

Merging Down under: A Comparative Analysis of Australian and United States Merger Guidelines

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Recommended Citation

Glance, Robert J. (1995) "Merging Down under: A Comparative Analysis of Australian and United States Merger Guidelines," *Cornell International Law Journal*: Vol. 28: Iss. 2, Article 8.
Available at: <http://scholarship.law.cornell.edu/cilj/vol28/iss2/8>

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Merging Down Under: A Comparative Analysis of Australian and United States Merger Guidelines

Robert J. Glance *

Introduction	501
I. Background	503
A. History of Merger Analysis in the United States	503
B. History of Merger Analysis in Australia	506
II. Analysis	509
A. Market Definition and Market Shares	509
B. Concentration Levels	512
C. Imports	515
D. Entry	516
E. Failure and Exiting Assets	516
F. Authorization and Public Benefit	518
1. <i>Efficiencies</i>	519
2. <i>International Competitiveness</i>	519
3. <i>Nonefficiency Values</i>	520
G. Enforcement	521
Conclusion	523

Introduction

The goal of the antitrust laws is to protect the competitive enterprise system.¹ Economists, lawyers, and judges differ over whether the exclusive goal of these laws is to maximize economic efficiency, or whether antitrust laws should consider social and political values as well.² Political values include preservation of small business, maintenance of private control over business enterprises, and deconcentration of economic power to increase democratic political influence.³ Social values include equitable distribution of wealth and protection of fair treatment in economic dealings.⁴

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1. SECTION OF ANTITRUST LAW, AM. BAR ASS'N, MONOGRAPH NO. 12, HORIZONTAL MERGERS: LAW AND POLICY 5 (1986) [hereinafter HORIZONTAL MERGERS].

2. *Id.* at 7.

3. *Id.* at 8.

4. *Id.*

The goal of merger law is to prevent firms from engaging in express or tacit collusion or oligopoly behavior.⁵ Merger law should not prohibit all mergers, however, because some mergers produce beneficial consequences such as economies of scale and the market for corporate control.⁶ Two problems arise from the application of merger law. First, merger law attempts to predict the future: the competitive effects after two firms become one. An inherent problem is separating the good mergers from the bad. Second, society may decide that even though a merger may be competitively bad, social and political goals dictate that the merger continue. Merger law must account for these value conflicts while maintaining the semblance of predictability required for the effective operation of business.

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the United States and the Trade Practices Commission (TPC) in Australia recently issued new horizontal merger guidelines. Merger guidelines describe the approach taken by the government in evaluating mergers in order to facilitate business planning. Following the procedures and policy in the guidelines, the government agency decides if it will challenge the merger in court as a violation of the antitrust laws.

The 1992 DOJ and FTC Merger Guidelines⁷ represent the refinement of over two decades of merger guidelines in the United States.⁸ For Australia, statutory amendments to the Trade Practices Act⁹ have significantly changed the standard for evaluating mergers. The changes make the Australian approach comport more with the standard expressed in the U.S. guidelines.

This Note will compare the U.S. and Australian approaches to mergers as expressed by their guidelines. While the guidelines share similar views of the underlying economic theories, merging firms in Australia proceed differently than their counterparts in the United States because of the authorization process and the statutory basis of Australian merger law. In Australia, an administrative procedure is the primary force behind the regulation of mergers, whereas in the United States, the ultimate decision is often left to the courts. This Note will focus on the differences in the guidelines and the practical effects these differences will have on mergers in the respective countries.

Part I of this Note describes the history and development of merger analysis in the United States and Australia as reflected in the competition statutes and merger guidelines. Part II compares the primary elements of

5. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 12.1b (1994).

6. *Id.*

7. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, *HORIZONTAL MERGER GUIDELINES* (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992) [hereinafter 1992 DOJ GUIDELINES].

8. Charles A. James, *Overview of the 1992 Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 447, 447 (1993).

9. Trade Practices Act 1974, AUSTL. C. ACTS No. 51, § 50 (1974), amended by 5 AUSTL. C. ACTS No. 222 (1992).

the most recent merger guidelines issued in the United States and Australia. This section compares the different approaches to market definition and market shares, concentration levels, imports, entry, failure and exiting assets, and efficiencies. This Note also analyzes the significant differences in merger law enforcement in the United States and Australia.

I. Background

A. History Of Merger Analysis In The United States

In the United States, the FTC or DOJ challenges mergers based on section 7 of the Clayton Act:

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be *substantially to lessen competition*, or to tend to create a monopoly.¹⁰

The Supreme Court's interpretation of "substantially to lessen competition" during the 1960s caused much confusion. While lessening competition generally means higher prices, the Supreme Court in *Brown Shoe Co. v. United States*¹¹ and *United States v. Von's Grocery Co.*¹² held that a merger likely to result in lower prices was illegal, rejecting the view that efficiency and consumer welfare (lower prices) are more important than political and social values.¹³ Following *Brown Shoe* and *Von's Grocery*, businesses had difficulty predicting when the government or a competitor would successfully challenge a merger.

Against this background, the DOJ issued Merger Guidelines in 1968¹⁴ to give businesses guidance by providing a statement of policy indicating when the government will challenge a merger.¹⁵ The 1968 DOJ Guidelines implicitly repudiated the Supreme Court's analysis in *Brown Shoe* and

10. 15 U.S.C. § 18 (1988) (emphasis added).

11. 370 U.S. 294 (1962).

12. 384 U.S. 270 (1966).

13. In *Brown Shoe*, the Supreme Court found an unlawful merger when it involved an acquired firm that accounted for no more than two percent of sales in the market. 370 U.S. at 346. The competitive threat to less efficient small retail establishments concerned the Court. *Id.* at 339-46. Clearly, consumers would be better off after the merger because Brown Shoe could offer shoes at lower prices. *Id.* A similar rationale motivated the Court to hold a merger between two grocery store chains accounting for a combined 7.5% of retail grocery sales in the Los Angeles Metropolitan Area unlawful in *Von's Grocery*. 384 U.S. at 277-79. In both cases, the Court decided that the political and social values of small, locally owned businesses outweighed the benefits consumers would receive through lower prices.

14. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1968), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,101 (May 30, 1968) [hereinafter 1968 DOJ GUIDELINES].

15. Kevin J. Arquit, *Perspectives on the 1992 U.S. Government Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 121, 121-24 (1993).

