Beware the new business acquisitions provisions in the Commerce Amendment Act 1990

Mark Berry* and Anne Riley**

In this article the authors examine the new "voluntary" merger notification regime introduced by the Commerce Amendment Act 1990, and indicate some significant inconsistencies and uncertainties in the new regime.

I INTRODUCTION

The mandatory pre-merger[1] notification regime in force in New Zealand between 1975 and 31 December 1990 was typical of such provisions found in other jurisdictions. On 1 January 1991 the mandatory notification provisions and thresholds in the Commerce Act 1986 were repealed and replaced with a voluntary "strike down" regime.[2]

The Commerce Law Reform Bill 1989 initially envisaged no more than minor procedural changes to the mandatory pre-merger notification regime. However, following the Select Committee stage a significant turnaround occurred. When the Bill was reported back to the House it proposed the introduction of a new voluntary notification regime. The justification for this turnaround was explained in terms of

* Barrister and Solicitor, New Zealand; Bell Gully Buddle Weir, Wellington.

** Solicitor, England and Wales; Bell Gully Buddle Weir, Auckland.

1 The terms "merger", "takeover" and "business acquisition" are used synonymously in this article and they relate to the relevant legislation under discussion. The term "merger or takeover" is used with reference to the discussion of the Commerce Act 1975 and the Commerce Act 1986 until its amendment under the Commerce Amendment Act 1990, at which time this term was substituted by that of "business acquisition".

2 Although the voluntary "strikedown" regime brings New Zealand closer in procedural terms to the current position in Australia, the move away from a mandatory pre-merger notification system is generally against the trend in other jurisdictions. For example, in the United States pre-merger notification requirements were introduced in 1976 under the Hart-Scott-Rodino Antitrust Improvements Act. Notification requirements were also introduced in Canada under its Competition Act 1986. These provisions came into force on 15 July 1987. The EEC adopted a mandatory pre-merger notification regime on 21 December 1989, which came into force on 21 September 1990. Although the United Kingdom still has a system of voluntary notification, the OECD recommended in 1984 that member countries which had not already done so should consider adopting a mandatory pre-merger notification regime. (OECD Report on Mergers Policies and Recent Trends in Mergers 1984).

reduction of compliance costs imposed on the business community and harmonisation with Australian laws.[3]

The speed with which the Commerce Amendment Act was enacted following Select Committee stage is worthy of comment. The Parliamentary Bulletin for the Second Session of 1990 indicated that the Bill was reported back from Select Committee on 21 June 1990 (incorporating for the first time the new voluntary regime). It was given its second and third readings only three working days later on 26 June, and received Royal Assent on 29 June.

It is ironic that Sir Geoffrey Palmer, who was Prime Minister at the time the Commerce Amendment Act was passed, commented in *Unbridled Power* (in relation to another statute) that a period of nine days between the report of the Select Committee and the third reading of a Bill "did not produce good law".[4]

Under the Commerce Amendment Act, significant changes to the business acquisitions regime were not properly considered because of the unwarranted speed of the Bill from Select Committee to the third reading stage. As a consequence of that speed, no opportunity was provided for comment by interested persons on the proposed new legislation and this speed and lack of consultation is reflected in the new business acquisitions rules.

This article will explore the new business acquisitions provisions introduced in the Commerce Amendment Act 1990.[5] These provisions, which centre upon a broadly worded prohibition against certain anti-competitive acquisitions, will inevitably require a case law gloss to be applied to them. At this time the future application of the new business acquisitions rules can only be anticipated, and it is against this background that a number of interpretative suggestions are advocated with particular reference to the new section 47 of the Commerce Act 1986. In undertaking this review, the precedent value of certain guidelines which emerged under the previous mandatory pre-merger notification regime is also examined.

The scheme and essential arguments of this article will be:

(a) To consider the concept of "acquisition" as that term is used in section 47 of the Commerce Act 1986. It will be submitted that the repealed implementation rules should no longer have application, that the new rules contain drafting inadequacies in relation to situations where parties are acting jointly or in concert, and that transfers of shares or assets between wholly-owned interconnected bodies corporate should not constitute an acquisition in the relevant sense. It will be further argued that in considering procedural issues

3 See 1990 NZ Parliamentary Debates 2221.

4 GWR Palmer *Unbridled Power* (Oxford University Press, Auckland, 2nd ed 1987) 158.

5 We confine our review to the procedural aspects of the new voluntary notification regime. The concepts of "market", "dominance", "strengthening of dominance" and "substantial lessening of competition" are beyond the scope of this article.

relating to the structure of multiple transactions and acquisitions by co-operative acquirers and joint ventures, there is much greater scope for flexibility than was the case under the previous merger or takeover rules. Finally, the uncertainties relating to the extra-territorial application of the business acquisitions provisions will be noted.

(b) To examine the meaning of the terms "assets of a business" and "shares" in section 47. It will be argued that the previous definition of the term "business" (in repealed section 48(2)(c) of the Commerce Act 1986) and the analysis which that term received will be of interpretative assistance. Uncertainties relating to the definition of "shares" will also be discussed.

(c) To consider the application of the new section 47 to the acquisition of control, de facto control and partial acquisitions of shares. It will be submitted that section 47 in its present form is inadequate in the case of partial acquisitions, and that this provision should apply only where the acquisition results in the attainment of a substantial degree of influence over the target. A series of rebuttable presumptions will be advocated.

(d) To review the "associated persons" provisions contained in section 47(2), (3) and (4).

(e) To analyse briefly bare transfers of market dominance.

(f) To suggest that section 27 of the Commerce Act 1986 should not apply to business acquisitions.

(g) To consider, for the sake of completeness, the amended clearance and authorisation procedures, undertakings, remedies, penalties and appeals.

II ACQUISITION OF ASSETS OF A BUSINESS OR SHARES

A *Outline*

Section 47(1) of the Commerce Act 1986 provides that:

> (1) No person shall acquire assets of a business or shares if, as a result of the acquisition:
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> (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
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> (b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened.

This part of the article addresses various issues of interpretation arising out of the terms "acquisition of assets of a business" and "shares". First, the general concept of acquisition is considered. This will then be followed by a consideration of what

constitutes the assets of a business or shares. The final part will review the application of section 47(1) to a range of transactions from total acquisition to partial acquisition.

B Acquisition Issues

The term "acquire" is defined in section 2(1) of the Act. The definition is not particularly informative. "Acquire" in relation to goods is defined to include obtaining by way of gift, purchase or exchange, or taking on lease, hire or hire purchase. In the case of services, acquire includes accepting, and in relation to interests in land the term includes obtaining by way of gift, purchase, exchange, lease or licence. It is arguable that these inclusionary definitions have a common theme of relating to a completed rather than a partial transactional phase.

It is significant that with the repeal and replacement of the provisions of Part III of the Commerce Act 1986, no corresponding amendment was made to the definition of the term "acquire". Furthermore, certain previously defined concepts relating to the issue of acquisition (such as "implementation",[6] "acting jointly or in concert",[7] transfers between interconnected bodies corporate[8] and "merger or takeover proposal"[9]) have now been removed from the statute.

In contrast, the definition of the term "acquire" in section 4(4) of the Trade Practices Act 1974 (Cwlth) addresses some of these concepts. It provides that the acquisition of shares or assets is to be construed as a reference to an acquisition "whether alone or jointly with another person" of "any legal or equitable interest" in such shares or assets.[10] In addition, section 50(1) of the Australian Act provides a further legislative gloss on the term "acquire" by prohibiting certain acquisitions which may be made "directly or indirectly".

This part of the article outlines the approach which it is submitted should be taken under the new section 47 in determining what constitutes an "acquisition". It is convenient to do this by reference to the previously recognised concepts of implementation, acquisitions jointly or in concert and transfers between interconnected bodies corporate. Related issues of procedure and extra-territoriality will also be briefly discussed.

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6 Repealed s 48(1) of the Commerce Act 1986.

7 Repealed ss 47(7), 48(1) and 50(2) of the Commerce Act 1986.

8 Repealed ss 47(3), 47(4) of the Commerce Act 1986.

9 Section 67 of the Commerce Act 1975 as introduced and amended by s 22 of the Commerce Amendment Act 1976 and s 26 of the Commerce Amendment Act 1983; repealed s 47 of the Commerce Act 1986.

10 For discussions of s 4(4) of the Trade Practices Act 1974 (Cwlth) see A I Tonking in *CCH Australian Trade Practices Reporter* ¶ 8-110; J D Heydon *Trade Practices Law* (The Law Book Company Limited, Sydney, 1989) 4533 - 4541.

1 Implementation

The first question which must be addressed is at what point is there an "acquisition" in any given transaction. Does it occur when the parties reach heads of agreement, enter into formal contractual relations or proceed to settlement? This inquiry is conveniently commenced by a brief consideration of the previous law.

Repealed section 50(2) of the Commerce Act 1986 prohibited the "implementation" of merger or takeover proposals falling within the asset thresholds which did not have the requisite prior clearance or authorisation. The prohibition against implementing a proposal subject to the mandatory pre-merger notification rules was first reviewed by the Commerce Commission at a time when the term "implementation" was not defined in the statute. The references then made to the term related to the requirement of the time at which notification was to be given.[11] In *Fletcher Holdings Limited/Carter Holt Holdings Limited*[12] the Commission expressed "substantial agreement" with the following views on the meaning of the word "implemented":[13]

(1) implementation is a transactional concept;

(2) it refers to the process of carrying into effect, whether by one action or many, a merger or takeover proposal (a proposal being a thing merely of intention);

(3) implementation includes all steps up to and including completion;

(4) it is to be distinguished from completion (which is a resolved state of affairs) by virtue of its transactional reference; and

(5) a proposal can be "implemented" at different stages. "Completion" on the other hand refers not to any mere stage but to finality only.

Subsequent statutory definition of the term (introduced by section 26 of the Commerce Amendment Act 1983) provided that implementation meant "the engaging in any conduct that wholly or in part effected the completion of the proposal". A parallel development under this amending legislation was also significant. Section 26 of the 1983 Act introduced a new section 69 which provided that there would be no implementation of a merger or takeover proposal provided that the contract did not come into force until consent had been given to it and provided that application for consent was made within specified time frames. These amendments were adopted in the now repealed provisions of section 48(1) and 51 of the Commerce Act 1986.

A restrictive interpretation of the concept of implementation had therefore emerged. Any first step such as entering into a contract appeared to be regarded as

11 Section 26(1A) of the Commerce Amendment (No 2) Act 1979.

12 (1980) 2 NZAR 391.

13 Above n 12, 398 - 399.

implementation.[14] All subsequent steps up to and including completion were also interpreted as constituting individual instances of implementation.

In considering the new business acquisitions regime, the immediate issue is whether the term "acquire" appearing in the new section 47 is equivalent to the concept "implementation". If it is, it becomes a matter of concern that repealed provisions such as section 51 of the Commerce Act 1986 have not been reproduced. Historically this exemption, which permitted merger parties to enter into conditional contracts, has appeared in some form in each of New Zealand's previous competition laws governing business acquisitions.[15] Its absence would naturally draw adverse inferences if the term "acquire" is given a meaning equivalent to that previously attributable to implementation.[16]

For two reasons it is submitted that there is a fundamental distinction between the concepts of "acquisition" and "implementation". First, the definition of "acquire" in section 2(1) is, as has been previously indicated, at least reflective of a completed state of affairs.

