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**DEFICIENCIES IN AUSTRALIA'S CURRENT MERGER REGIME:  
THE CALL TO COMBAT CREEPING ACQUISITIONS**

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A thesis submitted in fulfillment of the requirement for degree Master of Laws by Research

School of Law  
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## ABSTRACT

The Australian Competition and Consumer Commission (**ACCC**) does not have adequate tools to prevent creeping acquisitions under the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

Section 50 of the CCA prohibits a corporation from acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. The expression ‘creeping acquisitions’ refers to a number of small individual mergers or acquisitions that, when considered in isolation, do not have a sufficient impact on competition to breach s 50, but when considered together, have a cumulative effect of substantially lessening competition in a market.<sup>1</sup> This seeming loophole in s 50 enables entities, particularly those with significant market power, to continue to grow in dominance, potentially to the detriment of incumbents and consumers.

The Director of the National Association of Retail Grocers of Australia (**NARGA**), Mr Alan McKenzie, summarised the problem of creeping acquisitions:

Section 50 has shown itself to be unable to deal with a series of small acquisitions undertaken by a company with a large market share over a period of time. While each individual acquisition does not have the effect of substantially lessening competition, the overall impact is one that potentially can substantially lessen competition. So, for example, if a major chain were to buy out 100 stores in one go, that would very much come under the ACCC’s spotlight. But, if they make those same acquisitions over a period of years, piecemeal and one

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<sup>1</sup> Chris Bowen MP, ‘Creeping Acquisitions’ (Discussion Paper, Consumer Affairs, 5 August 2008).

by one as part of a strategic plan to acquire that same level of market share, it is very difficult for the commission to find that each acquisition on its own represents a substantial lessening of competition. That is the problem.<sup>2</sup>

As a matter of principle, if the goal of s 50 is to prevent acquisitions which have the effect or likely effect of substantially lessening competition, s 50 should not distinguish between one acquisition which creates this outcome and a group of acquisitions which collectively creates the same outcome.

Further, creeping acquisitions have occurred in Australia. Over the past 40 years or so, ‘Australia has seen the demise of hundreds of small grocery stores, butchers, bakers, florists, greengrocers, pharmacists, newsagents, liquor outlets and other small retailers as a direct result of the continued expansion of major supermarket chains and major specialty retailers.’<sup>3</sup> Some of this expansion has been organic. Significantly however, some has been due to creeping acquisitions.

The resulting market power and vertical integration of the largest participants in the Australian grocery and food sector have led to a number of difficulties for other participants – including difficulties in suppliers having access to markets, difficulties in other participants competing and lower product choice for consumers (due to the way the largest participants have altered their product range in favour of their own private label products). This article takes a more expanded view of the type of competition that Australia should encourage, arguing that it should be more than low prices for the ultimate consumer. This article takes the view that product choice,

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<sup>2</sup> Senate Economics References Committee, Parliament of Australia, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (2004) 60.

<sup>3</sup> Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure? A Review of Australia’s Retailing Sector* (1999) (‘Baird Report’), vii.

access of suppliers to markets and smaller entities being able to compete with larger ones are worthy goals.

The food and grocery sectors are not the only Australian industries with an oligopolistic nature. This article takes the view that if creeping acquisitions can occur in the food and grocery sector, then they could occur in other sectors. Accordingly, s 50 needs to be changed to prevent creeping acquisitions in those sectors.

Viewing the utility of s 50 from that perspective, this article recommends legislative and administrative changes that would enable the ACCC and the Courts to adequately regulate creeping acquisitions. These include reinterpreting the objects clause of the CCA, aggregating all previous piecemeal acquisitions over a two-year period, mandatory notification and Commissioner's declarations.

## GLOSSARY

ABS – Australian Bureau of Statistics

ACCC – Australian Competition and Consumer Commission

ACT – Australian Competition Tribunal

AER – Australian Energy Regulator

AGL – Australian Gas and Lighting

AIW – Australian Independent Wholesalers

ALH – Australian Leisure and Hospitality Group

ASX – Australian Securities Exchange (formerly, Australian Stock Exchange)

BCA – Business Council of Australia

CCA – *Competition and Consumer Act 2010 (Cth)*

CMA – Competition Markets Authority

CPI – Consumer Price Index

CUB – Carlton & United Brewery

DoJ – Department of Justice

EC – European Communities

ECMR – European Commission Merger Regulation



EU – European Union

FCC – Federal Competition Commission (Comisión Federal de Competen)

FLEC – Federal Law of Economic Competition

FTC – Federal Trade Commission

GDP – Gross Domestic Product

HHI – Herfindahl-Hirschman Index

ICN – International Competition Network

LCA – Law Council of Australia

NARGA – National Association of Retail Grocers of Australia

NEM – National Electricity Market

NER – National Electricity Rules

OECD – Organisation for Economic Co-operation and Development

RBA – Reserve Bank of Australia

SIW – Statewide Independent Wholesalers

SLC – Substantial Lessening of Competition Test

SMP – Substantial Market Power

TPA – *Trade Practices Act 1974* (Cth)

TPC – Trade Practices Commission

## CHAPTER ONE – INTRODUCTION

### I INTRODUCTION

The expression ‘creeping acquisitions’ refers to a number of small individual mergers or acquisitions that, when considered in isolation, do not have a sufficient impact on competition to breach s 50, but when considered together, have a cumulative effect of substantially lessening competition in a market.<sup>4</sup>

This article addresses the failure of Australia’s current merger regime to adequately regulate and prevent creeping acquisitions.

Significant research was conducted in preparing this article. This article has been presented in Six Chapters. Chapters One to Four discuss the creeping acquisition issue in the context of Australia’s current merger provisions. Chapter Four contrasts this to the regulatory approach taken by other Organisation for Economic Co-operation and Development (OECD) jurisdictions. This draws out and critically analyses the strengths and weaknesses in Australia’s legislative regime.

After discussing observations as to the scale and reach of the issue, Chapter Five will conclude with a number of recommendations. These include reinterpreting the objects clause of the CCA to widen the ambit of protections. They also include aggregating all previous piecemeal acquisitions over a two-year period so as to capture the totality of multiple transactions. They further include introducing additional mechanisms such

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<sup>4</sup> Bowen, above n 1.

as mandatory notification and Commissioner's declarations to pinpoint firms or industries that may be predisposed to the engagement of this practice.

This article will focus primarily on how this practice has impacted the Australian supermarket and grocery sector and from that extrapolate more broadly on the threat it poses to other markets.

## CHAPTER TWO – IS THERE A NEED TO REGULATE CREEPING ACQUISITIONS IN AUSTRALIA?

### I INTRODUCTION

The preservation of competition is highly desirable – it brings about beneficial outcomes for consumers: lower prices, higher quality and greater variety of goods and services and continual innovation. By contrast, the broader economic impact of reduced competition is likely to include higher prices, reduced quality and variety of goods and services, fewer gains in efficiency and productivity and reduced innovation.

Crucially, the process of competition necessitates competitors. The more efficient competitors there are in a market, the more competition there will be. As Professor Zumbo articulated:

The greater the number of efficient competitors, the greater likelihood of vigorous competition in the market place. The fewer the competitors and the more concentrated the relevant market, the greater the likelihood of ‘price coordination’ or even collusion.<sup>5</sup>

Of course, competition inevitably results in harm to less efficient competitors – they will at least have reduced sales and may eventually exit the market. So competition benefits consumers rather than competitors.

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<sup>5</sup> Frank Zumbo, Submission No 14 to Senate Economics Legislation Committee, *Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009*, January 2010, 12.

As is discussed in Chapter Three, s 50 prohibits mergers and acquisitions that will have the effect or likely effect of substantially reducing competition in any market. But, as will be argued, s 50 essentially looks at each transaction in isolation. It doesn't allow for aggregating successive transactions. This permits entities to circumvent the operation of s 50 by growing in market dominance through a succession of small transactions that are not large enough to attract the operation of s 50 – that is, creeping acquisitions.

This Chapter essentially considers whether creeping acquisitions have occurred to date and whether there is a risk of them happening in the future. It argues that the supermarket sector has seen an increase in market concentration, partly due to creeping acquisitions. It argues that Australia has several oligopolistic markets that are susceptible to future creeping acquisitions. It also looks at some of the current characteristics of the supermarket industry and argues that these characteristics are not in the best interests of consumers or other market participants.

In the following pages, this article pursues the implications of a statement made by Peter McDonald, Marketing Lecturer at Sydney University – namely, the anomaly of having two grocery chain owners dominating so many different sectors of the Australian market.<sup>6</sup> That leads to anti-competitive conduct which in other markets may not be considered so harmful – hence the strong emphasis in the following pages on consumer choice, the need to guard against predatory conduct and 'predatory capacity', the benefits of preserving small independent retailers and the growing significance of vertical integration. In many markets, conduct of this kind could be

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<sup>6</sup> Sarah Whyte, *Pharmacies Next Target Of Big Two, Say Analysts* (2013) The Sydney Morning Herald <<http://www.smh.com.au/data-point/pharmacies-next-target-of-big-two-say-analysts-20130927-2ujm0.html>>.

evidence of vigorous and even necessary competition. That is often not the case in the Australian grocery market. As a consequence, this article contains comments and observations which, at first glance, might seem insupportable in other markets but which, upon reflection, do have a clear method and intention about them. That should also be clear from the conclusions this article draws in Chapter Five – where suggestions are made to enlarge the CCA’s preamble, include an additional merger factor and provide for mandatory notification. All of these suggestions might appear unnecessary in normal, functional markets. However, this article argues that they are necessary in the present case.

This article will now consider some of the inherent characteristics in Australian markets. Australia is a relatively young economy, which is geographically isolated from other large and influential markets and has a comparatively small population size. However, it possesses some of the most highly concentrated markets in the OECD.<sup>7</sup> To illustrate this, Australia is a market of only 25 million people.<sup>8</sup> It has a gross domestic product (GDP) of US\$1,229.6 billion.<sup>9</sup> By comparison, the European Union (EU) is a market of 508.5 million people with a GDP of US\$16,224 billion,<sup>10</sup> and the North American Free Trade Area<sup>11</sup> is a market of 476 million people with a GDP of US\$20,650.4 billion.<sup>12</sup> Despite its significantly smaller size, Australia has a

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<sup>7</sup> Rod Simms, ‘Thoughts on Market Concentration Issues’ (Speech delivered at the Australian Food and Grocery Council Industry Leaders Forum, Canberra, 30 October 2013).

<sup>8</sup> Australian Bureau of Statistics (2018), *Australian Demographic Statistics*,

<sup>9</sup> OECD (2017), *OECD Economic Surveys: Australia 2017*, OECD Publishing, Paris.

<[http://dx.doi.org/10.1787/eco\\_surveys-aus-2017-en](http://dx.doi.org/10.1787/eco_surveys-aus-2017-en)>.

<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>.

<sup>10</sup> OECD (2016), *OECD Economic Surveys: European Union 2016*, OECD Publishing, Paris.

<[http://dx.doi.org/10.1787/eco\\_surveys-eur-2016-en](http://dx.doi.org/10.1787/eco_surveys-eur-2016-en)>.

<sup>11</sup> Canada, Mexico and the United States

<sup>12</sup> OECD (2016), *OECD Economic Surveys: United States 2016*, OECD Publishing, Paris.

<[http://dx.doi.org/10.1787/eco\\_surveys-usa-2016-en](http://dx.doi.org/10.1787/eco_surveys-usa-2016-en)>; OECD (2016), *OECD Economic Surveys:*

*Canada 2016*, OECD Publishing, Paris.

