Commerce Amendment Act 1983 - necessary procedural change for mergers and takeovers

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The Commerce Amendment Act 1983 has provided new procedures for investigation and inquiry into mergers and takeovers which may be contrary to the public interest. These changes have been in response to concern for matters such as time-delay, and the constraints on obtaining a determination of the Commerce Commission. Most of the problems have been due to the inadequacy of the statutory procedures, and the informal methods which have arisen to overcome this. This article considers these problems and the reasons for them, using the insights gained from a survey questionnaire sent to merger and takeover participants during 1983.

I. INTRODUCTION

In 1976 the Commerce Act was amended[1] to set up a new regime for the investigation and inquiry into mergers and takeovers, and in particular Third Schedule mergers and takeovers which require consent before they can proceed. The Minister was replaced by the Commerce Commission as the decision-making authority, with the Examiner of Commercial Practices being given the power to consent to proposals he considered not to be contrary to the public interest. The procedures of the Act have however proved to be inadequate because of the time-delay, expense, and unwanted publicity involved for the participants in pursuing a determination from the Commission, or in using the statutory conciliation procedure. Participants have been reluctant to contest the opinion of the Examiner, which meant that the power to refuse consent, vested by the Act in the Commission, had effectively rested with the Examiner. This has also resulted in very little opportunity for public scrutiny, for the Examiner's reasons for giving or refusing consent, and most assurances[2] given by participants to those consents, have not been made public. The precise nature and extent of these problems are investigated in this article.

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1 The Commerce Amendment Act 1976.

2 Only formal conditions were required to be gazetted. See s. 69(1) of the unamended Act.

To this end the author has sought the opinions and experiences of those generally involved in the process — the Examiner, representatives from consumer and employee groups, and has surveyed by means of a questionnaire the participants in those mergers or takeovers consented to by the Examiner in the July 1982 - July 1983 year. From these inquiries it was evident that there was need to streamline the process, by identifying as early as possible those proposals requring deeper investigation. There was also need to make the Commission more accessible, and to enable participants to seek a determination of the Commission without the necessity of a full public hearing. These were procedural solutions, called for by the substantial problems which had arisen out of defective procedure.

The Competition Bill, formulated late in 1982, included an answer to these problems, but went beyond procedural reform. This Bill, which died before reaching the legislative chamber, was to be a complete redesign of New Zealand's competition laws, in line with the approach taken in the Trade Practices Act of Australia. As well as extending the role of the Commission by giving it both the investigative and decision-making roles, a procedural change which would address the problems above, it would have changed the pragmatic policy of New Zealand competition law by introducing a presumption for competition, regardless of other economic and social considerations.[3] The Act which was finally introduced was the Commerce Amendment Act 1983[4]; it made no substantive changes to public interest policy and was directed purely at the procedural problems outlined above.

In order to illustrate the reasons for the inadequacies in statutory procedure, and the problems arising from these, the statutory procedure prior to the 1983 amendment is briefly outlined, and the points at which divergence occurred explained. This has involved an analysis of the actual flow of cases through the process and the experience of participants as ascertained from the survey questionnaire. With a recognition of the exact nature of the problems faced, the solution sought in the 1983 Amendment Act is then considered.

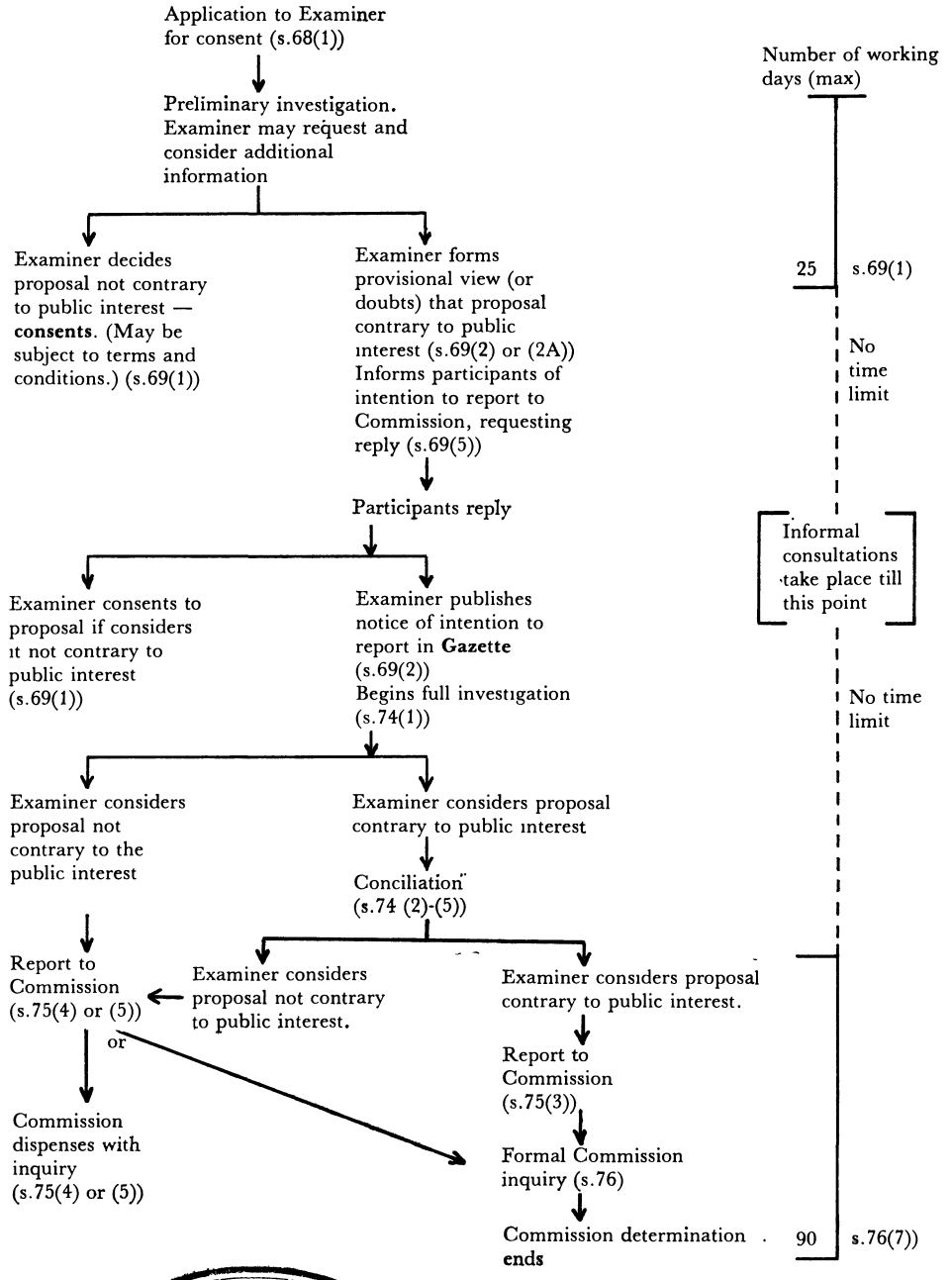
II. PROCEDURE FOR CONSENT TO THIRD SCHEDULE MERGERS AND TAKEOVERS PRIOR TO THE 1983 AMENDMENT

