolution.

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As mentioned, the Australian legislation has controlled takeovers effected by these methods with the use of clear unequivocal language in Section 50 which provides that a corporation shall not acquire directly or indirectly any share in the capital, or any assets of a body corporate, whereas in New Zealand the effect is likely to have the result of substantially lessening competition. We, in New Zealand, await judicial interpretation for the final answers.

Criticism of Section 50

Two principal criticisms can be levelled against Section 50. First it lays down no opportunity for the establishment of guidelines to determine whether a merger has anti-competitive effects.

Mergers provide opportunities for firm's to grow, diversify and achieve economies in production and distribution, all of which have pro-competitive effects. The advantages of mergers are countered by the present uncertainty in the Australian legislation which can preclude this development. Merger guidelines which have been suggested by one writer (12) similar to those issued by the Department of Justice in the United States would help to remove the uncertainty in the application of the merger law. J. Levine suggests that rather than specify guidelines there should be general policy statements in the legislation, and the administrative authorities should then issue clear and specific merger guidelines delineating enforcement policies. The writer considers that of more help would be regular publication of clearances, authorizations, and rejections, with reasons for the decisions.

(12) Jane R. Levine "Aspects of the Trade Practices Bill" 1973 47 A.L.J. 679 at p.704

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Secondly, Section 50 does not provide for any "failing" company defence; this is also a criticism that can be made of the corresponding New Zealand legislation and this question is worthy of examination by both Governments. Whether such a defence will be read in by the Court remains to be seen.

This defence, which requires the proof that substantial and unsuccessful efforts were made to sell the failing company to a non-competitor, was first recognized in the United States in the International Shoe case (13). Today this defence is only available if the company's resources are so depleted that a reorganization is not possible, and if it is established that the acquiring company is the only available purchaser.

But the main strength of Section 50 lies in attacking questionable mergers before completion by requiring pre-merger notification. For the American experience has shown that it is very difficult, costly and time consuming (14) to undo a merger, and during the course of such litigation there is nothing in the present Act to stop the acquiring firm from stripping the acquired firm of its key assets and management personnel rendering divestiture, if ordered, of the acquired firm as a viable entity unlikely. Finally, even if divestiture is achieved, the American experience demonstrates (15) that it is unlikely to prove a successful remedy.

(13) (1930) 280 US P291 a horizontal acquisition was upheld on the grounds that one of the merging firms was "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of business failure."

(14) See Nader Study Group: The Closed Enterprise System (1971) p.657 at p.709 for examples.

(15) See Elzinga "The Antimerger Law" (1964) American Journal of Law of Econ. p.43.
Breit and Elzinga "Anti Trust Penalties and Attitudes Towards Risk: An economic analysis" (1973) 86 Harv. L. Rev. p.693 at pp695-696.

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The Approach taken to the Control of Mergers and Takeovers in New Zealand:

The Australian legislation only condemns anti-competitive mergers, a similar approach has been adopted in New Zealand; a merger will be allowed so long as it is not contrary to the public interest. Mergers and takeovers have often in the past been seen as the royal road to monopoly and as such, distrusted; nevertheless mergers play an important place in the modern business world. The benefits that often result from successful mergers include more efficient use of resources through the rationalization of production facilities and marketing arrangements; a saving of man power; facilities for improved research and development, resulting in the introduction of new techniques and know how, with the possibility of lower prices for the consumer as a result of the cost economies achieved. V. Korah sums up the advantages well when he wrote (16) "The fear of a possible takeover bid is one of the most effective inducements to the managers of a small firm continually to make the best use of its resources. A contested bid is likely to increase efficiency, whether or not it is successful, for no one is likely to make a bid unless he thinks he can make more profit from the existing assets than can the present managers." Secondly it must be remembered that New Zealand is a country with a very small internal market, and in many instances (e.g. Watties and production of tinned foodstuffs) resources are put to better use if competition is limited. It is very much cheaper to make some products in large plants that are in constant operation than in many separate factories for the demand is not sufficient

(16) Valentine Korah "Monopolies a restrictive practice" 1968 Pengiun Books at p.69.

