Mergers and Acquisitions

[Overlap provision: If yes to s 50, then no s 45 or civil cartel provision]

In ascertaining whether the relevant merger / acquisition in this case will likely be approved by the ACCC, it is necessary to turn to the prohibition pursuant to s 50 of the CCA. There, s 50 states that a corporation (1) or person (2) 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 SLC in any market.

This provision stipulates four elements that determine whether the merger/acquisition will satisfy a breach:

Step 1: A corporation (per s 4) must be affected by the acquisition

[Clearly, firm X will be affect by the acquisition as their assets are being purchased by firm Y]

Step 2: There must be an acquisition — 'directly or indirectly' acquiring shares or assets

- s 4(4) has a broad definition of 'acquisition' — it is satisfied on the facts as firm Y is acquiring the assets of firm X
- *Australian Meat Holdings v TPC* → 'a holding company 'indirectly' acquires shares or assets acquired by its subsidiary.' This was rejected in *Australian Iron & Steel*. However, it was said that it 'may apply' in *Gillette* ('at least arguable') and that the meaning of 'indirectly' should not be confined by the findings of *Australian Iron & Steel*
- *Australian Iron & Steel* established that 'a party must have acquired a legal or beneficial interest in shares or assets before it can be said to have made an acquisition.'

Step 3: Must be a causal link between the acquisition and SLC in the relevant market

[Apply the market analysis — what is the market? SSNIP test]

- Difficult to ascertain how much acquisition leads to SLC, particularly when there is a partial takeover.
- *Brisbane Gas v Hartogen Energy*: 'anti-competitive effects may flow from practical control of a body corporate through a minority shareholding'
- *Metcash*: must look at the market and commercial realities

Step 4: Threshold Test —**SLC**

Lastly, only a merger or acquisition that will have the effect or likely effect of SLC in any market will breach s 50.

[Go to SLC test above, then apply the Merger factors per s 50(3)]

- [Effects or likely effects only in the foreseeable future, generally within one to two years when considering the SLC]
- [If multiple counterfactuals exist, compare the two counterfactuals with the highest likelihood of occurring — where it is more probable than not that the counterfactual will process (greater than 50%).
- [Expected competition: Notwithstanding that firms may not currently be constraining one another, consider the foreseeable future constraint (whereby new entrants compete with current players in the market)]

The ACCC will have regard to the merger factors per s 50(3) (Merger Guidelines) when determining the effect or likely effect of SLC: [Everything is framed according to CONSTRAINT — all these factors impact on constraining the merged firm]

(c) the level of **concentration** in the market

- The ACCC will consider the level of concentration in the market, particularly, the number of firms and their respective market shares (include imports). The Merger Guidelines suggest that more concentrated markets with fewer firms with higher market shares will increase the likelihood of unilateral or coordinated effects, which may lead to SLC.
- The Herfindahl Index provides a quantitative indication of market concentration — the ACCC will be less likely to identify horizontal competition concerns when the post merger HHS is less than 2000 or greater than 2000 with a delta less than 100.
    - Square each firm's MS and the add them together (compare the counterfactuals).

(b) the height of **barriers to entry** to the market

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Vertical Restraints

Type of conduct caught under VR prohibitions:

- requirement contract
- tying and bundling arrangements
- third-line forcing (tying the purchase of different products together) — only supply G&S or give a discount on condition that purchaser buys G&S from particular TP.
    - for-line forcing (conditioning sale of one good on the sale of another)
- retail price-maintenance

Section 47 Exclusive Dealing — Non-price VR

[N.B. Over-lap provisions may be relevant here. Intersection between s 45 and s 47 will mean that the conduct is addressed in this s 47 provision (as s 45 is a per se provision). If s 47 then no 45 or cartel conduct. If NO s 47, s 45 cannot cover a refusal to supply, but s 46 can: *BHP*]

1. Trade or Commerce?

Corporation X's conduct has been engaged in the course of trade or commerce stipulated in s 47(1).

