APPENDIX 4: THE REGULATION OF MERGERS UNDER THE TRADE PRACTICES ACT

The regulation of anti-competitive mergers (and we use the term merger to relate to takeovers as well as mergers) in Australia over the years has been basically limited to the Trade Practices Act. Until 1974, there was no statutory provision that regulated anti-competitive mergers. In the Trade Practices Act (referred to as ***the Act***) which was enacted in 1974, section 50 (in general terms) prohibited mergers which had or were likely to have an anti-competitive effect. This was measured in terms of whether the effect or likely effect of the merger substantially lessened competition in the market. The language was in similar terms to the current section 50. The current rule provides as follows:

- "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."

There are a number of other provisions which impact on the evaluation of mergers. In particular, sections 50(3) and 50(6) play a significant part in any evaluation, as do the provisions relating to authorisation. Some provisions are not relevant to the specific issues being addressed by the Inquiry (eg the regulation of mergers under section 50A of the Act).

It is important to note that there has been very little litigation involving section 50 of the Trade Practices Act in its current form. There have been a number of cases involving the section in its previous form - from 1977 to 1992 when **dominance** rather than substantial lessening of competition was the relevant test. The submission will briefly comment on these cases where appropriate.

The Australian Competition and Consumer Commission (referred to as ***the ACCC***) and its predecessor the Trade Practices Commission (referred to as ***the TPC***) have over the years issued merger guidelines. These have formed the basis for the evaluation by those bodies of mergers. These guidelines provided (and still do provide) a useful insight into the attitude of the relevant regulator to the question of the competitive effect of mergers. The Industry Commission in its information paper on merger regulation provided a useful critical evaluation of the administration of merger law by the ACCC and its predecessor the TPC and recognised the need for the ACCC to be forward looking in administering its powers. It is important to note that these guidelines have no force in law.

The key concepts which will be addressed in this Submission are that of **market** and **competition**. The National's fundamental position is that the relevant merger law (ie section 50 of the Act) does not need to be changed. The critical test applied in evaluating a merger from the competition viewpoint should remain. However, the National firmly believes that there is a need to reassess and to broaden the interpretation of the concepts of market and competition when assessing a merger under the Act. A change in the interpretation of the Act should be seen as part of the process which has evolved in dealing with section 50 of the Act. A little background will explain the basis of the National's suggestion.

In 1992, following the 1991 report of the Senate Committee on Legal and Constitutional Affairs (known as ***the Cooney Committee***), the Act was amended to reinstate the substantial lessening of competition test which had in turn been replaced in 1977 by a dominance test. When the present test was recommended, the Cooney Committee also suggested that some guidelines should be provided to the court, the Trade Practices Tribunal and the TPC to enable them to evaluate whether mergers were anti-competitive. Section 50(3) of the Act introduced a number of criteria which the relevant body must consider in evaluating whether a merger has or is likely to have the necessary anti-competitive effect in a relevant market. These matters are not exhaustive so that the relevant body, including now the ACCC and the Australian Competition Tribunal (which has replaced the Trade Practices Tribunal), will be able to take into account other matters. The ACCC has shown a considerable degree of flexibility in its recently released merger guidelines (referred to as ***the Merger Guidelines***) by adding matters to the list - in particular it has included the notion of efficiency as one which has relevance to the evaluation of the merger.

In paragraphs 5.159 - 5.162 of the Merger Guidelines, the ACCC has indicated that it will consider efficiencies (or efficiency) as a relevant factor in determining whether a merger is anti-competitive or not. It has done so notwithstanding the decision of the Full Federal Court in *Davids Holdings Pty Ltd & Ors v Attorney General of the Commonwealth & Anor* (1994) 16 ATPR 41-304. Drummond J at p 42,098 of that decision made certain observations - the merger was being considered in the context of the pre-1993 merger test - whether the merger led to dominance - which may preclude the ACCC (or the Tribunal or court) from considering efficiency. The judge noted:

> "It is no answer, once [dominance is established] to show, for example, that a moderate reduction in price competition resulting from a particular merger would be greatly offset, so far as the general public interest in the efficient allocation of resources is concerned by benefits created by the merger. Any such balancing exercise is for the Trade Practices Commission to carry out in dealing with an authorisation application ... not the Court that has to consider whether section 50 bars a particular merger".