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to warrant the expenditure on more than one or two plants big enough to achieve full economies of scale. Watties is a good example of toleration by Parliament of limitations on competition: it wants firms to rationalize and combine in units that are larger than necessary to achieve all the economies that are possible at the plant level, since big firms can afford to spend large sums on research and development. The sole supplier of a product enjoys a securer market than firms in more competitive industries and earns higher profits. The supplier is free to invest more in long term projects of research and development which, if successful, will benefit the consumer. Secondly, the ability of New Zealand industry to compete on export markets against large overseas giants demands the development of such monopolies.

As mentioned, the aim of both the Australian and New Zealand legislation is to ensure that the many advantages of mergers occur to the public without the many detriments that so often flow from a series of mergers and takeovers.

But a merger can have precisely the wrong effect if executed solely to add the profit of a smaller company to those of the larger, or to remove a competitor, or to provide assets which can be stripped off and sold for a valid profit. Also, many of the undesirable features that flow from a monopoly can also result from a merger or series of mergers. These possible detriments may result in, as we have seen, undue concentration of economic power in the form of monopoly, market dominance or sheer agglomeration of resources, resulting in the establishment of a point of no return in an industry so that the emergence of future competitors is effectively prohibited. The possibility of charging unduly high prices in relation to cost and quality certainly exists as does the possibility of inadequate research

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and development if there is no such incentive for it to take place.

In short, the aim of the Australian legislation and the New Zealand Commerce Bill (as it now stands) is to ensure that mergers are completed for the common good, and a regulatory method has been established to do this.

Scheme of the Commerce Bill: Clause 59, 60, 60A-B, 61, 65A, 66 and 67.

Clause 59 defines "a merger or takeover: as a transaction which "results in any two or more enterprises ceasing to be distinct enterprises."

The method of regulation appears to be quite simple and effective. Clause 60 provides that notification shall be given to the Examiner of any proposed merger except those scheduled by Clause 60A.

Clause 60A sets out those mergers to which Clause 60 does not apply. They include:

- completely alien companies;
- professional partnerships whose fees are fixed by legislation;
- where the value of the assets of all the enterprises involved is less than $1,000,000 or where the assets of one of the companies involved is less than $100,000; and finally
- where one of the parties is declared an overseas person with no other significant business interest in New Zealand, and of course, where the merger is exempted.

The Examiner then (under Clause 60) informs the Minister furnishing him with a provisional report indicating whether the merger is considered by the Examiner to be in the public interest or not.

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The Minister has 35 days to consent, or if his provisional view is that the merger is contrary to the "public interest" require the Commission to inquire into it to determine whether it is contrary to the public interest as defined in Clause 62 (supra.). If consent is given within 35 days or no notice is published ordering an enquiry, the merger may go forward within twelve months of that date.

Clause 61 governs the inquiry by the Commission, which must report its findings to the Minister within two months (the parties have a right to a copy).

Finally under Clause 65 the Minister upon receiving the Commission's report, consents to the merger, or if it is found by the Commission to be against the public interest, prohibits it or imposes conditions. The Minister can invite a conference with the parties concerned to see if an agreement can be reached.

Clause 60B provides that where Clause 60 does not apply the Minister may still order an enquiry by the Commission if he considers it contrary to the public benefit, but he can't exercise this power if two months have passed since the merger. Under Sub-section (4) where the Commission finds that the merger or takeover is contrary to the public interest the Minister may, irrespective of whether the merger or takeover has resulted in any monopoly or partial monopoly, may make an order in council under Clause 56 requiring among other things:

1. a person to limit the area of his business;
2. dispose of his business in a certain area;

or under Clause 65 (1)(b) prohibit the proposed merger or declare it to be unlawful and order its dissolution.

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Clause 65A provides that it is an offence against the Act to be a party to a merger to which Clause 60 applies and no notice is given, it is an offence to breach any of the conditions imposed by the Minister. Clause 66 outlines the penalties for a breach of Clause 60 and 65A.