<[http://dx.doi.org/10.1787/eco\\_surveys-can-2016-en](http://dx.doi.org/10.1787/eco_surveys-can-2016-en)>; OECD (2017), *OECD Economic Surveys:*

disproportionate number of Fortune top 500 global companies prevalent in the mining,<sup>13</sup> banking,<sup>14</sup> telecommunications<sup>15</sup> and retailing industries.<sup>16</sup>

A deeper examination of these industries highlights just how concentrated Australian markets are. In the supermarkets and grocery industry, the top three firms control over 70% of the market, with Wesfarmers and Woolworths alone controlling 67.7%.<sup>17</sup> In the banking and finance sector, the top four firms control over 70% of the market.<sup>18</sup> In telecommunications, the top three firms control 65% of the market, with no firm in the remaining 35% controlling more than 5% market share.<sup>19</sup> In the mining industry, the top two firms control approximately 30% market share, again with no other player controlling more than 5%.<sup>20</sup> The definition of a major player is a company that operates primarily within the relevant industry and generates over 5% of industry revenue.<sup>21</sup> Therefore, outside of these concentrated top firms, there are no major competitors in these markets. The table below compares the concentration levels in the Australian versus the US markets:

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*Mexico 2017*, OECD Publishing, Paris.

<[http://dx.doi.org/10.1787/eco\\_surveys-mex-2017-en](http://dx.doi.org/10.1787/eco_surveys-mex-2017-en)>

<sup>13</sup> BHP-Billiton and Rio Tinto.

<sup>14</sup> National Australia Bank, Commonwealth Bank, Australia and New Zealand Banking Group and Westpac.

<sup>15</sup> Telstra alone exudes dominance generally, but also Optus and Vodafone in provision of specific services.

<sup>16</sup> Woolworths and Wesfarmers / Coles.

<sup>17</sup> Nathan Cloutman (on behalf of IBISWorld), *Supermarkets and Grocery Stores in Australia*, Industry Report G4111 (2018).

<sup>18</sup> Tommy Wu, *Finance in Australia*, IBISWorld Industry Report K6200 (2016).

<sup>19</sup> Brian Lo, *Telecommunications Services in Australia*, IBISWorld Industry Report J5800 (2017).

<sup>20</sup> Alen Allday, *Mining in Australia*, IBISWorld Industry Report B (2017).

<sup>21</sup> Lo, above n 19.



Table 1.1 Three stark examples: the US v Australia <sup>22</sup>		
Industry	Market share of major AU firms	Market share of major US firms
Commercial banking	70%	28% <sup>23</sup>
Supermarkets	80%	31% <sup>24</sup>
Telecommunications	65%	30% <sup>25</sup>

This composition is apparent in many other Australian markets including the airline,<sup>26</sup> paper and packaging,<sup>27</sup> print media,<sup>28</sup> and beer industries.<sup>29</sup>

These characteristics increase the potential for firms to merge to achieve market power, or those holding substantial market power to exploit that power by engaging in uncompetitive behaviour.<sup>30</sup> Australia's comparatively small size and geographical isolation make the market less able to correct for prolonged anti-competitive behaviour. The market share of dominant firms and Australia's isolation from the rest of the world create a sizeable barrier to entry.<sup>31</sup> With the exception of concentration, no social, economic, political or legislative response can alter these characteristics.

<sup>22</sup> Andy Kollmorgen, 'Squeezing out the Competition' *Choice*, 2016.

<sup>23</sup> Wells Fargo & Company (12.6%), JP Morgan Chase & Co. (9.1%) and Bank of America Corporation (7.1%) see Viraj D'Costa, *Commercial Banking in the US*, IBISWorld Industry Report 52211 (2017).

<sup>24</sup> The Kroger Co (15.8%), Albertsons companies LLC (9.9%) and Publix Super Markets Inc. (5.7%) see Meghan Guattery, *Supermarkets & Grocery Stores in the US*, IBISWorld Industry Report 44511 (2017).

<sup>25</sup> AT&T Inc. (20%), Century Link Inc. (7.4%) and Verizon Communications Link (3%).

<sup>26</sup> Virgin and Qantas.

<sup>27</sup> Visy and Amcor.

<sup>28</sup> News Corporation and Fairfax.

<sup>29</sup> Lion Nathan and Carlton United Breweries control over 90% of beer taps nationwide.

<sup>30</sup> Mika Oinonen, *Does EU Merger Control Discriminate Against Small Markets Companies? Diagnosing the Argument with Conclusions* (Kluwer Law International, 2010) 329.

<sup>31</sup> Frank Zumbo, 'Don't Bank on Bank Competition: The Case for Effective Laws Against Anti-competitive Mergers and Creeping Acquisitions' (2010) 18 *Trade Practices Law Journal* 26, 1-2.

This Chapter will examine Australia's grocery industry – where creeping acquisitions have been the most prolific. As a microcosm of the Australian market place, the grocery sector provides a case study of the dangers associated with highly concentrated markets which have been partly achieved through creeping acquisitions.

## II CASE STUDY: THE SUPERMARKET AND GROCERY SECTOR - A MICROCOSM OF THE AUSTRALIAN MARKET PLACE

### A *An Example of Creeping Acquisitions in Australia*

The creeping acquisition reforms suggested by this article have been influenced by Australia's experience of creeping acquisitions in the food and grocery retailing sector and the adverse consequences of the current concentrated market structure for suppliers, competing smaller businesses and, to a lesser extent, consumers. It is acknowledged that not all increases in market power have been due to creeping acquisitions. The grocery sector has inherent features that make it susceptible to negative outcomes. These include very high levels of market concentration, extensive vertical integration<sup>32</sup> and high barriers to entry for smaller competitors. The negative outcomes discussed below have a broader focus than just consumer welfare. It is acknowledged that the CCA is largely concerned with consumer welfare, through the protection of the process of competition (rather than competitors). However, this article argues for a broader focus.

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<sup>32</sup> Vertical integration is a strategy where a company expands its business operations into different steps on the same production path, such as when a manufacturer owns its supplier or distributor.

The Australian retailing sector provides a vast array of products to consumers through a wide range of outlets. Food retailing in Australia is defined under the Australian and New Zealand Standard Industrial Classification<sup>33</sup> to include supermarkets and grocery stores (including convenience stores) and specialised food retailers.<sup>34</sup>

Both Coles and Woolworths have a long history of expansion through acquisition. Rapid urbanisation in Australia in the 1950s and 1960s created economic conditions favouring the establishment of supermarkets as the dominant food store format. Woolworths and Coles moved away from variety store bases to supermarket operations through a combination of organic growth and acquisitions of small chains such as BCC in Brisbane and Flemings in Sydney.<sup>35</sup>

In the 1970s and 1980s, Coles and Woolworths acquired four major competitor discount chains – Franklins in NSW; Bi-Lo in South Australia; Shoeys in Victoria and Jack the Slasher in Queensland.<sup>36</sup> Within the same decade, another 126 Safeway stores in eastern Australia came under Woolworth's ownership.

In 1981, Woolworths moved into the electronics market with the acquisition of Dick Smith Electronics. This continued in 2001 with the acquisition of the Tandy chain in Australia from InterTan. In 1999, Coles expanded into computer hardware with the acquisition of Harris Technology.

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<sup>33</sup> Abs.gov.au, 1292.0 – Australian And New Zealand Standard Industrial Classification (ANZSIC), 2006 (Revision 2.0) (2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1292.0>>.

<sup>34</sup> Specialised food retailers include retailers that sell fresh meat, fish and poultry, fruits and vegetables, confectionary, liquor, non-alcoholic drinks, small goods, baked goods not manufactured on premises, and any other specialised food items.

<sup>35</sup> Kyle W Stiegart and Dong Hwan Kim, 'Structural Changes In Food Retailing: Six Country Case Studies' (2009) 22.

<sup>36</sup> Franklins, Submission to the Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure? A Review of Australia's Retailing Sector* (1999) 200.

The late 1990s saw the expansion of Coles and Woolworths into ‘express’ or ‘metro’ stores. These scaled-down ‘convenience’ stores were located in high-traffic metropolitan areas and competed successfully against stores such as 7-Eleven by offering a better-balanced portfolio of products with high convenience and at more reasonable prices.

A submission by NARGA in response to the *Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008) (**Grocery Inquiry**) reported that acquisitions in the period of 1993-2007 represented 39% of the growth in the number of sites of major chains, making a substantial contribution to their market share growth over that period.<sup>37</sup>

In 1996, Bi-Lo, operated by Coles, acquired six Newmart discount supermarket stores in Western Australia. By 2002, this grew to 16 stores. In 1998, Woolworths expanded into the liquor businesses with the acquisition of Dan Murphy’s.

The 2000s saw the acquisition of the retail fuel operations of Shell Australia, with the fuel outlets rebranded as Coles Express to counter Woolworths’ similar move with Caltex. These alliances with major petrol refiners/retailers and petrol store ownership enabled Coles and Woolworths to offer discount petrol as an incentive for customers who shop in their stores.

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<sup>37</sup> National Association of Retail Grocers of Australia Pty Ltd, Submission to the Australian Competition and Consumer Commission, ‘Creeping Acquisitions’ (2008) 3.

In 2005, Woolworths acquired 23 demerged Foodland Action supermarkets. In the same year, a joint venture between Woolworths and hotel operator Bruce Mathieson purchased the Australian Leisure and Hospitality Group (**ALH**). Later that year, ALH expanded its portfolio to 250 hotels by acquiring the Taverner Hotel Group and the Bruce Mathieson Group.

Preceding the acquisition of the Coles Group, Wesfarmers' expansion was also spurred on by an agenda of acquisitions including, but not limited to, CSBP (a manufacturer and supplier of chemicals), Western Collieries, Bengalla Deposit, MDL and Curragh mining operations, Dalgety and IAMA rural merchandise wholesaler and retailers, Bunnings Warehouse and Howard Smith hardware networks, Australian Railroad Group freight operator, Lumley Finance Australia and New Zealand, OAMPS Insurance Brokers, Coregas, Australian Vinyls and Greencap Limited.

In 2010 to 2011, the Australian grocery industry was worth \$130.6 billion, accounting for around 10% of the Australian economy. With a population of 23.9 million,<sup>38</sup> Australia is significantly smaller in size than the United States (**US**) and United Kingdom (**UK**), yet has more supermarkets per capita than the US and nearly three times as many as the UK.<sup>39</sup>

As at 2015, the Australian grocery retailing industry is accurately and unanimously described as a duopoly. It is dominated by two large vertically integrated retailers, each with significant economic influence and market power – Coles (now part of

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<sup>38</sup> OECD (2017), *OECD Economic Surveys: Australia 2017*, OECD Publishing, Paris.  
<[http://dx.doi.org/10.1787/eco\\_surveys-aus-2017-en](http://dx.doi.org/10.1787/eco_surveys-aus-2017-en)>.

<sup>39</sup>Stuart Alexander Website Development Link Digital, *Australian Market – Stuart Alexander & Co: Premium FMCG Specialist Marketers, Distributors And Importers* (2015) [Stuartalexander.com.au](http://www.stuartalexander.com.au)  
<[http://www.stuartalexander.com.au/aust\\_grocery\\_market\\_woolworths\\_coles\\_wholesale.php](http://www.stuartalexander.com.au/aust_grocery_market_woolworths_coles_wholesale.php)>.

Wesfarmers Limited) and Woolworths Limited possess 30.9% and 36.8% market share respectively.<sup>40</sup> Woolworths Limited and Wesfarmers Limited were ranked the 18<sup>th</sup> and 22<sup>nd</sup> largest retailers in the world respectively by Deloitte's Global Powers of Retailing 2013 report.<sup>41</sup> These two companies take in 40 cents in every retail dollar spent in Australia.<sup>42</sup>

By total revenue, Woolworths is ranked number 2 of the top 2000 companies in Australia. In 2017, the company generated total revenue of \$55 billion, including sales and other revenue. In 2017, Woolworths had 202,000 employees in Australia, including employees from all subsidiaries under the company's control.<sup>43</sup>

Wesfarmers Limited is one of Australia's largest diversified companies. Wesfarmers' industry specific revenue is expected to be \$31.2 billion dollars in 2017/18.<sup>44</sup>

This high level of retail concentration is unprecedented. As stated above, a significant contributing factor has been the number of creeping acquisitions that, little by little, have augmented the retail dominance of the two chains.