Von's Grocery by completely ignoring nonstructural factors.¹⁶

Merger analysis generally consists of two steps. The first step consists of defining the market. The second step consists of predicting the effect of the merger on market behavior. As to market definition, the 1968 DOJ Guidelines described the relevant market in both product and geographic terms. The market included all interchangeable products that are in a geographic area where firms generally make sales of the products.¹⁷

For the second part of the analysis, the merger's effects on the market, the guidelines adopted a strict approach. The 1968 DOJ Guidelines promulgated bright line rules based on market concentration and the market share of the merging firms.¹⁸ In response to the prevailing economic view at the time, the guidelines adopted the structure-conduct-performance paradigm (S-C-P). The S-C-P is a merger analysis model that attempts to predict future market conduct based on market structure.¹⁹ The basic premise of the model assumes that a merger that takes place in a highly concentrated market is more likely to create anticompetitive effects. The S-C-P model focuses on market concentration and the individual firm's market share. This model presents a shortcut to analyzing the anticompetitive relationships in the market. The S-C-P model generally holds that market concentration gives rise to market power, and consequently high prices to consumers, the bane of the antitrust laws.²⁰

Economists soon challenged the S-C-P model, advocating that high market concentration does not necessarily mean high prices.²¹ The most efficient firms gain market share because they have lower costs and can offer products at lower prices. Thus, a merger policy that focuses on prohibiting large firm mergers does not accurately reflect the competitive relationship between the firms. In response to this changing view of economics, that a large market share was not necessarily anticompetitive, the DOJ issued the 1982 Merger Guidelines.²²

Preventing the exercise of market power was the touchstone of the 1982 DOJ Guidelines. Market power is the ability of one or more firms to profitably maintain prices above competitive levels for a significant period

16. While the 1968 Guidelines ignored the political and social values important in *Brown Shoe* and *Von's Grocery*, they also expressly refused to consider efficiencies. 1968 DOJ GUIDELINES, *supra* note 14, § 10.

17. 1968 DOJ GUIDELINES, *supra* note 14, § 3(i), (ii).

18. *Id.* § 5-6.

19. HOVENKAMP, *supra* note 5, § 1.7.

20. See, e.g., Leonard W. Weiss, *The Concentration-Profits Relationship and Antitrust*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 184 (Harvey J. Goldschmid et al. eds., 1974); Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104 (1979).

21. See, e.g., Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 20, at 164; John S. McGee, *Efficiency and Economies of Size*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING, *supra* note 20, at 55.

22. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (1982), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,102 (June 14, 1982) [hereinafter 1982 DOJ GUIDELINES].

of time.²³ Whereas the 1968 DOJ Guidelines defined the product market in terms of products that were “reasonably interchangeable,”²⁴ the 1982 DOJ Guidelines adopted a specific market definition: a market consists of the products and geographic area in which a hypothetical monopolist could profitably raise prices by five percent for one year.²⁵ This “hypothetical monopolist” standard continues as the cornerstone of market definition in U.S. and Australian merger guidelines. While the 1982 DOJ Guidelines had presumptive rules about market conduct based on market structure, the guidelines also considered factors to rebut or enhance the presumption of market power including ease of entry, buyer characteristics, past market conduct of the merging firms, and market performance.²⁶ This consideration of nonstructural factors comported more accurately with the economic realities of the marketplace than did the S-C-P model. As in the 1968 DOJ Guidelines, the 1982 DOJ Guidelines did not consider efficiencies as a merger justification.²⁷

The 1984 DOJ Guidelines²⁸ added flexibility to the approach of the 1982 DOJ Guidelines. These updated guidelines changed the five percent price increase of the hypothetical monopolist to a “small but significant and nontransitory” price increase.²⁹ The precise level, which could be larger or smaller than five percent, would be determined by the nature of the industry.³⁰

The 1984 DOJ Guidelines were unique in that they explicitly considered efficiencies in evaluating the competitive consequences of mergers. While efficiencies were not dispositive, they were considered persuasive evidence for the first time.³¹ The 1984 DOJ Guidelines, however, required that the parties to the merger establish the efficiencies by clear and convincing evidence.³² The relevance of nonstructural market characteristics increased, but was “most likely to be important where the Department’s decision whether to challenge a merger is otherwise close.”³³

The 1992 DOJ Guidelines depart further from complete reliance on market structure and provide a more detailed analysis of the economic factors important in assessing the competitive effects of the merger. The structure of the market, measured by concentration, is no longer dispositive, but only a factor weighed in the analysis.³⁴ DOJ officials now judge

23. 1982 DOJ GUIDELINES, *supra* note 22, § I.

24. 1968 DOJ GUIDELINES, *supra* note 14, § 3(i).

25. 1982 DOJ GUIDELINES, *supra* note 22, § II.A.

26. *Id.* § III.C.

27. *Id.* § V.A.

28. ANTITRUST DIV., U.S. DEP’T OF JUSTICE, MERGER GUIDELINES (1984), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984) [hereinafter 1984 DOJ GUIDELINES].

29. *Id.* § 2.0.

30. *Id.* § 2.11.

31. *Id.* § 3.5.

32. *Id.*

33. *Id.* § 3.4.

34. James, *supra* note 8, at 449. The 1992 Guidelines also dropped the “clear and convincing” standard for showing efficiencies. 1992 DOJ GUIDELINES, *supra* note 7, § 4.

the anticompetitive effect based on the totality of the evidence, not just market structure.³⁵

The DOJ or the FTC will follow five stages of analysis under the 1992 DOJ Guidelines.³⁶ In the first stage, the DOJ defines the market, measures the market shares of the members, and calculates the concentration of the market.³⁷ From this analysis of market structure, the DOJ determines whether the merger would result in the likely exercise of market power.³⁸ In stages two through five the DOJ determines whether other considerations indicate that the exercise of market power by the merged firm is unlikely.³⁹

B. History Of Merger Analysis In Australia

Australia enacted legislation restricting anticompetitive mergers in 1974.⁴⁰ The Trade Practices Act prohibits business activity which substantially lessens competition.⁴¹ Section 50 of the Trade Practices Act 1974, as enacted, prohibited mergers which substantially lessened competition, the same standard as section 7 of the Clayton Act.⁴² "Substantially lessen competition" generally means that prices in the relevant market will be materially higher than they would be without the merger.⁴³

In 1977, the Australian Parliament made significant changes to section 50 of the Trade Practices Act. First, Parliament revised section 50 to prohibit only mergers that caused a position of dominance or strengthened a pre-existing position of dominance in the market.⁴⁴ This created an inconsistency: the Trade Practices Act prohibited two companies from

35. James, *supra* note 8, at 450.

36. 1992 DOJ GUIDELINES, *supra* note 7, § 0.2.

37. *Id.* § 1.0.

38. *Id.*

39. The five stages of analysis are:

- 1) whether the merger will result in a concentrated market;
- 2) whether the merger will likely have adverse competitive effects;
- 3) whether entry will be likely to counteract the competitive effects;
- 4) whether the merger will result in efficiency gains not achievable by other means;
- 5) whether, but for the merger, either party will be likely to fail, and its assets exit the market.

Id. § 0.2.

40. Trade Practices Act 1974, *supra* note 9, § 50(1)(a).

41. The primary substantive sections are § 45 ("Contracts, arrangements or understandings that restrict dealings or affect competition"), § 46 ("Misuse of market power"), and § 50 ("Prohibition of acquisitions that would result in a substantial lessening of competition").

42. 15 U.S.C. § 18 (1988).