Criticisms

Clause 60A provides that "Section 60 shall not apply in respect of any merger if ... the assets of the enterprise involved are less than $1,000,000." But no allowance is made for liabilities which create a totally artificial situation. Secondly, this figure requires close examination as was pointed out by the Stock Exchange Association in the context of present rates of inflation.(17) They pointed out that annual rates of inflation of 10 to 15% mean that (on the 15% rate) 1974 currency will buy about five times the assets that the same amount of 1985 currency will buy. No provision is made for this very real problem.

How mere size alone can ever be contrary to the public interest is beyond the writer, for it is only the way that the power represented by that size is used that can be bad, and needs control. Much could be learned by the legislature by examining the E.E.C. approach of taking turnover rather than assets value as the critical determinant as to the need for notification of transactions leading to a "concentration" (the E.E.C. equivalent of a merger). For by using turnover one can look at the potential effect of the merger (rather than just speculating at the possible percentage of the market that group could control based on its assets value or size) in a positive and unmistaking way.

(17) Submission on the Commerce Bill

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For turnover shows the ability to control a market by providing the Commission with actual numbers of units or goods the new group will produce.

The E.E.C. Commission has decided that there will be no concentration (a concentration occurs where an undertaking has acquired the power to hinder effective competition in the Common Market) where the goods or services produced by the concentration do not account in any member state for more than 25% of the turnover in identical goods or services which due to their price or characteristics may be regarded as similar by the consumer.

A second criticism is the problem of the considerable time involved in an application for consent.

The same can be said of the Australian procedure for obtaining an authorization or clearance but the length of time involved is considerably shorter, for example Section 95 dealing with Clearances of Mergers provides that the Commission has 30 days after receiving notice of a proposed merger, to determine whether it will substantially lessen competition and if no notice of the decision is received by the parties within 30 days their proposal is assumed to have been approved of.

The time taken has been cut back considerably, but business opportunities do not wait. There is a 35 day period given to the examiner after notice of a proposed merger is given for consideration of the application. If unconditional consent is <u>not</u> given, a further period of up to four months is occupied by an inquiry, and the Minister has a further one month in which to make the final decision - a total of over <u>six</u> months.

Only time will tell whether this length of time involved in obtaining consent proves to be an inhibiting factor for many beneficial mergers.

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The realities of this problem can be illustrated by a memo circulated to stockholders of the New Zealand Refrigerating Co, from the Southland Frozen Meat Co. It pointed out that S.F.M.'s offer of March 14th 1975 (which provided for acceptance by N.Z.R. stockholders by 30th April 1975) was conditional on the consent of the Minister of Agriculture and Fisheries under Section 73 of the Meat Act 1964 which provides that consent of the Minister is required for the acquiring of an interest in an export slaughter-house. The Minister's consent had not been given by this later date and due to the delay of over nine weeks Southland Frozen Meat found itself forced to withdraw its offer made on the 14th March. (18)

Thirdly, initiation is left to the Minister, a feature absent from the Australian. It is the writer's view that for the following reasons this is the more desirable approach. There is some danger that political motivation might prevent cases coming before the Commission, but this is to a certain degree balanced by the fact that there must be a sorting house and it is felt that the department should have this job for it acts as the public representative. Anyway, if we are to be guided by events in the United Kingdom, the mergers which deserve reporting will be few and obvious to the public at large.

PART C
MONOPOLY: METHOD OF REGULATION IN AUSTRALIA

This is achieved by one main section: Section 46 of the Trade Practices Act 1974.

(18) Southland Frozen Meat on the 16th June made a new offer and were faced with the expense of repeating the process again.

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Section 46 makes it clear that it does not prevent normal competition by enterprises that are big by taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or harm its competitors.

The New Zealand legislature has adopted a similar approach of requiring the Commission to report to the Minister on the public benefit (or lack of it) of any monopoly or partial monopoly that is referred to that body by the Minister. The word partial monopoly in the writer's opinion, will lead to difficulties, and a better phrase would be 'near monopoly' which more accurately describes the situation outlined in the definition of 'partial monopoly' in Clause 2.

Section 46 prevents a corporation "in a position to substantially control a market for goods or services" from engaging in conduct "to eliminate or harm a competitor, prevent entry of a person into the market, or deter or prevent a person from engaging in competitive behaviour in that market or in another market.