The Report by the Joint Select Committee on the Retailing Sector titled *Fair Market or Market Failure? A Review of Australia's Retailing Sector* (1999) (**Baird Report**) was the first contemporary review to identify the significant role that creeping acquisitions played in the rise to dominance of the major supermarket chains.

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<sup>40</sup> Cloutman, above n 17.

<sup>41</sup> Deloitte, Global Powers of Retailing 2015 (2015) 2  
<<http://www2.deloitte.com/content/dam/Deloitte/au/Documents/consumer-business/deloitte-au-cb-gpor-120115.pdf>>.

<sup>42</sup> National Association of Retail Grocers of Australia Pty Ltd, above n 37, 2.

<sup>43</sup> IBIS World, *Woolworths Ltd*, Company Premium Report (2017).

<sup>44</sup> Cloutman, above n 17.

However, as early as 1936, the Industrial Commission of New South Wales was directed to inquire into and report on the management, control and operations of chain stores in that State. The terms of reference focused on the effects of the chain stores, which included Coles and Woolworths, on other parties, including producers, wholesalers, storekeepers and consumers, and whether there was any evidence of unfair competitive practices or undue restraints of trade.<sup>45</sup>

Since that time, Australia has experienced a half-century of food retail development culminating in significant market concentration. Current day concerns have been taken up by the major political parties, particularly during the 1998 election campaign, with a commitment by the Coalition party to set up an enquiry into retail domination as soon as possible after the election.<sup>46</sup> Since that time, a myriad of Government reports focused on corporate behaviour in the grocery sector.

The majority of submissions to the Trade Practices Act Review Committee – *Review of the Competition Law Provisions of the Trade Practices Act in 2003 (Dawson Review)*<sup>47</sup> made reference to the retail grocery market as a prime example of creeping acquisitions which may ultimately result in the significant lessening of competition.<sup>48</sup>

On 5 August 2008, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, released the Government's preliminary

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<sup>45</sup> Baird Report, above n 3, 3.

<sup>46</sup> Ibid, 1.

<sup>47</sup> Trade Practices Act Review Committee, Commonwealth of Australia, *Review of the Competition Law Provisions of the Trade Practices Act (2003) ('The Dawson Review')*.

<sup>48</sup> Julie Clarke, Submission to the Australian Competition and Consumer Commission and Treasury, *Creeping Acquisitions, Discussion Paper 1*, 2011, 2.

action plan in response to the Grocery Inquiry.<sup>49</sup> This was the original call for tangible legislative reform to address creeping acquisitions. The ACCC stated that the particular structural features of the supermarket industry meant that acquisitions by Coles and Woolworths of small independent supermarkets were a potential competitive concern and those acquisitions were unlikely to be prohibited by current legislative provisions.

The Grocery Inquiry also reported the Herfindahl-Hirschman Index (**HHI**)<sup>50</sup> for the retailing of packaged groceries to be between 2750 and 3000.<sup>51</sup> By comparison, the Merger Guidelines state that the ACCC considers markets to be concentrated for the purposes of notification when a small number of firms accounts for a large proportion of sales, output or capacity, giving a HHI of greater than 2000. Therefore, according to the ACCC's own definition, the market for packaged groceries is concentrated – to a level that requires action on the part of the regulator.

The Australian Airports Association, NRMA, Retail Guild of Australia, Council of Small Business Australia, Friends of Hawker Village, Metcash and Australian United Retailers Limited trading as Foodworks have all called for changes to address creeping acquisitions.<sup>52</sup>

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<sup>49</sup> Bowen, above n 1, 1.

<sup>50</sup> As discussed in Chapter Three, the HHI is a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers, and can range from close to zero to 10,000.

<sup>51</sup> National Association of Retail Grocers of Australia Pty Ltd, above n 37, 5.

<sup>52</sup> Commonwealth of Australia, 'Report on Competition Policy Review' (2015) 265 (*Harper Report*).



## B *The Materialisation of Harm*

After a string of acquisitions and expansions, it is clear that Woolworths and Coles dominate the Australian supermarket retail sector. Coles/Wesfarmers and Woolworths have utilised their position to expand into a vast range of Australian industries, including but not limited to insurance, petrol, liquor, clothing, data companies, office supplies, hotels, gaming, mining and hardware, with pressure to move directly into pharmacy operations to compete with legislatively-protected specialised pharmacy/chemist stores. Peter McDonald, Marketing Lecturer at Sydney University commented:

It's an anomaly worldwide to have ... two owners dominating so many different sectors.<sup>53</sup>

Consumers, as well as retail competitors, suppliers, wholesalers, producers and manufacturers have all felt the impact of this. They require a pro-competitive environment that in the longer term encourages investment and innovation, choice, variety, value and responsiveness. Benefit means a lot more than just short-term low prices and forward looking regulation must be adopted to ensure consumers will not be worse off in the end.

### 1 *The Impact on Consumers – Reduced Variety, Quality and Service*

The following discussion identifies areas where consumers could legitimately claim that the Coles/Woolworths duopoly has resulted in them being worse off.

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<sup>53</sup> Sarah Whyte, *Pharmacies Next Target Of Big Two*, *Say Analysts* (2013) The Sydney Morning Herald <<http://www.smh.com.au/data-point/pharmacies-next-target-of-big-two-say-analysts-20130927-2ujm0.html>>.

Part of consumer welfare involves consumers having a variety of goods and services to choose from. As discussed below, Coles and Woolworths have utilized their position as vertically integrated suppliers and retailers with significant market power to reduce or eliminate many branded products in favour of their own multi-tiered private label products. The lack of competition in the retail market makes it difficult for consumers to purchase those branded goods elsewhere, resulting in an overall reduction in variety available to consumers.

According to the Australian Food Grocery Council cited in the KPMG Report – *Competitiveness & Sustainable Growth*<sup>54</sup> (**KPMG Report**), the number of branded SKUs deleted in FY13 was the highest in the previous four years, while the number of private label SKUs deleted that year was the lowest. In the same year, 88 new private label products and 1048 new branded products were introduced. In comparison, 211 private label products and 1743 branded label products were deleted. That is, there was a net reduction in variety. Retail data suggests that the share of the AU\$1.6 billion bread market held by private label products grew from 11% to 19% from 2008 to 2009 while the share held by major manufacturer Goodman Fielder fell from 42% to 34.5% over the same period.<sup>55</sup>

Market research organisation Roy Morgan Research found that only 52 per cent and 56 per cent of customers who shop at Coles and Woolworths respectively say their supermarket stocks the brands they want, and these numbers have been declining

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<sup>54</sup> Australian Food and Grocery Council, 'Competitiveness & Sustainable Growth' (June 2014).

<sup>55</sup> Stiegart and Kim, above n 35, 25.

since a peak in 2011.<sup>56</sup> Forty-eight per cent of IGA's customers said they could find the brands they want, while only 29 per cent of ALDI shoppers expressed the same. General Manager of Consumer Products at Roy Morgan Research, Geoffrey Smith commented:

[O]ver the last few years, an increasing number of well-known brands have been replaced on supermarket shelves with stores' own home brands – and it appears shoppers are noticing the absence.<sup>57</sup>

CHOICE surveyed members regarding the prevalence of their favourite brands. The response was described as overwhelming with comments such as:

'More and more I find I have to drive around town to get the products I'm looking for.'<sup>58</sup>

'I'm sick of having to chase my favourite products down.'<sup>59</sup>

'Pretty much everything I used to buy is getting less shelf space, only to be replaced with the three varieties of shop brand.'<sup>60</sup>

The issue is not the disappearance of brands per se because in a competitive market weaker competitors will be eliminated. Rather, it is the disappearance of brands that are otherwise popular with consumers, due to the vertically integrated Coles/Woolworths duopoly either failing to stock those brands, failing to stock those

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<sup>56</sup> Sophie Langley, 'Australian Supermarket Consumers Miss Branded Food Products', *Australian Food News* (5 August 2013) <<http://ausfoodnews.com.au/2013/08/05/australian-supermarket-consumers-miss-branded-food-products.html>>.

<sup>57</sup> Ibid.

<sup>58</sup> Elise Dalley and Zoya Sheftalovich, 'The Situation on the Supermarket Shelves' *CHOICE*, 11 September 2014.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

brands in sufficient quantities to make them viable, failing to display those brands in ways that enable them to compete or purchasing those brands at prices that are unsustainable for the suppliers.

For example, an article by CHOICE – a leading independent consumer advocate that provides Australians with information and advice, free from commercial bias – reported on the managing director of a company who cited an experience with Coles where Coles refused him any shelf space, would only stock his product behind obstructions and denied him the use of promotions in store and in their catalogue. ‘It made it impossible for us to compete.’ Eventually his product was deleted due to lack of sales. He commented:

‘We suspect what they were really doing was targeting products they wanted to delete so that it would be easier to justify in six to eight month time.’<sup>61</sup>

Tim Morris, managing director of New Zealand strategic management consulting and market research firm Coriolis Research commented:

At the end of the day, the retailer owns the store and can do whatever they want. They can put rival products on the bottom of the shelf, and their own products at eye level. They can manipulate the price. The only controls are competition and the consumer.<sup>62</sup>

Another report by CHOICE told of Mark\* (\*name changed) who had his organic product deleted directly after Woolworths acquired the Macro wholefoods label. Following steady sales for three years, Woolworths’ category buyer told him there

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<sup>61</sup> Dalley and Sheftalovich, above n 58.

<sup>62</sup> Ibid.

was only room for one organic label – Macro, its own.<sup>63</sup> Products that do not maximise profits fall by the wayside. A very popular item with low margins is not worth the shelf space.

Another example is the bankruptcy of wholly Australian-owned cannery, Windsor Farm Foods, who packed for Edgell, Cowra Gold and Lachlan Gold.<sup>64</sup> It has been alleged that part of the reason was the pressure which Coles and Woolworths placed on growers and food manufacturers.<sup>65</sup>

There are other examples. In 2011, Woolworths replaced the entire range of Allsep's bagged lollies with Chinese imports, thus replacing a brand serving Australian generations since 1934.<sup>66</sup> In January 2012, Heinz Australia closed its tomato sauce factory in Gigarre, Victoria. Heinz's Golden Circle beetroot and fruit processing facility in Queensland's Lockyer Valley shared a similar fate as its business was partly shifted from Australia and New Zealand.<sup>67</sup> Factories in Northgate, Brisbane, Wagga Wagga and New South Wales have undergone downsizing.<sup>68</sup> 'Greenseas', one of Heinz's popular brands, reported significant deletions in lieu of Coles' private label brand.<sup>69</sup>

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<sup>63</sup> Ibid.

<sup>64</sup> Sophie Langley, 'Last Australian Food Cannery Turns off the Light', *Australian Food News* (14 August 2013) <<http://ausfoodnews.com.au/2013/03/14/last-australian-food-cannery-turns-off-the-light.html>>.

<sup>65</sup> Ibid.

<sup>66</sup> Stuart Washington, 'Consumers May be Winning but at a Hefty Cost to the Food Industry' *The Sydney Morning Herald*, 26 November 2011.

<sup>67</sup> Langley, above n 64.

<sup>68</sup> Matt Paish, 'AFGC Renews Calls for Government Action on Factory Closures', *Australian Food News* (9 January 2012) <<http://ausfoodnews.com.au/2012/01/09/afgc-renews-call-for-government-action-on-factory-closures.html>>.

<sup>69</sup> Washington, above n 66.