43. TRADE PRACTICES COMMISSION, DRAFT MERGER GUIDELINES § 4.10 (1992) [hereinafter TPC DRAFT MERGER GUIDELINES].

44. The 1977 amendment to section 50 of the Trade Practices Act of 1974 provided:

A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if -

- (a) as a result of the acquisition, the corporation would be, or be likely to be, in a position to dominate a market for goods or services; or
- (b) in a case where the corporation is in a position to dominate a market for goods or services -

contracting to substantially lessen competition,⁴⁵ but permitted mergers that substantially lessened competition as long as the merger did not create or enhance a position of dominance in a substantial market.⁴⁶ The rationale behind the dominance standard was to encourage mergers in order to achieve economies of scale and to improve international competitiveness.⁴⁷

Second, the Australian Parliament revised section 50 to prohibit mergers only in substantial markets for goods or services in Australia, in a State or Territory.⁴⁸ Parliament altered the provision in order to prevent merger prohibition in very small markets.⁴⁹ U.S. law makes no such market qualification.

In 1992, the Australian Parliament restored the original version of section 50 of the Trade Practices Act, prohibiting mergers that substantially lessen competition.⁵⁰ Section 50 continued to prohibit mergers only in substantial markets, as it did under the dominance standard.⁵¹

Although lawyers and the TPC found the dominance standard easier to apply,⁵² it failed to curb the exercise of market power.⁵³ Market power can be exercised either unilaterally by a single firm or coordinated by more than one firm. The dominance test only prohibited the exercise of unilateral market power by the dominant firm. Often, however, unilateral market power could be exercised by nondominant firms, especially firms

- (i) the body corporate or another body corporate that is related to that body corporate is, or is likely to be, a competitor of the corporation, or of a body corporate that is related to the corporation; and
- (ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to dominate that market.

Trade Practices Act 1974, AUSTL. C. ACTS No. 51, § 50 (1974), *amended by* AUSTL. C. ACTS No. 81 (1977).

45. *Id.*

46. *Id.* § 50. For commentary, see George Hay & Jill Walker, *Merger Policy and the TPC's Draft Merger Guidelines*, 1 COMPETITION & CONSUMER L.J. 33, 37 (1993-1994).

47. Hay & Walker, *supra* note 46, at 37; A.I. Tonking, *Section 50—Controlling Mergers in the Future?*, 20 AUST. BUS. L. REV. 285, 287 (1992).

48. Trade Practices Act 1974, *supra* note 44, § 50(6) (1977 amendment to § 50).

49. See Stacey L. Romberg, *The Australian Approach to Mergers and Acquisitions: Merits and Drawbacks*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 181, 186 (1992). "In other words the matter should be looked at according to the spread of activity of the merged enterprise across the whole state and not merely or necessarily one part of it." W. McComas, *Monopolisation and Mergers: What Can Be Done?*, BUS. L. EDUC. CENTRE, No. 7, at 36, *quoted in* Trade Practices Act 1974 § 50.40 (Butterworths Ann. 1994).

50. As of January 1993, section 50 of the Trade Practices Act 1974 provides:

- (1) A corporation must not directly or indirectly:
 - (a) acquire shares in the capital of a body corporate; or
 - (b) acquire any assets of a person;
 if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Trade Practices Act 1974, *supra* note 9, § 50.

51. *Id.* § 50(6).

52. See Tonking, *supra* note 47, at 292.

53. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 4.13-4.14. See S. G. CORONES, *RESTRICTIVE TRADE PRACTICES LAW 337* (1994).

with strong brand loyalty in markets for differentiated products.⁵⁴ Furthermore, the dominance standard prohibited mergers that facilitated collusion or coordinated interaction only if the dominant firm led the market.⁵⁵

Merger benefits include increased efficiencies, resulting in economies of scale, and an enhanced market for corporate control.⁵⁶ By abandoning the dominance standard, the Australian Parliament did not depart from its goal of encouraging international competition by permitting firms of increased size.⁵⁷ A merger in a highly concentrated market could result in efficiencies which might offset the anticompetitive effects.⁵⁸ Section 88(9) of the Trade Practices Act 1974 allows the TPC⁵⁹ or the Trade Practices Tribunal,⁶⁰ the appellate board of the TPC, to authorize a merger with anticompetitive effects where the public benefits.⁶¹ A public benefit can include anything of value to the community generally, including efficiencies resulting from the merger and all relevant matters that relate to the international competitiveness of Australian industry.⁶² Thus, the TPC may authorize a merger that would substantially lessen competition, but would not be prohibited under the dominance standard.

The legislative influence on merger guidelines is much stronger in Australia than in the United States. Whereas the U.S. guidelines are premised on the congressional intent to prohibit mergers which substantially lessen competition or tend to create a monopoly,⁶³ the Trade Practices Act contains a list of statutory factors⁶⁴ that must be considered by the

54. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.13.

55. "Collusion" connotes an express or tacit agreement between competing firms without a legitimate reason, usually resulting in higher prices for the consumer. "Coordinated interaction" is a broader term, encompassing anticompetitive activities among competing firms without an actual agreement. See 1992 DOJ GUIDELINES, *supra* note 7, § 2.1. See also TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.14.

56. HOVENKAMP, *supra* note 5, § 12.1b.

57. Hay & Walker, *supra* note 46, at 37.

58. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). The "Williamson Tradeoff" suggests that some mergers that result in higher prices may also result in increased efficiencies. Thus, even if there are higher prices after the merger, the increased efficiencies may indicate that the merger is pro-competitive on balance. However, when the gain in efficiencies accrues to the merged firm through higher profits, instead of to consumers through lower prices, the efficiency gains may not offset the increase in market power. See HOVENKAMP, *supra* note 5, § 12.2b.

59. Trade Practices Act 1974, *supra* note 9, Part II.

60. *Id.* Part III.

61. *Id.* § 88(9).

62. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 5.14-24.

63. 15 U.S.C. § 18 (1988).

64. The merger factors in section 50(3) of the Trade Practices Act 1974 are:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

TPC.⁶⁵ These statutory factors allow much less flexibility for the enforcement agency in evaluating mergers.⁶⁶ The Australian TPC Merger Guidelines provide a framework for these factors.⁶⁷

The Australian guidelines illustrate a two-part approach to mergers. During the first part, the TPC follows five stages of analysis⁶⁸ to determine whether the merger will substantially lessen competition in a substantial market. The TPC only undertakes the second part, called authorization, at the request of the parties.⁶⁹ The TPC may only grant authorization for the merger if the public benefits of the merger offset the anticompetitive effects.⁷⁰ The Trade Practices Act does not define "public benefit," but generally interprets the term expansively as including anything of value to the community.⁷¹ A merger creates a public benefit if it creates efficiencies⁷² or promotes the international competitiveness of any Australian industry.⁷³

II. Analysis

A. Market Definition and Market Shares

The Australian Guidelines adopt the analytical approach of the U.S. Guidelines when defining the market. The relevant market is the smallest product and geographic markets where a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price

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- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
 - (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
 - (h) the likelihood the merger would result in the removal from the market of a vigorous and effective competitor;
 - (i) the nature and extent of vertical integration in the market.