The Test in Section 46 for Monopolization

A good example of the kind of conduct Section 46 is aimed at was given by Senator Murphy of a person in a position to control a market, using his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply them to a competitor of him, excluding him from competing effectively.

The standard or test of monopolization is that of "substantial control" which allows for something less than absolute monopoly power. The same can be said of Clause 55

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of the Commerce Bill which empowers the Minister to require the Commission to conduct an enquiry and report to him as to any circumstances tending to bring about a complete or partial monopoly, or whether there exists in New Zealand or any part of New Zealand any complete or partial monopoly. (This last phrase substantially increases the ambit of coverage of this clause.)

This was a wise move on the part of both legislatures for instances of pure monopoly are rare and it is possible for a firm to affect the functioning of a market or to create its own competitive environment with less than absolute monopoly power. A similar approach was adopted in the E.E.C. via Article 86 of the Rome Treaty (preventing "abusive exploitation of a dominant position in the Common Market by one or more enterprises) defining dominant positions as the ability of a firm to behave over a period of time in a different manner than a firm in a workably competitive market would behave if it faced the same cost and demand conditions. (19).

In Continental Can it was held "undertakings are in a dominant position when they have the power to behave independently, which puts them in a position to act without taking into account their competitors, purchasers or suppliers. That is the position when, because of their share of the market combined with the availability of technical knowledge, raw materials or capital, they have the power to determine prices or to control production or distribution for a significant part of the product in question. This power does not necessarily have to derive from an absolute domination ... but it is enough that they be strong enough as a whole to ensure to those undertakings an overall independence of behaviour.

(19) (1972) Common Market Law Review 11 at p.27.

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Coverage of Section 46

Jane R. Levine (20) noted that the offence of monopolization can have two quite distinct aspects. On the one hand it may be concerned with abusive conduct, i.e. with preventing a firm with market power from using its strength to deter or destroy competition. Or monopoly may be concerned with market structure since the mere existance of a monopoly may be enough to cause the market to behave in an anti-competitive fashion as outlined earlier.

Section 46 only covers the former aspect.

Section 46 states a corporation ~~in a faction~~ ... shall not take advantage of the power in relation to that market it has by virtue of being in that position - to act in such a way as to achieve the prescribed results outlined in Section 46 (1) (a) - (c).

No attempt is made to define the type of conduct prohibited but certainly the practices forbidden by Sections 45, 47-50 and such unfair practices as coercive refusals to deal, predatory pricing, discriminatory treatment of customers and consciously depriving competitors of sources of supply, will probably be prohibited.

Section 46 could also be read so as to cover "legitimate" conduct such as conscious expansion into a new market opportunity, even the maintenance of low prices might be suspect for by consciously maintaining low prices a monopolist will successfully eliminate competitors. In short the problem is to maintain the fine line between honest conduct which should be encouraged and exclusionary conduct which should be prevented. The famous Alcoa case is an example (21) (See Appendix A).

(20) Aspects of Trade Practices Bill (1973) 47 A.L.J. 679 at p.690-701

(21) US v Aluminium Co. of America 148 F 2nd 416 2. Cir. 1945.

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Finally a number of criticisms can be made of Section 46 and this cuts back the scope of the section compared to Section 2 of the Sherman Act which encompasses three additional sorts of offence - the acquisition of monopoly power with intent, the attempted or unsuccessful acquisition of monopoly power and combinations/conspiracies to "monopolize" in this sense.

R. Baxt and M. Brunt (22) have posed a number of questions, in relation to Section 46 (1) (a) which will need to be resolved. Does Section 46 (1) (a) mean that discount houses, if they are dominant firms, are obliged to refrain from entering into shopping areas? or that supermarkets enjoying economies of scale should not price low? or that the dominant firm in an industry must so conduct itself as to establish a protective umbrella for any fringe firms that choose to exist?

Secondly as pointed out by Jane R. Levine (23) those who have already achieved.monopoly positions relying on the very practices now condemned are protected by the Act to the extent that they do not henceforth engage in prohibited conduct.