The second reason centres upon the meaning which has previously been attributed to the term implementation. The Commission's guidelines in *Fletcher Holdings/Carter Holt*,[17] and the subsequent statutory definition of the term "implementation",[18] accept that there is a fundamental conceptual distinction between implementation and completion. Subject to our later comments on the definition of the term "share", it is submitted that the term "acquire" in the new section 47 is synonymous with completion. As a general rule, the term "acquire" should relate only to a legal and not an equitable interest in shares or assets. The logic of this proposition is supported by reference to the equivalent Australian legislation which is briefly described below.

Under Australian law it is necessary to consider the interaction between sections 4(4) and 50(4) and (5) of the Trade Practices Act 1974 (Cwlth). It is significant that the term "acquire" is defined in section 4(4) to include a reference to "any legal or equitable interest" in shares or assets. Sections 50(4) and 50(5) provide that an acquisition of shares or assets is not to be regarded as having taken place if the relevant contract is subject to a condition that it will not come into force until it is granted authorisation. It is apparent from the decision of the Federal Court in *Broken Hill Pty Co Limited* v

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14 See *Commerce Commission* v *Fletcher Challenge Limited* [1989] 2 NZLR 554, 609.

15 Sections 67 and 69 of the Commerce Act 1975; s 22 of the Commerce Amendment Act 1976; s 26 of the Commerce Amendment (No 2) Act 1979; s 26 of the Commerce Amendment Act 1983; repealed s 51 of the Commerce Act 1986.

16 Although not referring to the concept of "implementation", it is interesting to note that s 35(1) and 35(2) of the Commerce Act 1986 provide that s 27 does not apply to a contract conditional on authorisation. As with the repealed s 51, s 35 requires an application to be made within 15 working days.

17 Above n 12.

18 Section 26 of the Commerce Amendment Act 1983; repealed s 48(1) of the Commerce Act 1986.

Trade Practices Tribunal[19] that the reason for the presence of section 50(4) and (5) is to overcome the problem that entering into a contract to acquire shares or assets, whether conditional or unconditional, confers an equitable interest in such shares.[20]

It is significant that the term "acquire" in New Zealand has not been amended so as expressly to apply to the acquisition of both a legal and an equitable interest in shares or assets as is the case in Australia. Accordingly, the absence of any equivalent provisions to sections 50(4) and (5) of the Australian Act is not critical to the approach which we are advocating.

It therefore follows on the above analysis that the reference to "acquisition" in the new section 47 refers only to the point of completion at which time a legal interest is obtained.[21] Prior implementational steps at which an equitable interest may be obtained, which steps will inevitably give the purchaser rights to have the agreement enforced, do not constitute acts of acquisition. If this position is accepted, then the repeal of section 51 of the Commerce Act 1986 is not of moment because the act of entering into a conditional business acquisition contract will not of itself be in breach of section 47. If the contrary view is taken, however, then the business community will be required to plead as a matter of urgency for the reintroduction of a provision based upon section 51.

2 Acquisitions "jointly or in concert"

Business acquisitions may be achieved in a number of ways apart from direct acquisition by a single purchaser. For example, the purchaser may arrange for another person to make the acquisition on its behalf, persons may co-operate in making acquisitions, or the purchaser may form part of a joint venture which is the acquisition vehicle. Clearly such alternative methods of acquisition may have the potential for competitively significant acquisitions to be structured so as not to be subject to the relevant competition laws. In this context it should be noted that the Commerce Act 1986 contains no general anti-avoidance provisions.[22]

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19 (1980) ATPR ¶ 40 - 173.

20 Above n 19, 42, 387 (per Bowen CJ), 42, 393 (per Franki J) and 42, 398 - 42, 399 (per Brennan J).

21 While we do not attach much weight to the United States authorities on this point, because the term "acquire" appearing in s 7A of the Clayton Act is undefined, it is noteworthy and it is suggested supportive of this line of argument that the Federal Trade Commission has taken the position that the Act applies to acquisitions and not to offers or agreements to acquire. See S M Axinn, B V Fogg and N R Stoll *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act* (Law Journal Seminars - Press, Inc, New York, 1979) 83.

22 The only provision under competition legislation in New Zealand since 1975 which has addressed anti-avoidance was s 67(7) of the Commerce Act 1975 as introduced by s 26 of the Commerce Amendment Act 1983. This provision was not repeated in the Commerce Act 1986.

The concept of acquisitions "jointly or in concert" has in the past received express statutory recognition[23] and was also contained in sections 47(7), 48(1) and 50(2) of the Commerce Act 1986. The repeal of these provisions on 1 January 1991 means that there is now no direct reference to acquisitions "jointly or in concert" in the Commerce Act.

The term "jointly or in concert" was not expressly defined in previous legislation. However, prior to the repeal of sections 47(7), 48(1) and 50(2), the Commission provided some guidelines on the application of these provisions in two different situations.

The first situation arose in the *Fletcher Holdings/Carter Holt* case.[24] This case involved the acquisition of shares by sharebrokers as nominees on behalf of an undisclosed principal. The Commission stated that it was:[25]

> ... of the opinion that s 67(7) should not be restricted in its interpretation to "persons with a common objective of taking over a target company between them" and that is sufficient in the present case if it is satisfied that Fletchers and NZUC were co-operating together in acquiring shares with the common objective of promoting the takeover scheme.

The second case of note is *Brierley Investments Limited and Others/Air New Zealand Limited.*[26] In this case, a consortium of four was proposing to acquire all of the issued share capital of Air New Zealand Limited. It was argued that there were four separate proposals because there was no more than the concurrent acquisition by four individuals of separate parcels of shares. In rejecting this submission the Commission concluded:[27]

> In their submissions the parties place emphasis on the word "jointly". However the phrase in total is "jointly or in concert". The definition is disjunctive. "In concert" means concurrent, uniform or co-operative action. There need only be a wholly shared purpose or even the same or similar intentions, particularly in relation to the period after completion of the transaction. The parties in this case are acting together in seeking to acquire over 20% of the shares in a company, and the fact that they are doing it for their own and different reasons does not change that situation. The Act does not require the parties to be "ad idem", just to be acting jointly or in concert - either conjointly or concurrently.

The need for statutory treatment of acquisitions made jointly or in concert has also been recognised in Australia. Section 4(4) of the Trade Practices Act 1974 (Cwlth) refers to acquisitions of shares or assets, whether they be made "alone or jointly with

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23 Section 67(1) of the Commerce Act 1975 first addressed the issue by defining the term "transferee" to include all persons who were acting jointly or in concert. Section 67(7) of the 1975 Act provided that joint or in concert applications were to be approached on the basis that all of the shares or assets at issue were to be acquired by each of the concert parties.

24 Above n 12.

25 Above n 12, 398.

26 (1989) 2 NZBLC (Com) paragraph 99 - 521.

27 Above n 26, 104, 467.

another person". Furthermore, the merger prohibition contained in section 50 of that Act refers to such acquisition being made "directly or indirectly". The term "indirectly" has been interpreted in such a way as to give it an equivalent meaning to the repealed jointly or in concert provisions.[28]

Against this background it is significant that the new business acquisitions rules introduced by the Commerce Amendment Act 1990 contain no "jointly or in concert" or similar provisions. In all probability this was an oversight.

However, another provision of the legislation (which was not amended) may apply to acquisitions jointly or in concert. The prohibition in section 47(1) is against any "person" acquiring shares or assets of a business. This term is defined in section 2(1) to include "any association of persons whether incorporated or not". The application of this definition to joint or in concert acquisitions has not previously required consideration because of the express statutory provisions referred to above. However, the potential application of the definition of "person" to include persons acting jointly or in concert cannot be discounted. Furthermore, we do not consider that the absence of express reference to acquisitions made jointly or in concert would automatically escape the application of the business acquisitions rules. As Lockhart J observed in *Trade Practices Commission* v *Australian Iron and Steel Pty Limited*:[29]

> I find it a little curious that the words [directly or indirectly] appear in the subsection at all because I doubt if they add anything to what would otherwise be the construction of the section.

Thus there is uncertainty as to how acquisitions made jointly or in concert are to be viewed under the new legislation. It is submitted that the following positions now apply to such acquisitions:

(a) In the case of acquisitions made by agents, nominees or trustees for some other person, we consider that such transactions will be subject to the prohibition contained in section 47(1). In this context it is relevant to view the person on whose behalf the shares or assets may be acquired as the relevant person for the

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28 In *Trade Practices Commission* v *Australian Iron and Steel Pty Limited* (1990) ATPR ¶ 41 - 001, 51,032 Lockhart J concluded that an indirect acquisition is an acquisition by someone acting as agent, trustee or nominee for the ultimate purchaser. An acquisition by a wholly-owned subsidiary has also been considered to be a form of indirect acquisition by its parent where such subsidiary is acting as agent for its parent company. See also *S A Brewing Holdings Limited* v *Baxt* (1989) ATPR ¶ 40-942, 50,275; *Trade Practices Commission* v *Legion Cabs (Trading) Co-Operative Society Limited* (1978) ATPR ¶ 40-092, 17,905. Cf *Australia Meat Holdings Pty Limited* v *Trade Practices Commission* (1989) ATPR ¶ 40 - 932, 50,094, where Davies J extended the concept of direct or indirect acquisition to encompass all forms of acquisition. On one view the reference to indirect acquisition in *Australian Meat Holdings* included the situation where a wholly-owned subsidiary was the acquisition vehicle even if it was not acting as agent for its parent company.

29 Above n 28, 51,032.

purposes of section 47(1). It will thus be possible for persons to make undisclosed "toe-hold" acquisitions using intermediaries provided that they do not obtain control or a substantial degree of influence over the target company, in breach of section 47(1).[30]

(b) The position is less clear in the situation where two or more persons make partial acquisitions in co-operation with each other with a view to achieving control or a substantial degree of influence over a company. The courts would presumably be reluctant to allow such acquisitions to escape the application of section 47(1). The definition of the term "person" and the above observations of Lockhart J in *Australian Iron and Steel*[31] would provide the courts with the ability to assume jurisdiction over such acquisitions.

(c) In the case of acquisitions by joint ventures,[32] the joint venture is the entity which is the relevant person for the purposes of section 47(1).[33]

Accordingly it is submitted that, notwithstanding the repeal of the direct references to acquisitions jointly or in concert, there will be no material change regarding the form of the proposals identified in examples (b) and (c) above. The co-operative acquirers and the joint venture are in each case to be regarded as the relevant "person".

However, it is submitted that competition analysis under the new business acquisitions rules should be undertaken in a materially different way in these two situations to that which previously applied under the repealed section 47(7) of the 1986 Act. It will be recalled that the Commission interpreted that provision to mean in relation to co-operative parties or joint ventures that each member of such bodies must be viewed as acquiring all of the shares at issue. Thus in the *Brierley Investments/Air New Zealand* case two minor joint venture members each entitled to only 7.5% of the 100% shares at issue, were treated for competition purposes as if they were each acquiring those 100% shares.[34] The logic of this previous approach was questionable, and it is suggested that continuation of it is not sustainable in view of the repeal of section 47(7). The appropriate inquiry is first to establish who may control or have a

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30 If there is a breach of the provisions of s 47(1) by reason of the acquisition, the agent, nominee or trustee will also attract liability. See Section VI C below.

31 Above n 28, 51,032.

32 The term "joint venture" lacks clarity of definition (see *Commerce Commission* v *Fletcher Challenge Limited*, above n 14, 613-616 and Linklaters & Paines and C Nightingale *Joint Ventures* (Longman, London, 1990) 1-11). Joint ventures can take a variety of forms including incorporated joint ventures, joint venture partnerships and unincorporated associations. The term is used in this article generally to relate to situations where the acquisition vehicle comprises more than one person. The competition law analysis should not alter, as the description of the acquirer in these situations is largely a matter of terminology.