Trade Practices Act 1974, *supra* note 9, § 50(3).

65. This list of factors is similar to the Canadian Merger Enforcement Guidelines. See generally Paul S. Crampton, *Canada's New Merger Enforcement Guidelines: A "Nuts and Bolts" Review*, 36 ANTITRUST BULL. 883 (1991).

66. Robert Baxt, *Changes to the Trade Practices Act*, 20 AUST. BUS. L. REV. 424, 425 (1992).

67. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.4.

68. The five stages are:

- 1) market definition;
- 2) whether the concentration thresholds suggest the merger is not likely to lessen competition;
- 3) the effect of import competition;
- 4) the effect of barriers to entry;
- 5) the effect of other structural and behavioural market features.

TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 2.24.

69. *Id.* § 5.4.

70. *Id.* § 5.11.

71. *Re Queensland Co-operative Milling Ass'n v. Defiance Holdings Ltd.*, 8 A.L.R. 481, 510 (1976).

72. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.18.

73. *Id.* § 5.19.

(SSNIP).⁷⁴ The SSNIP is generally around five percent but may be larger or smaller depending on the nature of the industry.⁷⁵

In Australia, the rationale behind the prior dominance standard was to encourage the formation of larger firms with economies of scale, thus enabling Australia to compete in the world economy.⁷⁶ While this continues to be a goal of merger enforcement under the substantial lessening of competition standard, Australia nevertheless chose not to increase the SSNIP to, for example, fifteen or twenty percent in order to allow firms more flexibility in achieving minimum efficient scale.⁷⁷ Rather, the TPC Guidelines allow individual firms to possess larger market shares. As the market becomes more concentrated, the firms have a greater likelihood of acting as the hypothetical monopolist. With a SSNIP of five percent, the worst case scenario is that the price will rise five percent. If a SSNIP of twenty percent was used, but with lower levels of market concentration permitted, the presence of many small firms would make it less likely that the conduct of the market would approach that of the hypothetical monopolist.⁷⁸ If it did, however, consumers would be seriously hurt by a price increase of twenty percent. By allowing larger firms without increasing the SSNIP above five percent, the guidelines recognize the efficiencies achieved by firms with large market shares. Thus, the guidelines allow a greater likelihood of a given price increase because of increased market concentration, but the magnitude of the price increase is at most five percent.⁷⁹

Both the Australian and U.S. guidelines define the market with a SSNIP above the competitive price. Although the market price may be the same as the competitive price, the market price would be lower if firms were exercising market power.⁸⁰

The guidelines differ in the approach taken to the supply side response to the SSNIP. The Australian guidelines include both the demand and supply side responses in the market, whereas the market in the U.S. guidelines only includes the demand side response. However, the

74. 1992 DOJ GUIDELINES, *supra* note 7, § 1.11; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.37.

75. 1992 DOJ GUIDELINES, *supra* note 7, § 1.11.

76. Hay & Walker, *supra* note 46, at 37; Tonking, *supra* note 47, at 287.

77. Hay & Walker, *supra* note 46, at 42.

78. *Id.* at 43.

79. *Id.*

80. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.37; 1992 DOJ GUIDELINES, *supra* note 7, § 1.11. Use of the competitive price instead of the current market price corrects the Supreme Court's error in market definition in *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956). The Supreme Court included the similarly priced wax paper in the market for DuPont's cellophane because consumers would purchase wax paper if the price of cellophane rose significantly. *Id.* at 394-404 (defining the relevant market). The only reason cellophane consumers considered purchasing wax paper, however, was because DuPont had exercised its market power to raise the price of cellophane so the more expensive wax paper was a viable alternative. Thus, the Court should not have included wax paper in the market for cellophane.

supply side response under the U.S. guidelines increases the number of participants in the market.

The supply side response is the response of producers to an increase in price.⁸¹ For example, if the price of aluminum wire rises, and copper wire producers switch over to the production of aluminum wire, then copper wire should be considered part of the market. The demand side response is the response of consumers to an increase in price.⁸² If the price of aluminum wire rises, and consumers buy steel wire instead, then steel wire should be considered part of the market. The U.S. guidelines include only the demand side response in market definition.⁸³ Thus, the market under the U.S. guidelines would include aluminum and steel wire.

The copper wire producers, however, would be participants in the market and would be assigned a market share based on their ability to switch over to the production of aluminum wire.⁸⁴ The U.S. guidelines assign the firm a market share only when the supply response is "likely to occur within one year and without the expenditure of significant sunk costs of entry and exit,"⁸⁵ in response to a 'small but significant and non-transitory' price increase.⁸⁶ If the supply response will not be within a year or will involve significant costs, the firm will not be assigned a market share, but will be evaluated under entry analysis.⁸⁷

Compared to the Australian guidelines, the market defined in the U.S. guidelines is narrower. The Australian guidelines include both supply and demand response in market definition.⁸⁸ In the example above, the Australian market would include aluminum, steel, and copper wire.

After determination of the relevant product and geographic markets based on the SSNIP, the guidelines require calculation of market shares for all firms identified as market participants.⁸⁹ The calculation of market shares is based on the best indicator of firms' future competitive significance. Since this varies by industry, the calculation is through dollar value assessment of sales, shipments, or production, or through physical measurement of sales, shipments, production, capacity, or reserves.⁹⁰

81. 1992 DOJ GUIDELINES, *supra* note 7, § 1.0.

82. *Id.*

83. *Id.* § 1.10.

84. *Id.* § 1.32.

85. Sunk costs are the acquisition costs of assets that cannot be recovered through the redeployment of these assets outside the relevant market. Examples include market-specific investments in production facilities, technologies, marketing, research and development, regulatory approvals, and testing. A significant sunk cost is one that could not be recouped within a year. *Id.*

86. *Id.*

87. See discussion *infra* part II.D.

88. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 4.32, 4.34.

89. 1992 DOJ GUIDELINES, *supra* note 7, § 1.41; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.49.

90. 1992 DOJ GUIDELINES, *supra* note 7, § 1.41.

