✓ The opinions of the parties themselves / Defendant's perception (who do they see as their competitors? *Arnotts*);

- Courts will give some weight to what the defendant thinks their market/competitors are. However, this is not determinative.

NOT

✗ Survey evidence – what would you do if the price of X went up 5%? (admissible, but not of high probative value because it is not a real response; *Broderbund Software Inc*); or

- It is very hypothetical. Surveys do not carry much weight.

✗ Economists' opinions (*Arnotts*).

Exam tips:
1. What is the market? o E.g. For Blockbuster, the market is not hiring movies, but for entertainment purposes. o What are the available substitutes? o SSNIP test **2. Does the company have power in that market?**

Is the market competitive? Or does a firm have market power?

- ***"Market power"*** is the antithesis of competition – it is the discretion to give less and charge more.
  - If there is competition, then no corporation has market power. If corporation has market power, there is no competition in the market.
- **In order to determine whether a market is competitive, the court will consider 5 elements of the market structure (*QCMA*):**
  - * **Remember: perform this analysis for your market (correct functional and geographic dimensions)**
  - * **NB. Barriers to entry is the MOST important factor**
  - * **IN EXAM:** talk about barriers first, **and concentration in market second** (refer to QCMA)**. Then discuss whether the other 3 factors are relevant to the scenario.**

1 Height of barriers to entry;

- How difficult is it for new firms to enter the market and secure a viable market share?
- The Tribunal regards this element as the most important (*QCMA*). This is because the threat of entry of a new firm into the market operates as the ultimate regulator of anticompetitive conduct – that is, if the barriers to entry are low, firms in the market must behave competitively otherwise they risk new firms entering the market.
- Is there evidence of actual entry? Suggests that the barriers to entry are not high;

What are barriers to entry?

- Must be a disadvantage that a potential entrant would face that the incumbent does not (asymmetry disadvantage). Look for "sunk costs" – those costs that a potential entrant cannot recover;

- **Barriers to entry include:**
    i. Legal barriers (patent rights, exclusive government licences, or tariffs);
    ii. Restricted access to natural resources (eg potential entrants might only be able to access inferior natural resources, or it will cost them much more to access the same resources as the incumbent);
    iii. Large economies of scale (this will be a barrier if the entrant *cannot* get those same economies of scale as the incumbent/s – eg because the market is too small);
    iv. Strategic barriers to entry (a relevant strategic barrier might be conduct engaged in by firms to make entry into the market more difficult, eg predatory pricing; *Boral*. However, this is only effective when rivals are not aware of each other's cost structures – pricing below cost can signal to potential entrants that entry is not worthwhile; per McHugh J);
    v. Surplus capacity (in *AMH*, AMH had closed plants that it could reopen to meet the competition of a new entrant. Therefore, the new entrant would have to take away custom from AMH and this would deter entry);
    vi. Product differentiation (in *Arnotts*, the strength of brand loyalty enjoyed by Arnotts was a relevant deterrent to new entrants); and
    vii. [High capital costs (the cost of commencing production)?] Mason CJ and Wilson J in *Queensland Wire* questioned whether this could constitute a barrier to entry because they are not sunk costs. However, the Full Court in *Arnotts* suggested that this is a relevant barrier if there is asymmetry between the amount that the incumbent had to spend to acquire the assets and the amount the new entrant has to spend. Their Honours thought that a relevant asymmetry here was that Arnotts had 140 years to incur the costs, whereas an entrant would have to outlay it all at once.
        - Large start-up costs

s 50(3):

(b) The height of barriers to entry to the market;

(g) The dynamic characteristics of the market, including growth, innovation and product differentiation;

2 Number and market share of firms/independent sellers [market concentration];

- How many firms are in the market? What is the market share of each firm?
    - Eg a competitive market has a large number of firms with a small market share (eg in *Outboard Marine*, there were hundreds of retailers of outboard marine engines with small market shares, and the barriers to entry were low, therefore the market was highly competitive).
- If at the manufacturing level, look at the capacity of each firm – eg in *AMH*, AMH had nearly 64% of the capacity to slaughter cows in Northern Qld.

- In determining whether the acquisition would have the effect or likely effect of substantially lessening competition, the Act prescribes in s 50(3) that nine factors must be taken into account. These factors are essentially the same as those identified in *QCMA*:

(a) The actual and potential level of import competition in the market;

(c) The level of concentration in the market;

(f) The extent to which substitutes are available in the market or are likely to be available in the market;

(h) The likelihood that the acquisition would result in the removal of a vigorous and effective competitor;

3 Product differentiation;

- To what extent are the products in the market differentiated or homogenised?
- The more differentiated the product or sales promotion, the less competition in the market. The more homogenous, the stronger the competition (eg the concrete masonry products in *Boral*).
- N.B. this is not given much weight. Within an industry, there are slight differences.

4 Vertical relationships; and

- What is the extent of vertical integration?
- The greater the vertical integration between firms (eg manufacturers own the wholesalers and retailers), the less competitive the market because there is less inter-trading.
- A manufacturer, wholesaler or retailer chain – if a corporation has 2 or more of those links, then they will have more market power because they control different facets of that market.
  - E.g. Woolworths own a lot of their manufacturers so they can have more control/power.
- **This usually defines how much market power someone has.**

s 50(3):

- The nature and extent of vertical integration in the market.

5 Arrangements among firms.

- What is the extent of vertical integration?
- Are the firms independent?
- Look at the nature of any formal, stable and fundamental arrangements/relationships between firms, or common ownership between firms (eg *AMH*), which restrict their ability to compete / function as independent entities.

s 50(3):

(d) The degree of countervailing power in the market;

- Countervailing power = the extent to which market power held by the merged firm could be offset by market power held by customers or suppliers. Are there any strong buyers who can ensure that suppliers do not abuse market power?
- Strong buyers can counter the market power of suppliers by threatening to stop purchasing from the supplier unless the supplier behaves competitively.

(e) The likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins [essentially a conclusion];

Outboard Marine
Facts: • Outboard Marine (OM) supplied 2 different brands of outboard motors for boats in the region on the coast of NSW. • Their arrangement for supplying outboard motors was that people they supplied to were not allowed to supply Suzuki motors (the alternative). • OM stopped supplying to a company because they wanted to sell Suzuki motors at the same time. Issue: Whether refusing to supply to one retailer would affect the structure. Held: No, it did not impact on the structure of the market.