The diagram which follows sets out the statutory procedures for investigation and inquiry into Third Schedule mergers and takeovers as they existed before 1 April 1984.

3 The pragmatism of the Commerce Act lies in the provisions for balancing the various listed public benefits and detriments (of which desire for competition is one), but with no pre-determined weighting given to any. The size of the New Zealand market may make a monopoly or oligopoly acceptable in some situations, or the concentration of an industry may be necessary in New Zealand in order to export competitively overseas. To exchange this pragmatism for a more rigid adherence to the competition principle would be to change the whole policy base of the current legislation. Public interest criteria are listed in ss. 21(1) and 80, and general guidelines in s. 2A.

4 This Act is the subject of an article by van Roy and McLuskie, in The Accountants' Journal, March 1984, 69.

THIRD SCHEDULE MERGERS AND TAKEOVERS — PROCEDURE PRIOR TO THE 1983 AMENDMENT



Over 99 per cent[5] of applications for consent have been resolved within the period specified in section 69 — five weeks or more. This was before an intention to report to the Commission would be gazetted by the Examiner and therefore before a full investigation was required.[6] At that stage the Examiner need only have formed a provisional view. There were no statutory requirements for him to state the reasons for his view — even if he decided to gazette his intention to report to the Commission and request the participants to make representations in reply.[7] It is probable that in practice most participants were being adequately informed of these reasons.[8] However, when it is important to focus swiftly on the areas of concern, as is the case in merger and takeover investigations, there should be a duty to fully inform the participants at the earliest possible stage.

Where the formal conciliation procedures of section 74 were utilised, the Examiner would not only have conducted a full investigation, but would also have written to the participants setting out the reasons for his opinion.[9] Agreements reached in conciliation had always to be reported to the Commission, which decided whether a formal hearing would be held or dispensed with. However, the formal conciliation procedures had been used no more than three times at the date of the survey,[10] and only two proposals had been before the Commission for a decision.[11] It appears that the pressure of time-delay, cost and unwanted publicity involved in a full public inquiry[12] had discouraged the use of the formal statutory procedure, and moved the point of conciliation into the period of five weeks (or more) which the Examiner has for consent. In so doing it had moved the

5 Of the 776 applications for consent dealt with at the date of the survey (July 1983), the Examiner consented to 732.

6 As at July 1983, out of the 776 proposals dealt with by the Examiner, only 5 had been subject of a gazetted notice. Seventeen of the others were withdrawn after the Examiner notified the participants of his intention to report, but before this intention could be gazetted.

7 Ricketts and Williams have suggested that "such a conciliation procedure currently has little merit as the Examiner is not required to state in the notice calling for representations the reasons for his preliminary view". "Mergers and Takeovers Under the Commerce Act 1975" (paper presented at the Law Society Conference 1981).

8 Evidence from the survey tends to support this view.

9 Although in trade practices cases these written statements are often no more than a bare listing of the parts of s. 21(1) that the Examiner considers are at issue. See the Examiner's reports on the practices of F. Flipp Ltd., Spurway Cooper, or the N.Z. Stock and Station Agents Association. Further explanation was often given through discussions or further correspondence.