B. Concentration Levels

After market definition and market share measurement, the Australian and U.S. guidelines provide concentration thresholds that indicate when the merger is likely to substantially lessen competition.⁹¹ Concentrated markets contain firms with higher market shares. The guidelines assign a numeric value corresponding to the degree of concentration. The concentration threshold is the point at which the guidelines conclude that a merger increasing the concentration of the market is likely to create or enhance market power or facilitate its exercise, and thus substantially lessen competition.⁹²

The methods of assigning a numeric value to measure market concentration differ. The U.S. guidelines follow the Herfindahl-Hirschman Index (HHI)⁹³ of market concentration, while the Australian guidelines use the traditional four-firm concentration ratio (CR4).⁹⁴ The 1968 DOJ Guidelines originally used the CR4,⁹⁵ but the DOJ adopted the HHI concentration measurement in 1982.⁹⁶

The primary difference between the HHI and the CR4 is that the HHI is sensitive to asymmetrical market shares, while the CR4 is not. One firm with a large market share greatly increases the HHI.⁹⁷ Economists disagree over whether equality of market shares facilitates collusion.⁹⁸ The use of the HHI supports the view that a leading firm with a large market share is more likely to engage in collusion and coordinated interaction.⁹⁹ Empirical studies indicate that mergers which increase the equality of firm sizes result in competitive benefits as long as the market consists of several firms.¹⁰⁰ The use of the HHI supports this evidence.¹⁰¹ Although the HHI and the CR4 differ, the consequences of choosing one measure over the other may not be that great since they generally convey the same

91. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.22; 1992 DOJ GUIDELINES, *supra* note 7, § 1.51.

92. 1992 DOJ GUIDELINES, *supra* note 7, § 1.51; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.48.

93. 1992 DOJ GUIDELINES, *supra* note 7, § 1.5. The HHI is calculated by squaring the individual market shares of each of the firms participating in the market, and then summing the squares. *Id.* For example, a market with five firms, each with a 20% market share, has an HHI of 2000 ($20^2+20^2+20^2+20^2+20^2 = 2000$).

94. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.22. The four-firm concentration ratio is the sum of the market shares of the four largest firms in the market. *Id.*

95. 1968 DOJ GUIDELINES, *supra* note 14, § 5.

96. 1982 DOJ GUIDELINES, *supra* note 22, § III.A.

97. The HHI increases as the asymmetry in market shares increases. A symmetrical market with five firms, each with a 20% market share, has an HHI of 2000 ($20^2+20^2+20^2+20^2+20^2 = 2000$). An asymmetrical market comprised of four firms with market shares of 40-30-20-10 has an HHI of 3000 ($40^2+30^2+20^2+10^2 = 3000$).

98. Collusion may be more likely between firms of similar size since they would have similar power and similar interests. A large firm in a generally atomistic market has less to gain by colluding with its smaller competitors.

99. HORIZONTAL MERGERS, *supra* note 1, at 180.

100. Paul A. Pautler, *A Review of the Economic Basis For Broad-Based Horizontal-Merger Policy*, 28 ANTITRUST BULL. 571, 650 (1983).

101. Express collusion, however, may be more likely to succeed when all firms are the same size. Thus, the CR4 may be more accurate.

information.¹⁰²

A comparison of the concentration thresholds of the United States and Australian guidelines must focus on particular market structures because the HHI depends much on the individual market shares.¹⁰³ A postmerger HHI level of 1800 corresponds roughly to a CR4 of seventy percent.¹⁰⁴ While the U.S. and Australian guidelines are equally strict towards mergers in concentrated markets,¹⁰⁵ the Australian guidelines are much more liberal in moderately concentrated markets, allowing larger postmerger market shares.¹⁰⁶

If the four-firm concentration ratio is less than seventy-five percent, the Australian guidelines permit the merger of firms that result in a postmerger share of less than forty percent.¹⁰⁷ The U.S. guidelines can still prohibit postmerger shares of less than forty percent. A merger between firms with a twenty percent and fifteen percent market share in a moderately concentrated market clearly violates the U.S. thresholds,¹⁰⁸ but not the Australian.¹⁰⁹

The concentration thresholds are similar, however, for highly concentrated markets since the Australian postmerger limit of fifteen percent corresponds roughly to a change in the HHI of 50-100.¹¹⁰

Thus, the Australian concentration thresholds permit the merger of larger firms until the market becomes highly concentrated. The U.S. thresholds address the problem earlier, preventing larger firms from merging in moderately concentrated markets.

102. See generally HOVENKAMP, *supra* note 5, § 12.3a.

103. For example, two markets, one comprised of firms with market shares of 50-15-5-5-5-5-5 and the other with shares of 20-20-20-15-10-10-5, have the same four-firm concentration ratio of 75%, but the HHIs are significantly different: 2900 and 1650, respectively.

104. HORIZONTAL MERGERS, *supra* note 1, at 190.

105. The guidelines define highly concentrated as HHI > 1800 in the United States and CR4 > 75% in Australia.

106. In Australia, a merger will substantially lessen competition if:

- 1) the four largest firms will have a market share of 75% or more and the merged firm will have a market share greater than 15%, or
- 2) the four largest firms will have a market share less than 75% and the merged firm will have a market share greater than 40%.

TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.22.

In the United States, a merger will create or enhance market power or facilitate its exercise if:

- 1) the post-merger HHI is between 1000 and 1800 and the increase in HHI is more than 100 points, or
- 2) the post-merger HHI is above 1800 and the increase in HHI is more than 50 points.

1992 DOJ GUIDELINES, *supra* note 7, § 1.51.

107. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.22.

108. The post-merger HHI would be greater than 1225 (352) and the increase in HHI would be 600 (2 x 20 x 15).

109. The merged firm would have a 35% market share, less than the 40% threshold for markets with a CR4 < 75%.

110. The change in HHI for a 10-5 merger is 100 (2 x 10 x 5), for a 13-2 merger 52 (2 x 13 x 2), but for a 14-1 merger 28 (2 x 14 x 1).

Although the numeric thresholds in the 1984 and 1992 DOJ Guidelines are identical, the wording is different. Under the 1984 DOJ Guidelines, the DOJ would be "likely to challenge" a merger that violates the HHI thresholds.¹¹¹ A violation of the 1992 thresholds indicates that the merger is "likely to create or enhance market power or facilitate its exercise," the touchstone of the 1992 guidelines.¹¹² In Australia, the TPC will want to "give further consideration"¹¹³ when a merger violates the thresholds, but parties must show that the merger will not cause "a substantial lessening of competition."¹¹⁴ The soft wording of the 1992 U.S. and Australian guidelines indicates that violation of the concentration thresholds is not dispositive of the decision to challenge the merger, but rather one factor among several to consider when assessing the likely competitive effects of a merger.¹¹⁵ The U.S. Supreme Court, however, has suggested that market concentration is almost dispositive.¹¹⁶

The U.S. and Australian guidelines consider evidence which indicates that historical market shares may not be an accurate proxy for future market shares. The guidelines look to the potential for change in the market, such as when there is declining demand, and the potential for change in the shares of the merging firms, which, for example, could be affected by the expiration of a patent or the antiquity of the production methods.¹¹⁷

The U.S. and Australian guidelines recognize the importance of both market conduct and market structure.¹¹⁸ The U.S. guidelines also articulate the precise ways that increased concentration affects competition, through coordinated interaction¹¹⁹ and unilateral effects.¹²⁰ The U.S. guidelines articulate factors contributing to these results,¹²¹ whereas the Australian guidelines make the general observation that "the coordinated exercise of power will be easier the more concentrated the market structure . . . and the larger the share of the 'market leader(s)'."¹²² Later, however, the Australian guidelines indicate the TPC will consider the past

111. 1984 DOJ GUIDELINES, *supra* note 28, § III.A.1(c).