33 The reference to joint ventures in this article is limited to acquisitions made by them. The topic of the application of business acquisition rules to the formation of such entities is beyond the scope of the present discussion.

34 Above n 26, 104, 467 - 104, 468.

substantial degree of influence over the person making the acquisition.[35] If it becomes apparent that there are members of the acquiring person who do not cross this threshold, this should accordingly be taken into account in undertaking the competition analysis.

3 Transfers between interconnected bodies corporate

The issue of transfers of shares or assets between interconnected bodies corporate has received specific legislative attention. The previous policy was expressly to exempt such acquisitions from requiring consent under the mandatory pre-merger notification regime.[36] A legislative void emerges on this issue under the new business acquisitions rules, notwithstanding that the definition of the term "interconnected body corporate" remains in section 2(7) of the Act. The implications of this omission are unclear.

Two situations involving transfers between interconnected bodies corporate require consideration. The first is the transfer of shares or assets between wholly-owned parent and subsidiary companies. It is illogical that the provisions of section 47(1) should prohibit such transactions, although statutory clarification of this issue is desirable. In the case of such transfers between interconnected bodies corporate, it is arguable that there is no acquisition in the relevant sense, because it is implicit that "acquire" requires at least some degree of change in control of ownership or influence. From a competition law point of view transfers between wholly-owned parent and subsidiary companies will not cause any such result. The status quo will prevail.

The second situation involving the transfer of shares or assets between interconnected bodies corporate arises where the parties are not under entirely common ownership. The term "interconnected body corporate" as defined under section 2(7) of Commerce Act 1986 adopts the holding/subsidiary company test under section 158 of the Companies Act 1955. This means that a company is interconnected to a holding company so long as the holding company either holds more than 50% of the equity share capital of the subsidiary or it has the ability to appoint the majority of its directors. Whereas transfers between interconnected bodies involving parties other than wholly-owned subsidiaries were immune from scrutiny under the repealed merger or takeover rules, it cannot automatically be assumed that this will continue to be the case under the new regime. If a minority shareholder is in some way able to exert a substantial degree of influence over the affairs of a company such that the minority shareholder is dictating the competitive policy of that company,[37] then there may be competition considerations which will at least require some degree of scrutiny under

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35 See Section II C 3 below.

36 Section 67(3) of the Commerce Act 1975. as introduced by s 22 of the Commerce Amendment Act 1976 and amended by s 26 of the Commerce Amendment Act 1983; ss 47(3) and 47(4) of the Commerce Act 1986. Other jurisdictions have taken a similar policy stance. Certain intra-person transaction exemptions apply in the United States (see Axinn, Fogg and Stoll, above n 21, 251) The term merger in s 91 of the Competition Act 1986 (Canada) refers to the acquisition of shares or assets "in the whole or part of a business of a competitor, supplier, customer or other person".

37 See Section II C 3 below.

section 47(1) in situations where such company proposes to merge with a competing interconnected body corporate.

The position relating to the transfer of shares and assets between interconnected bodies corporate is unsatisfactory and it is a matter which requires legislative guidance in terms of the scope of appropriate exemptions.

4 Procedural aspects of multiple transactions and acquisitions by co-operative acquirers and joint ventures

A number of procedural issues concerning the interpretation of the term "acquire" arise in the case of transactions involving multiple steps and acquisitions by co-operative acquirers and joint ventures. The matter is of particular relevance when notifying a transaction. The issue may also need to be addressed when considering the application of the enforcement provisions of the Act.

The repeal of the rigorous definition of the term "merger or takeover proposal" previously contained in section 47(1) of the Commerce Act 1986 now provides the opportunity for more flexibility to be taken in the approach to clearance or authorisation notifications. If an agreement provides for the acquisition of multiple assets, the parties to it may elect to submit a single application for clearance or authorisation.[38] The same approach should equally be applicable in the case of shares. If, for example, an acquirer agrees to purchase all of the shares of three subsidiaries of another company, there is now no apparent reason why this should be treated differently from an acquisition of the assets of those companies. Whereas prior to repeal, section 47(1)(a) did not permit flexibility in analysing what constituted a share merger or takeover proposal, the repeal of this section now gives such flexibility.

Under the new regime, the applicant appears to be entitled to structure an application for clearance or authorisation to an acquisition of shares as it thinks fit. It may submit a single notification and later amend this by proferring undertakings to divest if some aspects of the proposed acquisition raise competition concerns. Alternatively, separate notifications may be made if the proposal relates to a diverse range of assets or shares. There will be a particular attractiveness in this approach in cases where the target company engages in a wide range of activities which would otherwise take some time for the Commission to analyse in their entirety. If it is important or desirable to obtain prompt clearance or authorisation from the Commission to acquire certain parts of a business, separate applications may be made at the outset, or after lodging the principal notification.

Turning to notifications by persons acting in co-operation or notifications by joint ventures, under the repealed provisions of section 47(7) of the Commerce Act 1986 the

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38 This approach was previously accepted by the Commission. See Example 2 of the Commerce Commission "Merger/Takeover Proposals" Practice Guidelines (July 1989).

Commission required notifications in the name of each member of such bodies.[39] This practice, while apparently dictated by statute, had no logical foundation. The new business acquisitions rules provide the opportunity for the discontinuance of this duplicative practice.

If at any time prior to acquisition there is a change in the composition of acquiring persons acting in co-operation or in the composition of a joint venture, a new proposal for acquisition will arise. Furthermore, individual clearances or authorisations obtained by any or all of the members of a joint acquisition vehicle should not be viewed as constituting proper consent for the joint acquisition.[40] Such clearances or authorisations will be validly implemented only to the extent that they may be acted upon by the individuals holding such consents.

5 *Extra-territorial jurisdiction*

Section 4 of the Commerce Act 1986 provides that the Act extends to the engaging in conduct outside New Zealand by a person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand. Through section 4 it is claimed that the Act applies to certain transactions occurring outside New Zealand which impact on a market in New Zealand. For example, if a company in the United States sells all of the assets of one of its divisions (which includes a New Zealand branch operation) to an English company, and the American company and a subsidiary or branch of the English company both carry on business in New Zealand, by virtue of section 4 that sale is potentially subject to consideration under section 47.

In the review of the 1986 Act,[41] it was originally intended that a provision similar to section 50A of the Trade Practices Act 1974 (Cwlth)[42] be introduced into the Commerce Act. Clause 17 of the Commerce Law Reform Bill 1989 provided that if an acquisition outside New Zealand of shares resulted in one company becoming an interconnected body corporate of another and resulted in the creation or strengthening of dominance, the court may order the disposal of assets in New Zealand. This provision was omitted from the Commerce Amendment Act 1990.

It is submitted that there is a need, as recognised in the Commerce Law Reform Bill 1989, for express legislation on the extent of the extra-territorial reach of the Act. Until this occurs, there will be continuing uncertainty in relation to the precise application of section 4.

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39 See Example 5 of the Commerce Commission "Merger/Takeover Proposals" Practice Guidelines (July 1989).

40 *Commerce Commission* v *Fletcher Challenge Limited*, above n 14, 604.

41 Ministry of Commerce "Review of the Commerce Act 1986" (August 1989) 2.

42 Section 50A Trade Practices Act 1974 (Cwlth) provides that the Trade Practices Tribunal may make findings and orders under this Act where an acquisition takes place outside Australia which results in the acquirer acquiring a controlling interest in a corporation in Australia.

C Assets of a Business or Shares

1 Assets of a business

The first method of acquisition to which section 47(1) relates is to "assets of a business". The assets concerned must constitute assets of a business before the acquisition will fall within the prohibition in section 47. The prohibition will not simply apply to any acquisition of assets.

The phrase "assets of a business" is undefined in the Act. The term "assets" is defined in section 2(1) to include intangible assets. The term "business" is also defined under that provision. Again this definition, like that for "assets", is not particularly informative. It provides that a "business" is any undertaking that is carried on for gain or reward or in the course of which goods, services or any interest in land is acquired, supplied or disposed of other than free of charge. The previous additional definition of the term "business" under repealed section 48(2)(c) of the Commerce Act 1986 has not been repeated under the new legislation. This is unfortunate because the definition under section 48(2)(c) provided a useful guideline. It stated that:

> (c) Without limiting the definition of the term "business" in section 2 of this Act, "business" includes any activity that forms part of a business and is capable of being operated independently as a business.

No difficulty of interpretation is likely to arise where a purchaser is acquiring all of the assets of a business which is a going concern. However, significant areas of doubt can arise in situations involving partial asset acquisitions. Further questions arise in the case of the sale of a defunct business.

In the case of partial acquisitions, it is submitted that it is appropriate to commence the inquiry with a review of the test in repealed section 48(2)(c) described above, as well as the principles applicable to that provision as provided by the Commission in the *Pfizer Laboratories Limited/Coopers Animal Health (NZ) Limited* decision.[43] While not binding, the tests enunciated in these sources provide the best starting point for the inquiry.

In *Pfizer/Coopers* the Commission stated that two issues arise:[44]

> First, what is an "activity that forms part of a business"? Secondly, when is that activity "capable of being operated independently as a business"?

As to the first of these issues, the activity test, the Commission stated:[45]

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43 (1987)1 NZBLC (Com) ¶ 99-505.

44 Above n 43, 104,096 - 104, 097.

45 Above n 43, 104, 097.

> ... the test in the Act as to what constitutes a "business" refers not to assets or their completeness but to an "activity". The word "activity" connotes action and is a reference to the operation carried on with the assets rather than a reference to the assets themselves. That being the case, it is necessary and better to look at the activity carried on in relation to the assets to see whether the assets are capable of being a business. Are the assets used to create a trading activity and is that activity transferred or is it simply that bare assets are being transferred? If the effect is merely to transfer assets and not the activity, then the test is not satisfied.

Thus the sale of an individual piece of machinery on its own would not pass the test. However, sale of such machinery along with other assets likely to transfer the benefits of the activity would constitute the sale of a business. Such assets may typically be the transfer of the benefit of the operation, the transfer of intellectual property rights, the transfer of know-how and the provision of customer lists.

Turning to the second issue, that of operational capability, the Commission developed a test of materiality in assessing independent capability. It emphasised that:[46]

> It is the circumstances of each transaction and business which should be examined to judge what are the material assets so as to be capable of being operated independently as a business. Of particular relevance appear to be the nature of the assets transferred, the circumstances of the vendor and purchaser at the time of the transaction, the nature of the business in question and so on. The key question is what, upon the basis of present facts, is the commonsense commercial perception in each case.

Assets which were thought likely to be particularly material to the independent capability of a business included the transfer of goodwill, patents, trade marks, know-how, special equipment, access to raw materials, stock on hand and work in progress. Indications of assets which may not be material included book debts, distribution facilities, the transfer of a geographic part of a business, personnel and research or testing facilities.[47]

It is submitted that the sale of a defunct business should not be subject to section 47(1). Such a sale would not satisfy the activity requirement set out in the *Pfizer/Coopers* formulation. The proposition is also supported by reference to foreign jurisdictions. The term "assets" appearing in section 7 of the Clayton Act is not defined in that Act. In relation to section 7, Areeda and Turner have advanced the following general proposition:[48]

> To acquire the "whole or any part of the assets" within the meaning of Clayton Act section 7 is to acquire a going (even though failing) concern, or its equivalent, involving a relatively immediate and relatively permanent transfer of market share from one to another covered corporation.

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46 Above n 43, 104,098.