2. Does the conduct constitute the practice of exclusive dealing? [Identify the provision the conduct applies to ss 47(2)–(9)]

The Condition The Conduct	Not acquire good/service from comp	(Not) resupply G&S from comp	(Not) resupply to particular parties/persons	(Not) acquire G&S from Third Parties
Supply	(2)	(2)	(2)	(6)
Refuse to supply	(3)	(3)	(3)	(7)
Acquire	(4)	(4)	(4)	
Refusing to acquire			(5)	

[Use the table to locate the broader sub(s) and then select the letter sub(s) and state the prohibition]

On Condition — applies to s 47(2), (4), (6), (8) CCA

Per s 47(13)(a), 'on condition' refers to 'any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances.'

- *Ku-ring gai* (On condition): Building society providing secured loans to its members required them to also use a nominated insurance company. This was 'on condition' notwithstanding that the condition originated from the rules of the society, not from the supplier. It is irrelevant where the condition originates.
- *SWB Family* (Not on condition): SWB offered 4% rebates from its loans if members used Alliance travel agency.
    - There was no element of compulsion here — members were not obliged to select Alliance, they would only miss the rebate — the account would be re-credited.
- *Baxter Healthcare:* Baxter had a monopoly over Sterile Fluids (SF), but faced competition for PD fluids. They bundled the sale of SF and PD, pricing others out of the market. It was uneconomical to purchase SF from B and PD from competitors.
    - [The 'on condition' qualification requires the conduct to possess an element of compulsion, whereby the TP is deprived of choice. In Baxter, there was a choice to purchase separately or as a bundle. Analogously...]
    - (cf *TBC*; the reading of 'on condition' as requiring compulsion is controversial and unsettled, but on the balance of the case law, the Court is likely to adopt the reasoning in Baxter and SWB)

[For third-line forcing, you need a triangle, three parties (including TP). Therefore, you need another person and you need two products, or else you the triangle won't work.]

Another Person — applies to s 47(6), (7), 8(c), 9(d)

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Horizontal Arrangements (cartel conduct, exclusionary provs, price-signalling)

Div 1, Part IV: Cartel Conduct

1. Is there a CAU that has been made, arrived at, or given effect to

Is there a contract between the colluders? Formal written arrangement? *unlikely*

[On the facts, there is no contract between X and Y that has been given effect.]

Arrangement (*almost a contract*) **or Understanding** (*very informal)*

[To fall within the spectrum of consensual dealings expounded in *Leahy* with regards to an 'arrangement or understanding', there must be a finding of communication, consensus and commitment.]

Communication

- express or implied
- *Email*: No communication (or consensus or commitment), the coincidence of their identify tenders and price variation were explained by economic concept of price-leadership (following the leader)
- *Apco*: there was communication → the discussed the new entrant in a meeting / family friend would pass Anderson information / would make phone-calls to Apco's parent company, passing it to Anderson.
- *Leahy:* using circumstantial evidence to make out communication is difficult as there are always differing explanations

[Clearly, as X has represented to Y that _____, this is an [express/implied] communication of the exclusive dealings.]

Consensus

- meeting of the minds of those party to the CAU
- *Apco:* no consensus. Anderson was held to have exercised his own independent mind when setting prices.
- *Leahy:* no consensus → each party had their own profit-making interest to increase prices with knowledge of other existing price increases.

Commitment

- Expectation that they will act based on the consensus reached (can be a sent letter).
- A mere hope or mere expectation will not provide grounds for commitment; a party has to assume some sort of obligation (duty, not necessarily legal)
- *Apco:* No commitment → none of the conversations related to *future* prices, only past movements in price
- *Leahy*: No commitment → the phone calls conveyed price increases already made, no different from prices displayed on the boards outside. The pattern was a result of market forces

Make, arrive at, or give effect to [identify the conduct itself (provision)]

- **s 4(1) 'arrive at'** → includes each or enter into
- **s 4(1) 'give effect'** → to do an act pursuant to, in accordance with or to enforce, or purport to enforce
- **s 45(4)** → provisions can be aggregated to provide the overall effect.
- *Safeway*: substance over form, element that brings about the result as intended
- *Leahy*: must provide for something to occur (or not occur), substantive enough to attach meaning.

[Then identify the provision and what it is (i.e. *Rural Press:* that RP would not enter Mannum to distribute papers]

2. Is there a provision in the CAU that is a cartel provision?

[Step 1: which provision does the CAU conduct fall under? Identify the section]

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