10 *L. D. Nathan & Co. Ltd. and Ballins Industries Ltd.*, application to take over *A. A. Corban & Sons Ltd.* (May 1977) (*Gazette* ref. 1441/1977); *Fletcher Holdings Ltd.*, application to purchase the total shareholding in *Carter Holt Holdings Ltd.* (May 1980) (*Gazette* ref. 1645/1980); and *Ballins Industries Ltd.*, application to take over the wholesale liquor interests of *Dalgety NZ Ltd.*, and the total shareholding in *Philips and Pike Ltd.* (July 1981) (*Gazette* ref. 1992/1981).

11 *Re the Proposed Takeover by L. D. Nathan & Co. Ltd. of McKenzies (NZ) Ltd.* (1981) 2 N.Z.A.R. 321, Commission Decision Nos. 42 and 42A; and *Re the Proposed Takeover by L. D. Nathan & Co. Ltd. and Ballins Industries Ltd. of A. A. Corban & Sons Ltd.*, Commission Decision No. 14.

12 Although s. 77(3) enabled the Commission to conduct the whole or any part of its inquiry in private this provision had not been used.

effective control of Third Schedule mergers or takeovers from the Commission to the Examiner.

When this control was moved from the Minister through the 1976 Amendment Act, the Tarrant Committee had intended the decision-making authority to be the Commission — to ensure the continuity of consistent judgments and increase the powers and obligations of the Commission relative to those of the Examiner.[13] The members of the Commission are chosen for their expertise or experience in commercial or legal matters,[14] are obliged to conduct inquiries according to the rules of natural justice, and are open to public scrutiny through their public hearings and published reasoned decisions. The Examiner on the other hand is a career officer with the Department of Trade and Industry, and although all incumbents have brought a degree of relevant experience to the post,[15] there is no special requirement for experience and knowledge in the area of competition or trade practices law. The decisions are administrative and made entirely behind closed doors.[16] Also he appears to have no obligation in his investigations to comply with the rules of natural justice.[17]

Two other points at which there has been frequent departure from the statutory procedure are the consultations with the Examiner initiated by participants prior to making application for consent, to ensure their proposals would conform to the public interest as defined in the legislation,[18] and the acceptance by the Examiner of informal assurances (which were not gazetted) rather than formal terms or conditions (which were briefly gazetted) when giving consent to a proposal.[19] Information concerning the use of these procedures was sought in the survey and is discussed in the section which follows.

III. THE SURVEY

In August 1983 most participants[20] in mergers or takeovers consented to by the Examiner during the year July 1982 - July 1983 were sent a questionnaire

13 Report of the Working Party to the Minister of Trade and Industry on the Commerce Act 1975 (March 1976), paras 21 and 19.

14 Section 3(6) and (2).

15 For example in price control matters.

16 Collinge "Call for Review of N.Z. Mergers", *The Auckland Star,* Auckland, New Zealand, 11 June 1983.

17 Even the lesser duty to act fairly, at least in trade practices cases, has been narrowly prescribed by Quilliam J. in accordance with the statutory duty of the Examiner (see *F. Flipp Ltd.* v. *Soutar Super Meats Ltd.* (Unreported, High Court, A.233/81), pp. 24-28). This is probably because the judge's view of the Examiner is that he "is not to be regarded as a person who makes any binding decisions but one whose function, in the end, is only that of a party to proceedings" (p. 13). As the Examiner has no formal power to refuse consent to mergers and takeovers, the same duty would probably have applied.

18 This growing practice was noted in *The Report of the Department of Trade and Industry for the year ended 31 March 1980,* New Zealand, Parliament, House of Representatives. Appendix to the Journals 1980, G14:21.

19 Under s. 69(1).

20 All whose names appeared in the *New Zealand Business Who's Who.* Some had been involved in more than one merger or takeover during the year, and those replies therefore represented more than one experience.

by the author relating to their experience with the office of the Examiner. This was to determine (i) the level of communication with the Examiner and whether the participants were satisfied with this, (ii) whether there were problems with time-delays, and if so where and why, and (iii) the level of use of informal procedures and the reasons for such use.

Of the 59 participants surveyed, 34 (i.e. 58 per cent) replied, of which 30 replies were relevant. Responses were varied, and ranged from complete satisfaction to considerable frustration. It is possible to appreciate the divergence from statutory procedure from the statistics alone, and to speculate on the reasons because of the particular urgency of decisions concerning mergers or takeovers, but for a full appreciation of the issues it was necessary to consult the participants themselves.

The survey confirmed the existence of the problems already identified by the author, and added information as to their importance and extent. Some issues have been put into better perspective, for example, the concern over time-delay, when it was useful to know that participants were generally satisfied with a period of five weeks for consent. There was insight also into some of the more controversial issues, for example, the value of listing public interest criteria, and of enabling the participation of interested third parties. It is useful then to know that nearly every respondent found the criteria in sections 80 and 21(1) helpful, and that participants would like to be fully informed of any third party viewpoint.

A. The Issue of Time-delay

Participants were asked whether the time taken by the Examiner to consent to their proposal was

1. More *than the statutory twenty-five days (five weeks), and if so, approximately how long; or*
2. Less *than the statutory twenty-five days.*

Of the thirty relevant replies, seven (or 23 per cent) indicated that they had experienced more than the statutory twenty-five days. Of these seven, three indicated that they experienced between fifty and seventy days.[21] Such extended periods were possible as the Act provided for no limit to the time by which the five-week period could be extended.