47 Above n 43, 104,097 - 104,098.

48 P Areeda and D F Turner *Antitrust Law* (Little Brown & Co, Boston and Toronto, 1980) Vol V, 302.

The point has also been addressed in the Canadian context under repealed section 33 of the Combines Investigation Act. In *R* v *Thompson Newspapers Limited*[49] the Ontario Supreme Court granted a motion for non-suit in relation to a merger charge on the ground that the acquisition related to the assets of a defunct business. The competitive effect complained of was considered to stem from the closure of the business at issue.[50]

2 *Shares*

The second method of acquisition envisaged by section 47(1) is shares. A new definition of the term "share" is contained in section 2(3) of the Commerce Amendment Act 1990. "Share" is defined as a "share in the capital of a company or other body corporate,[51] whether or not it carries the right to vote at general meetings". This part of the definition contains a significant departure from the repealed provisions of section 47(1)(a) of the Commerce Act 1986. The old merger regime applied only to shares

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49 Ont S C (October 28, 1983) (Unreported), cited in P S Crampton *Mergers and the Competition Act* (Carswell, Toronto, 1990) 573 footnote 47. The Court qualified this statement of principle as follows:
"No doubt, if the closing and repurchase of the assets were in fact brought about by one transaction disguised to sever one aspect from another, the Court would say the severance was a sham and could ignore it."

50 An alternative argument in the case of the sale of a defunct business is the failing company defence. The American concept of the failing company defence has received some recognition and acceptance in New Zealand. References to the defence and its elements are contained in *J Wattie Canneries Limited* (1984) 4 NZAR 354 and *West Coast Bakeries Limited/Callaghan's Bakery Limited*, Decision 194, 16 April 1987. For a more detailed discussion of the elements of the defence see T B Walthall "The Failing Company Defense and Corporate Collapse: Probing for a Rational Approach to Business Failure" (1982) 5 GMUL Rev 51.

51 The concept of the acquisition of "capital", previously recognised under the repealed s 47(1)(b) of the Commerce Act 1986, is not recognised under the new business acquisitions rules. The term "share" is limited to the share capital of companies as that term is defined under the Companies Act 1955. The previous "capital" category related to non-incorporated bodies such as partnerships. "Capital" acquisitions may now come within the definition of asset, being an intangible asset as envisaged by the s 2(1) definition of that term. In the United States, s 7 of the Clayton Act, defines assets to mean "property or property rights, real or personal, tangible or intangible, which are subject to transfer". Cases under that section have held that convertible notes are assets (*F&M Shaefer Corporation* v *C Schmidt & Sons Inc* 597 F 2d 814 (2d Cir 1979)) as also have been promissory notes (*US* v *Gould Inc* 1969 - Trade Cases ¶ 72, 863 (DC Ohio, 1969).

carrying voting rights.[52] The new definition of the term "share" also provides inclusionary guidelines. The term includes:

(a) A beneficial interest in shares;

(b) A power to exercise, or control the exercise of, a right to vote at general meetings which attach to any such shares;

(c) A power to acquire or dispose of, or control the acquisition or disposition of, any shares; and

(d) A perpetual debenture and perpetual debenture stock.

The reference in category (c) to the acquisition of a power to acquire or dispose of shares gives rise to some potential concern depending on its interpretation. It is possible that the obtaining of a mere equitable interest, such as entering into a mortgage of shares or entering into put or call options, may be caught by the Act. If there is no event of default or exercise of any option in these examples, one may question whether any requisite power will arise and whether there would be an "acquisition" as that term is used in section 47(1).

It is submitted that the concept of "power" should be given a narrow interpretation to accord with the scheme of the legislation. A conditional power to acquire shares of itself is not a matter of concern unless it is coupled with some actual ability to control or exercise a substantial degree of influence over the way those shares will be voted upon. Until such time as there is causal nexus between the power to acquire and the requisite control or influence of the target, it is submitted that the category (c) definition of "share" is not satisfied.

In addition, the reference in category (d) to "perpetual debentures" may be inappropriate in a definition of the term "share". While originally the line between equity and debt financing may not have been clear,[53] a modern day reference to perpetual debentures in a definition of the term "share" seems inappropriate unless it is also given a narrow meaning. There is no immediate answer as to how the term "perpetual debenture" should be defined. It is not defined under the Commerce Act 1986, and the only reference to it in the Companies Act 1955 is in the heading to section 69 of that

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52 It is arguable that the acquisition of non-voting shares will not in fact be subject to the s 47(1) prohibition because the purchaser may be merely passive and not assume control or a substantial degree of influence over the target company. See Section II C3 below. A further interesting point on passive shareholders arises in the case of shares acquired wholly for investment. The third paragraph of s 7 of the Clayton Act exempts such acquisitions provided that the shares are not voted upon. See Areeda and Turner, above n 48, 324-333.

53 See JH Farrar and MW Russell *Company Law and Securities Regulation in New Zealand* (Butterworths, Wellington, 1985) 159.

Act. In modern day practice it appears that perpetual debentures are virtually non-existent.

The view may be taken that perpetual debentures are a peculiar form of debt which contain no provision for repayment of the debenture holder's principal at a fixed date. Rather, payment of principal is only to be made on a contingency.[54] If this interpretation is placed upon the term "perpetual debenture" it may accord with the meaning which was presumably intended to apply to it. One assumes that debt obligations could only appropriately be raised under the Commerce Act as equating to share acquisitions where they confer on the holder the ability to control or substantially influence the company for a competitively significant period of time. If a "perpetual debenture" is in the form described above, it is only likely to be held by persons with such requisite degree of competitive control or influence.

3 Control, de facto control and partial acquisitions

As previously noted, the new section 47 prohibits the acquisition of assets of a business or shares if, as a result, a dominant position is acquired or strengthened. There is apparently no minimum level of share or asset acquisition, so that at least on the face of section 47, the acquisition of any assets or any shares may lead to a contravention. The Commission has stated:[55]

> Acquisitions by companies which would previously have fallen outside the merger control of the Commerce Act or which involve less than a 20% shareholding may, under the new regime, offend if they can be shown to create or strengthen a dominant position.

Section 47 prohibits only those acquisitions which result in the acquisition or strengthening of dominance. It is submitted that this causative element can only be satisfied if the acquirer either gains control of the target through the acquisition, or if the level of the shareholding or assets acquired, together with other links between the acquirer and the target are such that the acquirer is able to exert a substantial degree of influence over the competitive behaviour of the target.

The Commission has previously recognised that the analysis of dominance is a two staged process. Before considering whether the acquisition will create or strengthen a dominant position, it is necessary first to consider whether the acquirer will acquire sufficient control or influence over the target in order for the proposal to have "meaningful effect".[56] The Commission has recognised that a company may have the ability to control another even when it does not have absolute control, and accordingly,

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54 See *The Encyclopaedia of Forms and Precedents* (Butterworths, London, 4th ed, 1967) Vol 6, 1207 footnote 21.

55 J Feil "Approach of the Commerce Commission to the New Law", Commerce Commission Business Acquisitions Seminar, Wellington, 6 December 1990, 5.

56 *Fletcher Challenge Limited/NZ Forest Products Limited* (1988) 1 NZBLC (Com) ¶ 99-517, 104, 311-104, 312. See also *Rada Corporation Limited/NZ Forest Products Limited* (1987) 1 NZBLC (Com) ¶ 99-512, 104, 188.

it has recognised the existence of differing levels of control.[57] These levels are absolute control, de facto control and influence resulting in the removal of competitive constraints. The concepts of "control" and "influence" have also been recognized in other jurisdictions as a pre-requisite to establishing a merger situation.[58]

Absolute control has been interpreted as meaning a situation where one company becomes an interconnected body corporate of the other. Where the shareholding is in excess of 50%, the acquirer's ability to control the behaviour of the target will be apparent. However, shareholdings at levels less than 50%, particularly if accompanied by other links between the acquirer and the target, may give the ability to influence the competitive behaviour of the target.

De facto control and substantial influence are recognised by the Commission to exist at a level short of absolute control. The essential question appears to be whether two "heads" are reduced to one.[59]

The Commission said in *Fletcher Challenge Limited/NZ Forest Products Limited*:[60]

> As a practical matter, a situation could be envisaged where the influence of a shareholder was short of control, but so substantial as to amount to the same thing. Put in another

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57 Above n 56.

58 (i) *EEC*: See the EEC Merger Regulation (EC Regulation 4064/89, 1989 OJ L257/14). Article 3 defines a "concentration" for the purposes of the Regulation as occurring when two previously independent undertakings merge, or where one or more undertakings directly or indirectly acquire control of another. Control occurs where rights confer the possibility of one or more undertakings exercising a "decisive influence" over another.

(ii) *United Kingdom*: Merger situations qualifying for investigation exist where two or more enterprises "cease to be distinct". This occurs where enterprises are brought under common ownership or control. Common control is deemed where a person or group of persons is able directly or indirectly to control or has the ability materially to influence the policy of a body corporate, without having actual control. See ss 64 and 65 of the Fair Trading Act 1973 (UK).

(iii) *Republic of Ireland*: A merger situation exists where two or more enterprises come under common control. Enterprises are deemed to be under common control if management decisions in the acquirer and target are able to be made by the same person or group of persons. See s 1(3) of the Irish Mergers, Takeovers and Monopolies (Control) Act 1978.

(iv) *Germany*: 1990 Amendments to the German Act against Restraints of Competition bring within the definition of "merger" all combinations that result in the ability of the acquirer to exercise a significant competitive influence over another entity.

(v) *Canada*: S 91 of the Canadian Competition Act 1986 defines a merger for the purposes of the Act as the acquisition or establishment, direct or indirect of control over a significant interest in another.

59 This test is similar to the United Kingdom concept of enterprises "ceasing to be distinct". See ss 64 and 65 of the Fair Trading Act 1973 (UK).

60 Above n 56, 104,311 - 104,312.

way, the circumstances might be such that it is impractical to regard the two companies as separate "heads" for the purpose of analysing whether competition exists in any market and whether a person is acquiring or strengthening a dominant position.

The question of whether the acquirer and the target become one "head" or remain two "heads" is the correct starting point. Clearly if the circumstances of the case indicate that the acquirer and the target are one, in that a single person directs their strategy, it is correct to aggregate their market shares for the purpose of assessing dominance. Where, however, the two remain independent "heads", aggregation does not occur. Any competitive co-ordination between the independent parties is a matter which should be scrutinised under Part II rather than Part III.[61]

It is necessary to ask, therefore, at what levels such "influence" may be said to have been achieved such that it is impractical to regard the two companies as separate heads for competition purposes. Further, what factors are relevant in deciding whether the required degree of influence exists?

It is submitted that "substantial degree of influence" is the appropriate test for determining whether the acquirer possesses (or will possess) a sufficient degree of influence to enable it to influence the competitive behaviour of the target. This approach is consistent with the terminology found elsewhere in section 47.[62] Useful guidance for assessing whether substantial influence exists can be obtained from the Commission's previous decisions and from the United Kingdom authorities on the existence of substantial or material influence.

It is submitted that rebuttable presumptions should be adopted as an aid to assessing whether the necessary degree of influence exists. The authorities suggest that shareholdings at certain levels under 50% may give rise to certain presumptions of ability to influence. Clearly such presumptions must be rebuttable, as the degree of influence depends on the facts of each case.

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61 This distinction is recognised in the EEC Merger Regulation (above n 58) and in the European Commission Notice regarding concentrative and co-operative operations ((1990) OJ C203/10) which provide that acquisitions fall within the Merger Regulation if they bring about a durable change in the structure of the undertaking and result in the creation of an autonomous economic entity. The acquisition of minority shareholdings where the companies remain independent do not fall within the Merger Regulation, but may be considered under Article 85 (similar to s 27 of the Commerce Act) where the acquisition results in the co-ordination of competitive behaviour.