Clearly, questions of whether the merger produces public benefits is an issue that is relevant to an authorisation application. However, just as clearly in the National's view, questions of greater efficiency should not be ignored in determining whether a merger is anti-competitive in the first place. To require that these matters only be considered in the authorisation context would be to render the process of considering mergers highly inefficient. It should be borne in mind that it is only the ACCC that can seek to enjoin a merger. Parties who wish to seek a divestiture (a remedy that would be very rarely pursued) will still be able to do so if the ACCC were to consider that the merger is not to be challenged on the basis of efficiency. The National strongly supports the inclusion of the question of efficiency in the Merger Guidelines. It believes that this approach should inform any subsequent Tribunal or court decision.

Section 50(6) of the Act defines market so that in the context of mergers the legislation will only be triggered if the merger involves a substantial market for goods and services in Australia, in a State or in a Territory. The National generally supports the broad approach of the ACCC and the Tribunal to market definition (see discussion below). However, the

National believes that there is need for some further guidelines to be considered in evaluating the geographic markets.

Whilst it is possible to consider a State or a Territory as a relevant geographic market, it is the National's view that in the context of the information set out in earlier chapters the ACCC should as a matter of course treat the market as a national market unless there are exceptional circumstances to depart from that point of view. This has been emphasised by the Hilmer Committee (see chapter 5) and by other evaluations of mergers. It is also a matter which received particular prominence in the Trade Practices Tribunal decision in *Re Queensland Independent Wholesalers Limited* (referred to as the ***QIW*** case (1995) ATPR 41-438).

In the context of the definition of product market it is interesting to note that when the legislation was amended in 1977 following the report of the Swanson Committee (which is discussed briefly below) the definition of market was amended to ensure that questions of substitutability were treated as relevant matters for consideration. Some further guidance should be provided to the relevant bodies considering this concept by extending the definition.

Background

Australian Regulation

The history of the control of mergers in Australia is interesting and provides an instructional backdrop to any evaluation of the current ACCC "initiatives" in this area.

Prior to the enactment of the Act there were no regulatory controls on mergers from a competition viewpoint (although there were other regulations in relation to takeovers - eg corporations law, industry specific legislation etc).

When the Act was enacted in 1974 it contained a provision not unlike the present section 50. Between 1974 and 1977 the predecessor to the Industry Commission (the Industries Assistance Commission, referred to as ***the IAC***) had argued for a more generous treatment of mergers by the TPC. This was necessary in the IAC's view because there was a need for areas of Australian industry to rationalise their activities to enable them to produce efficiencies of scale and scope. This in turn was seen as necessary to enable certain Australian companies to compete more effectively internationally. In those years there was a perception that the TPC had adopted an "aggressive" approach to merger control. It should be borne in mind that during this period the legislation included an interesting provision allowing mergers to be "cleared" by the TPC without parties having to go through the formal **authorisation** process (ie seeking to justify the merger on public benefit grounds). The existence of this clearance procedure may have led the TPC to be more aggressive towards mergers.

A considerable amount of interest was generated in the debate between the IAC and the TPC in relation to merger control. The TPC's approach was seen by many as too interventionist and vigorous, and the IAC saw it as being more aggressive than was warranted in the context of the Australian economy. Indeed the history of the administration of mergers in Australia by the TPC, and now by the ACCC, in many ways parallels the treatment of mergers in the United States in the 1960s under the Clayton Act (see later for US background). The newly elected Liberal National Government appointed a committee (the Swanson Committee) to review the Trade Practices Act including the treatment of mergers under the Act.

As noted earlier, mergers (but none in the banking area) were the subject of a clearance mechanism. This mechanism was removed from the Act in 1977 as a result of reforms generated by the Swanson Committee. The clearance provision was also removed from nearly all anti-competitive practices or agreements with a revised version of it - the notification - being retained for exclusive dealing. Together with the removal of the "safe harbour" of clearance, the legislation was amended so that a dominance test was inserted into section 50 to replace the substantial lessening of competition test (which has since been "reinstated" in the legislation in 1992). It felt that the substantial lessening of competition test was too "restrictive" for Australia. The Swanson Committee supported the retention of merger control, but it recommended two significant changes to section 50 - that a statutory defence should be provided in the case of a failing target company and that merger provisions should not apply to small acquisitions. The Government's first amending Bill in 1976 contained a threshold of $3 million (annual turnover) below which mergers would not be the subject of the Act. This was consistent with the Committee's recommendations. However, further changes were proposed and indeed in another version of the amending legislation it was intended to omit merger control altogether. When the final Bill was tabled in the Parliament in 1977, the relevant Minister (in fact the current Prime Minister, John Howard then in his capacity as