Participants were then asked —

Did time-delay hinder the smooth progress of your merger/takeover?

Six responded that it had, although only three of these were from the group of seven who had experienced an "extended" five-week period for consent. The rest of that group (which included two who experienced over sixty days) had presumably been prepared for the delay encountered.

21 Note however that these respondents did not indicate whether or not they meant "working days". If these were calendar days, the time-periods would be correspondingly shorter.

Of the twenty-three who experienced the statutory five-week period (or less), only three (or 13 per cent) considered their merger or takeover had been hindered by time-delay, and their suggestions generally brought forward the view that some proposals, which could be identified initially as unlikely to be troublesome, should take even less than the five-week period to process. The majority of this group of twenty-three however (78 per cent) had either positive comments to make, or made no suggestions at all. This suggests satisfaction with a period of five weeks (or twenty-five working days) for the Examiner to consent to proposals. Where his investigation had taken longer than five weeks there was less satisfaction with time taken.

In order to ascertain their view of the reasons for time-delay, and any ways in which this could be reduced, participants were asked —

Have you any suggestions which may help to reduce any time-delay?

The following conclusions can be made from their comments:

(a) Good communication with the Examiner was very important and at the earliest possible stage. Some who had pre-application discussions with the Examiner recommended this procedure, and some who had had poor communications expressed uncertainty. It is probable that the participants who took the more active role in communication were the more adequately informed.

(b) Some applications were perceived to require even less than the statutory five weeks, e.g. those in which the aggregate value of the assets was small,[22] private company acquisitions, and those already having the verbal approval of the Examiner from pre-application discussions. If these could be separated from the rest, they could be attended to more promptly.

(c) Participants should present a thoroughly-prepared case. Seventeen respondents had been required to provide additional information to the Examiner, and as ten of these still experienced less than the statutory five-week period it is probable that this information was not indicative of any cause for concern, and earlier disclosure would have been beneficial to all concerned. It may be that this was caused by lack of experience on the part of the participants, but the fact that six of the seventeen required to provide additional information had had pre-application consultations with the Examiner may indicate some failure in communication. There may also be room for better disclosure requirements to be specified on the application form. It should be noted however that the Examiner's Office was still able to process over half of these applications within the five-week period.

(d) Some participants expressed concern at the lack of commercial knowledge and ability within the department. For those who were not in agreement with the Examiner's opinion of their merger or takeover and were generally unable to change that opinion, the very real cost of seeking the opinion of the expert body, the Commission, must have been daunting.[23]

22 This is possible for a Third Schedule Class A industry, for these have lower threshholds than Class B proposals, or even no threshholds at all.

23 Note the comments of Mr B. S. Cole, the managing director of L. D. Nathan & Co. Ltd., concerning their experience during the takeover of McKenzies — "Blueprint for

B. Informal Pre-Application Consultations

The attention of the participants was then drawn to the growing practice of consulting informally with the Examiner before the submission of proposals, and they were asked —

Did your company consult informally with the Examiner in these early stages?

Fourteen (or 46 per cent) responded that they had. It is noteworthy that none of the seven who had experienced an extended five-week period were represented in that fourteen, and it is possible that some would have been aided on such early consultations. However, it is also probable that informal consultations have resulted in the abandonment of some proposals perceived by the participants to be unlikely to obtain the Examiner's consent.

This practice of pre-application consultations, falling as it does outside the statutory procedure, is indicative of a desire on the part of participants to expedite the consideration of their applications by overcoming any uncertainty as to the view which the Examiner would take concerning the public interest in their particular case. It also enabled attention to be focussed early on his concerns — a requirement emerging often in responses to the survey.

C. The Helpfulness of the Listed Public Interest Criteria

The participants' uncertainty as to the requirements of the Examiner concerning public interest appears to have been related to inadequate communication rather than the wide ambit of public interest criteria. They were asked —

Did you find the public interest criteria set out in section 80 and section 21(1) helpful in determining in advance whether your company was embarking on a merger/takeover which would be acceptable to the Examiner?

Twenty-five (or 75 per cent) indicated that they found them helpful; one considered them to be too wide whilst another considered them too restrictive.[24]

Participants are required to address these criteria when making application for consent to their proposal[25] and the provision of a specific list of criteria has the benefit not only of focusing the concerns of the Examiner, but also of enabling participants to know what these concerns are and address each one specifically in their application.

D. The Public Interest Emphasis of the Examiner

Respondents were asked *whether the public interest emphasis of the Examiner was concerned with*

Acquisition" (1980) 59 The Accountants' Journal 416, 418. Note also the comments in the Directors' Report of Bunting & Co. Ltd. for 1983, concerning the sale of the stock and station division of The NZ Farmers' Co-operative Assn. of Canterbury Ltd. to Wrightson NMA Ltd.

24 The others who considered them unhelpful did not give a reason.

25 See part VI of the application form.

1. *Retention of competition?*
2. *Maintenance of employment?*
3. *Other (specify)?*

Twenty-one (or 70 per cent) answered this question, seventeen indicating that he was concerned with the retention of competition, and twelve the maintenance of employment (eight of the twenty-one indicated his concern for both). No-one specified other criteria, but although most criteria in sections 21(1) and 80 could be related in some way to those two criteria, other possibilities could have been export trade or regional development.