62 We suggest that the test of "substantial degree of influence" is the same under ss 47(1) and 47(3). See Section III below.

REBUTTABLE PRESUMPTION 1:

A shareholding between 30% and 50% is likely to give rise to substantial influence.

The authorities indicate that a shareholding between 30% and 50% is likely to give rise to substantial influence.[63] In *Broadcast Communications Limited/The Crown*[64] the Commission said, when considering TVNZ's existing influence over Sky Television:[65]

> While TVNZ's shareholding (35%) does not give it control of Sky, its presence on Sky's board gives it the ability to influence the direction of Sky. TVNZ's technical and commercial expertise gives added weight to that influence ... Sky's ownership structure would allow it to act in a manner which was independent of TVNZ, but it is considered that Sky's equity and other links with TVNZ are such that the two organisations are likely to act as one in much of their day to day operations.

REBUTTABLE PRESUMPTION 2:

A shareholding of between 20% and 30% is likely to give rise to substantial influence only if there are "other factors".

These "other factors" would include the distribution of other shareholdings,[66] the ability to defeat shareholder resolutions[67] and board representation. The presumption is clearly rebuttable, and in appropriate cases shareholdings of 20%-30% may not confer

63 30% - 50%: material influence likely: *Babcock & Wilson Limited/Herbert Morris Ltd* (MMC Report 1976): a 39% interest gave the ability materially to influence; *Rada Corporation/NZ Forest Products* (above n 56, 104,188): a 30% interest could give rise to de facto control; Mergers, Takeovers and Monopolies (Control) Act 1978 (Eire): where the acquirer holds over 35% of the voting shares in the target, the acquirer and target are deemed to be under common control.

64 Decision 248, 11 July 1990.

65 Above n 64, para 7.2.

66 *BP/Kuwait Investment Office* (MMC Report 1988, Cm 447): material influence could exist "as low as" 22% where other shareholdings are fragmented; *Great Universal Stores PLC/Empire Stores (Bradford) PLC* (MMC Report 1983, Cmnd 8777): a holding of 29.99% gave an ability materially to influence. The shareholdings were widely distributed, with no other holding representing more than 7%; *Coats Viyella PLC/Tootal Group PLC* (MMC Report 1989, Cm 833): a shareholding of 29.9% constituted material influence as other shareholdings were "considerably fragmented".

67 *Tate & Lyle PLC/Ferruzzi Finanziaria SpA/S & W Berisford PLC* (MMC Report 1987, Cm 89): Ferruzzis' holding of 23.74% relative to other shareholdings (next highest 14.69%) meant it was almost certain Ferruzzi could defeat a special resolution, and in some circumstances may have been able to defeat ordinary resolutions; *Elders IXL PLC/Scottish and Newcastle Breweries* (MMC Report 1989, Cm 654) an ability to block special and ordinary resolutions constituted material influence as Elders had the largest single shareholding and could block the appointment of directors.

the requisite degree of influence.[68] The critical question in any case must be whether the holding gives the acquirer the ability to influence the target's management and policy.[69]

A consideration of these "other factors" is evident in a recent United Kingdom Monopolies and Mergers Commission (MMC) report, where the MMC concluded that British Airways, through a 20% shareholding, acquired an ability materially to influence Sabena World Airlines.[70] The MMC reached this conclusion even though Sabena SA retained 60% of the capital of Sabena World Airlines and had the right to appoint six of its ten directors. British Airways had been closely involved in the development of Sabena World Airlines' business plan, it had seconded five key employees to the company, and its appointees to the company's board were influential figures in the industry. Furthermore, the significant investment made by British Airways showed it had a reasonable expectation of being able to influence the way in which Sabena World Airlines' business was developed.

It is interesting to note that the repealed section 47(1)(a) contained a threshold level of 20%. The Commission stated in *Fletcher Challenge/NZ Forest Products*[71] that the 20% level was a jurisdictional threshold only, and that a further investigation was necessary to determine whether the shareholding sought actually resulted in the passing of control. This is true in respect of shareholdings both above the former 20% threshold and shareholdings below it.

REBUTTABLE PRESUMPTION 3:

For shareholdings between 15% and 20%, substantial influence is unlikely unless there are special circumstances.

The authorities indicate that substantial influence is unlikely with shareholdings between 15% and 20%, unless there are special circumstances.

In *Brierley Investments/Air New Zealand*,[72] a holding of 19.99% where there was an independent majority shareholder indicated that there was a separation of identity between the 19.99% holder and the target, such that it was "unrealistic to treat the two as one head",[73] thus the question of dominance was only relevant if the acquisition would remove existing competitive constraints.

To date, the lowest holding of voting shares which has been held to constitute substantial or material influence is 16.1%. This conclusion was arrived at by the

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68 *Apolo Business Machines Inc* v *Compucorp* (1976-2 Trade Cases ¶ 61015: a 24% holding of voting shares did not fall within s 7 Clayton Act in the circumstances of the case. There was no evidence of control and no board representation.

69 *Crane Co* v *Harsco Corp* 509 F Supp 115 (1981).

70 *British Airways/Sabena* (MMC Report 1990, Cm 1155).

71 Above n 56, 104,312.

72 Above n 26.

73 Above n 26, 104,473.

Monopolies and Mergers Commission in the United Kingdom in *P & O/European Ferries*.[74] In that case P & O held 20.8% of the shares in European Ferries, but only 16.1% of the voting rights. P & O's Chairman was also a non-executive director of European Ferries. Furthermore, both companies agreed that there was an ability materially to influence. This latter point was considered to be influential but not decisive. The MMC decided that these factors, together with evidence of P & O's intervention in the company's affairs, were circumstances "peculiar to the case" which lead them to the conclusion of material influence.

REBUTTABLE PRESUMPTION 4:

Shareholdings of 15% and under do not give rise to the necessary degree of influence.[75]

On 13 February 1991 the Commission announced that it would be taking no action in relation to Brierley Investments Limited's acquisition of a 14.17% holding in Lion Nathan Limited because Brierley Investments would not be able to exercise "a substantial degree of influence" over Lion Nathan. The Commission stated:[76]

> Without the possibility of such influence, and without evidence of anti-competitive co-operation between the two companies, the circumstances did not give the Commission grounds to intervene.

Clearly whether the necessary degree of influence is established in any instance will depend on the facts of each case. The critical question is not one of numerical control, but what the probable future effect of that holding will be combined with the other links between the parties.[77]

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74 *The Peninsular and Oriental Steam Navigation Company/European Ferries PLC* (MMC Report 1986, Cm 31).

75 *L J Drieling Motor Co* v *Peugeot Motors of America* 1985-1 Trade Cases ¶ 66413, 605 F Supp 597: an acquisition of 15% was not an acquisition of a sufficiently large interest to fall within s 7 Clayton Act; *Amcor Limited/New Zealand Forest Products Limited* (1987) 1 NZBLC (Com) ¶ 99-515: 15% held by Rada and NZFP in NBHH was not sufficient to amount to control or substantial influence, thus the joint venture between Amcor, NZFP and APPM (a subsidiary of NBHH) had to be regarded as two heads in competition terms; *H Weidmann AG/B S & W Whiteley Limited* (MMC Report 1975): a holding of 9.94% did not give an ability to exercise material influence; *Hart-Scott-Rodino*: acquisitions of up to 10% of a company's stock for investment purposes is exempted from notification (15% in the case of an institutional investor). See Axinn, Fogg and Stoll, above n 21, 236.

76 Commerce Commission Media Release, 13 February 1991.

77 *Gulf Western Industries* v *Great Atlantic Pacific Tea Co Inc* 476 F 2d 687 (1973).

The authorities indicate that the relevant factors are:

(a) The distribution of other shareholdings;

(b) Board representation;

(c) Evidence that the acquirer has influenced the policy of the target;

(d) Reciprocal connections;[78] and

(e) Parties agreeing that material influence exists.

It is submitted that the two most important factors, and accordingly those which should carry the most weight in establishing ability to influence, are:

(a) The distribution of other shareholdings;[79] and

(b) Board representation.

The distribution of other shareholdings is clearly important. For example, depending on the facts, a shareholding of 40% which would be "likely" to result in significant influence under the rebuttable presumptions advocated may not result in a substantial degree of influence if there was only one other shareholder with 60% who was not influenced by the 40% shareholder. However, the fact that there is another block shareholding, does not necessarily negate the possibility of influence over the target, as can be seen from the United States case of *Gulf and Western Industries* v *Great Atlantic Pacific Tea*.[80]

Furthermore, even if there is one single large shareholder and the remainder of the shares are widely held, this does not necessarily mean that the single shareholder possesses the necessary degree of influence if, for example, there is evidence that the target is not in fact influenced by that shareholder.

Arguably of greater significance than the size and distribution of shareholdings is the question of board representation and control. Although a company clearly has a

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78 Cross directorships which do not result in the parties ceasing to be distinct and becoming one head, may be a means by which competition as to prices and terms are restricted, resulting in co-ordination of competitive behaviour: *Edmonds Food Industries Limited/WF Tucker & Co Limited* (Decision 84, 21 June 1984); *Transfin Investments Limited/Grower Holdings Limited* (1984) 5 NZAR 20. We discuss in Section V below the relationship between ss 47 and 27.

79 *Scottish Newcastle/Elders IXL* (above n 67); *BP/Kuwait Investment Office* (above n 66); *Great Universal Stores* (above n 66).

80 Above n 77. Gulf & Western argued that it was not likely to attain control of Great Atlantic, as one family held collectively over 50% of the voting rights. However, there was no evidence of block voting by the family, and the family was not unwilling to reduce its interest.

responsibility to report to its shareholders, in the case of public companies it is not normally the shareholders who formulate and direct the policies of the company. This is the function of the board. A situation may arise where there is a low shareholding but board control. In such a situation, it is at least arguable that an enterprise which controls the board of another, or even one which has a significant representation on the board of another, has the ability to exercise a substantial degree of influence over the competitive behaviour of that other.

In *Fletcher Challenge/NZ Forest Products*,[81] the Commission commented that the effect of one company having a director on the board of another meant that those directors would have access to information relating to strategic planning, marketing, substantial or long-term contracts and short-term competitive plans. Although the directors in question are under a legal duty to act in the interests of the company on whose board they appear, the availability of strategic information to the first company may enable that company to alter its competitive behaviour.

In summary, it is submitted that no question of aggregation can arise unless the acquisition results in control or the ability to exercise a substantial degree of influence. Accordingly, no consideration of dominance should be necessary unless this first step of control or substantial influence is satisfied. If there is no such control or influence, then the acquirer and the target remain independent "heads" for the purposes of competition analysis.

The adoption of the rebuttable presumptions outlined above would, it is suggested, assist in assessing whether the acquisition of a shareholding in any particular case will or is likely to give the acquirer the ability to influence the competitive behaviour of the target, and thus to assess whether it is necessary to undertake an analysis of dominance.

III ASSOCIATED PERSONS

The new section 47(2) provides that where two or more persons are interconnected or associated and together are in a dominant position, each of them is deemed to be in a dominant position. Section 47(3) states that a person is associated with another if it is able, directly or indirectly, to exert "a substantial degree of influence over the activities of another". Section 47(3) is substantively similar to section 50(2A) of the Trade Practices Act 1974 (Cwlth).[82]

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81 Above n 56, 104,312.