Minister for Business and Consumer Affairs) noted that the categories of merger that should be subject to legislation would be quite limited. He stated: "There should be no unnecessary impediment, legislative or administrative, to the attainment of rationalisation of Australian industry. It is in Australia's best interest to achieve economies of scale in improved international competitiveness ...". As a result, the Bill and the final Act followed this approach. The new section 50 only prohibited mergers which would lead to a position of dominance or increased dominance in the relevant market. The Government chose neither to introduce a defence based on failing companies, nor to contain a threshold. The Government, however, retained the authorisation process which could be used to support mergers that use public benefits which outweighed the potential anti-competitive detriment resulting from the merger.

The dominance test remained in the law despite a number of attempts to remove it. In 1984 there was a proposal by the newly elected Labour Government to reintroduce a test similar to the current test. The report of the House of Representatives Standing Committee on Constitutional and Legal Affairs (the Griffith Committee 1990) recommended against change, no doubt influenced by the fact that there had been successful litigation brought by the TPC in a number of cases. However, the Cooney Committee, to which we have referred previously, believed that on balance things had changed by 1991 and a case had been made for reverting to the current test. The Government enacted legislation in support of its recommendation in late December 1992.

Whilst there have been a number of cases involving the TPC and parties that are challenged in relation to the dominance test (for example, *TPC v Ansett Transport Industries (Operations) Pty Limited* (1978) 20 ALR 31, and *TPC v Arnotts Limited* (1990) 93 ALR 657 (amongst others)) there have been no court decisions in which the current test - the substantial lessening of competition - has been considered in a case that has been argued through to conclusion. There have been a number of interlocutory decisions involving the substantial lessening of competition test, but these did not provide any significant guidance to the meaning of the terms under consideration.

There have, however, been some interesting Trade Practices Tribunal decisions involving the substantial lessening of competition test. Two in particular play a significant part in the evaluation of mergers both by the regulators (the TPC and now the ACCC) and have had some impact on court discussions of issues raised in section 50 namely the *QCMA* case and *QIW* case. We shall be referring to these decisions during the course of this submission.

US Regulation

The Australian regulation of mergers is based to a certain extent on Section 7 of the Clayton Act. Indeed much of the early thinking by the TPC on merger control was premised on the approach adopted by the Department of Justice, in particular, in the United States. Certain decisions by the US courts relating to bank mergers in the context of the US legislation offer some interesting insights into the thinking of the TPC, and possibly the ACCC, in relation to bank mergers.

There was a tendency on the part of the US regulators to approach mergers on the basis of the theory that you needed "to nip the anti-competitive thrust in the bud" to avoid increased concentration and the inevitable reduction (so it was argued) of competition. The very aggressive and interventionist approach of both the Department of Justice and the Federal Trade Commission in relation to mergers in the United States in the 1960s was highlighted by a series of United States Supreme Court decisions.

The banking sector in the United States was very much part of this particular history. The principles laid down by the US Supreme Court in *United States v Philadelphia National Bank* (374 US 321 (1963), in particular, have had an enduring effect on US jurisprudence in this area. These views were to a larger extent confirmed by the US Supreme Court when commenting on the decisions of lower courts in *United States v Phillipsburg National Bank* (379 US 350 (1969)) and *United States v Connecticut National Bank* (418 US 656 (1973)) two further cases involving bank mergers.

In *Philadelphia National Bank* the prospective merger was between the second and third largest of the 42 commercial banks in the metropolitan area. The Supreme Court concluded that the products supplied by banks must be treated as a "cluster of products" so that only other institutions which offered the full range of products which could be offered by banks could be considered as competing with banks in the same market. The notion of a cluster of products has played some part in the thinking of the TPC and of the now defunct Price Surveillance Authority (***PSA***) (see later).

The notion of a "cluster" market excluded firms that produced some but not all products in the "cluster". A relevant product market was justifiably defined to include a "cluster" of products when consumers perceived that cluster of products to be a commodity bundle which would be purchased jointly.

The reasoning was that if consumers perceive a set of services as a "cluster" to be purchased jointly then a price increase for one or more of the commercial bank products or services would induce consumers to consider an alternative supplier for the entire cluster of commercial bank products and services, rather than seek an alternative supplier for just the products or services subject to the price increase.
The Supreme Court in *Philadelphia National Bank* outlined the market for banking services as follows;

> "Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply.... Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions... Finally, there are banking facilities which, although in terms of costs and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits." (374 US at 356-357).