Gourmet Food Holdings, which owns the iconic brands Rosella and Aristocrat, as well as Galiko, the Curry Makers, Blue Banner Onions, Artisano, Waterthins, Waterwheel, and Stromboli branded condiments, was unable to cope with strategies adopted by Coles and Woolworth and was placed in liquidation in 2012.<sup>70</sup>

For a succession of years, Coca-Cola Amatil, has carried the losses of its subsidiary SPC Ardmona (SPCA), the last remaining fruit processor in Australia. In 2013, significant workforce restructuring and downsizing was made by the management in an effort to maximise efficiency and save the industry. This included SPCA's cannery operations in Victoria's Goulburn Valley and Murray Valley.<sup>71</sup> Although SPCA secured a \$70 million supply deal with Woolworths, it is reported that that deal will only allow SPCA to break even. A step in the right direction from the previous deal, that saw SPCA run at a 30 per cent loss.<sup>72</sup>

In 2016, IBISWorld reported that approximately one in three products on supermarket shelves were private label<sup>73</sup> and it is predicted that the private label products' global market share will double to 50 per cent by 2025.<sup>74</sup>

In the cases where entire brands have collapsed, consumers are also no longer able to source these brands from independent or rival retailers.

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<sup>70</sup> Ferrierhodgson.com, *The Gourmet Group* (2015)  
<<http://www.ferrierhodgson.com/au/administrations/the-gourmet-group>>.

<sup>71</sup> Sharman Stone, 'Hon Dr Sharman Stone Speech' (Media Release, 6 May 2014)  
<<http://spcardmona.com.au/en/media-room/media-releases?article=/Hon%20Dr%20Sharman%20Stone%20MP%20House%20of%20Representatives%20speech>>.

<sup>72</sup> Jared Lynch, 'Growers Welcome \$70m Woolworths Deal with SPC', *The Sydney Morning Herald* (online), 11 March 2014 <<http://www.smh.com.au/business/growers-welcome-70m-woolworths-deal-with-spc-20140311-34k0d.html>>.

<sup>73</sup> <https://www.choice.com.au/shopping/everyday-shopping/supermarkets/articles/choice-supermarket-special>.

<sup>74</sup> Rabobank, 'Producing Both Brands and Private Label' (May 2012) 9.

In addition to variety, consumer welfare also requires quality goods and services. However, in 2014, Mr Simms, Chairman of the ACCC, noted examples of a decline in quality of products due to the private label market. In an article published in the *Financial Review*, Mr Sims said:

Major retailers are sourcing private label and branded products more cheaply from overseas by cutting out "middleman" distributors and agents. They do not have proper systems and processes in place to ensure that the products they import comply with Australian safety standards.<sup>75</sup>

These comments followed legal action led by the ACCC against Woolworths for selling faulty products such as deep fryers, drain cleaners, folding stools and safety matches.<sup>76</sup>

Ironically, competitors of Coles and Woolworths such as ALDI and Costco compete on price, resulting in necessary reductions in product variety and quality of service. ALDI operates on a discount supermarket format with limited product assortment<sup>77</sup> and service. Ninety per cent of its products are private label brands delivered to stores via one of ALDI's centralised distribution centres.<sup>78</sup>

While this limited range is advertised by ALDI as a benefit to consumers – being a carefully selected range of which there are few alternatives of the same product,

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<sup>75</sup> Sue Mitchell, 'Faulty products don't wash with ACCC' *The Australian Financial Review*, 18 September 2014.

<sup>76</sup> Ibid.

<sup>77</sup> 900 products.

<sup>78</sup> Australian Competition and Consumer Commission, Parliament of Australia, *Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008) 43 ('*Grocery Inquiry*').

designed to match the needs of a price conscious consumer,<sup>79</sup> the real benefit achieved is the ability for ALDI to operate out of smaller stores<sup>80</sup> – reducing overheads such as rent, utilities and payroll.<sup>81</sup> To further reduce costs and keep prices low, ALDI does not undertake significant advertising and marketing campaigns. ALDI displays products on pallets or packaging boxes and its checkout system is designed to minimise both labour costs and queue times with customers having to pack their own groceries into either purchased or bought from home bags. Consumers effectively trade lower prices for reduced variety and reduced service.

ALDI also sources many of its more affordable products abroad. In isolation, this is not an issue. However, it raises a concern as to whether there will be sufficient retailers of locally produced products in the long term for the Australian agricultural sector to remain viable.

Similarly, Costco Wholesale Corporation operates an international chain of member's only big-box discounter warehouses, under the 'Costco Wholesale' name. Costco introduced a new style of 'big box' retailing to Australia operating out of simple warehouses and stocking a wide range of products in sizeable quantities including grocery, jewelry, office supplies, homewares, sports, clothing, meats, bakery, fresh produce and dairy, to name a few. It also offers its own private label product line – Kirkland. Costco claims that the size and efficiency of these warehouses allow for lower costs than traditional retailers. However, Costco is not substitutable to a full service supermarket. Costco's unique large format, with only 9 warehouse locations

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<sup>79</sup> ALDI, Submission to the Australian Competition and Consumer Commission, *The Grocery Inquiry*, 7.

<sup>80</sup> With the average trading area of Aldi sites being around 850m<sup>2</sup>.

<sup>81</sup> ALDI, above n 79, 7.



Australia wide and bulk product range, is not accessible by or practical for the average Australian consumer.

Furthermore, a PriceWaterhouseCoopers report on the state of the Australian grocery industry shows that despite controlling a staggering 80 per cent of the market share, Woolworths, Coles and ALDI only employ 43 per cent of all grocery employees. In contrast, independent retailers with a 20 per cent market share employ 57 per cent of our nation's grocery staff.<sup>82</sup> Keeping this in mind, a Network Economics Consulting Group report referred to in the Senate Committee's report on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* analysed the volume of business expected to be lost by Metcash (nearest competitor to the major supermarket chains) as a result of 'an expected current round of creeping acquisitions involving 16 stores' as 1.77 per cent. It considered a range of scenarios relating to further losses in sales volume of up to 10 per cent as a result of possible future acquisitions.<sup>83</sup> A loss of such volume compromises the sustainability of these independent retail outlets that employ so many Australians. Those very Australians are also the consumers whose welfare is paramount.

## 2 *The Impact on Competing Retailers – the Waterbed Effect and Predatory Pricing*

The market power of the major supermarket chains allows them to force down the price they pay suppliers – for example, processors for private label milk. On its own,

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<sup>82</sup> Nick Xenophon, *Australia's Grocery Sector* (2015) <<http://www.nickxenophon.com.au/campaigns/supermarkets>>.

<sup>83</sup> Senate Economics Reference Committee in the Report *Milking it for all it's Worth – Competition and Pricing in the Australian Dairy Industry* ('Milk Report'), 61.

this is no problem. However, the price paid by Coles and Woolworths to milk processors has reached an unsustainable level, leading to the processors charging a higher price on milk sold to other retailers to compensate.<sup>84</sup> Independent retailers told the Senate Economics Reference Committee in the Report *Milking it for all it's Worth – Competition and Pricing in the Australian Dairy Industry (Milk Report)* that this worked as follows:

Independent retailers pay more than the contract price for house brand milk to Fonterra and to National Foods. They have to charge me more so that they can, at the end of the day, make money. I am, in effect, subsidising the supply of house brand milk to those people [major supermarket chains].<sup>85</sup>

To express the point another way, there is a level of return that a milk processor requires. Therefore, the lower the prices paid by the major supermarket chains for private label milk, the higher the prices the milk processor will need to charge smaller retailers for branded milk to make up for the lower returns from Coles and Woolworths.<sup>86</sup>

This is known as the 'waterbed effect'. The 'waterbed effect' is the term used to describe the result when a large player in a market demands lower wholesale prices from suppliers, forcing those suppliers to increase prices to other customers – the other retailers in this case – to bring earnings back to a sustainable level.<sup>87</sup>

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<sup>84</sup> Ibid, 27.

<sup>85</sup> *Committee Hansard*, 4 February 2010 (Mr Ken Henrick).

<sup>86</sup> Zumbo, above n 5, 9.

<sup>87</sup> *Grocery Inquiry*, above n 78, 353.

Australia is a market dominated by two fully vertically integrated retailers with high barriers to entry. For small retailers to remain competitive they have had to band together under a banner group such as the case of Metcash Limited<sup>88</sup> and IGA.

A further practice is predatory capacity. Predatory capacity describes the situation where the major supermarket chains build an oversized supermarket in a town where there is no need for any new supermarket. The new supermarket runs at a loss up until the point where smaller local businesses' loss of trade becomes too much for them and they close. The oversized retailer's initial losses are funded by the profits earned in other unrelated markets and industries. A report by the Commonwealth Bank pointed out that Woolworths was accumulating around \$1 billion worth of property per annum.<sup>89</sup> Retail floor space is actually being built faster than population growth.<sup>90</sup> Of this, Wakefield Planning, a Melbourne based consultancy firm commented:

Any future commercial development ... needs to be completely justifiable on the basis of current population levels. Given that levels of growth are below the levels predicted for the initial planning period, floor space needs to not 'lead demand'. This is because there is highly

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<sup>88</sup> Metcash, previously named Davids, is Australia's largest wholesale distribution and marketing company specializing in independently owned grocery, fresh food, liquor, hardware, automotive parts and accessories. Metcash operates under three business pillars – Metcash Food & Grocery (MF&G), Australian Liquor Marketers (ALM) and Metcash Hardware & Automotive. Metcash uses a franchise model for its retail activities; these stores and hotels are outlets owned by independent retailers who draw on the full marketing, branding, logistical and distributional support of Metcash.

MF&G is comprised of 2,400 independent stores across Australia including; 1,365 IGA branded stores, 117 Foodland stores, 484 FoodWorks stores and 245 Lucky 7 convenience stores. The IGA network alone competes in a number of retail formats. Supa IGA and IGA Fresh stock a full range of products in larger format stores. IGA Stores are medium neighbourhood stores with a more limited range. IGA X-Press is the smaller convenience store format and IGA Liquor, a line of liquor stores across Australia.

A large proportion of these independent retailers serviced by Metcash operate in rural or regional areas. Metcash does not operate in Tasmania; with the wholesaling function for independent retailers being undertaken there by Woolworths owned SIW.

<sup>89</sup> Commonwealth Bank, When Woolies Became an A-REIT, *Global Markets Research: Equities, Woolworths Limited*, 1 June 2012.

<sup>90</sup> Z Fielding, 'Shop Space Grows Despite Slow Sales', *The Australian Financial Review* (Sydney), 11 July 2012, 46.

limited ability for population growth to ‘take up’ floor space demand provided in advance of such growth. This again reinforces the importance of retail floor space trailing rather than leading population growth.<sup>91</sup>

Bermagui, a small town with of 2,323 residents in south-east New South Wales provides an example of this practice.<sup>92</sup> Woolworths Limited lodged a development proposal to build a 1,852 square metre Woolworths supermarket and a 152 square metre liquor store in Bermagui.<sup>93</sup> At the time, the residents of Bermagui were already serviced by a 450 square metre FoodWorks, an IGA, a 777 store, a butcher, greengrocer, bakery, pharmacy and newsagent. Just 20 minutes away in both Bega and Narooma there was also a Coles and Woolworths supermarket.

The Woolworth development application avoided considering whether an oversupply of retail space for the resident population would occur by citing a previous case involving a Woolworths’ subsidiary, Fabcot Pty Ltd. In *Fabcot Pty Ltd v Hawkesbury City Council (97) LGERA*, Justice Lloyd noted ‘economic competition between individual trade competitors is not an environmental or planning consideration to which the economic effect described in s 90(1)(d) is directed.’

The development application also contended that any detrimental effects would be outweighed by the greater competition, price, range and convenience provided by the proposed Woolworths supermarket development.<sup>94</sup> Contrary to the representations in the development application, competition and product range have been reduced since

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<sup>91</sup> Wakefield Planning, *Submission on DA 2012.0098: Proposed Woolworths Supermarket, Bermagui*, June 2012, 5.

<sup>92</sup> ID, *Population, Dwellings & Ethnicity | Bermagui Coast – Wapengo and District (2015) Profile*.id Community Profile <<http://profile.id.com.au/bega-valley/population?WebID=120>>.

<sup>93</sup> Fabcot Pty Ltd, *submission on DA 2013.405: Proposed Woolworths Supermarket – Montague Street, Young street and Unnamed Laneway, Bermagui*, 26 March 2014.