PART VII - Authorizations and Clearances

In this part of the Act provision is made for optional clearances on the basis of the absence of the likelihood of any effect of substantial lessening of competition (Section 92(2)) and for authorization by reference to a similar test of "substantial benefit to the public" Section 90 (5). As mentioned previously an application for clearance is essentially a request for clarification of the anti-competitive standing of some proposed conduct. An application for authorization is a request for a "public interest" determination.

(21) Supra note 5 at p.22.

(22) Supra note 20 at p.709.

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Clearances (Mergers)

Clearance is available for mergers only (Section 3 (a)) but not for "monopolization" as defined in Section 46 (Section 46 (4) (b)). Once a clearance has been applied for by a corporation Section 94 provides that the Commission may within 30 days "give notice in writing to the corporation stating whether or not the Commission considers that the proposed acquisition would be likely to have the effect of substantially lessening competition in a market for goods or services".

If the Commission gives no notice within 30 days the merger is automatically cleared (Section 93 (3)). It should also be noted that there is no provision for extending the 30 days, even by agreement.

At the outset it must be acknowledged that the great advantage of a clearance is that of certainty beforehand, but a number of criticisms can be made against the clearance provisions as they now stand.

A clearance once granted, gives protection for all time. Unlike an authorization, a clearance is final and unconditional, and as Prof. R. Baxt and M. Brunt point out, on the other hand an authorization can be made with or without conditions, limited or unlimited as to time; and subject to revocation on grounds of false or misleading information, non-compliance of conditions, or of a material change or circumstances.

As mentioned the main advantage of a clearance is that of certainty, but is it rather no more than a hollow shell? The test to be applied by the Commission in granting a clearance is that it shall not grant a clearance if it considers that "an effect ... may be substantially to lessen competition or to tend to result in a person being in a position substantially to control a market for goods or services." No further guidance is offered

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as to the meaning of the standard it is to employ. There is no provision for publication of reasons for decisions, so no guidance will be offered to the business community as to what criteria it has employed.

Finally, with the granting of an order capable of such far-reaching consequences will not the Commission be most wary of granting a clearance to a merger of any significance?

<u>Authorizations</u> (Sections 88-91)

The Commission may, upon application by a corporation, grant an authorization to the corporation to make an acquisition of shares or assets that might otherwise contravene Section 50.

In the case of an application for an authorization the Commission is required to apply a different set of criteria from that applied by the Court in determining whether an offence has been committed. Section 90 (5) sets out a "public interest test".

The grant of an authorization thus depends on proof of a substantial benefit to the public being a benefit that would not otherwise be available.

Simple as it may sound, it is particularly difficult in the case of a merger to demonstrate future benefits and even more difficult to demonstrate that this benefit would not otherwise be available.

In seeking to demonstrate that a merger will produce efficiencies ultimately benefitting the public the Commission could look at this question on the basis of reasonable probabilities rather than positive certainties, for if the benefits did not occur, the Commission could revoke the authorization on the grounds of a "subsequent material change of circumstances". (Section 91 (4) (b).)

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As mentioned, the more difficult task is to demonstrate that this benefit would not otherwise be available and probably the Commission will interpret this requirement as meaning nothing more than requiring proof that the claimed benefit could not practicably be obtained by methods less restrictive of competition, than those proposed. But despite these possible areas of difficulty there is at least one advantage of the authorization procedure as it now stands, that of certainty. The publication of reasons for decisions will establish guidelines for businesses - the clarification of what is lawful and unlawful, and at its best it will ensure clarity of thought, fairness and consistency between cases.

<u>GENERAL COMMENTS ON: THE COMMERCE BILL Sections 55-58 (Monopoly)</u>

As with the Australian Act, the Bill as it now stands does not begin assuming that size is bad, for

(a) Clause 55 requires that the existence of a monopoly be shown; and

(b) that it be shown to be against the public interest in terms of Clause 62, i.e. in deciding this question, regard shall be had to the provisions of Clause 17" and any economic or other effects which any such monopoly ... is likely to have ... which would not take place in the absence of the monopoly.

In short the Commission is asked to decide much the same thing as is the Commission of the Australian legislation, whether a company is in a position substantially to control a market or the supply of any goods or services.