The fact that four respondents indicated the Examiner's concern for the maintenance of employment alone is a clear result of the pragmatism of the New Zealand Act. A trade practice, merger or takeover does not have to be shown to unacceptably reduce competition before it can be considered contrary to the public interest, although this must be considered the dominant emphasis of the Act. Although in practice it is unlikely that a merger or takeover will be stopped in New Zealand because of detriment to employment, it is probable that conditions or undertakings will be required to ensure maintenance of employment in some cases.

E. Communication of the Examiner's Concerns

Because conditions could be imposed when the Examiner was under no obligation to inform the participants of the nature of his concerns, respondents were asked: *If the Examiner requested you to make any concessions or changes did he inform you of his concerns regarding the public interest so that you could adequately reply to them?*

Of the nineteen proposals consented to subject to conditions and/or informal assurances, or after additional information had been requested and considered, only one considered they were not given adequate information.

From this low percentage it is apparent that the Examiner has endeavoured to expedite proceedings by leaving little room for uncertainty when changes were requested. The uncertainty noted by participants appears to have arisen during the period of waiting for the Examiner to come to a provisional view, a period in which participants would like to have known the concerns of the Examiner as they arose, and have been able to dispel or discuss them with a view to early resolution.

F. Use of Conditions and Informal Assurances

When asked: *Were any conditions imposed by the Examiner?* and *Were any informal assurances undertaken by your company?* seven replied that they had undertaken informal assurances, and six formal conditions. Three stated that they had undertaken both. From the commencement of these procedures in 1976, and up to the time of the survey, twelve proposals had been consented to subject to formal conditions, and gazetted. Of the six survey respondents who claimed to have accepted such conditions, only two were present in the twelve. It is probable that

what had been undertaken by the other four were informal assurances. This confusion suggests that some participants were not concerned whether they accepted a condition or informal assurance. This raises a question as to why the Examiner should have been prepared to accept informal assurances rather than impose conditions. Unlike the participants he should have no reason to require the secrecy which these assurances afford.

While the frequency and content of conditions can be readily ascertained from *Gazette* notices, the frequency and content of informal assurances are known only to the Examiner and the participants involved. The use of conditions had been rather sparing — only twelve (or under 2 per cent) of the 732 proposals consented to by the Examiner at the time of the survey. The survey has indicated considerably more use of informal assurances, i.e. 27 per cent of respondents. It is apparent that in a significant number of cases the secrecy of these assurances has been considered beneficial. However, without the opportunity for public scrutiny it cannot be known whether these benefits are to the public, and whether the objects of the Act have been pursued.

G. Conciliation — Formal and Informal

None of those receiving the survey questionnaire could have encountered the formal conciliation procedure of section 74,[26] for none had been subject to a gazetted notice of intention to report to the Commission. Nevertheless several replied to the questions concerning conciliation. These replies have then been considered to relate to the "informal conciliation" which took place within the (extendable) five-week period of section 69.

Participants were asked —

(a) Did you find the conciliation process
1. *Not helpful*
2. *Helpful*
3. *Very helpful*

(b) Why?

Six replied. Two indicated that they found the process "not helpful", three found it "helpful", and one found it "very helpful". On addressing the reasons for this, one respondent did not consider "minor points discussed in two brief phone calls" to be helpful, while another found the "face-to-face" rather than written communication helpful in dispelling the Examiner's concerns and wished that such an interview could take place at the time the original application was made.

The "conciliation" encountered here is that which took place outside the statutory procedure and without the safeguards afforded by that procedure. As in most cases there would be clear pressure for participants to avoid the formal conciliation procedure and the resulting public hearing of the Commission, the effective decisions were being made by the Examiner at the informal level.

26 One respondent mistakenly considered that he had.

It is important therefore that all consultations be seen to be two-way and that there be opportunity for participants to adequately put their point-of-view in response to clearly defined concerns of the Examiner.

H. Third Party Involvement

There are sometimes other persons[27] with an interest in the proceedings, but they had no right to be consulted at any time before a formal Commission hearing.[28] Their views are however often useful for the Examiner, and even when he has consulted them he has not been obliged to inform the participants of these viewpoints. Participants were therefore asked —

If there were interested third parties involved, were you adequately informed of their point-of-view?

Of the seven who experienced some form of third party involvement, four stated that they had not been adequately informed of the point-of-view of these parties. When asked the way in which the third party view was discovered, only one had been involved in joint consultation with the Examiner and these parties, and another two had been informed of the viewpoint through written communication from the Examiner. The "other" ways of being informed were by indirect or verbal "asides" from the Examiner, through media publicity, and through direct (and independent) discussions with the parties themselves. One respondent expressed concern that the delay he had experienced might have been due to a third-party viewpoint which he knew was being considered by the Examiner, but about which he had not been informed. Regardless of the validity of this fear, the resulting uncertainty could easily have been avoided.

Where interested third parties have a viewpoint to air, they will find a way to do this. It would be helpful to all concerned if this was channelled into the consultation and conciliation process.

IV. SUMMARY OF THE PROBLEMS ARISING UNDER THE ACT

It was evident then from investigation into the use of the statutory procedures, both through the survey and through analysis of the relevant statistics, that there were some very real problems with the former statutory procedure.