<sup>94</sup> Ibid.

Woolworths opened with both the Foodworks and IGA closing down, and the 777 store reporting a 40 per cent downturn in profits.<sup>95</sup>

The market power of the major supermarket chains allows for the cross subsidisation of unviable developments with their extensive network of stores including related retail, fuel, insurance, liquor and gambling enterprises. These initial losses are offset by their ability to drive out all competition and consequently not have to compete on price in the medium and long term.

The problem with this behaviour is that it eliminates any chance that small or independent competitors may grow into businesses with economies of scale sizeable enough to enjoy a similar buying power and influence. As long as the major supermarket chains are able to employ strategies that keep the small retailers small or completely eliminate them from the market, a shift in the competitive structure will never be seen.

While these practices may in fact be a breach of the market power provisions in ss 46(1) and 46(1AA) of the CCA, establishing a breach is problematic. The initial symptoms often appear pro-competitive and acquiring clear, cogent evidence of an anti-competitive purpose to uphold such an allegation is inherently difficult.

To properly deal with these weaknesses, Australia requires a pro-active competition regime that guides and permits decision makers to consider the aggregation of previous piecemeal acquisitions from the outset. The objective of policy makers

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<sup>95</sup> Albery McKnight, 'Bermagui Woolworths' market share cutting main street profits *Bega District News*, 20 July 2015.

should be to prevent damage from arising in the first instance, rather than seeking to unwind it through the market power provisions. These pro-active approaches are considered in detail in Chapter Five.

### 3 *The Impact on Farmers and Suppliers – Unsustainable Incomes*

Farmer organisations have expressed concern that the market power of the major supermarket chains has enabled them to drive aggressive bargains in the purchase of produce. Coles and Woolworths account for a very large part of most food processors' businesses – up to 70% in some cases. Any loss of distribution to Coles and Woolworths would dramatically decrease the volume output through their factories, impacting on efficiency, economies of scale and overhead recovery.<sup>96</sup> So farmer organisations have to accept the lower prices that Coles and Woolworths offer. The issue is whether these lower prices are sustainable for the suppliers.

A KPMG Report found Coles had cut the prices of more than 6,000 grocery items by an average of 10 per cent since its 'down' campaign began in 2010. Woolworths did the same.<sup>97</sup> Viewed in isolation, this is good for consumers. But the issue is whether this comes at the cost of the prices paid to suppliers being unsustainable.

A further issue arises in relation to private label products. In many cases, the supplier and producer of a branded product is also the supplier and producer of the major supermarket chain's private label product. To secure a contract with the major supermarket chains, processors are pressured to reduce prices for the supply of private

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<sup>96</sup> Stiegart and Hwan Kim, above n 35, 84.

<sup>97</sup> Interview with Hon Bruce Billson MP, Minister for Small Business (Radio Interview, 19 June 2014).

label products. If these reduced prices are unsustainable then the lost revenue must be recovered from the branded products produced by the processors, which makes the branded products less competitive. Take for example a firm such as Murray Goulburn – Murray Goulburn may lose its Devondale milk shelf space to the Coles private label milk product, both of which it supplies. Although on paper, Murray Goulburn is still supplying the same volume of milk, the less profitable private label milk sales are increased at the expense of the highly profitable branded Devondale sales. Volume remains steady but profits are decreasing to levels which might not be sustainable.

Firms who accept these arrangements are effectively competing with themselves, cannibalising their own margins and reducing their long-term competitiveness. In 2011, Coles announced a pricing strategy of \$1 per litre for its home brand milk.<sup>98</sup> The milk would be used as a ‘loss leader’ product to encourage consumers into the store. Woolworths followed suit. Overnight, milk in Australia became cheaper than bottled water and soft drinks.<sup>99</sup> The milk processors were told they would as a result be paid less and had no alternative but to pass that price cut on to the producer – a dairy farmer. The dairy farmers had no power to refuse supply to Coles and Woolworths and were forced to accept a price below the cost of production. This ability of the major supermarket chains to extract more advantageous trading terms from suppliers and access financial benefits at the beginning of the retail chain can never be recovered by a competitor.

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<sup>98</sup> Coles, ‘Because We All Buy Milk: Coles Cuts the Price to Help Shoppers Save’ (Media Release, 26 January 2011).

<sup>99</sup> [australiancompetitionlaw.org](http://www.australiancompetitionlaw.org), *Australian Competition Law* (2015) <<http://www.australiancompetitionlaw.org/reports/2011milk.html>>.

An Inquiry by the Senate Committee in 2010 that resulted in the *Milk Report* was established to investigate a number of concerns with the pricing strategies implemented in the milk sector. The major supermarket chains' use of certain pricing strategies in relation to home brand products was found to have unintended and anti-competitive consequences. It was found that the major supermarket chains were making far more profit from the sale of milk than were the farmers.<sup>100</sup> The *Milk Report* also reported that although the impetus of this report was the dairy industry, the issues were common to many other sectors of the economy where the retail market was also becoming increasingly dominated by private label products sold by the major supermarket chains. Processors were increasingly in the position of having to compete with their own branded goods.<sup>101</sup>

The ACCC's media release of 22 July 2011 stated that it considered there to be no evidence that Coles acted in breach of the CCA in relation to milk discounting. The ACCC revealed evidence that Coles' purpose in reducing the price of its house milk was to increase its market share by taking sales from its competitor Woolworths. This is consistent with what the ACCC would expect to find in a competitive market.<sup>102</sup>

The reality of the situation however was that Coles and Woolworths adopted the same strategies, resulting in no significant effect on market share or milk consumption but an unfavourable outcome for the milk production chain.<sup>103</sup>

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<sup>100</sup> Milk Report, above n 83, 2.

<sup>101</sup> Milk Report, above n 83, 7.

<sup>102</sup> Australian Competition and Consumer Commission, 'Coles discounting of house Brand Milk is Not Predatory Pricing' (Media release 22 July 2011).

<sup>103</sup> Roger Crook, 'Do Coles and Woolworths Control Australian Agriculture?' *Global Farmer*, (16 August 2014).



For the major supermarket chains, private label goods are big profit drivers. Marketing them is cheap and manufacturing is streamlined. Lion Dairy & Drinks, which previously held private label contracts in most states with both Coles and Woolworths, stepped out of the bidding war based on the plain reasoning that ‘the extra volumes merely help recover fixed costs in processing plants. They are not profitable for the sake of putting volume through milk plants, but without such contracts more than half of the market is effectively closed to them.’<sup>104</sup>

Furthermore, where suppliers provide both brand and private label business, the negotiation position of the supplier versus the food retailer is far from equal. The negotiation position of a supplier pivots on the information asymmetry regarding the supplier’s cost base, pricing structure and innovation pipeline. Through the private label supply, the supplier is disclosing most of its cost structure, undermining the market position of its brand and reinforcing the retailer’s negotiation power. By introducing a 1:1 copy of a branded product anywhere from 20 per cent to 60 per cent cheaper, the retailer can quite easily infer the mark-up attracted to a branded product and demand a larger share of the profit pool. The retailer is in the position to negotiate the purchase price of branded products more similar to the price charged for private label products. This indicates a shift in market power in the Australian food-value chain from producers and manufacturers to retailers.<sup>105</sup>

The overarching concern here is the reduction in the return back down the value chain to processors and the farm gate. This redistribution of wealth along the supply chain is having detrimental effects on the Australian farming sector, particularly in country

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<sup>104</sup> Sue Mitchell, ‘Fonterra Inks Milk Deal With Woolworths’ *The Financial Review*, 3 April 2014.

<sup>105</sup> Stiegart and Kim, above n 35, 24-25.

and regional communities where most of the food factories are located. Society as a whole would be very much poorer if it did not have the diversity and opportunity that many competitors bring to the market.<sup>106</sup> NARGA's national spokesman, Mr Alan McKenzie commented:

If the government fails to intervene, the market share of the independent retailers will continue to be eroded, to the point where the entire sector will be threatened with irreversible market failure due to the loss of critical mass. The consequences of such an outcome will be severe and, in particular, will bring great hardship to rural Australia. At 80 per cent of the retail grocery market, when do we say enough is enough?<sup>107</sup>

Exacerbating the effects on every level is the extent of vertical integration of the major supermarket chains, often achieved through a strategy of creeping acquisitions. Vertical integration enables the major chains to derive their entire profitability from retail operations, while in the independent sector both the warehouse and the retail stores make separate profits.

Vertical integration enables a firm with market power to increase monopoly profits through price discrimination. As Mason CJ and Wilson J observed in *QCMA*:

... vertical integration may help a monopolist distinguish between customers whose demand is less and more elastic. Where consumers are able to trade amongst themselves, the monopolist cannot discriminate. By integrating vertically it may be possible for a monopolist to prevent this inter-trading. For example, power companies usually own distribution systems. This enables them to discriminate in pricing between residential and commercial users. Therefore,

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<sup>106</sup> Baird Report, above n 3, 138.

<sup>107</sup> Commonwealth, *Parliamentary Debates*, Senate, 12 July 1999, 1031 (Mr Alan Mackenzie).

although vertical integration does not by itself mean that a firm has a substantial degree of market power; it may well be the means by which the firm capitalises on that market power.<sup>108</sup>

The push to vertical integration has the potential to put good firms out of business – with all the implications that brings for competition, consumer choice and our capabilities as a food exporting nation. For most grocery manufacturers, supermarkets are the main distribution channel to customers. That leaves many at the mercy of the big two – and reliant on the terms and conditions they choose to offer.

Australia has already experienced the collapse of a number of large-scale manufacturers and a reduction in the number of independent supermarkets as customers of those manufacturers.<sup>109</sup> Without a viable food-processing sector, Australia's long term domestic agricultural and manufacturing industry is at stake. According to the Australian Food and Groceries Council in 2011 to 2012, 335 food-processing businesses closed down in Australia or moved overseas. The Parliamentary Report titled *The Supermarket Revolution in Food*<sup>110</sup> published in 2011 recorded that in the previous three months alone, there had been a number of announcements regarding the closing down of major food factories in regional areas and the movement of their operations overseas. The closure of a dairy factory, for example, means that farmers no longer have an outlet for their milk. This comes at a cost to many direct jobs, leading to dramatic economic flow-on effects for local communities. With the loss of a major industry, small regional areas die a slow death because of the inability to sustain social infrastructure such as schools, hospitals,

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<sup>108</sup> Australian Competition and Consumer Commission, Parliament of Australia, 'Merger Guidelines' (1999) 5.156 <<https://www.accc.gov.au/publications/merger-guidelines>>.

<sup>109</sup> Dalley and Sheftalovich, above n 58.

<sup>110</sup> Stiegart and Kim, above n 35.

banks, supermarkets, and so on.<sup>111</sup>

The ability of the major supermarkets to impose such onerous terms on its suppliers distorts markets in ways that consumers don't see and suppliers can't effectively counter. The impact of these low prices is far beyond the supermarket shelves, and far beyond consumers' wallets.<sup>112</sup>

### III CONCLUSION

This case study provides an example of what other markets in Australia may look like if unregulated creeping acquisitions were to expand to other sectors.

As discussed above, the major supermarkets have incrementally gained control of all levels of the supply chain so they now deal directly with suppliers or have entirely eradicated the need for suppliers. This translates to further commercial control and advantage over the independents that must source supply from wholesalers that are often owned by their major supermarket competitors. The ongoing viability of the independent network is dependent on their share of the market not shrinking to the stage where that wholesaling and distribution network becomes unviable. Mr John Hunter, General Counsel for Metcash Trading Ltd, summarised the situation as follows:

[T]he cumulative impact of creeping acquisitions by the major chains in the retail grocery sector is anticompetitive. That is not only because the 'ongoing duopolisation' of the grocery

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<sup>111</sup> Stiegart and Kim, above n 35, 86.