82 The Trade Practices Amendment Bill 1990 (Cwlth) will insert into the Australian Trade Practices Act (with effect from 21 December 1990) a provision to the effect that the reference in s 50(2) to persons together being in a position to dominate the market is a reference to their being in that position whether or not they have acted in concert to put themselves in that position. The Commerce Amendment Act 1990 does not contain a provision similar to the proposed s 50(2AA) of the Australian Act, and questions may arise as to whether parties have acted in concert to put themselves in a dominant position.

Sections 47(2) and 47(3) relate to persons who are already associated with one another, whereas section 47(1) is concerned with the acquisition of the shares or assets of another, whether or not there is any existing holding. It has been suggested above that in the case of partial acquisitions, section 47(1) requires a two stage analysis: first an assessment of whether the acquisition results in two heads becoming one, and, if that test is satisfied, an analysis of dominance.

The Commission has indicated that in considering the meaning of the phrase "substantial degree of influence" in section 47(3) it would be inclined to obtain some guidance from the New Zealand Society of Accountants accounting standard on business combinations (SSAP8).[83]

The term "significant influence" in SSAP8 is an accounting standard which is concerned with establishing the ability of a long term investor to influence the financial and operating policies of the "investee".[84] It is submitted that section 47(3), however, is concerned only with establishing the ability of one person to influence the competitive behaviour of another.

We have cited above[85] a number of authorities which establish when substantial influence exists. Although in many cases these do not diverge markedly from the definition in SSAP8, we suggest that a similar test for establishing influence should be applied under both section 47(1) and section 47(3),[86] and that guidelines for assessing influence should more appropriately be drawn from the Commission's previous decisions and from the overseas authorities cited.

IV BARE TRANSFER OF MARKET DOMINANCE

Stated in its simplest form, a bare transfer of market dominance occurs where there is the mere substitution of one head for another in a market. The acquirer has no existing presence in the relevant market and no strengthening of dominance will result from the acquisition.

It appears to be sound as a matter of competition policy that such acquisitions be permitted to occur unhindered. No change in market circumstances would result. If such a transaction was considered to amount to the acquisition of a dominant position there may, by virtue of the transfer, be no immediately apparent countervailing public

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83 S M Lojkine "How the Commerce Amendment Act has changed the Merger and Takeover Regime", Commerce Business Acquisition Seminar, Wellington, 6 December 1990, 9.

84 Paragraph 3(12) SSAP8.

85 Above Section II C 3.

86 In *P & O/European Ferries* (above n 74) the MMC in assessing whether material influence existed heard evidence from the accountancy firm Peat Marwick Mitchell & Co as to the need for P & O to equity-account for its shareholdings in European Ferries under the United Kingdom Accounting Standard SSAP1. However, the requirement to equity-account was only one of the factors which lead the MMC to the conclusion of material influence.

benefit to justify authorisation. Such an approach and outcome would result in the protection of incumbent directors and managers of already dominant firms. As Jennings and Vautier point out, the net effect of this approach "would be greatly to reduce the disciplining influence of competition for corporate control on the directors and managers of such firms".[87]

Against the background of the Australian experience, it was surprising that the Commerce Act 1986, when first enacted, did not make express reference to the bare transfer situation. In Australia, a prohibition against mergers was introduced in July 1977 couched in terms materially similar for present purposes to those contained in section 47(1) of the Commerce Act 1986. Under the repealed section 50(1)(a) of the Australian Act, corporations were prohibited from acquiring shares or assets if this would result in the acquisition of a position to control or dominate a market. Not long after the introduction of this amended legislation, the concerns of various commentators were confirmed when it was indicated by the Federal Court in *Trade Practices Commission* v *Ansett Transport Industries (Operations) Pty Limited*[88] that the bare transfer of a dominant position fell within this prohibition. Accordingly, for such acquisitions to proceed, they would first require the grant of authorisation on public benefit grounds. This case, together with subsequent proceedings commenced by the Trade Practices Commission, caused a substantial degree of debate in Australia.[89] Eventually, section 50(2C) of the Trade Practices Act 1974 (Cwlth) was enacted as the Trade Practices (Transfer of Market Dominance) Amendment Act 1986 (Cwlth). This provision, in essence, provided that the prohibition in section 50 did not apply to situations where the acquirer's transferred dominance was no greater than the dominance of the target firm.

Inevitably there was a danger that in the absence of express legislation pertaining to the bare transfer situation, a result similar to that envisaged in *Ansett* could occur in New Zealand. However, in a series of cases[90] the Commission elected to take a sound approach in the context of a statute designed to promote competition, rather than taking a strictly literal approach. The views of the Commission in relation to the bare transfer of a monopoly power are best summarised in the *Welgas Holdings Limited/Auckland Gas Company Limited* case,[91] where it emphasised that clearance would only be declined if there was a concern about any increase in market power as a result of the proposal.

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87 S Jennings and K M Vautier "Review Article - Competitive Trading in New Zealand: The Commerce Act 1986" [1988] NZ Recent Law 95, 103.

88 (1978) ATPR ¶ 40-071, 17,731.

89 See F Hanks, "Not with a Whimper but a Bang: Bare Transfer of Monopoly Power and the Trade Practices Act" (1986) ABLR 150.

90 *News Limited/Independent Newspapers Limited* (1986) 6 NZAR 47, 51; *Equiticorp Holdings Limited/Fisher & Paykel Industries Limited* (1987) 1 NZBLC (Com) ¶ 99-506, 104, 101; *Welgas Holdings Limited/Auckland Gas Company Limited* Decision 209, 3 September 1987, paras 8-13.

91 Above n 90.

Notwithstanding the approach taken by the Commission on the bare transfer question, it should be noted that this matter was not the subject of litigation before the High Court. New section 48 of the Commerce Act 1986[92] codifies the approach which has been enunciated by the Commission. Section 48 excludes the application of section 47 if the target firm is dominant and if the acquisition has not resulted or will not result in the strengthening of that dominant position. This new provision is a welcome addition to the Act. It gives statutory recognition to an approach for analysing bare transfers, the logic of which does not appear to be in dispute.

V SECTION 27

Section 46 of the Commerce Act 1986 provided that the restrictive trade practices provisions in Part II did not apply to the entering into of a contract in so far as it contained a provision providing for the acquisition of shares in a company or the whole or any portion of the capital or assets of a business. The Commerce Amendment Act 1990 repealed section 46 with effect from 1 January 1991 and did not replace it with an equivalent provision. The 1990 Act did, however, insert a new section 69 which provides that nothing in sections 27 and 47 applies to the acquisition of assets of a business or shares if the acquisition is carried out in accordance with a clearance or authorisation. The repeal of section 46, combined with the new section 69, is open to the interpretation that in the absence of a clearance or authorisation section 27 is capable of applying to any acquisition of shares or assets. Section 83(6) may support this analysis, since it provides that a person is not liable to pecuniary penalties under both section 80 (restrictive trade practices) and section 83 (business acquisitions) in respect of "the same conduct".

The Commission has stated that it intends to apply both sections 47 and 27 to mergers which have not been cleared or authorised. The Commission argue, in support of this approach, that Parliament intended that section 27 should apply to all uncleared and unauthorised acquisitions. The Chairman of the Commission has stated:[93]

> It is clear that the legislature intended to expose uncleared mergers to section 27, and that intention must be put into effect. The raising of the Part II penalties to match the penalties for breach of the section 47 dominance provision is another indication that the legislature wanted to emphasise the seriousness of failing to obtain clearance or authorisation where the thrust of the Act indicates that this is desirable. ... The Commission has decided that it will give effect to the legislative intention to come down severely on uncleared mergers by attacking such provisions under section 27 as well as under section 47.

As noted in the introduction to this article, in changing from a system of mandatory pre-merger notification to a voluntary system, it was the legislature's intention to bring the business acquisitions regime in New Zealand closer to that in Australia. If the Commission is correct and section 27 is capable of applying to the acquisition of shares

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92 Introduced by s 18 of the Commerce Amendment Act 1990.

93 Above n 83, 11.

or assets, then harmonisation with Australian law will not have been achieved in so far as the relationship between the mergers provisions and the restrictive trade practices provisions are concerned. Section 45(7) of the Australian Act provides that section 45 (which is equivalent to section 27 of the Commerce Act) does not apply to contracts, arrangements or understandings in so far as they provide for the acquisition of shares or assets. Section 45(7) of the Australian Act equates to the repealed section 46 of the Commerce Act 1986. The Australian legislation recognises a clear distinction between the application of rules relating to restrictive trade practices and the rules relating to mergers.

It is submitted that section 27 should not apply to situations involving the acquisition of shares or assets of a company except to the extent that such acquisitions contain elements of a continuing behavioural nature such as restraints of trade or distribution and marketing arrangements. This submission rests upon the premise that business acquisitions are structural and that subsequent restrictive trade practice conduct is behavioural.

This fundamental distinction between the structural and behavioural aspects of full merger situations has been recognised in Australia and now also in the EEC. In 1987 the European Court of Justice issued its judgment in the *Philip Morris* case,[94] in which it indicated that a partial acquisition was capable in some cases of falling within Article 85 of the Treaty of Rome.[95]

The European Commission, which had been endeavouring since 1973 to achieve the adoption of a Merger Regulation, claimed that Article 85 was capable of applying to all acquisitions (including full mergers), if competition was lessened. The threatened application of Article 85 by the Commission resulted in businesses lobbying their national governments for a clarification of the law. It was argued that Article 85, which was aimed at restrictive trade practices, was unsuitable for application to merger situations where there was no continuing agreement or arrangement between the vendor and the purchaser. Furthermore, additional uncertainty was created by Article 85(2) which states that contractual provisions which fall within Article 85 are "void". After *Philip Morris* the momentum for change in the EEC increased dramatically, and on 21 December 1989, the Commission achieved its objective with the introduction of a Community Merger Regulation.[96]

There is now a clear distinction in the EEC between acquisitions which bring about a lasting change in the structure of an enterprise and the creation of a single economic entity (or "one head" to use the Commerce Commission's terminology) and those which "have as their object or effect the coordination of the competitive behaviour" of

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94 *British-American Tobacco Company Limited and R J Reynolds Inc* v *European Commission* (1988) 4 CMLR 24.

95 Article 85 is similar in its terms and effect to s 27. It prohibits agreements and concerted practices which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition in the Common Market.

96 Above n 58. The Regulation came into force on 21 September 1990.

enterprises.[97] The former fall within the Merger Regulation and will not now be considered under the restrictive trade practices prohibition in Article 85, whereas the latter are excluded from the Merger Regulation and may fall within Article 85.[98]

Apart from the fundamental analytical problem of treating acquisition conduct as behavioural as argued above, the potential application of section 27 to such situations is incompatible with certain other provisions of the Act. In addition, the machinery in the Act is unsuited to deal with circumstances where an acquisition is implemented without clearance or authorisation and is in breach of section 27 but not section 47. We elaborate briefly on these views.

(a) The first point to note is a potentially significant incompatibility created by the exception provisions of section 44. Section 27 prohibits persons entering into contracts which contain provisions substantially lessening competition. If section 27 were capable of applying to mergers, one must ask which "provisions" of the acquisition agreement would lessen competition substantially. Presumably one would say it is those provisions relating to the sale and purchase of shares or assets. This would, however, lead to strange results. In particular, section 44(1)(d) provides that nothing in Part II applies to the entering into of a contract or the giving or requiring the giving of a covenant in connection with the sale of a business or shares "in so far as it contains a provision that is solely for the protection of the purchaser in respect of the goodwill of the business". Section 44(1)(i) further provides that nothing in Part II applies to any act done to give effect to a contract, or arrangement or understanding falling within section 44(1)(a)-(g).