But, as previously stated, the test for the actual offence of monopolization in Australia is whether the company is actively exploiting its position with intent to achieve the prohibited

results as outlined in Section 46 (1) (a) - (c) of that Act, while the test in New Zealand is whether the situation benefits the public of New Zealand.

As with the Australian legislation, the Commerce Bill as it now stands has moved away from a quantative (established when an arbitrary percentage of the market is reached) to a qualitative definition of monopoly (e.g. from 1/3 market in the old Australian Act) to being in a position to control a market of any goods or services.

But the Commerce Bill as it now stands has one main advantage over the Australian Act, for left untouched in Australia are positions of market dominance that have been achieved during the Australian laissez-fair period of trade practice regulation. Those who have already achieved monopoly positions, in part by relying on the very practices now condemned, are protected by the Act to the extent that they do not continue to engage in prohibited conduct. Is it enough for the purposes of this type of legislation to allow a monopoly as long as it does nothing to increase its power? In the writer's opinion the answer must be no, for the public must bear the costs of higher prices, reduced output, inefficiencies, and lack of innovation so often reflected in a monopoly situation. Also left untouched by the Australian legislation as it now stands are the existing oligopolies - a small number of firms dominating an industry with high barriers to entry may approximate the conduct of a monopolist. As D. Turner points out "Both situations are characterised by an absence of vigorous price competition, wider price/cost margins than would exist under effective competition, protection of inefficient firms and a consequent misallocation of economic resources."

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The New Zealand answer of allowing monopoly while they can prove public benefit, something which will be no easy task, and of keeping control over the monopoly by vigilant re-examination ensures the reverse will occur, for managerial skills, and research are encouraged by allowing natural growth in an enterprise resulting in lower prices for the consumer.

Method of Regulation adopted in Clauses 55-58.

Clause 55

The Minister of Trade and Industry may require the Commission to conduct an enquiry into monopolies, partial monopolies or oligopolies, and report to him whether there exist: in New Zealand or in any part of New Zealand any of the above, and secondly any circumstances tending to any of these, and under Section 55 (1) (b) require a decision as to the public benefit of such monopoly once shown to exist.

Clause 56

Outlines the action the Governor-General in Council may take on the recommendation of the Minister following an enquiry under Clause 55. It should be noted they are very wide and far reaching ranging from requiring a person "to restrict or limit his business to a certain area" to requiring a person to take such action as the Governor General thinks fit.

A stark contrast to the Australian approach of allowing situations of market dominance and control to exist so long as the dominant firm(s) refrains from engaging in certain prohibited conduct.

Clause 57

Allows the Minister to exercise other actions, authorised by Clause 56 (1) for the purposes of that Clause.

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Clause 58

Finally Clause 58 makes it an offence for any person to "contravene or fail to comply with any order in council made under Section 56 or by the Minister under Section 57." Fines are imposed though no prosecution may be begun without the Minister's consent.

As the Bill now stands it is sumbitted there is one glaring weekness - leaving the word monopoly as an undefined term in the Bill. Surely in a Bill which requires a qualitative test to be used some indication should be given of the factors to be used and taken into account and of the appropriate weight to be given to them. There are questions of economic analysis, and of opinion as to the effect on competition to be answered, more aid should be given to the Commission in finding them. It is suggested that a non-exhaustive list be prepared of criteria as in the case of determining the public benefit, outlined in Clause 17. Yet both partial monopoly and oligopoly are defined. As mentioned the definition of partial monopoly is a poor one, for it does not cover successfully the area it was intended to cover and by reason of the ambiguity serves only to confuse the issue.

The definition of Oligopoly is general but this may be to its advantage, for the definition may include combinations who by agreement cover the market. The phrase "small number of enterprises" must be general to cover all situations since relativity is crucial in this area. But some difficulty might be found in the definition of 'market' itself. Is this market to be both regional and national? and is the market to be judged in terms of a product. See for example the Cellophane Case (23)

(23) 351 US. 377

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which highlights the problems the United States have experienced. In that case the issue was should the market be judged in terms of bottles rather than glass or in packaging rather than bottles.

