
S50 Mergers and acquisitions

DEFINITION:

The merger/acquisition will be prohibited under **s50** where:

1. It is a corporation (See above)

S5(1) extends application of Part IV to conduct outside of Aus to bodies corporate incorporated in Australia or carrying on business within Australia

2. Directly/indirectly acquires shares in the capital of a body corporate/person (s50(2))

Acquire (**s4(4)**) – [CORPORATION] directly acquires shares in [2ND CORPORATION]

‘Directly’ or ‘indirectly’

- I. Holding company indirectly acquires shares through its subsidiary (**Davis J** in *Australian Meat Holdings*)
- II. Acquiring corporation must acquire some legal or beneficial interest of relevant property (**Lockhart J** in *Aus Iron and Steel*)
- III. Left open by court in *TPC v Gilette*, noted would not dismiss prima facie case on this basis

3. Has effect of substantially lessening competition

Previous test (Dominance Test – Ansett) (Ansett; AMH v TPC; Arnotts; QIW)

- Mergers were prohibited where resulted in a position to control or **dominate** market
- Factors considered:
 - The existence of body corporate which controlled/dominated market directly affected that market (Northrop J in *Ansett*)
 - Factors towards dominance (*Ansett*; citing *United Brands*)
 - Firms operating and degree of market concentration
 - Capacity for [Co] to determine prices without being consistently inhibited in its determination by other firms
 - Barriers to entry
 - Product differentiation/sales promotion
 - Corporate integration/corporate relationships
 - In *Ansett*, Avis inhibited in determination of its rates. Low barriers to entry. Expanding market. While advantage in advertising (from authority to adv w/ airport), services substitutable.

What is the market? (See above)

Current test (Merger factors)

- In assessing whether the merger has the effect of SLC, the ACCC will assess the future “with” and “without” the merger (**ACCC Merger guidelines; AGL**).
- The ACCC must however satisfy that there was a “real chance” of substantially lessening competition (French J in AGL; Seven Network, Left open by **FCCA** in *Metcash*) or that it was “more likely than not” (**Emmett J** in *Metcash*; **Northrop J** in *Ansett*)
 - *Nb In Metcash – Hypothetical ‘new’ situation was proposed*
- The factors to be considered are detailed in **s50(3)**:
NB IN EXAM, EXAMINE ALL FACTORS
 - Actual and potential level of import competition in market
 - Height of barriers to entry
 - Level of concentration in market
 - Degree of countervailing power in market
 - Likelihood acquisition would result in acquirer being able to significantly and sustainably increase prices or profit margins
 - Extent to which substitutes are available in the market or are likely to be available in the market
 - Dynamic characteristics of the market, including growth, innovation and product differentiation
 - The likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
 - The nature and extent of vertical integration in the market
- **Cases**
 - **Metcash** - Acquisition by independent grocery wholesaler of retailing business. Counterfactual involved speculation on alternative factual scenario. Controversial as moves away from

conventional hypothetical situation with and without. Nb. Consideration that ACCC shouldn't have brought case b/c of strong positions of Coles + Woolworths

4. Authorisation?

[Merger parties] may seek authorisation of the merger under s88 CLA. The ACCC will also grant authorisation if satisfied that:

- Proposed acquisition would not substantially lessen competition (**See above analysis**) **OR**
 - *“Per the above analysis, it is likely/unlikely that the merger will SLC. On this basis, ACCC will/will not grant authorisation”*
- The likely public benefit from the proposed acquisition outweighs the likely public detriment
 - *[Corporation] will submit that the acquisition has the public benefit of [X]...*
- ACCC must make determination granting or denying merger authorisation within **90 days** of receiving a valid application (Tatts/Tabcorp)
- The recent amendments mean that merging parties must not obtain ACCC determinations prior to appearing before the Aus Competition Tribunal

OFFSHORE ACQUISITIONS (s50A)

“EXAMPLE: Where by reason of an acquisition (first controlling interest) in company, person obtains controlling interest in an Australian company”

Offshore M&As will be caught by s50A where the acquisition:

- would cause a change in control in an Australian subsidiary (s50A(8)); **and**
- would be likely to have the effect of SLC in Australia (above); **and**
- with respect to which there is no likely countervailing public benefit.

Nb. Little practical importance given extraterritorial application of s50. Additionally, s50A(7) provides that if both s50 and 50A apply, acquisition will be examined only under s50.

s.46 Misuse of Market Power

[X] may submit that [corporation] has misused their market power by [reason] in contravention of s46 CCA.

S46 prohibits a corporation from misusing their market power, thereby ensuring that corporations with market power do not misuse it by altering the market structure and lessening competition. It is genuine competitive conduct is not penalised.

1. Define the market (above)

Corporation is prohibited from engaging in conduct which has the purpose/effect of SLC in **(1)(a)** the market in which it operates **(b)** any other market corp supplies directly/indirectly to or **(c)** market which corp acquires goods directly/indirectly from

2. Substantial degree of market power (SDMP)

For [corporation] to be liable for [conduct], the corporation must first be established to possess a substantial degree of power in the market. This warrants an analysis of the market structure. **[SEE ABOVE]**

Substantial power?