<sup>112</sup> Charles Fishman, *The Wal-Mart Effect* (Penguin Press, 2006), 80.

sector means that price competition offered by a ‘third full service player’ is at risk, but also because the competitive ability of wholesalers who supply independent grocery retailers is under threat.<sup>113</sup>

Detriment has also materialised for consumers. A report prepared by the Network Economics Consulting Group on behalf of Metcash Trading Ltd and submitted to the 2004 Senate Inquiry concluded:<sup>114</sup>

If cost increases are not passed through to consumers, the viability of Metcash and/or its independent retailers will be threatened well before a ten per cent loss of volume is reached. With as little as a six per cent loss of volume, we estimate that Metcash would no longer be able to raise equity finance. Well before this, Metcash’s ability to provide retail support services would be squeezed, which would flow through to deteriorating customer service at the retail level.<sup>115</sup>

The point of the above discussion of the supermarket sector is that merger laws need to operate in a way which prevents the loss of competition and resulting negative outcomes in the supermarket sector also arising in other markets. It is conceded that not all the increases in market power in the supermarket sector arose from creeping acquisitions. But they played a significant role. This article takes the position that creeping acquisitions could occur in other markets, given the oligopolistic nature of many Australian markets. The next Chapter will discuss why creeping acquisitions avoid the operation of s 50. The article will then discuss how this loophole could be closed.

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<sup>113</sup> Milk Report, above n 83, 60.

<sup>114</sup> Metcash Trading Ltd, Submission to the Australian Competition and Consumer Commission, ‘*The Grocery Inquiry*’ (2003) 4.

<sup>115</sup> Ibid.

## CHAPTER THREE – HOW DO CREEPING ACQUISITIONS CURRENTLY AVOID

### REGULATION?

#### I INTRODUCTION

The merger review process can be broken down into three distinct phases. First, the administrative processes of bringing a merger or acquisition under review; secondly, the process of analysing the likely competitive effects of that merger; and thirdly, the remedies and penalties for breach of the merger provisions.

As Australia's current competition law stands, there are severe remedies and penalties if s 50 is breached and the parties involved do not modify or withdraw the merger or acquisition. In these cases the ACCC may commence proceedings for pecuniary penalties,<sup>116</sup> seek an injunction to prevent the merger or acquisition occurring,<sup>117</sup> apply for an order of divestiture requiring the disposal of shares or assets acquired from the merger,<sup>118</sup> seek damages for loss as a result of the contravention,<sup>119</sup> or accept undertakings to resolve matters without proceeding to litigation.<sup>120</sup> Parties may also be liable for significant fines.<sup>121</sup>

Where the merger provisions are deficient, however, is in the first two phases. While the remedies and penalties are there, the tools and guidelines to bring high-risk mergers to the attention of the ACCC and then establish a breach are not. The drafters

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<sup>116</sup> *Competition and Consumer Act 2010* (Cth) s 76.

<sup>117</sup> *Competition and Consumer Act 2010* (Cth) s 80.

<sup>118</sup> *Competition and Consumer Act 2010* (Cth) s 81.

<sup>119</sup> *Competition and Consumer Act 2010* (Cth) s 82.

<sup>120</sup> *Competition and Consumer Act 2010* (Cth) s 87B.

<sup>121</sup> *Competition and Consumer Act 2010* (Cth) s 76.

of the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] also regarded s 50 as inadequate in dealing with ‘acquisitions by stealth.’<sup>122</sup> Broadly, the three main deficiencies include:

1. There is no obligation to notify the ACCC of high-risk mergers;
2. The counterfactual can only apply to a single merger and does not reflect commercial realities; and
3. There is no express authority in the merger factors for the ACCC or the Courts to consider the cumulative effect of mergers and acquisitions.

## II NO OBLIGATION FOR PRE-MERGER NOTIFICATION

Around the world,<sup>123</sup> pre-merger notification is considered essential to allow governments either to stop anti-competitive mergers or to negotiate remedies with parties. Compulsory notification is enshrined in the ICN guidelines and most international jurisdictions have some form of compulsory notification regime.

Despite this, there is currently no statutory pre-merger notification regime in Australia requiring parties to notify and seek approval from the ACCC before merging

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<sup>122</sup> Explanatory Memorandum, Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] (Cth) 3.

<sup>123</sup> These include but are not limited to, Austria, Bulgaria, Canada, China, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Egypt, Estonia, Finland, Germany, Greece, Hungary, India, the Isle of Man, Italy, Korea, Latvia, Lithuania, Mexico, the Netherlands, Nicaragua, Norway, Pakistan, Poland, Portugal, Romania, the Slovak Republic, South Africa, Spain, Switzerland, Taiwan, Turkey, Uruguay and the US.

regardless of how high risk the merger may be.<sup>124</sup> The current Merger Guidelines only urge firms to notify the ACCC when the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market and the products of the merged firms are substitutes or complements. The traditional avenues where the ACCC may be notified of an acquisition early enough to intervene are purely voluntary. These avenues include:

1. Assessment of the proposed acquisition on an informal basis;
2. An application for formal clearance of a proposed merger;<sup>125</sup>
3. Assessment of an application for authorisation of a merger, using a net public benefit test.<sup>126</sup>

An informal clearance is essentially a statement by the ACCC that the merger would not be likely to raise competition concerns under s 50, and the ACCC does not intend to oppose the merger. Although this advice is not binding<sup>127</sup> and the ACCC may still bring action against a merger,<sup>128</sup> the advice that the ACCC will not oppose the merger means the parties can proceed with greater confidence that their conduct will not be challenged.

Alternatively, merger parties can obtain statutory immunity from s 50 through formal clearance granted by the ACCC. Formal merger clearance confers legal protection to

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<sup>124</sup> Australian Competition and Consumer Commission, Parliament of Australia, 'Merger Guidelines' (2008) 7.12 <<https://www.accc.gov.au/system/files/Merger%20guidelines.pdf>> 2.1-2.9.

<sup>125</sup> *Competition and Consumer Act 2010* (Cth) Part VII, Division 3, Subdivision B.

<sup>126</sup> *Competition and Consumer Act 2010* (Cth) Part VII, Division 3, Subdivision C.

<sup>127</sup> See, for example, *Trade Practices Commission v Santos Ltd* (1992) 38 FCR 382.

<sup>128</sup> Herbert Smith Freehills, *Changes To Informal Merger Clearance Guidelines* (2015) <<http://www.herbertsmithfreehills.com/insights/legal-briefings/changes-to-informal-merger-clearance-guidelines>>.



the person to whom clearance is granted from the application of s 50. This means that neither the ACCC nor any other party may initiate action on the basis of an alleged contravention of s 50 so long as the merger takes place in accordance with the clearance.<sup>129</sup> The ACCC's decision must be based on a determination that the merger would not have the effect or be likely to have the effect of substantially lessening competition in any market.

As a third option, under ss 88(9) and 90(9) of the CCA, if a merger is found to substantially lessen competition it may nevertheless proceed if the ACCC grants an authorisation on the grounds that the merger, while lessening competition, leads to public benefits that outweigh the likely anti-competitive detriments.<sup>130</sup> This principle finds its grounding in the objectives of the CCA – ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provisions for consumer protection’.<sup>131</sup>

There has been widespread criticism of the two formal processes<sup>132</sup> and in practice the formal merger clearance process has never been used in Australia and the merger authorisation process has only been used three times.<sup>133</sup>

In Canada, the Notifiable Transactions provisions in Part IX of the *Competition Act*<sup>134</sup>

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<sup>129</sup> Australian Competition and Consumer Commission, *Merger Reviews* (2015) <<https://www.accc.gov.au/business/mergers/merger-reviews>>.

<sup>130</sup> *Competition and Consumer Act 2010* (Cth) s 95AZH.

<sup>131</sup> *Competition and Consumer Act 2010* (Cth) s 2.

<sup>132</sup> Allens Linklaters, *Competition, Consumer & Regulatory* (2018) <<https://www.allens.com.au/services/comp/harpmaj-mergers.htm>>.

<sup>133</sup> AGL Energy Limited - ACT 1 of 2014, Sea Swift Pty Ltd - proposed acquisition to acquire assets associated with the Toll Marine Logistics business and Proposed merger of Tabcorp Holdings and Tatts Group cited on merger register.

<sup>134</sup> *Competition Act*, RSC 1985, c C-34.

require that parties notify the Competition Bureau of certain transactions when they are of a specific type, exceed certain thresholds and are not subject to any exemptions, regardless of their likely impact on competition.

The Competition Bureau must be given advance notice of proposed transactions when the target entity's assets in Canada or revenues from sales in or from Canada generated from those assets exceed \$88 million, and when the combined Canadian assets or revenues of the parties and their respective affiliates in, from or into Canada exceed \$400 million.<sup>135</sup> Failure to notify is a criminal offence.<sup>136</sup>

Similarly in the US, where applicable thresholds are met and the transaction is not otherwise exempt, notification is mandatory. The *Hart-Scott-Rodino Act (HSR Act)* established the federal premerger notification program, which provides the Federal Trade Commission (**FTC**) and the Department of Justice (**DoJ**) with information about large mergers and acquisitions before they occur. The parties to certain proposed transactions must submit premerger notification to the FTC and DoJ. Premerger notification involves completing a HSR Form, also called a 'Notification and Report Form for Certain Mergers and Acquisitions', with information about each company's business. The parties may not close their deal until the waiting period outlined in the HSR Act has passed, or the government has granted early termination of the waiting period.<sup>137</sup>

For the HSR Act to apply to a particular transaction, it must satisfy three tests: the

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<sup>135</sup> *Competition Act*, RSC 1985, c C-34, ss109 and 110.

<sup>136</sup> Government of Canada, *Reviewing Mergers* (2018)

<[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_00114.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00114.html)>.

<sup>137</sup> Federal Trade Commission, *Premerger Notification Program* (2018)

<<https://www.ftc.gov/enforcement/premerger-notification-program>>.

commerce test of Section 7A(a)(1) as well as the size of transaction test and the size of person test of Section 7A(a)(2).

An acquisition will satisfy the commerce test if either of the parties to a transaction is engaged in commerce or in any activity affecting commerce. The size of transaction test is met if, as a result of the transaction, the acquiring person will hold an aggregate amount of voting securities, non-corporate interests and assets of the acquired person valued at more than US\$50 million. The size of person test is met if one of the parties has sales or assets of at least US\$100 million and the other party has sales or assets of at least US\$10 million.<sup>138</sup>

A handful of countries such as Argentina, Indonesia, Japan and Russia also have post-merger notification regimes.<sup>139</sup>

Failing to adhere to a regime of mandatory notification for mergers puts Australia out of line with international best practice.<sup>140</sup> Australian competition would be better served by legislating for such a regime.

### III THE PROCESS OF REVIEWING A MERGER

Mergers and acquisitions are regulated by the substantially lessening of competition test enshrined in s 50 of the CCA. Section 50(1) prohibits corporations from acquiring 'shares in the capital of a body corporate' or 'any assets of a person' if the

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<sup>138</sup> Federal Trade Commission, Premerger Notification Office, To File or Not to File: When you Must File a Premerger Notification Report Form, 2.

<sup>139</sup> Lex Mundi, 'Global Practice Guide: Pre-Merger Notification' (2012).

<sup>140</sup> Clarke, above n 48, 2.

acquisitions ‘would have the effect, or be likely to have the effect, of substantially lessening competition in any market’.

In *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*,<sup>141</sup> Smithers J summarised the elements required by the substantial lessening of competition test:

To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. To my mind one must look at the relevant significant portion of the market, ask oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantial lessening of competition.<sup>142</sup>

The elements of the test are therefore: was there an acquisition; what is the extent of concentration in the relevant market; and has there been a substantial lessening of competition in that market? Appendix 1 provides this diagrammatically.

These elements will be discussed below.

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<sup>141</sup> (1982) 44 ALR 173.

<sup>142</sup> *Ibid*, 173.