1. The problem which caused most of the other difficulties was the practical inaccessibility of the Commission. Inquiries into mergers and takeovers, perhaps more than any other area of "competition law", are susceptible to the pressures of time, cost and unwanted publicity, and these pressures made the formal public inquiries of the Commission quite prohibitive to participants.[29]

27 Referred to here as "third parties" for convenience.

28 The Commission would determine their status at such hearings — ss. 14 and 15. Compare these with s. 15(2)(b), (3) and (4) of the Act as amended in 1983, which to a large degree retains the former provisions.

29 Unless disagreement between the participants and the Examiner was so fundamental that a hearing was the only alternative to abandonment (e.g. the *Takeover by L. D. Nathan & Co. Ltd. of McKenzies (NZ) Ltd.*, supra n. 11).

2. The effective control of mergers and takeovers rested therefore with the Examiner rather than the expert body, the Commission, with the attendant loss in the ability for public scrutiny.

3. Time-delay was only of real concern to participants who experienced an extended five-week period for consent, although some respondents considered that proposals which were unlikely to have objectionable characteristics (and which therefore needed only minimal investigation) were not being identified as such, causing unnecessary delay. Others considered that limited communication with the Examiner while he was investigating and forming his views prevented discussion of those views in time to avoid delay.

Another period of concern was the time taken by the Examiner to report to the Commission after gazetting his intention to do so — there was no time limit on this specified in the Act. There have been only two determinations by the Commission to date (Nos. 42/42A and 14),[30] for which the Examiner took seventy-five working days and ninety-five working days respectively to complete his investigations and report to the Commission. This was a subject of concern to the Commission in the former case.[31]

4. There was a general tendency to bypass statutory procedures and use informal ones in order to avoid unnecessary delay or to avoid what could be a costly Commission hearing. The use of informal measures in preference to the statutory provisions was a clear indication that the latter provisions were not fulfilling their intended purposes. The policy of the Act could have been promoted equally through the informal measures (e.g. proposals likely to be contrary to the public interest being discouraged), but there were few ways in which the public could monitor this. Participants may have been afforded the same rights as under the formal statutory procedures, but these would necessarily have been at the discretion of the Examiner. While the pressures of time, cost and unwanted publicity made it beneficial for participants to avoid the formal procedures, this is not a tradeoff they should have to make. Participants should have the advantage of speed, minimal cost and an appropriate amount of privacy as well as statutory rights (e.g. to be fully informed of the Examiner's concerns) and ready access to the expert decision-maker.

On 1 April 1984 the 1983 amendment to the procedures of the Commerce Act came into force. As will be seen from the following discussion, this amendment, through what are largely procedural changes, has focussed on the elimination of most of the problems identified by the survey.