Secondly, Clause 62 (Public Interest) merely states that in determining whether the existence of any complete or partial monopoly ... or any proposed merger or takeover is likely to be contrary to the public interest regard shall be had not only to the provisions of Section 17 (which lists the proven detriments resulting from the above practices) "... but also to any economic or other effects which any such monopoly or merger is likely to have on the well-being of New Zealand and which would not take place in the absence of monopoly." No such list of the results of such practices which the Government considers to be in the public interest exists.

For this provision is one of the key clauses to the successful control of monopolies and mergers, for it provides an escape route which depends upon proof of "economic effects by the applicant which would not take place in the absence of the monopoly" at present only the detriments are listed, but not the potential benefits. Such a list could be along the line of those in the United Kingdom which include the following benefits:

(a) economics of scale,

(b) more efficient use of resources through the rationalization of production facilities and marketing arrangements,

(c) a saving of manpower,

(d) facilities for increased export and the opening up of new markets; and allied to this

(e) facilities for reduction of imports;

(f) introduction of new techniques and know how, and improved facilities forimproved research and development.

(g) greater range of products for the consumer and possible

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lower prices for the consumer due to the cost economies achieved.

CONCLUSION

The advantages of the Commerce Bill are best appreciated by highlighting the weaknesses of the Australian legislation. Those firms which have reached and achieved monopoly positions by relying on the practices now condemned are protected by the Australian Act to the extent that they do not continue to engage in such conduct. It is quite possible that this may effectively foreclose the development of future competition and for the time being at least, the Act's failure to attack firms in such a dominant positions means that it is the public who must bear the costs of higher prices and the closely related vices of reduced output and lack of innovation that history shows are so often characteristic of a monopoly situation.

The same cannot be said of the Commerce Bill for Clause 55 empowers the Minister to attack these undesirable results, by requiring the Commission to conduct an enquiry at anytime as to the existence of any monopoly, partial monopoly or oligopoly.

Secondly the offence of monopolization in Australia depends on whether the company is actively exploiting its position with intent. There are grave difficulties associated with emasculating a large enterprise by requiring it to do nothing to increase its share of the market. This will encourage a stagnant market and inefficient production. Is it enough for the purposes of this type of legislation to allow a monopoly as long as it does nothing to increase its power? The writer thinks not. The dangers to the market associated with merely having reached such a position are as serious as those associated with increasing anti-competitiveness. The New Zealand method of

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regulation adopts a similar approach in that the Commission is asked to decide much the same thing as the Commission of the Australian legislation: whether a company is in a position to substantially control a market or the supply of any goods or services. But the test for the actual offence of monopolization is different, and does not involve the question whether the Company is actively exploiting its position but rather as to whether the situation benefits the public of New Zealand. This approach of allowing monopoly if public benefit is proven overcomes the above mentioned difficulties of the Australian method of regulation; and ensures managerial and productive skills are encouraged by allowing natural growth of enterprises while at the same time the profits will be distributed to the nation as a whole through lower prices or increased exports. In short the New Zealand legislation leaves no room for a company to rest on its laurels or established market power.

Concerning the control of mergers, the Australian legislation only condemns anti-competitive mergers. The weakness of its approach is that mergers usually have some less welcomed aspects which may include loss of jobs and employment in a region - a common result of rationalization. Size does not always ensure the best allocation and most efficient use of resources: for the smaller business unit when threatened by an unwelcome merger is forced to utilize its resources away from production to fight it.

In New Zealand, the public interest test as outlined in Clause 67 enables the Commission and ultimately the Minister to weigh up all benefits and determinants of a proposed merger before authorizing its go-ahead.

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APPENDIX I

Alcoa until 1909 was a lawful and passive beneficiary of a monopoly in the aluminium ingot field. After that it progressively strengthened its market position by meeting every new market opportunity for the use of aluminium.

U.S. S.C. decided that the expansion was conscious and provided evidence of an intent to monopolise.

"... It was not inevitable that it should always anticipate increases in demand for ingots and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insisted that it never excluded competitors; but we think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization having the advantage of experience, trade connections and the elite of personnel ... Alcoa meant to keep and did keep that complete and exclusive hold upon the ingot market with which it started. That was to monopolise that market however innocently it otherwise proceeded."

145 F. 2d 416 2.Cir at pg 431, 432.

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