## A Merger or Acquisition

Merger and acquisition are not terms defined in the CCA. In Australia, the term merger is a commercial concept rather than a legal one.<sup>143</sup> The 2017 Media Merger Guidelines authored by the ACCC note as to terminology that s 50 mergers are those transactions where typically the shareholders of two companies (the merger parties) become the shareholders of the new merged company.<sup>144</sup> An example is the 1985 merger of Coles Variety Stores and Myer Emporium Ltd to form the new entity Coles Myer Ltd.<sup>145</sup>

Acquisitions on the other hand are those transactions where a company (the acquirer) acquires the shareholding or assets of another company or person (the target).<sup>146</sup> From this transaction no new entity is formed. One entity expands its scope and size while the other entity is either reduced or eliminated entirely. An example is Wesfarmers' acquisition of the Coles Group<sup>147</sup> in 2007.<sup>148</sup> As a result, all Coles Group activity became wholly owned and controlled by Wesfarmers. Its shares were suspended from trading on the Australian Securities Exchange (ASX) and the Coles Group ceased to exist.<sup>149</sup>

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<sup>143</sup> Allens Linklaters, 'The Allens Handbook on Takeovers in Australia' (2017) 11 <<https://www.allens.com.au/pubs/pdf/ma/takeovers-handbook.pdf>>.

<sup>144</sup> Australian Competition and Consumer Commission, Parliament of Australia, 'Media Merger Guidelines' (2007). <[https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017\\_0.pdf](https://www.accc.gov.au/system/files/Media%20Merger%20Guidelines%202017_0.pdf)>.

<sup>145</sup> Deloitte Access Economics, 'Analysis Of The Grocery Industry' (2012) 3 <[http://www.academia.edu/7969473/Analysis\\_of\\_the\\_grocery\\_industry](http://www.academia.edu/7969473/Analysis_of_the_grocery_industry)>.

<sup>146</sup> Australian Competition and Consumer Commission, above n 144.

<sup>147</sup> No longer Coles Myer Ltd as Coles and Myer demerged in 2005.

<sup>148</sup> Deloitte Access Economics, above n 145, 3.

<sup>149</sup> Wesfarmers Limited, *Wesfarmers – Corporate Transactions* (2015) <<https://www.wesfarmers.com.au/investors/shareholder-information/corporate-transactions.html>>.

The occurrence of a merger or acquisition as per these definitions satisfies the first element.

## B *The Extent of Concentration in the Relevant Market*

This element requires two steps – first, what is the defined market affected by the merger or acquisition, and secondly, is there an absence or presence of concentration in that defined market?

The first step, market definition, establishes the broad ‘field of inquiry’ relevant to the ACCC’s consideration of the acquisition. It identifies the areas of competition that may be affected by the proposed acquisition. When determining the limits of the relevant market, the Australian Competition Tribunal (**Tribunal**) and the courts must consider all influential factors – product substitutability,<sup>150</sup> geographical constraints on supply and demand, function<sup>151</sup> and temporal dimensions of the market.<sup>152</sup> The *market* when used in the context of s 50 can include multiple geographical markets for goods or services in Australia, including state, territory, regional or local markets.<sup>153</sup> This may also include upstream and downstream markets.<sup>154</sup>

For the purposes of the CCA, s 4E defines the market as ‘a market in Australia and, when used in relation to goods or services, includes a market for those goods or

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<sup>150</sup> This process of defining a market by substitution involves both including products which compete with the defendant’s and excluding those which because of differentiating characteristics do not compete. *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177, 577.

<sup>151</sup> That is, whether the focus is to be on the *selling function* or the *buying function*.

<sup>152</sup> That is, how much time is needed for customers and suppliers to make their adjustments in response to economic incentives?

<sup>153</sup> *Competition and Consumer Act 2010* (Cth) s 50(6).

<sup>154</sup> Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) 1.6.

services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.’<sup>155</sup>

The Tribunal in *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd*<sup>156</sup> (QCMA) elaborated upon this to also capture the network of actual and potential transactions between buyers and sellers of goods and services that are, or could be, in close competition.<sup>157</sup>

A market is an area of close competition between firms or, putting it a little differently, the field of rivalry between them... Within the bounds of the market there is substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is a field of actual and potential transactions between buyers and sellers amongst whom there can be *strong substitution, at least in the long run*, if given sufficient price incentive... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost and price incentives... In determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to ‘give less and charge more’ would there be, to put the matter colloquially, much of a reaction? (emphasis in original).<sup>158</sup>

Without an accurately defined market, competitors cannot be clearly identified, as was articulated by Mason CJ and Wilson J:

too narrow a description of the market may exclude legitimate competitors, creating the appearance of more market power than in fact exists; too broad a description may erroneously

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<sup>155</sup> *Competition and Consumer Act 2010* (Cth) s 4E.

<sup>156</sup> (1976) 8 ALR 481.

<sup>157</sup> Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International, 2003) 14.

<sup>158</sup> *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 8 ALR 481, 517.

classify certain non-rivals as competitors, creating the appearance of less market power than there actually is.<sup>159</sup>

The case of *Australian Competition and Consumer Commission v Metcash Trading Limited*<sup>160</sup> exemplifies this. In that case, Emmett J did not accept the ACCC's market definition and the Commission's case failed on that basis.<sup>161</sup>

The ACCC relied primarily on economic theories, namely the theory of coordinated effects, in support of its preferred market definition.<sup>162</sup> The ACCC alleged that the acquisition would substantially lessen competition in the independent wholesale grocery market for 'packaged groceries'. The Commission based its case on there being a separate market for the wholesale supply of packaged groceries. This was limited to branded and generic items, such as breakfast cereal, canned food, biscuits, flour, tea, coffee, soft drinks, nappies, cleaning products, personal hygiene products and frozen food, but not including fresh items such as fresh fruit and vegetables, meat, delicatessen items and bakery items.<sup>163</sup>

On appeal, the Full Court soundly rejected this theoretical approach, in line with earlier decisions criticising arguments based primarily on economic theory.<sup>164</sup> The Court found no such separation, and defined the market more broadly as a national market for the supply of packaged groceries as well as fresh products, general

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<sup>159</sup> *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177, 577.

<sup>160</sup> [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011).

<sup>161</sup> *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011) 337.

<sup>162</sup> Jack Wright Nelson, 'The ACCC Merger Guidelines 2008: Some Concerns and Recommendations' (2012) 14 *the University of Notre Dame Australia Law Review*, 85.

<sup>163</sup> *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011), 182.

<sup>164</sup> See *Australian Gas Light Company v Australian Competition and Consumer Commission* (2003) 137 FCR 317, 416.



merchandise, health, beauty and cosmetic products to the consuming public.<sup>165</sup> By the Court defining the market by reference to a broader range of products, the post-merger market concentration the ACCC built its case upon would not have occurred.

To apply the *QDMA* analysis above, the Court in *Metcash* found the rivalry between the major supermarket chains (Coles and Woolworths) and independent retailers was such that there was a very significant constraint on the capacity of Metcash to increase price or decrease service without the likely loss of business. The Court found that, even post-merger, should Metcash give less and charge more, there would be a significant reaction from consumers to the benefit of Metcash's competitors. To this Emmett J commented:

I am not persuaded that an increase of between five and ten per cent in the price at which goods are supplied by Metcash to independent retailers could be sustained without a resultant significant loss of business.

Once the relevant market is defined, a conclusion about the presence or absence of market power, and whether the merger or acquisition ought to proceed, will follow.<sup>166</sup> The Merger Guidelines published in 1996 introduced an administrative safe harbour and the CR4 concentration ratio as tools to measure market concentration. Safe harbours are a practical tool widely used by administrators of the law to specify certain conduct that will be deemed not to violate a given rule. The safe harbour and the CR4 approach stipulated that for a merger that will result in a post-merger combined market share of the four (or fewer) largest firms (CR4) of 75 per cent or

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<sup>165</sup> *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011), 341-342.

<sup>166</sup> Stephen Corones, *Competition Law and Policy in Australia* (Lawbook, 1990) 58.

more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will need to give close consideration to other merger factors to determine whether or not the merger is likely to result in a substantial lessening of competition.<sup>167</sup>

Certain shortfalls were acknowledged with this formulation. The 2008 Revised Merger Guidelines replaced the 1999 articulation.<sup>168</sup> The revised Merger Guidelines introduced the HHI, which is still current. The HHI, which is also used by the US DoJ Antitrust Division, takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.<sup>169</sup>

The HHI captures the number of firms and the dispersion of the market shares by taking into account the pre- and post-merger market shares of the merged firms, the level of symmetry between rival firms' market shares and the actual increase in concentration.<sup>170</sup> The HHI is calculated by adding the sum of the square of both pre- and post-merger market shares of the merged firms and each rival in the relevant market.<sup>171</sup> The ACCC will be less likely to identify concerns when the post-merger HHI is:

- Less than 2000; or

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<sup>167</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 108, 5.103.

<sup>168</sup> Alex Bruce, *Restrictive Trade Practices Law in Australia* (LexisNexis Butterworths, 2010) 187.

<sup>169</sup> The United States Department of Justice, *Herfindahl-Hirschman Index* (29 July 2015) <<https://www.justice.gov/atr/herfindahl-hirschman-index>>.

<sup>170</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124.

<sup>171</sup> Corones, above n 166, 18.

- Greater than 2000 with a delta<sup>172</sup> less than 100.<sup>173</sup>

For example, if the market is composed of five firms: A, B, C, D and E, with market shares of 12%, 15%, 18%, 25% and 30% respectively, then the pre-merger HHI value is 2218:

$$12^2 + 15^2 + 18^2 + 25^2 + 30^2 = 2218$$

Post-merger, the market is composed of four firms as B and C merged, so the market shares are now 12%, 33%, 25% and 30% respectively. The post-merger HHI value is 2758:

$$12^2 + 33^2 + 25^2 + 30^2 = 2758$$

The delta, or change from the pre-HHI value to the post-HHI value, is 540:

$$2758 - 2218 = 540$$

In this circumstance, the merger would invite close scrutiny by the ACCC as the HHI is greater than 2000 and the delta is greater than 100.

It is important to note that the HHI threshold is a screening device for identifying merger and acquisitions that may require closer scrutiny. HHI values above the threshold do not determine that a merger will result in a substantial lessening of

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<sup>172</sup> The delta reflects the changes in market concentration as a result of the merger.

<sup>173</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 7.14.

competition. Likewise, a merger falling below the HHI threshold may still raise competition concerns.

For that reason, the next step is to consider further merger factors as part of the overall assessment of whether a merger or acquisition is likely to substantially lessen competition. These factors are codified in s 50(3) of the CCA and are discussed below.

C *The Substantial Lessening of Competition Test, the Counterfactual and the Merger Factors*

Substantial is an important concept in competition and consumer law. It arises in a number of provisions, yet there has been little judicial guidance. ‘Substantial’ has been defined in case law as large, weighty, big, real or of substance or not insubstantial. However it is not straightforward; the meaning of substantial depends on the context and is used in a relative sense.

In *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000]<sup>174</sup> French J said that to work out whether competition is being substantially lessened

‘...there [must] be a purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process.’

The application of the substantial lessening of competition test involves a comparison of the competitive situation with the merger against the competitive situation without

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<sup>174</sup> FCA 38; (2000) ATPR 41-752.

the merger. The latter is called the ‘counterfactual’. The counterfactual is an analytical tool used in answering the question of whether the merger gives rise to a substantial lessening of competition.<sup>175</sup> The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the Commission or the Court to predict with some confidence what the outcome of a merger and acquisition would be on the market.

At trial in the case of *Metcash*,<sup>176</sup> Emmett J considered that it was necessary for the ACCC to establish ‘on the balance of probabilities’ what the ‘future state of the market will be, both with and without the proposed acquisition’.<sup>177</sup> The without test predicts what the future state of the market will be should the *proposed* merger not occur. It deliberates on the potential changes in the market and compares this ‘hypothetical market’ to the present state of the market. Should the future market with the merger stifle competition, the acquiring firm may be prohibited from proceeding with that transaction.<sup>178</sup> However, should the future market with the merger or acquisition maintain or encourage competition that would otherwise not occur, the transaction is likely to be permitted to proceed.