112. 1992 DOJ GUIDELINES, *supra* note 7, § 1.51(c).

113. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.48.

114. *Id.* § 4.52.

115. James, *supra* note 8, at 452; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.22 ("[C]oncentration above these thresholds is not considered to give rise automatically to a substantial lessening of competition. Rather it establishes the need for further qualitative evaluation of market conditions.").

116. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects).

117. 1992 DOJ GUIDELINES, *supra* note 7, § 1.52; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.67.

118. 1992 DOJ GUIDELINES, *supra* note 7, § 2; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.66.

119. 1992 DOJ GUIDELINES, *supra* note 7, § 2.1.

120. *Id.* § 2.2.

121. *Id.* §§ 2.1-2.2.

122. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.45.

market conduct of the firm.¹²³ Relevant conduct under the TPC guidelines includes price fixing, oligopoly, discounting, and conditions conducive to future coordination of market power.¹²⁴ The U.S. guidelines specify similar factors that result in anticompetitive coordinated interaction: "conditions conducive to reaching terms of coordination" and "conditions conducive to detecting and punishing deviations."¹²⁵

C. Imports

While both guidelines treat imports similarly by assigning the appropriate market share to the importing firm,¹²⁶ import competition is more important to Australian firms because the economies of scale of overseas firms often provide a cost advantage.¹²⁷ Australia has low tariffs, and imports comprise a large proportion of total sales in many markets.¹²⁸ After assigning the market shares, the TPC will consider arguments that the market shares of importing firms do not accurately indicate their competitive role.¹²⁹ Importing firms, unlike domestic firms, may have the ability to expand rapidly the supply of goods in response to higher prices. This is more likely in markets for homogeneous goods.¹³⁰ As prices rise in Australia, firms can increase profits by diverting sales in other countries to Australia. Since the output sent to the Australian market is likely to be a small part of the world production, such expansion is relatively easy.¹³¹ There may be tariffs or quotas, however, that prevent the importing firms from expanding their share. The guidelines take such factors into account when assessing the competitive effects of imports.¹³²

In addition, included in the TPC Guidelines is a list of relevant factors which indicate the precise role of imports: information that domestic suppliers are consistently inhibited in their pricing by import supplies, the extent to which imports are independent domestic suppliers or the extent to which they are brought in under the license of the merging firms and/or other domestic suppliers, and whether the existing import supply routes could accommodate a significant expansion of supply, without the need to invest in sunk costs of distribution, advertising and promotion.¹³³ While both guidelines treat imports similarly, the Australian guidelines indicate that imports play a much more important role in their analysis.

123. *Id.* § 4.66.

124. *Id.*

125. 1992 DOJ GUIDELINES, *supra* note 7, §§ 2.11-12.

126. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.43; 1992 DOJ GUIDELINES, *supra* note 7, § 1.43.

127. *Cf.* TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.53.

128. Hay & Walker, *supra* note 46, at 37.

129. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.54.

130. *See* Hay & Walker, *supra* note 46, at 44.

131. *Id.* at 37.

132. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.56; 1992 DOJ GUIDELINES, *supra* note 7, § 1.43.

133. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.56.

D. Entry

The U.S. and Australian guidelines determine when effective entry is likely to occur. Although a proposed merger may violate the concentration thresholds, if effective entry is likely the merger will not substantially lessen competition because the merged firm will not be able to exercise market power. Thus, entry analysis is extremely important.¹³⁴ Effective entry occurs within a two-year period if the merged firm exercises market power. Since it is impossible to start from scratch and enter most industries within two years, the two-year time period is important in assessing the likelihood of entry.¹³⁵ The entry must be on a sufficient scale and sufficiently attractive to consumers in order to restrain effectively anticompetitive conduct. Effective entry causes competitors to lower prices in response to the new market entrant.

Often, a concentrated market indicates barriers to entry. "Barriers to entry can be any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms."¹³⁶ Entry barriers include sunk investment, brand loyalty, accessing shelf space, and costs associated with promotion and advertising.¹³⁷

The 1992 DOJ Guidelines analyze the timeliness, likelihood, and sufficiency of entry.¹³⁸ While the Australian guidelines do not follow this tripartite division exactly, the analysis focuses on the same concerns.¹³⁹ Important to both is the notion that entry be likely, not merely theoretically possible.

The likelihood of entry depends on the minimum viable scale.¹⁴⁰ Entry is likely when it would be profitable at premerger prices.¹⁴¹ Although it may be profitable for a firm to enter the market at high postmerger prices, a rational firm will not do so if its entry will cause prices to drop to an unprofitable level. Likewise, entry is not effective from the view of a consumer if the entry cannot cause the prices to return to the premerger level.

E. Failure And Exiting Assets

As a factor in analyzing the competitive effects of a merger in the United States, firms can show that the imminent failure of one of the merging firms will cause the assets of the firm to exit the market.¹⁴² The requirements for this showing are strict.¹⁴³ Although Australian guidelines consider the possible failure of one of the merging firms only when it is in a

134. See *Queensland*, 8 A.L.R. at 516.

135. See John C. Hilke & Philip B. Nelson, *The Economics of Entry Lags: A Theoretical and Empirical Overview*, 61 ANTITRUST L.J. 365, 385 (1993).

136. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.58.

137. *Id.*

138. 1992 DOJ GUIDELINES, *supra* note 7, §§ 3.0-4.

139. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 4.57-60.

140. HOVENKAMP, *supra* note 5, § 1.6.

141. 1992 DOJ GUIDELINES, *supra* note 7, § 3.3.

142. *Id.* § 5.0.

143. Section 5.1 of the 1992 Guidelines require that:

declining market and there is little or no prospect for new entry, they provide for the consideration of such arguments during the authorization process.¹⁴⁴ In 1976, the Trade Practices Act Review Committee suggested that section 50 enable a statutory defense for those companies imminently likely to go out of business.¹⁴⁵ Parliament did not adopt this suggestion, possibly because the TPC has always granted authorization when failure was likely.¹⁴⁶ Whereas the likelihood of imminent failure is a factor under the U.S. guidelines when deciding whether the merger is likely to create or enhance market power or to facilitate its exercise, in Australia mergers with failing firms should be more likely because the authorization process considers the public benefits of the merger.¹⁴⁷ The public benefit of a merger with a failing firm would include continued employment and other benefits the firm provides to the community.¹⁴⁸

Two recent applications for authorization question the efficacy of the failing company defense in Australia. The TPC denied an authorization for a merger between the only two newspapers in Perth. The TPC decided that the anticompetitive effects of a failing firm leaving the market and allowing room for a new entrant may be less than the effects of allowing the merger to increase the size of the dominant firm and effectively deter any new entrants into the market.¹⁴⁹ It is unclear, however, how the newspaper customers of Perth are better off with only a morning paper instead of two daily papers since there have been no new market entrants.¹⁵⁰

In a seemingly identical situation, the TPC granted an authorization for the merger of two airline computer reservation systems, resulting in a firm with ninety-five percent of the market.¹⁵¹ If the authorization had been denied, one of the firms could have possibly failed, but at least the threat of new entrants would have constrained the remaining firm.¹⁵² In light of these two applications for authorizations, it is unclear whether the

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- 1) the allegedly failing firm would be unable to meet its financial obligations in the near future;
 - 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act;
 - 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and
 - 4) absent the acquisition, the assets of the failing firm would exit the relevant market.