Although the Supreme Court recognised that some of the products and services that commercial banks offered were also provided by other financial institutions, these institutions were excluded from the market in part because they did not offer all of the products and services available from commercial banks.

In *Phillipsburg National Bank*, in contrast, the relevant District Court (306 F Supp 645 (DNJ 1969)) emphasised the competition between the banks and other types of financial institutions, for example savings and loan associations, pension funds, mutual funds, insurance and finance companies. The District Court expressed the view that in terms of function the defendant banks were more comparable to savings institutions than to large commercial banks. The Supreme Court, however, was of the opinion that the District Court had erred and that these issues were more relevant for looking at sub-markets but not for the definition of the product market itself. The Supreme Court followed the *Philadelphia Bank* "cluster" theory in holding that the merger was anti-competitive.

In *Connecticut National Bank*, the relevant District Court (362 F Supp 240 (Connecticut DC 1973)) concluded, as had the equivalent court in *Phillipsburg*, that the appropriate product market included both commercial banks and savings banks. The District Court was of the opinion that the pronouncements in *Phillipsburg* and *Philadelphia* were not intended to be "ironclad, hard and fast rules which require a court to don blinders to block the true competitive situation existing in every set of circumstances". Several factors led the District Court to conclude that savings banks were in direct and substantial competition with commercial banks in providing products and services. It pointed out that savings banks in Connecticut competed with commercial banks for real estate mortgages, personal loans, deposits and commercial loans. It distinguished *Philadelphia* and *Phillipsburg* by pointing to the absence of significant competition by savings banks in the relevant geographic markets in those cases.

The Supreme Court in *Connecticut National Bank* agreed with the District Court that the decisions in *Phillipsburg* and *Philadelphia* did not require a court to blind itself to economic realities. It also acknowledged that the District Court was correct in assuming that complete industry overlap was not necessary for inclusion in the same market. Nevertheless, the Supreme Court held that the District Court was mistaken in including both savings and commercial banks in the same product market for the purposes of the case. The Supreme Court acknowledged that there was a large measure of similarity between the services marketed by the two categories of banks. In its opinion, however, the overlap was not sufficient at that stage of the development of savings banks to treat them as being part of the same market as commercial banks. The Court noted that despite the strides towards parity, commercial banks continued to provide a cluster of services that savings banks could not. The Supreme Court, however, was careful, in *obiter dictum*, to point out that the *Phillipsburg* and *Philadelphia* cases did not stand for the proposition that in a case involving a merger of commercial banks a court would never consider savings banks and commercial banks as operating in the "same line of commerce" (or market) no matter how similar their services and economic behaviour. The Court acknowledged that at some stage of the development of savings banks it would be unrealistic to distinguish them from commercial banks for the purposes of antitrust law.

It is interesting to note that the approach to market definition adopted by the TPC in the Challenge Bank merger in 1995 (see Westpac/Challenge Background to TPC decision 21 September 1995) involves many similarities, in broad outline, to the approach adopted in the US Supreme Court cases. This is so despite the fact that a number of US commentators have challenged the reasoning of the Supreme Court in this trilogy of cases and its application to modern banking practices. As the number of financial alternatives has grown, commentators have noted that many commercial bank customers may find one-stop banking more costly than selecting separate institutions to provide different products and services as a "cluster". A brief discussion of their views may be instructive.

Both Loevinger in his article, "Antitrust, Banking and Competition" ((1985) Antitrust Bulletin 583) and Bronsteen in his article, "Product Market Definition in Commercial Bank Merger Cases", ((1985) Antitrust Bulletin 677) noted the relative obsolescence of the "cluster" theory espoused in the trilogy of cases in the current US banking environment. Both authors argued that banks were faced with the reality that their industry was really part of a larger industry encompassing all financial institutions. In particular, relevant banking services were examined by Loevinger who concluded that all the services constituting the "unique" characteristics of commercial banks in the era when *Philadelphia*, *Phillipsburg* and *Connecticut* were decided were in fact being offered in the 1980s by savings and loan associations, credit unions and other financial institutions.

Loevinger contended that it was beyond serious dispute that commercial banks were being assailed by competition from a wide variety of other institutions and that the simple rules of the *Philadelphia*, *Phillipsburg* and *Connecticut* cases were both unrealistic and inapplicable. He compared the modern banking environment with that existing at the time *Philadelphia, Phillipsburg* and *Connecticut* were handed down and concluded that they are as different as today's jets are from the flying machines built by the Wright brothers.