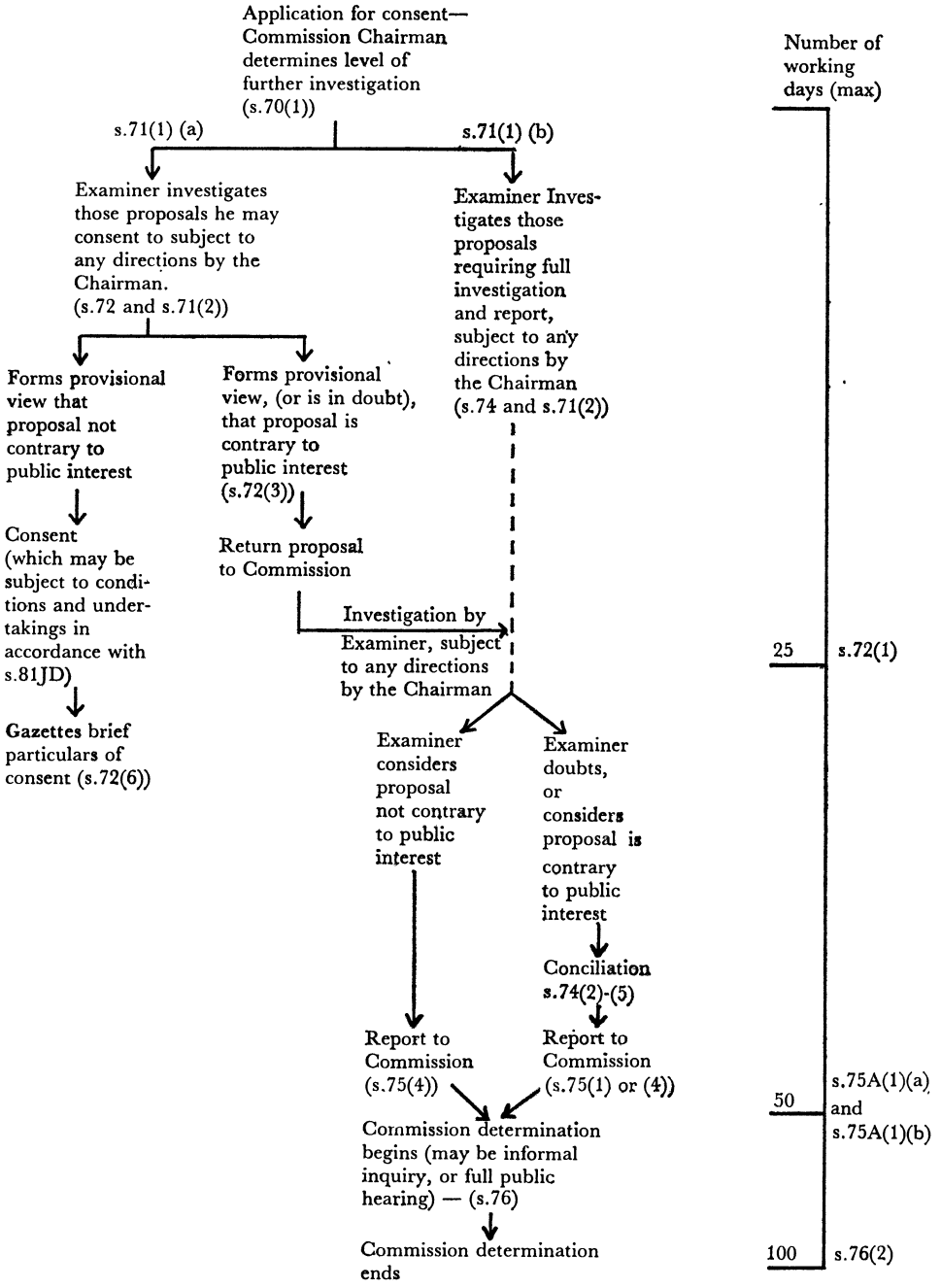
V. THE COMMERCE AMENDMENT ACT 1983

The diagram which follows sets out the new procedure for the investigation and determination of Third Schedule mergers and takeovers provided for in this

30 Supra n. 11.

31 *Re the Proposed Takeover by L. D. Nathan & Co. Ltd. of McKenzies (NZ) Ltd.* (1981) 2 N.Z.A.R. 321, where in para. 9 the time from gazetted intention to actual report was noted as 41 working days, and concern was expressed about the lack of time constraint safeguards over this period (see para. 13).

THIRD SCHEDULE MERGERS AND TAKEOVERS — PROCEDURE UNDER NEW PROVISIONS (s.70-76)



Act. As before, the investigative role remains largely with the Examiner, and the decision-making role with the Commission, but unlike the former Act, there has been a redistribution of control which should ensure that these roles are retained.

The most important change brought about by the 1983 Amendment Act is to move to the Commission the effective control over mergers and takeovers requiring approval, making it considerably more accessible in the process. This has been done in two ways —

1. The Act makes provision for an increased emphasis on the administrative role of the Commerce Commission, through a specific ability to conduct inquiries in a more informal and expeditious manner,[32] although still subject to the rules of natural justice.[33]

The success of the new procedures will depend to a large degree on the Commission's attitude to this discretion and to its attitude to the application of its new administrative role.[34] For some mergers and takeovers will be singled out initially for full investigation and report to the Commission, and these determinations will necessarily be made by the Commission, even if it chooses to accept a conciliated agreement. If sufficient privacy and informality is afforded where appropriate, the cost of obtaining a decision of the expert body should be acceptable to participants.

2. On receipt of an application for consent to a Third Schedule merger or takeover the Chairman of the Commission will make the initial decision as to whether a proposal is unlikely to be contrary to the public interest and so left to the Examiner to investigate and consent to (under section 72), or whether it is likely to have aspects contrary to the public interest sufficient to require the Examiner to investigate fully and report on the matter (under sections 74 and 75). For the latter proposals, the previous requirement for a preliminary investigation leading to a provisional view and gazetted intention to report has been replaced by the chairman's initial classification. Together with any directions from the chairman, this should enable swift attention to the important issues. For the former group (i.e. those under section 72) the chairman may similarly give directions and may also specify a time-period shorter than the statutory five weeks if he wishes. Again under section 72, if the Examiner decides not to consent having formed the provisional view that a proposal is contrary to the public interest, he must return it to the Commission and accept any directions the chairman may give concerning investigation and report. Once an investigation is undertaken under section 74 a report must be made to the Commission, whose decision it then becomes. It is then the chairman and not the Examiner who is given control over the appropriate handling of each proposal, and therefore control over where the decisions will be made.

32 Sections 11A(1) and (2), and 14(1) and (2) of the Commerce Act as amended in 1983.
33 Section 14(3) of the amended Act.
34 Its membership remains essentially the same, although reduced from its recent level of eight members, to a maximum of five, and with a new chairman — Mr. John Collinge has been recently appointed on the retirement of Mr. Kevin O'Brien.

The question of time-delay has been addressed directly in the amendment, through the provision of time-limits on all procedures. The initial sorting of applications enables those identified as unlikely to be contrary to the public interest to obtain a quick consent, i.e. within twenty-five working days, or less if required by the chairman.[35] For those identified as requiring report, the Examiner has a maximum of fifty working days in which to make that report.[36] This will require the Examiner to focus early on the important concerns, for fifty working days is considerably less than the ninety-five working days and seventy-five working days taken in the only two cases to date.[37] Once a report has been made to the Commission, it has fifty working days in which to issue its determination.[38] This should not pose any problems for the Commission, for the fully-contested *Nathan/McKenzies* case took only thirty-five days for the determination to be made (of which eleven were hearing days).[39]

There should be less incentive to augment informally the statutory procedures of the new Act because —

(a) There will be no advantage in determining in advance the opinion of the Examiner as it is the chairman who makes the initial sorting, or the opinion of the chairman as it is the Examiner who does the investigation and makes the report.