Substantial power is construed as "large or weighty" (*Eastern Express*)

- **FACTORS** pointing towards substantial power
 - !! Firm can profitably sustain prices above competitive levels (*Guidelines*)
 - Or raise barriers to entry, profitably reduce quality of G/S, slow innovation (*Guidelines*)
 - Corporation does not need to succeed to be substantial (**Wilcox J** in *Eastern Express*)
 - MUST consider constraint by competitors or by who person acquires/supplies to/from **(4)(a)**
 - MAY consider power arising from arrangements w/ others **(4)(b)**
 - Agreements with other parties (**Lockhart J** in *Dowling*)
Pastoral houses members of unincorporated association which conducted sales at the yards. Agreement b/w pastoral houses that no other agents would be permitted to use saleyards
 - If related body corporates have a substantial degree of power **(3)** *ACCC v Safeway* wholly owned subsidiary of major public company
 - Other matters Ct sees fit **(6)**
- CAN have SDMP even if: **(5) (a)** corp doesn't substantially control market or if **(b)** corp does not have absolute freedom of constraint
- Does not necessarily follow that because a firm enjoys freedom from competitive constraint, and refused to supply, that this was b/c of SDMP (**HCA** in *Melway*)
- Nb. **(7)** More than one corporation may have a substantial degree of power in market

3. Did conduct SLC?

Since the Harper Reforms, **s46** now requires a consideration of whether conduct has **purpose or effect** of SLC in the market. Whether conduct "substantially" lessens competition is a qualitative assessment which assesses whether the conduct's effect is "meaningful or relevant to the competitive process" (*Rural Press*)

Generally, the court will examine the relevant market structure and assess how the conduct affects that structure (*Outboard Marine*)

1. Purpose

- Purpose = end sought to be accomplished by conduct, different from motive (*South Sydney*)
- Purpose must be substantial – "considerable or large", "real and not imaginary" (*Seven Network per Dowsett and Lander JJ*)
- **Subjective** effect may be inferred from **objective** matters (**Gleeson CJ** in *News Ltd v South Sydney*)

2. Likely effect is a factual analysis

- Likely cannot be "a mere possibility whether real or not" (*Radio 2UE*, **Lockhart J**), must be otherwise "considerable"
- "real or not remote chance... less or more than 50%" (**Deane J** in *Tillmann*)

MISUSE

Conduct what generally WON'T be misuse: enhance efficiency, innovation, product quality, price competitiveness, research and development

- ASK: Is conduct deterring rivals from competing on their merits?
- **[If individual party affected]** may argue that s46 aims to promote competition, not the private interests of particular persons or corporations (**HCA** in *Melway*)
- Must TAKE ADVANTAGE
 - Was not taking advantage of market power, just its access to material and organisation assets (to produce a competing newspaper) (*Rural Press*)
 - Complying with an existing (distributorship) system created prior to gaining market power in refusing to supply directories (*Melway*)

MAIN EXAMPLES OF MISUSE

- **Margin/price squeeze**
 - Reduce margin -> Charge competitors input price which would make it uncommercial for them to offer a competitive price in the downstream market-> prevent efficient compts from competing on merits -> must sell below cost to compete
 - **Discriminatory pricing - Pont Data** – Restraint held to be for purpose of **preventing competition** with ASXO in the wholesale information market and deterring of competition with JECNET (part of ASX) in the retail market.
- **Refusal to deal**
 - Through [conduct], [co] is preventing the [rival firm] from entering the market of [market] and competing away business. Further, a purpose of SLC need only be a substantial purpose and does not need to be the only purpose.
 - **Qld Wire** – BHP refusing to sell Y-bar to QWI amounted to taking advantage of its substantial market power for the purpose of preventing QWI entering the market for star picket fence posts.
 - **NT Power** – PAWA preventing Nt Power access to transmission infrastructure to sell electricity in breach of s46 as aim was to protect its electricity sales revenue
 - **Regents v Subaru** – Terminate Regents distributorship + refuse to supply genuine Subaru parts for resupply. Parts of other car manufacturers not physically substitutable BUT Subaru still priced w/ regard to chance that consumers wouldn't buy if too exp.
- **Tying or bundling products**
 - If [company] cannot purchase [product], it will likely lose customers. Consequently, [co] is left with no choice but to purchase both [product] and [2nd] product per the bundle. This will effectively prevent or hinder potential entrants from competing to supply [product]
 - **ACCC v Baxter** – Bundling of PD products and sterile fluids eliminated competition from rival PD fluid suppliers. Baxter had monopoly over sterile fluids.
 - *Dissent Dowsett J* – need to have regard to identified markets, not the individual tender process.
- **Other**
 - **Singapore Airlines** – Allegation that by Singapore Airlines increasing price and **restricting flights** to those departing from WA breached. Not breach b/c market extended to other island holiday destinations.
 - Would firm without market power 'delete products', causing harm on itself? Firm w/ market power would be commercially incentivised to stock full range of products + satisfy customer demand (*Safeway*)
 - **Safeway - Refusing to acquire** to induce bread manufacturer to take action and have its retailers cease discounting

PREDATORY PRICING (price war)

[X] may allege that [corp] engaged in predatory pricing in breach of s46. Predatory pricing was expressly prohibited under the old s46, however it would still be captured under the new provision.

