

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates, 1 to 4 June 2004

Question: Bud 72

Topic: Mergers

Hansard Page: Written Question on Notice

Senator Conroy asked:

Following the recent Federal Court decision in the AGL case, could it be argued that under s 50 a merger will not substantially lessen competition unless the ACCC is able to demonstrate that following the merger, the merged entity will be able exercise market power (ie if the merged entity cannot exercise market power, then there is not a substantial lessening of competition as required by s 50)?

Would the commission be concerned if this approach became accepted as the appropriate test under section 50?

[See comments by French J in *Australian Gas Light Company (ACN 052 167 405) v Australian Competition & Consumer Commission* (No. 3) [2003] FCA 1525 (19 December 2003) paras 393, 394, 397, 402]

Answer:

The ACCC does not consider that Justice French's approach in his assessment of the AGL case represents a change in either the approach or test to be applied in the assessment of cases under section 50 of the *Trade Practices Act 1974*. Justice French applied the factors set out in section 50(3) of the Act to assess the likely effect of the proposed transaction on competition. Justice French then noted that the factors in section 50(3) were not an exhaustive list of factors to be considered. Justice French's approach does not represent any change or divergence from the "mergers" test as currently prescribed in section 50.