(b) The "informal consultation or conciliation" which took place in the extended five-week period should now be unnecessary. For proposals investigated under section 72 have a fixed time-limit in which the Examiner must consent or refer back to the Commission,[40] and where the Commission is readily accessible this should not put pressure on the parties.

Where a proposal has been initially selected for full investigation and report, the time-limit in which the Examiner must report, together with the inevitability of a Commission decision, should mean that the statutory conciliation procedure in section 74 will be fully utilised.

(c) The incentive to make informal assurances will however remain, and the Amendment Act does little to change this. The Examiner will be able to require formal conditions when giving consent. He will also be able to accept or require the giving of written undertakings[41] and these are deemed by section 81JD(2) to be

35 Section 72(1) of the amended Act.
36 Either under s. 75A(1)(a) or (b) of the amended Act.
37 *Re the Proposed Takeover by L. D. Nathan & Co. Ltd. and Ballins Industries Ltd. of A. A. Corban & Sons Ltd.* (Commission Decision No. 14), and *Re the Proposed Takeover by L. D. Nathan & Co. Ltd. of McKenzies (NZ) Ltd.* (1981) 2 N.Z.A.R. 321 (Commission Decision Nos. 42 and 42A).
38 Section 76(2) of the amended Act.
39 The Commission made a determination in only ten working days concerning the proposed takeover by *L. D. Nathan & Co. Ltd. and Ballins Industries Ltd. of A. A. Corban & Sons Ltd.* (Decision No. 14), because after investigation and conciliation the Examiner had decided to recommend consent, and the Commission accepted this and dispensed with an inquiry.
40 Failure to do one of these enables the proposal to proceed as if consent had been given — s. 72(5)(b).
41 Section 81JD of the amended Act.

conditions. Whether these written undertakings will replace informal assurances remains to be seen but the incentive to use the latter will remain if written undertakings are gazetted, as part of the Examiner's consent.[42] When the Commission requires the giving of written undertakings these will be published as part of its decision.

Interested third parties will generally be able to participate in the public hearings of the Commission (if granted standing by the Commission under section 15(2)(b), (3) and (4)), but the Act is silent as to their ability to participate in the less formal inquiries. The Commission has been given a broad discretion as to the conduct of these inquiries, although its duty to observe the rules of natural justice in all its proceedings[43] should ensure that those which the Commission considers "justly ought to be heard" will be consulted.[44] The form of participation will be at the discretion of the Commission, but the experience of survey respondents shows that face-to-face consultations amongst all parties reduces uncertainty.

VI. CONCLUSION

It is clear that the procedures for inquiry into Third Schedule mergers and takeovers introduced in 1976 have not been a success. The main reason for this has been the inaccessibility of the Commission, as its inquiries have always involved full public hearings. Participants require decisions which are expeditious, with minimum cost and publicity. This has meant that most decisions on mergers and takeovers have been made by the Examiner within the statutory five-week period, although this period has sometimes been extended considerably. A number of problems have resulted —

1. The inaccessibility of the Commission which made the Examiner the effective decision-maker.

2. Little opportunity for public scrutiny of proceedings.

3. The growth of informal measures outside the statutory procedures. The Examiner had no statutory guidelines in regard to these measures, so their use was largely discretionary.

4. Time-delay because of limited communication between the Examiner and the participants, and lack of statutory time-limits.

The Act was amended in 1983 in order to meet these problems. The Commission has been made more accessible by enabling it to choose less formal,

42 Section 72(2) of the amended Act.

43 See s. 11A(1) and (2), and s. 14. Section 11A(1) enables the Commission to "hold such inquiries and . . . conduct such investigations as it thinks fit", but this is "subject to the provisions of the Act", which is silent as to locus standi at these inquiries.

44 The term "justly ought to be heard" has been interpreted by the Commission to "include within its ambit those who appear to be entitled to a hearing under the application of the relevant common law rules of natural justice." (*Re Applications by The Hotel Association of New Zealand and Combined State Service Organisations* (1977) 1 N.Z.A.R. 236, para. 2, p. 236.)

administrative inquiries, and by giving the choice of decision-maker, and control over the appropriate level of investigation to the Chairman of the Commission. The likelihood of time-delay has been reduced by the introduction of time limits at various stages in the procedure, and there is less incentive for procedures to develop outside those provided for in the Act. There should be improved opportunity for public scrutiny, for all decisions of the Commission must be published[45] and consents of the Examiner noted in the *Gazette*.[46] Should the practice of accepting informal assurances remain however, this could be cause for concern. There is also uncertainty as to the extent to which interested third parties can participate in the administrative type of inquiry of the Commission. The procedure that has been provided should enable participants to obtain determinations of the Commission or Examiner which are speedy, and which avoid unnecessary cost or publicity. However, much will depend on the attitude of the Commission to its increased involvement. The need for some privacy for a great many mergers and takeovers will need to be balanced by ensuring that inquiries into those mergers and takeovers of a more controversial nature be in public.

45 Section 130(1) of the amended Act (see also s. 130(2)).
46 Section 72(6) of the amended Act.