(b) A further area of incompatibility is section 66(3). Section 66(3) provides that if the Commission is satisfied that an acquisition does not result in dominance under section 47(1)(a) or (b), it shall grant clearance. Since section 66(3) does not refer to section 27, in cases where the dominance test is not satisfied but the substantial lessening of competition test is satisfied, the Commission is required to grant clearance, and, by virtue of section 69, the clearance operates to disapply section 27, regardless of the effect on competition.

(c) In considering the appropriateness of applying section 27 to business acquisitions, it is useful to consider a hypothetical transaction which has in fact taken place without a clearance or authorisation. In this example one must

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97 Above n 58, Recital 23. See also European Commission Notice on Concentrative and Cooperative Operations (above n 61).

98 This distinction applies equally to full mergers and to the acquisition of interests or participation rights in a joint venture (which performs on a lasting basis all the functions of an autonomous economic entity and which does not give rise to the coordination of competitive behaviour between the parties to the joint venture), and also to the acquisition of minority interests (EC Notice, above n 61). To satisfy the requirement of the creation of one entity, the acquisition of the minority interest must give rise to the ability to exercise a "decisive influence" over the target.

assume that consideration has passed and that the acquirer has taken all steps possible to perfect title, such as the registration of share transfers. How is section 27 to apply in such circumstances? The schemes of sections 47 and 27 are significantly different in this context. Section 47 and its related provisions are structured to apply to business acquisitions. A key remedy applicable to acquisitions which fail the dominance test is divestment. No such remedy is expressly available under section 27 when it is contravened. Rather, section 27(4) is couched in terms of rendering provisions of contracts unenforceable. This is inappropriate, uncertain and arguably inadequate when applied to business acquisitions which have in fact taken place.

The problem is, of course, that the relief obtainable under section 27 relates to behavioural rather than structural situations. Apart from penalties and damages, it is not clear what further relief courts will be able to grant. It may be argued that contractual variation or cancellation could be ordered under section 89(2), but this option poses obvious difficulties. It will not be possible under this approach to vary the nature of the contract or to cancel it in the way envisaged by this provision because the dealing between the contracting parties is complete and it may be difficult, if not impossible to restore events to their pre-contractual position particularly if some assets or shares have been on-sold. Thus, in any case where a business acquisition is found to contravene section 27 (and not section 47), the court will be placed in a dilemma as to the precise nature of its powers to grant relief.

In summary, it is inappropriate to apply section 27 to the structural aspects of business acquisitions. There is a strong case for the immediate reintroduction of a provision similar to the repealed section 46.

VI CLEARANCES AND AUTHORISATIONS, UNDERTAKINGS, REMEDIES, PENALTIES AND APPEALS

A *Clearances and Authorisations*

The procedural mechanics of the clearance and authorisation provisions are beyond the scope of this article. A brief comment upon the main changes to these provisions which have been introduced by section 23 of the Commerce Amendment Act 1990 follows.

The method of application for clearance and authorisation has now changed. The old section 66 related to applications for clearance or authorisation. These two steps have now been severed with new section 66 dealing with clearances and new section 67 dealing with authorisations. The Commission has confirmed that there has been a deliberate change to the pre-1 January 1991 regime under which an application for clearance could convert into an application for authorisation if dominance concerns were

thought to exist. The Commission now requires separate applications for clearance and authorisation.[99]

Under clearance applications, the Commission has 10 working days, or such longer period as the Commission and the notifying party agree, to determine whether or not the proposal would or would be likely to result in the acquisition or strengthening of a dominant position.[100] If the Commission does not reach a determination within this time-frame it is deemed to have declined the application.[101]

Turning to authorisation applications, the Commission must follow two steps within 60 working days or such longer period as the Commission or the applicant may agree. It must first determine whether it should grant clearance to the application on the grounds that dominance concerns do not arise. If the Commission forms the opinion that dominance concerns are present however, it may grant authorisation to the proposal if "it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted."[102] As in the case of clearances, if an authorisation application is not determined within the time frame outlined above, it too is deemed to be declined.[103]

The key distinctions between the old and new clearance and authorisation provisions are:

(a) The initial time frame for the consideration of clearance and authorisation applications has been reduced from 20 and 100 working days to 10 and 60 working days respectively.[104] The new provisions also provide greater flexibility in that the Commission and the applicant can agree to extend the period.

(b) If the Commission fails to determine an application within the initial time-frames laid down in the Act or otherwise agreed between the Commission and the notifier, it is now deemed to have declined that application. Under the old regime consent was deemed to have been given in such circumstances.[105]

(c) The previous methodology of authorisation applications may be altered by the introduction of the new test of permission contained in section 67(3)(b). If there were dominance concerns the onus was previously on the Commission to identify detriments which would result or be likely to result from such dominance. The Commission was then required to determine whether the claimed public benefits outweighed the detriments. In this last inquiry the onus

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99 Decision 259 prescribing forms for applications under ss 66 and 67.

100 Section 66(3) of the Commerce Act 1986.

101 Section 66(4) of the Commerce Act 1986. It is interesting to note that no equivalent provisions for clearance are contained in the Trade Practices Act 1974 (Cwlth).

102 Section 67(3)(b) of the Commerce Act 1986.

103 Section 67(4) of the Commerce Act 1986.

104 See repealed ss 66(3) and 66(9) of the Commerce Act 1986.

105 See repealed ss 66(4) and 66(9) of the Commerce Act 1986.

reverted back to the applicants.[106] Presumably the deletion of the reference to the requirement that the claimed public benefits must outweigh the detriments has some significance. Inevitably, a balancing exercise must still be undertaken. In deciding whether an acquisition should be permitted on public benefit grounds the Commission will be required to balance established public benefits against the dominance concerns it has. Ultimately the analysis is unlikely to differ materially from that undertaken pre-1 January 1991, however the onus on the Commission to identify and establish detriments at the half-way stage no longer appears to apply.

We note one last point on the meaning of "public benefit". The term has not previously been defined in legislation and it has proven to be an elusive concept to apply in practice. The Commission's previous approach to public benefit has been inconsistent. In some cases it has concentrated on whether it could be demonstrated that benefits will flow to the consumer rather than the company and its shareholders.[107] The contrary position has also been taken that the Act sets no distributive standard.[108] Thus, there has been confusion and debate as to the weight to be given so-called private benefits.[109]

For the first time some statutory guidance on the issue of public benefit has been provided through the introduction of a new section 3A into the 1986 Act. This section, which came into force on 1 July 1990, provides that in determining whether, or the extent to which, conduct will result or will be likely to result in a benefit to the public, regard should be had to "any efficiencies" arising from such conduct. No doubt differing views will emerge concerning what is meant by the term "efficiencies" and the weight that should be attached to such efficiencies. Those who have previously advocated that the objective of the Act is economic efficiency will be encouraged by the introduction of section 3A.[110] However, the potential still remains for the view to be taken that public benefits equate only to those benefits which can be demonstrated to be passed on to consumers or a significantly wide cross-section of the New Zealand public. Indeed, in October 1990 the Commission signalled that such approach would be applicable. In

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106 *Goodman Fielder Limited/Wattie Industries Limited* (1987) 1 NZBLC (Com) ¶ 99,509, 104,146-104 148; *Amcor Limited/NZ Forest Products Limited* above n 75, 104, 246-104, 247; *Fletcher Challenge Limited/NZ Forest Products Limited* above n 56, 104, 305-104,307.

107 *Goodman Fielder/Wattie*, above n 106, 104, 148- 104,149; *Fletcher Challenge/NZ Forest Products*, above n 56, 104,309.

108 *New Zealand Co-Operative Dairy Company Limited/Auckland Co-Operative Milk Producers Limited* (1988) 1 NZBLC (Com) ¶ 99-518, 104,357 - 104, 358.

109 For a criticism of the Commission's previous approach on this issue see R J Ahdar "Authorisation and Public Benefit Under the Commerce Act 1986: Some Emerging Principles" (1988) ABLR 128, 141-142.

110 See F Hanks and P L Williams "The Treatment of Vertical Restraint Under the Australian Trade Practices Act" (1987) ABLR 149, 155-167; R R Officer "The Public Benefit Test in an Authorisation Decision", Trade Practices Workshop Paper, Monash University, July 1987, 7-8; P L Williams "Why Regulate for Competition" in *Regulating for Competition* (Centre for Independent Studies, 1989) 13,25-26.

Telecom Corporation of New Zealand Limited/The Crown[111] the Commission concluded that efficiency gains which were claimed to be public benefits should be discounted because these savings would pass to shareholders rather than the New Zealand public.

B Undertakings

The Commerce Act 1975 provided that in giving consent or clearance to merger or takeover proposals, the Commission could accept or require the giving of written undertakings.[112] The 1986 Act however, prior to its amendment in 1990, contained no express provisions enabling the Commission to accept undertakings when granting a clearance or authorisation. Until the Court of Appeal judgment in *Goodman Fielder Limited* v *Commerce Commission*[113] there was a general belief that undertakings were not an option under the 1986 Act. Following the Court of Appeal's judgment, the Commission concluded in *Amcor Limited/NZ Forest Products Limited*[114] that undertakings may be given by the parties and accepted or declined by the Commission in line with "fostering practical expedience and commercial reality".[115]

Undertakings accepted by the Commission have generally related to structural matters and it has always demonstrated an understandable reluctance to accept behavioural undertakings which would be difficult to monitor. In *Broadcast Communications/Crown*[116] the Commission commented that "if behavioural undertakings create difficulties, mere intentions would create even more problems".

The Commerce Amendment Act introduced a new section 69A into the 1986 Act, which provides statutory recognition of the Commission's power to accept written undertakings when granting clearance or authorisation under sections 66 or 67.[117] The new section 69A sets out the limits of the Commission's ability to accept undertakings. Undertakings may now be accepted only for "the disposal of assets or shares specified in the undertaking". Section 69A(2) makes it clear that the Commission cannot accept any undertakings other than undertakings for the disposal of assets or shares.

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111 Decision 254, 17 October 1990, ¶ 144.

112 Section 81 JD(1) of the Commerce Act 1975, inserted by s 38 of the Commerce Amendment Act 1983.

113 [1987] 2 NZLR 10.

114 Above n 75. The acceptance of undertakings also received lengthy consideration in *Goodman Fielder/Wattie Industries*, above n 56. The Commission stated that undertakings must be precise and contain adequate machinery to satisfy the Commission as to compliance. The Commission suggested that the undertakings should include provisions for divestment to be made within a specified time, and provisions to ensure that the business was sold as a going concern and not merely closed down.

115 Above n 75, 104,253.

116 Above n 64, para 10.3.

117 The acceptance of undertakings reflects the OECD recommendation for OECD countries to use undertakings as an alternative to allowing or banning a proposed merger. The OECD recommended allowing mergers subject to undertakings relating, for example, to divestiture which would then enable the merged firm to improve the conditions of competition. *OECD Report on Merger Policies and Recent Trends in Mergers* (1984).