- Generally, low prices are beneficial to consumers and the competitive process.
- Effect: To cause competitor to exit market, discipline competitor for competing aggressively, or discourage potential competitors from entering market. (*ACCC Guidelines*)

In *ACCC v Boral*, it was implied that for predatory pricing to be established, the following elements must be made out :

- i. Is the company selling below cost?
[Co's] reduction in [costs] were substantially lower than those offered by [X] and were insufficient to cover the costs of [X]. [Co] sold at these reduced costs for a significant period of time of [X]
- ii. Are they likely to recoup losses down the track?

Since the answers to both are [affirmative], it is probable that the ACCC will find a case of predatory pricing on the facts. In reducing prices, the conduct had the purpose, effect or likely effect of SLC. Consequently, [company] will be found in breach of s46.

***Nb.** Economists note that predatory pricing is rare b/c in practice, will not work and is highly unlikely. Probability that other companies can intervene and take over the spot.

ACCC v Boral	
Facts:	ACCC alleged Boral (manufacturer of bricks) engaged in predatory prices in tendering prices. Alleged tenders below cost for purpose of driving other builders out. Nb. Boral had high rep, 33% MP. Depression in building service demand at time.
Held:	There was new rapidly growing firm expanding in market. Demonstrated low barrier to entry. No substantial market power on facts. No predatory pricing.

48 Resale Price Maintenance

[X] may allege that by way of [conduct], [corporation] engaged in resale price maintenance (**RPM**) in contravention of **s48**. RPM, as defined in s96-s100, is the act of specifying the price to retailers below which goods are not to be supplied. RPM is prohibited **per se**, hence there is no need to establish SLC.

- ***Goods includes (4)** Supply of **goods, including** (a) ships, aircraft, other vehicles (b) animals, inc fish (c) minerals, trees, crops, whether on land or not (d) gas and electricity

1. Inclusion of services

- **S48** prohibits both the supply of goods and services under **s96A(2)**
- **S4(1)** broadly defines 'services' to mean any rights, benefits, privileges or facilities that are provided, granted or conferred in ToC, as well as rights granted or conferred in a K relating to:
 - Provision of, use of or enjoyment of facilities for amusement, entertainment, recreation or instruction
 - Conferring rights, benefits, or privileges for which remuneration is payable in the form of royalty, tribute, levy or similar extraction
- **Per s4C(f)** resupply includes:
 - Supply of original services to somebody else in an altered form or condition
 - Supply to another person of services substantially similar to original and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier
- Accordingly, [service] may be analysed under the RPM provisions

2. Recommending prices s97

[Corporation] is not liable if conduct complained of was merely to **recommend prices**, permissible by **s97**. Corp may hence submit that its [statement] either:

- noted it is the recommended price **or**
- **(b)** includes "*the price set out or referred to herein is a recommended price only and there is no obligation to comply with the recommendation*"
- As such, supplier not deemed to have engaged in RPM.

4. Price less than specified

"[X] may argue that they were not permitted to sell under the minimum price specified by supplier. [Supplier] will be argued to have specified the price by [CONDUCT]. [Victim] sold at less than the specified price by [conduct]"

- Per **s4(1)** price is referred to as a 'charge of any description'.
- Price specified by supplier as it was specified by (**s97(4)**):
 - **(a)** specified person on behalf of supplier
 - **(b)** by supplier making it known price specified by another person re: goods or goods of like description (goods only) (i.e supplier says you can't sell goods lower than another person selling similar goods)
 - **(c)** by supplier or agent giving 'formula' to ascertain price
 - **(d)** by supplier or agent giving 'formula' specified by another person to calculate price
 - Includes **approximation** of a range of price (*TPC v Bata Shoe Co*; *TPC v Mobil Oil*)
- **SELLING: S96(7) Selling at less than price includes** references to:
 - **(a)** advertising
 - **(b)** displaying of goods
 - **(c)** offering of goods
- Corporation may be liable as they were:
 - involved, either as the **supplier** or '**2nd purchaser**'. (**s96(1);(2)**).
 - Supply includes agreeing to supply (**s4C(b)**)
 - provision or re-supply or services (**s96A; s4C(f)**)

5. Prohibited acts of resale price maintenance

For [supplier] to be liable for RPM, it must be shown that they engaged in a prohibited act under s96. Here, [supplier] has...

1. **Making it known agreement required S96(3)(a)**
 - [X] will argue that [supplier] made it known agreement was required by [conduct], thereby breaching **s96(3)(a)**
 - "**may**" or "**can**" certain enough (*Dermalogica* nb. Terms written on site)
 - *Bata shoes co* – Would not supply leather shoes to known discounter, Woolworths, unless agreed not to sell at price less than specified