A more recent commentary (Yvonne S Quinn, "Practical Aspects of Defending Bank Mergers before the Federal Reserve Board and the Department of Justice" (1993) 62 Antitrust Law Journal 91) confirms that the Department of Justice has in fact moved away from the "cluster market" definition. However, the Federal Reserve Board, which also has a role to play in evaluating bank mergers, has continued to give some support to the cluster theory although it does recognise competition from non-bank providers of financial services as an additional factor to be weighed in determining whether a particular merger will be approved. Quinn in this article illustrates that there is nevertheless a considerable flexibility being shown by both the Department of Justice and the Federal Reserve Board in examining product markets. So, for example, both bodies recognise that thrifts provide reasonable substitutes for banks in offering products to retail customers. Credit Unions also are seen as fully fledged competitors to banks for retail customers and other forms of companies may offer evidence of competition - for example, leasing companies, mortgage companies and others.

The recognition that these types of organisations and the nature of the services that they provide do impact on the evaluation of a product market is important in the context of any analysis that is undertaken in the Australian market.

Some comments on aspects of the Australian Statute and the Merger Guidelines

The definition of market in the Trade Practices Act is not a particularly helpful one either in terms of bank mergers or indeed other matters where this definition is crucial. The definition provides that market means "a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services". The substitution clause was added to the definition following the report of the Swanson Committee (see above). The National has demonstrated earlier in this submission that the services provided by banks have changed considerably over the last few years and that there is considerable competition and contestability in the provision of these services and other services by other players in the relevant industry. The fact that the market is constantly evolving in this sector is something that the current definition may not accommodate very comfortably. Accordingly it is believed that when interpreting these provisions, the decision maker should take a broad view and a practical approach in light of the recent changes in the industry.

Market has a number of other dimensions which are clearly recognised by the ACCC in the Merger Guidelines which were recently issued. Those discussions include a geographic market, functional market, and time. The question of time is something that has only recently been recognised as of greater importance in the evaluation of the market. There has been a tendency for regulators, not only in Australia but elsewhere, who view the impact of mergers on a very short time term. Section 50(1) requires the merger to be evaluated in the context of the effect or the **likely** effect. It is particularly important that the ACCC, or as this applies to other similar regulators, does not put itself in a straight-jacket that has narrow time limitations. Competition must be seen as an ongoing process, a process as recognised by the decisions of the Tribunal to which we will return later. The National wishes to comment briefly on each of these aspects of the "definition".

Geographic market

As noted earlier, section 50(6) of the Act provides that in evaluating the geographic market the relevant decision maker (whether court, Tribunal or ACCC) needs to examine the merger in the context of a national market or a State or Territory market. In addition, the market must be a substantial one. Indeed, as we have noted earlier in discussing the internationalisation of banking, there are strong reasons for continuing to see the relevant market as being the one beyond the shores of Australia. Indeed, as the Hilmer Report emphasised, it has been suggested by bodies such as the Industry Commission that regulators and courts alike need to be more expansive in their view of markets from a geographic viewpoint. In certain circumstances it will be both appropriate and desirable for Australian companies to be seen in the international perspective rather than in the national perspective. In line with that thinking it is also important, in considering mergers in a purely Australian context, that unless there is a strong presumption to the contrary, markets should be seen as Australian rather than as State or Territory or part thereof. This is clearly in line with the terms of section 50(6) of the Act. It is clearly in line with the recent decision of the Trade Practices Tribunal in the *QIW* case which is also discussed in the next section dealing with the functional dimension of market.

Functional dimension of markets

The National believes that at the functional level the market for the relevant product should be seen as either wholesale or retail. It welcomes the clear acceptance by the ACCC that the functional dimension of markets is a very important question. In that context the National refers the Inquiry to the very helpful discussion of market, both from a perspective of product market and the functional level, in the Tribunal decision in the *QIW* case in particular the Tribunal's analysis at pages 4,951-4,952. This shows an encouraging trend towards a recognition that even though it may be appropriate to consider the level of the market in ways which may be narrower in some perspectives (even in the context of a geographic market), in concluding its analysis in that particular merger case the Tribunal noted that there was "an Australia-wide or national market for the distribution of grocery or products to the consuming public by integrated retail chains and independent wholesalers supplying independent retailers". Whilst the Tribunal did accept that there were sub-markets within this broad definition those sub-markets were not regarded as "separable markets".