1992 DOJ GUIDELINES, *supra* note 7, § 5.1.

144. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 4.68.

145. TRADE PRACTICES ACT REVIEW COMMITTEE REPORT (1976), paras. 8.21-24, *cited in* Peter Shafron, *Failing Companies, Media Mergers and the Trade Practices Act: Application for Authorisation by West Australian Newspapers Ltd.*, 20 AUST. BUS. L. REV. 91, 94-95 (1992).

146. Shafron, *supra* note 145, at 95.

147. *Id.* at 97. *See* discussion *infra* part II.F.

148. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.23.

149. Shafron, *supra* note 145, at 98.

150. Tonking, *supra* note 47, at 295-96.

151. Stephen Corones, *Structural and Conduct Considerations in the Airline Industry: Recent Trade Practices Commission Authorisations*, 22 AUST. BUS. L. REV. 148, 149-50 (1994).

152. *Id.* at 151.

TPC will grant an authorization the next time the imminent failure of a firm is asserted as a justification for a merger in Australia.

F. Authorization and Public Benefit

If the TPC decides that a merger will substantially lessen competition, it will inform the parties that if the acquisition continues, the TPC will challenge it in Federal Court.¹⁵³ The parties can either abandon the merger, apply to the TPC for an authorization, or continue with the merger under threat of suit.¹⁵⁴ If the TPC grants an authorization, the merger can proceed even though it will substantially lessen competition. The Australian authorization process is a remnant of British law.¹⁵⁵ The only method to initiate the authorization process is by party application.¹⁵⁶ The proceedings are open to the public and the TPC encourages input from interested parties.¹⁵⁷ The TPC has thirty days to reach a decision,¹⁵⁸ and the parties can appeal the decision to the Trade Practices Tribunal, which has sixty days to decide.¹⁵⁹

The TPC shall not grant an authorization "unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place."¹⁶⁰ "Public benefit" is a broad concept defined by the Trade Practices Tribunal to include "anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements . . . the achievement of the economic goals of efficiency and progress."¹⁶¹ While the concept of public benefit is broad, it still must satisfy three requirements: (1) it is the result or likely result of the acquisition, (2) it is not otherwise available, and (3) it is "substantial."¹⁶² The Trade Practices Tribunal defines "substantial" in a relative sense. That is, the likely benefits must outweigh the detriments flowing from the acquisition.¹⁶³

Public benefits generally fall into three categories: efficiencies, international competitiveness, and nonefficiency values.¹⁶⁴ Since the U.S. guidelines only recognize efficiencies as a merger justification, the DOJ or FTC would likely challenge a merger that the TPC could authorize in Australia because it would increase Australia's international competitiveness

153. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 2.27.

154. *Id.* § 2.9.

155. Tonking, *supra* note 47, at 287.

156. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.4.

157. *Id.* § 5.25.

158. *Id.* § 2.38.

159. *Id.* § 2.39.

160. Trade Practices Act 1974, AUSTL. C. ACTS No. 51, § 90(9) (1974), *as amended by* 5 AUSTL. C. ACTS No. 222 (1992).

161. *Queensland*, 8 A.L.R. at 510.

162. *Id.*

163. *Id.* at 512.

164. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 5.18-19, -23.

or foster political or social values.¹⁶⁵

1. *Efficiencies*

The United States and Australia consider efficiencies at different stages in the analysis. The Australian TPC considers efficiencies only upon party request during the authorization process.¹⁶⁶ In the United States, on the other hand, the DOJ or FTC considers efficiencies as a matter of course after the concentration thresholds indicate the merger will create or enhance market power or facilitate its exercise.¹⁶⁷ In both countries, if the efficiencies offset the anticompetitive effects of the merger, then the merger should proceed.¹⁶⁸

The effect of considering efficiencies may be that mergers permitted in highly concentrated markets would not substantially lessen competition.¹⁶⁹ In a competitive market, the greater economies of scale could have caused the high market concentration because large, integrated firms can offer products at the lowest cost. In a noncompetitive market, firms exercising market power because of high entry barriers or collusive or coordinated behavior cause high market concentration. Commentators such as Robert Bork, however, question whether there actually is a relationship between market concentration and collusion, suggesting that a market with two equally sized firms would be competitive.¹⁷⁰

Efficiencies result in a public benefit through lower unit costs and prices.¹⁷¹ Efficiencies can include, for example, economies of scale, better integration of production facilities, plant specialization, and lower transportation costs.¹⁷² In order for the merger to enhance competition on balance, the efficiencies must be greater the more significant the competitive risks identified by the market concentration and market share analysis.¹⁷³

2. *International Competitiveness*

The guidelines differ in the emphasis given to international competitiveness. The U.S. guidelines do not address international competitiveness, while in Australia, the Trade Practices Act and the guidelines expressly mandate that the TPC consider any "relevant matters that relate to the international competitiveness of any Australian industry."¹⁷⁴

165. If the DOJ or FTC choose not to challenge the merger, and a private party does so instead, the courts may be willing to consider social and political justifications for the merger. See discussion *infra* part II.F.3.

166. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.18.

167. 1992 DOJ GUIDELINES, *supra* note 7, § 1.51.

168. See discussion *supra* note 58.

169. *Id.*

170. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 221 (1978).

171. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.18.

172. 1992 DOJ GUIDELINES, *supra* note 7, § 4.

173. *Id.*

174. Trade Practices Act 1974, AUSTRALIAN C. ACTS No. 51, § 88 (1974), amended by 5 AUSTRALIAN C. ACTS No. 222 (1992).

In Australia, the primary justification offered in support of the dominance standard was that it would allow larger firms that could be more competitive in the international marketplace.¹⁷⁵ Professor Porter argues that vigorous domestic competition forces companies to look to global markets to capture greater efficiency and higher profitability. Thus, a highly competitive market at home is necessary to compete internationally.¹⁷⁶ Critics argue that in stressing vigorous domestic competition, Porter identifies prerequisites to healthy domestic competition "which are either absent or at an early stage of development in Australia."¹⁷⁷ The switch from the dominance standard to the substantial lessening of competition standard, however, indicates that the Australian Parliament accepted the view that domestic competition fosters international competitiveness.¹⁷⁸

Even under the substantial lessening of competition standard, the TPC Guidelines encourage international competitiveness. First, the concentration thresholds in the TPC Guidelines are more relaxed than the U.S. guidelines in less than highly concentrated markets.¹⁷⁹ Mergers create larger firms as long as the market does not become highly concentrated. This is consistent with the proposition that larger firms are necessary to compete in international markets.