The introduction of statutory undertakings is a welcome development. However, it is submitted that section 69A(2) will prove to be a significant constraint on the ability of the Commission to ensure that suitable undertakings are obtained. Section 69A(2) means that the Commission will be unable to accept any of the following undertakings:

(a) An undertaking not to acquire assets or shares;

(b) An undertaking that the company disposing of assets will run the business which is to be disposed of as a viable business distinct from others and maintain the assets and goodwill of the business until disposal;[118]

(c) An undertaking to give as much prior notice as possible to the Commission of the identity of the proposed purchaser;[119]

(d) An undertaking to ensure that the companies whose shares or assets were to be divested continued to trade and carry on business in the same normal and regular manner;[120]

(e) An undertaking to ensure that the companies whose shares or assets were to be divested remained in the same form and structure;[121]

(f) An undertaking to ensure that those companies did not enter into contracts, arrangements or understandings containing provisions substantially lessening competition;[122] and

(g) An undertaking not to enter into management or franchise agreements with the purchaser of the assets without the Commission's approval.[123]

Certain inadequacies of these new undertakings provisions are illustrated by reference to the position in the United Kingdom. The United Kingdom legislation has recently been amended to enable the Office of Fair Trading (OFT) to accept undertakings in merger situations to avoid a reference to the Monopolies and Mergers Commission.[124]

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118 *Trusthouse Forte PLC/Enterprises Belonging to Hanson Trust PLC* (MMC Report, 1987, Cm 96); Department of Trade and Industry Press Notice of 12 January 1987 sets out the undertakings given to the Secretary of State for Trade and Industry.

119 Such an undertaking was accepted in *Carter Holt Harvey Limited/Elders Resources NZFP Limited*, Decision 249A, 22 August 1990, paragraph 3 of the Deed of Undertaking.

120 Above n 119, paragraph 4(i) of the Deed of Undertaking.

121 Above n 119, paragraph 4(ii) of the Deed of Undertaking.

122 Above n 119, paragraph 4(iii) of the Deed of Undertaking.

123 Above n 119, paragraph 5 of the Deed of Undertaking.

124 The reasons for the United Kingdom moving to a system of statutory undertakings were discussed in Chapter IV of the Department of Trade and Industry Blue Paper "Mergers Policy" (1988, HMSO, London). They included making available a quicker and more flexible mechanism for dealing with competition problems and the benefits inherent in removing the objectionable features of a merger from the start.

The undertakings which the OFT may accept include undertakings to divest assets or shares, to safeguard the assets and goodwill until disposal and undertakings enabling the OFT to ensure compliance.[125]

This is not to advocate the adoption of behavioural undertakings as an alternative to structural undertakings. These are clearly difficult to monitor if they continue for any length of time. However, undertakings to safeguard assets are different in nature from undertakings, for example, to "treat customers fairly", which are clearly behavioural. It is submitted that as part of an undertaking to dispose of assets or shares within a limited time frame, an undertaking on the part of the disposer to safeguard the assets and goodwill of the business to be sold would assist in preserving the competitive value of the business, and would make enforcement easier from the Commission's point of view.

Section 85(1) of the Commerce Act as amended provides that if the undertaking is not complied with the Commission may apply to the court for an order for the disposal of the assets or shares which were the subject of the undertaking. This may not prove an effective remedy in practice, as the disposing company may comply with its undertaking under section 69A(1) and dispose of the assets or shares. However, it may have acted in such a way prior to disposal that the value of the disposed company or business as a competitor to the disposer is diminished.

Section 69A(3) provides that any undertaking given to the Commission under section 69A(1) is deemed to form part of the clearance or authorisation. If the undertaking is not complied with, then the acquisition will not have taken place in accordance with a clearance or authorisation, so that section 47 (and possibly section 27) will have been contravened. One of the consequences of this is that the Commission may apply to the court for a divestment order in respect of the section 47 breach. Only the Commission may apply for a divestment order, whereas under the new provisions relating to injunctions introduced into section 84, any person may apply. It is not clear why enforcement actions in relation to undertakings are limited to the Commission.[126]

Before passing from the question of undertakings, it is appropriate to consider confidentiality issues applicable to the consideration of such undertakings. The ability of third persons to be informed of and to make submissions on proposed undertakings is at issue.

Undertakings may be confidential in two situations. First, in the case of a clearance application where confidentiality is granted as to the fact, section 100 provides that such confidentiality order may continue in force until 20 working days after the date of the Commission's final determination. Second, undertakings may be proferred after the lodgement of an application and such proposed undertakings may be kept confidential by

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125 Section 75G of the Fair Trading Act 1973 (UK), inserted by the Companies Act 1989 (UK).

126 Under the new United Kingdom provisions relating to statutory undertakings, any person may bring proceedings to enforce an undertaking given to the OFT. Section 93A Fair Trading Act 1973 (UK), inserted by Companies Act 1989 (UK).

the Commission from interested parties. In either case the Commission may accept undertakings and grant a clearance without interested third parties having the opportunity to be heard. If the undertakings are given as a means of taking advantage of the fast-track clearance procedure and thus avoiding the authorisation and conference procedure, third parties who could otherwise participate in a conference will lose their right of appeal.

The dangers of maintaining this degree of confidentiality were perceived in the United Kingdom when the new statutory merger regime was discussed. The Department of Trade and Industry in its Blue Paper on United Kingdom Mergers Policy[127] proposed to overcome the disparity of information between parties privy to the negotiations on undertakings and others by announcing the fact that the discussions were taking place.

The Commission has previously acknowledged the need for informed discussion in relation to proposed undertakings. In particular in *Tasman Forestry Limited/The Crown*[128] the Commission said in relation to undertakings proferred at the conference:[129]

> The Commission would have preferred it if the undertakings had been incorporated into the proposal and widely circulated prior to the conference so as to ensure that all interested parties were aware of them and so that there could be informed discussion ...

Although the Commission was in that case considering undertakings given at a conference which were behavioural in nature, it is submitted that the need for informed discussion also applies in the case of structural undertakings, and that this need is particularly great in the absence of a conference where third parties will be deprived of appeal rights.

C *Remedies and Peanlties*

The Commission's armoury to attack offending uncleared mergers has been substantially strengthened by the Commerce Amendment Act 1990. The penalties in section 83 for contravening section 47 have been increased from a maximum of $300,000 to a maximum of $5 million in the case of a body corporate and from a maximum of $100,000 to a maximum of $500,000 in other cases. In addition to the substantial increase in the amount of pecuniary penalties which may now be imposed, it is worth noting that the new penalties have a wider scope of application than the pre-1 January 1991 penalties. The previous position under section 83 was that penalties could only be imposed on the persons who contravened section 50. This meant that the prohibition applied only to the persons implementing the merger or takeover proposal without clearance or authorisation.

New section 83(1)(a) provides that penalties may be imposed on a person who has contravened section 47 but does not, however, simply apply penalties to the breach of

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127 Above n 124, Chapter IV, paragraph 4.8.

128 Decision 224, 2 March 1989.

129 Above n 128, paragraph 6.4.

section 47 itself. The section has been amended in line with the penalty provision in section 80 (applying to restrictive trade practices), so that the business acquisitions penalty provisions now extend to persons who have:

(a) Attempted to contravene section 47;

(b) Aided, abetted, counselled or procured a contravention;

(c) Induced or attempted to induce a contravention;

(d) Been "in any way directly or indirectly knowingly concerned in, or party to the contravention"; and

(e) Conspired with others to contravene the section.

It would appear that the words "in any way directly or indirectly knowingly concerned in ..." in section 83(1)(e) could cover corporate officers of both the purchaser and vendor, provided that the necessary mental element is present. It appears equally possible that the section might apply to the advisers (both legal and financial) who "knowingly" advise the parties to proceed without a necessary clearance or authorisation. This view is also taken by the Commission, as can be seen from the following statement:[130]

> Where the Commission is considering seeking penalties or other remedies it intends to apply the Act widely to include not only the parties to a business acquisition but, in appropriate circumstances, to advisers, financiers and others who have been involved in or associated with a contravention of the Act. In short, where a business acquisition is undertaken which is likely to result in the creation or strengthening of a dominant position in a market, the Commission gives notice of its intention to apply the penalty provisions of the Act as widely as possible.

It is of course essential for the purposes of section 83(1)(e) that the mental element is satisfied, but in this context it is interesting to note that the criminal element has been removed from section 83. Section 83(3) now provides that the standard of proof is the lower civil standard of proof "on the balance of probabilities", rather than the criminal standard of proof "beyond reasonable doubt".

In addition to the significant increase in the amount and scope of the pecuniary penalties, section 85 relating to divestment orders has been repealed and replaced with a wider provision. Previously the court was able only to make a divestment order in relation to shares or assets which had been acquired in contravention of section 50. The new section 85 enables the court to give directions for the disposal of shares or assets "specified in the order". There is no requirement that these shares or assets must be those which have been acquired in contravention of the section, and the court apparently has power to order the acquirer to divest any of its shares or assets.

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130 J Feil, above n 55, 9.

If, however, shares or assets have been acquired where an undertaking to divest has been given, the court may only order divestment "in accordance" with the undertaking so given. This means that where an undertaking has been given, the court may only order the divestment of the shares or assets specified in the undertaking. These shares may or may not include the shares or assets which have been acquired.

Although the court may "give directions" for the disposal, there is no specific power in section 85 which would enable the court to order the vendor to re-acquire. So although the vendor may be at risk of incurring pecuniary penalties, once the acquisition has been completed the vendor does not have the problem of finding another purchaser for the shares or assets, unless the court exercises its power in section 89(2) to cancel the contract.

The ability of the court to order divestment is a useful remedy. However, it is perhaps unfortunate that the ability to apply for such an order was not extended to third parties. Applications may only be made under section 85 by the Commission which has limited resources. Had the right to apply for divestment orders been extended to others, that process may have proved to be a useful enforcement tool.

Third parties such as competitors are not, however, completely without remedy. The ability to apply for injunctions under section 84 has now been extended to "any other person", and a new section 84A has been inserted which provides that persons contravening section 47 are liable in damages for any loss or damage caused. Undoubtedly section 84, which enables third parties to seek injunctions, will be of greater tactical significance to opponents of a merger than to the Commission. The extension to "any other person" of the right to seek injunctive relief may mean that injunctions are more likely to be sought. The Commerce Act does not specifically exempt the Commission from giving undertakings as to damages when seeking interim injunctions. The Commission has indicated[131] that it intends to claim Crown immunity from giving undertakings, or if that is not successful, appeal the matter. If the Commission was unsuccessful in its appeal, it may be reluctant to give undertakings pending a change in the law. Third parties challenging a merger may be more prepared, however, to give such undertakings.

D Appeals

Finally, a short comment should be made on the question of appeals. Section 92 has been amended to extend the right of appeal to persons who "participated" in the conference. The right of appeal was previously limited to the participants of a merger, and interested third parties who took part in the conference had no right of appeal, but were limited to seeking judicial review. The question of who "participated" in a conference becomes critical. The Commission has indicated[132] that it takes the initial view that a "participant" should attend the conference and speak. "Participation" implies

131 Above n 55, 7.

132 S M Lojkine, above n 83, 14.

some active involvement and it is submitted that the Commission's view is correct, although, of course, participation through counsel should equate to participation by the client, even if the client does not actually speak.

VII CONCLUSION

It is critical that those engaging in fundamental commercial activities such as business acquisitions undertake such activities in an environment which is governed by appropriate and clearly ascertainable rules. Whether there is agreement as a matter of policy with the voluntary "strike down" regime is one matter. It is quite another, however, that such new regime be the subject of rushed legislation. The previous merger or takeover provisions under the Commerce Act 1986 were notorious for their complexity. There was a clear need for considered scrutiny of the new business acquisition rules but the passage of the Bill after the Select Committee stage did not provide sufficient opportunity for informed debate.

The problem is that the business community is now exposed to an environment of uncertainty. There are a range of interpretative problems which have been discussed in some detail in this article. As a matter of logic there also appear to be some fundamental anomalies such as the potential for the application of section 27 to business acquisitions. These problems are further exacerbated by the dramatic increase in penalties which may now be imposed under the Act and the rights which third parties now have to institute proceedings. One can only hope for case law clarification or statutory amendments in the near future.