Time

As a result of a series of decisions by the Trade Practices Tribunal the concept of time has now been accepted by the ACCC in its market analysis. The National welcomes the addition of this dimension to the definition of market. It is vital that questions of time be seen as relevant. Often a very short time frame is seen as relevant in analysing the question of market and competition. We suggest that the Inquiry gives consideration to the possibility of recommending that in interpreting the definition of market, a clear recognition of time as noted by the Tribunal in the decision *Re Tooth & Co Ltd* (1970) ATPR 40-113 is included. In this decision, the Tribunal stated that "in our judgment, given the policy objectives of the [Trade Practices Act], it serves no useful purpose to focus attention upon a short run transitory situation. We consider we should be basically concerned with substitution possibilities in the longer run" (at page 18,196).

Whilst the Merger Guidelines are extremely helpful, it is important to note that they do not have legal standing. They do, however, provide a very important "guide" to Australian business and its advisors on how the ACCC will evaluate merger activity in the context of the Act. These guidelines are an important aide. As noted earlier, there have been no decisive court decisions on the current statutory provision. However, the National welcomes the helpful analysis of market issues in Trade Practices Tribunal decisions such as the *QIW* case, *Re Tooth & Co Ltd* and the *QCMA* case, as well as a number of court cases which discuss the concept of market.

Competition

In chapter 5 of the Submission the National has noted that the concept of competition should not be treated as a static or narrow one driven by a fascination with the structure of an industry. The National recognises that structure is a matter that has been identified as an issue that needs to be addressed - see section 50(3) of the Trade Practices Act. But, to adopt a mechanical approach to competition by reference to these issues and by over emphasising the concentration ratios that are outlined in the Merger Guidelines, the ACCC, and indeed any court or tribunal that is asked to consider the issue, might fail to appreciate the fact that competition is a process which is both rich in its terms and needs to be evaluated in the context of a long run time frame as was noted by the Tribunal itself in *Re Tooth Ltd* referred to earlier, and has been demonstrated in this Submission.

In the leading Tribunal decision on mergers, the *QCMA* case continues to play a significant role in the interpretation of the Act both in the context of authorisations and in the context of any litigation that might be brought involving alleged anti-competitive behaviour. In that case, there is a clear recognition of the need to regard competition as a flexible process.

The Tribunal noted in *Re QCMA* at pp 17,245-17,246 the following:

> "However, `competition' is such a very rich concept (containing within it numbers of ideas) that we should not wish to attempt any final definition which might, in some market settings, prove misleading or which might, in respect of some future application, be unduly restrictive. Instead we explore some of the connotations of the term.
>
> Competition may be valued for many reasons as serving economic social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources ....
>
> Competition expresses itself is rivalrous market behaviour ...
>
> In our view effective competition requires both that price should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price - product - service packages offered to consumers and customers ...
>
> **Competition is a process rather than a situation**." (emphasis added).

The Tribunal did note that the structure of the markets in which firms competed were issues that needed to be addressed but it certainly did not over emphasise that particular issue.

In the later *QIW* decision (1995) the Tribunal gave full weight to its analysis of the process of competition in concluding that the merger of Davids Holdings Ltd and Queensland

Independent Wholesalers Ltd was not anti-competitive. In a rich and expansive analysis of competition and markets, the Tribunal held that the relevant merger was not anti-competitive. Its conclusion on market behaviour in the context of an industry that was highly concentrated with reasonably high barriers to entry for the market as a whole is particularly useful. The Tribunal noted that the market was characterised by:

> "a changing internal structure - not just in market shares of the participants but also in the very shape of the industry. It is an industry that is full of movement. Associated with this, there is an absence of cartelisation and a valuable and shifting diversity of retailing `product'. Industry members, both integrated chains and independents are challenged to counter the strong suppliers of national brands. In short, the outstanding feature of market structure is its dynamism" (at p 40,958).

Whilst the relevant market being considered in this matter was quite different in some respects from the banking or financial sector, there are many characteristics highlighted by the Tribunal as very relevant in its evaluation of the merger as being not anti-competitive that would be clearly reflected in the development of a highly `mobile' banking industry as outlined in earlier chapters.

It is this analysis of competition, and how it is to be assessed, that we believe is not given adequate consideration by the ACCC generally or in its Merger Guidelines. It is this kind of analysis which, when applied to industries such as banking, would provide a different framework against which potential mergers should be considered.