Second, the authorization process balances efficiencies in determining whether there is a public benefit.¹⁸⁰ Thus, in mergers that do violate the concentration thresholds, the TPC may still authorize the merger on the basis that the efficiency benefits offset the anticompetitive effects of the merger.

Third, during authorization the TPC must "take into account all other relevant matters that relate to the international competitiveness of Australian industry."¹⁸¹ The increase in the real value of exports or the substitution of domestic products for imported goods is relevant in measuring the international competitiveness of Australian industry.¹⁸²

3. Nonefficiency Values

The guidelines also differ in their approach to nonefficiency criteria in evaluating mergers. Whereas the TPC Guidelines contemplate nonefficiency values as a justification for an anticompetitive merger, the U.S. Guidelines do not let nonefficiency criteria influence the decision to prohibit an otherwise anticompetitive merger. U.S. case law, however, recognizes social welfare as an independent reason to condemn economically

175. Tonking, *supra* note 47, at 287.

176. Michael E. Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV., Mar. 1990, at 73.

177. Tonking, *supra* note 47, at 294.

178. Hay & Walker, *supra* note 46, at 38.

179. See discussion *supra* part II.B.

180. See discussion *supra* part II.F.1.

181. TPC DRAFT MERGER GUIDELINES, *supra* note 43, §§ 5.19-20; Trade Practices Act 1974, *supra* note 9, § 90(9A).

182. TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.19.

justifiable mergers. Thus, while social welfare can be a shield for merging firms in Australia, it is a potential sword for those in the United States who seek to prevent a merger.

Economic welfare is not the only concern of the authorization process in Australia. Interpreting "public benefit" as "anything of value to the community generally"¹⁸³ leaves room for many possible justifications for a merger.¹⁸⁴

Social welfare is not mentioned in the U.S. guidelines. The U.S. courts, however, have recognized noneconomic justifications for prohibiting mergers that traditional methods of measuring market shares and market concentration would not have deemed anticompetitive. In *Von's Grocery*,¹⁸⁵ the Supreme Court prevented two grocery store chains from merging because the low prices would have threatened small corner stores in the area. In *Brown Shoe*,¹⁸⁶ the Court prevented a merger because the lower costs of a vertically integrated firm would force the independent shoe stores out of business. In both cases the merger would have increased competition resulting in lower prices for consumers. While none of the DOJ merger guidelines issued since *Brown Shoe* and *Von's Grocery* purport to adopt their rationale, neither case has been overruled, thus leaving the possibility of a private party challenging a merger in the United States on grounds other than those articulated in the merger guidelines.

G. Enforcement

The role of the government in merger enforcement is much stronger in Australia than in the United States. There is no private right of action to enjoin mergers that violate the Trade Practices Act in Australia.¹⁸⁷ Since only the Minister or the Trade Practices Commission can enforce the merger provisions, the policy of the current government toward mergers is paramount.

Private parties are not, however, left remediless. They may apply for a declaration that the merger will contravene the Trade Practices Act.¹⁸⁸ Once a declaratory action is filed, the TPC can intervene and request an injunction.¹⁸⁹

In the United States, the enforcement policies of the DOJ and the FTC reflect the goals of the executive branch. During the 1980s, for example, the DOJ allowed mergers that were clearly anticompetitive under the

183. *Id.* § 5.14 (quoting the Trade Practices Tribunal in *Queensland*).

184. See TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 5.21.

185. 384 U.S. 270.

186. 370 U.S. 294; see discussion *supra* note 13.

187. Trade Practices Act 1974, *supra* note 9, § 88.

188. Trade Practices Act 1974, *supra* note 9, § 163(A)(1); CORONES, *supra* note 53, at 463.

189. Trade Practices Act 1974, *supra* note 9, § 163(A)(2).

1984 DOJ Guidelines.¹⁹⁰

Private parties who are unsatisfied with the efforts of the United States government to prevent anticompetitive mergers can bring their own injunctive action under section 7 of the Clayton Act without the acquiescence of the DOJ or FTC. Standing, however, is often difficult to establish because a special antitrust injury¹⁹¹ needs to be shown. An injury which results from a firm going out of business because the merged firm can sell products for a lower price is not sufficient.¹⁹²

Firms contemplating a merger in Australia can choose to go ahead with the merger or apply for an authorization first. The act of applying for an authorization, or the TPC denial of the authorization, does not mean the proposed merger will necessarily "substantially lessen competition."¹⁹³

If the TPC denies the authorization, and the parties decide to continue with the merger, the TPC has two primary advantages when it asks to enjoin the merger in federal court under Trade Practices Act section 80. First, the TPC has a tactical advantage because it heard the merging firms' best arguments during the authorization process. Second, the courts cannot consider the public benefit of the merger.¹⁹⁴ Only the Trade Practices Commission or the Trade Practices Tribunal can authorize a merger.¹⁹⁵ If the TPC chooses to challenge a merger in court, the court cannot balance the anticompetitive effects of the merger against efficiencies, social welfare, or international competitiveness.

A public benefit, however, is only necessary after a finding of substantial lessening of competition. While a court cannot grant an authorization when one should have been granted, it can find that the merger would not substantially lessen competition under the concentration thresholds and thus make authorization unnecessary.

Australian judges have less flexibility because they are bound by the statutory merger factors in the Trade Practices Act.¹⁹⁶ On the other hand, judges in the United States look to diverse Supreme Court precedent¹⁹⁷ and the legislative history of the 1950 Celler-Kefauver Amendment to Section 7 of the Clayton Act.

190. See, e.g., Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective—Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 947-51 (1987).

191. Antitrust injury means "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

192. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

193. *Queensland*, 8 A.L.R. at 508.

194. Trade Practices Act 1974, *supra* note 9, § 88; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 2.28.

195. Trade Practices Act 1974, *supra* note 9, § 88; TPC DRAFT MERGER GUIDELINES, *supra* note 43, § 2.28.

196. Trade Practices Act 1974, *supra* note 9, § 50(3). See *supra* note 64.

197. Compare *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) with *Brown Shoe*, 370 U.S. 294 (1962).

Conclusion

While the U.S. guidelines are more refined, illustrating a longer history of merger analysis, the Australian guidelines share the same underlying economic theories. Prior to recent statutory amendments, the dominance test in Australian merger law permitted almost all mergers in order to allow larger firms, even when the merger was likely to lessen competition. Now, while the Australian merger guidelines are based on a tougher statutory test, they adopt a structural test that is more relaxed than that of the U.S. guidelines, at least when applied to mergers in less than highly concentrated markets.

Furthermore, during the authorization process the TPC can permit a merger based on public benefits. Thus, despite the results of the economic analysis, the TPC can safeguard important policy goals, such as the promotion of international competitiveness. The role of the TPC is magnified further by the fact that the Australian courts cannot consider public benefits when analyzing the competitive effects of a merger.