In considering the future, assumptions are made about what is likely to happen. An analysis of s 50 does not encompass ‘mere possibility’ but requires assessment ‘at a

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<sup>175</sup> *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011), [130].

<sup>176</sup> *Ibid*, [130].

<sup>177</sup> *Ibid*, [45].

<sup>178</sup> *Ibid*, [135-136].

level that is commercially relevant or meaningful'.<sup>179</sup> Given the penalties that apply for a breach of s 50, this prediction must be more than hypothesis or conjecture.<sup>180</sup>

The Federal Court's 2011 decisions in *Metcash*<sup>181</sup> and *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)*<sup>182</sup> (**AGL Case**) addressed the necessary level of proof required to demonstrate that a proposed merger would substantially lessen competition. The Court approached the assessment in two stages:

(a) The counterfactual must be proved on the balance of probabilities so that it is more probable than not that the proposed counterfactual will come to pass if the acquisition does not proceed.

(b) There must be a 'real chance' that the effect or likely effect of the acquisition will result in a substantial lessening of competition. That is, there must be a real chance that if the proposed acquisition does proceed, that would result in a substantial lessening of competition compared to the scenario in which a competing counterfactual comes to pass.<sup>183</sup>

In determining whether a substantial lessening of competition is likely to occur for the counterfactual analysis the court and ACCC may consider the merger factors enshrined in s 50(3) of the CCA. They outline the analytical and evaluative

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<sup>179</sup> Ibid, [136].

<sup>180</sup> Ibid, [88].

<sup>181</sup> Ibid.

<sup>182</sup> (2003) 137 FCR 317.

<sup>183</sup> *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011), [146].

framework that the ACCC applies when reviewing mergers under s 50.<sup>184</sup> The nine merger factors are a non-exhaustive list of factors principally designed to guide the courts and the ACCC on the possible effect on competition of a given merger. The factors include:

1 *The actual and potential level of import competition in the market*

Import competition refers to the level of actual or potential direct competition from strongly substitutable imported goods or services in the relevant market. The extent to which the merging firms are constrained by this is an effective check on market power. Former Chairman of the ACCC, Allan Fels commented:

Potential, or real, import competition is considered an important factor because of the globalisation of markets. If import competition is an effective check on the exercise of market power, it is unlikely the Commission will intervene in a merger.<sup>185</sup>

There is no judicial interpretation of the requisite level of import competition to deem no substantial lessening of competition; however the ACCC has indicated that it will not oppose mergers in markets where the market share of imports has been more than 10% for at least 3 years.<sup>186</sup>

An example is the merger between *Avery Dennison Australia Group Holdings Pty Ltd* and *Jackstaedt Holdings Pty Ltd JAC Australia Pty Ltd*. In this case, the merger

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<sup>184</sup> Nelson, above n 162.

<sup>185</sup> Allan Fels, 'Mergers and Market Power' (Speech delivered at the Australian Financial Review Conference, CFO 2001 Summit, Sydney, 7 June 2001)

<[http://www.accc.gov.au/speeches/2001/pdf/Fels\\_AFR\\_CFO\\_Summit\\_7\\_5\\_01.pdf](http://www.accc.gov.au/speeches/2001/pdf/Fels_AFR_CFO_Summit_7_5_01.pdf)>.

<sup>186</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 5.111.

concentration thresholds were significantly exceeded. The merger was not opposed because:

[W]hile the merger combines the two largest domestic manufacturers of label stock; customers have indicated that their ability to import, or vertically integrate their operations by manufacturing label stock, will constrain price levels in the market post-merger. ... [T]he Commission notes that imports have constituted at least 10% of the Australian market for label stock for at least the last 3 years.<sup>187</sup>

In some cases, it is not necessary for imports to have reached 10% as long as there is the potential for imports. A case in point is *Cesco Australia Ltd and Forbes Engineering Holdings (Aust) Pty Ltd*. The proposed joint venture between these parties would have resulted in ‘the two largest manufacturers and services of concrete mixers combining their operations’. The Commission considered that despite the fact that existing imports ‘did not exceed 10 per cent’, there was a ‘potential for imports ... particularly from New Zealand’ and that this was a key factor in not opposing the merger.<sup>188</sup>

For markets where import competition is not an effective check on market power, barriers to entry are explored.

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<sup>187</sup> Avery Dennison Australia Group Holdings Pty Ltd (acquirer) and Jackstaedt Holdings Pty Ltd – JAC Australia Pty Ltd (target) (decided 19 November 2001): Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/nov\\_dec\\_2001/138m01.pdf](http://www.accc.gov.au/pubreg/s50/nov_dec_2001/138m01.pdf)>.

<sup>188</sup> Cesco Australia Ltd (acquirer) and Forbes Engineering Holdings (Aust) Pty Ltd (target) (decided 31 October 2001): Mergers Public Register 2001: <[http://www.accc.gov.au/pubreg/s50/sep\\_oct\\_2001/128m01.pdf](http://www.accc.gov.au/pubreg/s50/sep_oct_2001/128m01.pdf)>.



## 2 *The height of barriers to entry to the market*

The ease with which a new firm may enter a market can provide an important source of competitive constraint on existing operators. Markets with low barriers to entry are comprised of consumers that will easily switch to the operator providing the greatest benefit. Therefore, threats of new entrants make it unsustainable for existing operators to raise prices or withhold quality of services. A credible threat of new entry alone may actually be sufficient to regulate the market.<sup>189</sup>

Barriers to entry have a wide-reach. The Explanatory Memorandum to the *Trade Practices Revisions Bill 1986* (Cth) summarised barriers to entry as ‘[A]ny feature of a market that places an efficient prospective entrant at significant competitive disadvantage compared with incumbent firms’.<sup>190</sup> Commercially, this may include structural or technological barriers, strategic barriers, legal and regulatory barriers, or any combination. Examples of these include licensing requirements, planning or environmental controls, industry standards, scarce resources, the threat of incumbents’ retaliatory actions and pre-existing economies of scale or scope such that a new firm may find it near impossible to established brand loyalty.<sup>191</sup>

If there is a high likelihood<sup>192</sup> of timely<sup>193</sup> and sufficient<sup>194</sup> entry in all relevant markets post-merger (low barriers to entry), it is unlikely that a merger will have the

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<sup>189</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 7.17.

<sup>190</sup> Explanatory Memorandum, *Trade Practices Revisions Bill 1986* (Cth), 5.

<sup>191</sup> Russell V Miller, *Miller’s Australian Competition and Consumer Law Annotated* (Lawbook, 37<sup>th</sup> ed, 2015) 637; *Merger Guidelines*, above n 124, 7.26–7.32.

<sup>192</sup> The ACCC needs to be satisfied that actual or threatened entry post-merger is not just possible but likely in response to an attempted exercise of market power by the merged firm; Australian Competition and Consumer Commission, above n 108, 7.24.

effect of substantially lessening competition. If barriers are high, contemplation of further factors may be required.

The ‘Airport Monitoring Report’ describes the situation where barriers to entry are calculatedly created by Melbourne Airport to reduce the ability of off-airport parking and private bus operators to compete with the airport’s own car parking services.<sup>195</sup>

The ACCC found that Melbourne Airport ‘imposes excessive access levies, and controls the available space for [off-airport parking and private bus] operators, [which] affects those operators’ own prices, convenience and, therefore, attractiveness to consumers.’ By reducing the ability of alternative operators to successfully enter the market and compete, Melbourne Airport can increase demand for its own parking services, charge higher prices to consumers, and therefore earn monopoly profits.<sup>196</sup>

Moreover, customers of Melbourne airport car park reported increasing detriment despite having to dig deeper into their pockets. The ‘Airport Monitoring Report 2012-13’ revisits the latest passenger and customer ratings for these services:

- Curbside space congestion fell to ‘poor’.
- Ratings for availability of parking bays fell to ‘very poor’.
- Ratings for the availability of taxiways fell to ‘poor’.<sup>197</sup>

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<sup>193</sup> Entry will generally provide an effective competitive constraint post-merger if actual or threatened entry would occur in an appropriate time to deter or defeat any non-transitory exercise of increased market power by the merged firm.

<sup>194</sup> Entry must be of sufficient scale with a sufficient range of products to provide an effective competitive constraint.

<sup>195</sup> Australian Competition and Consumer Commission, ‘Airport Monitoring Report 2009-10’ (2011) vii <<https://www.accc.gov.au/system/files/Airport%20monitoring%20report%202009-10.pdf>>.

<sup>196</sup> Australian Competition and Consumer Commission, ‘ACCC Issues Annual Report on Airport Performance’ (Media Release, 7 February 2011).

<sup>197</sup> Ibid, 285.

Similar findings were presented for Sydney Airport.<sup>198</sup>

### 3 *The level of concentration in the market*

Any increase in market concentration resulting from a reduction in the number of competitors or accrual of significant additional market share will be relevant. The HHI threshold, as discussed, is used to determine the weight of this factor. It is the link between concentration and the strength of competition.

For example, the ACCC opposed the merger of the number two and number three paint manufacturers in *Barloworld/Wattyl*<sup>199</sup>. The ACCC determined that the post-merger paint manufacturer firm would have acquired 90 per cent market share.<sup>200</sup>

### 4 *The degree of countervailing power in the market*

Countervailing power exists where customers or suppliers have special characteristics allowing them to act independently of the merging parties. Such specific characteristics of a buyer may include – size, market power, commercial significance compared to suppliers or the possession of negotiating leverage over suppliers.<sup>201</sup> In

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Chris Pash, 'Poor Service, Expensive Parking But Australia's Monopoly Airports Are Making More Money Than Ever', *Business Insider Australia* (3 April 2014) <<http://www.businessinsider.com.au/poor-service-expensive-parking-but-australias-monopoly-airports-are-making-more-money-than-ever-2014-4>>.

<sup>198</sup> Australian Competition and Consumer Commission, above n 196.

<sup>199</sup> Australian Competition and Consumer Commission, Competition Assessment, 11 August 2006.

<sup>200</sup> Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (Lawbook, 33<sup>rd</sup> ed, 2011), 720. The 2015 edition of this text (Miller, above n 191, 639) refers to other examples – *Bluescope Steel Ltd/Hills Holdings Ltd* and *Carsales.com Ltd/Telstra Corporation Ltd* and *Mestle S.A/Pfizer Inc*.

<sup>201</sup> Miller, above n 191, 638.

*George Weston/Good Stuff Bakery*<sup>202</sup> the ACCC concluded that in an acquisition in the wholesale market for the manufacture and distribution of bread in southern Queensland and northern New South Wales the major supermarket chains of Coles and Woolworths were likely to possess countervailing power (buyer power) and therefore constrain the merged firms from exercising market power.<sup>203</sup> Therefore, the merger was permitted to proceed.

5        *The likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins*

Sustained price increases above competitive levels are the most obvious and visible manifestation of market power and reduction in competition. In general, an increase in price will result in a corresponding increase in profit margins. For this factor, it is irrelevant whether the merged firm actually exercises this power.

The closeness of rivalry between the merger parties and other market participants is also relevant. If, for a significant number of customers, the merger parties are the other's closest competitor and there would be no close competitors to the merged firm in one or more relevant markets, the ACCC considers this environment at risk of substantially lessening competition.<sup>204</sup> Conversely, if the merger parties are distant competitors and the comparable alternatives to the merged firm are available in plentiful supply to the entire market then, in the absence of coordinated effects, this

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<sup>202</sup> Australian Competition and Consumer Commission, Competition Assessment, 16 March 2007.

<sup>203</sup> Miller, above n 200, 720. The 2015 edition of this text (Miller, above n 191, 639) refers to other examples – *Baxter International Inc/Gambro AB* and *Hexion/Orica*.

<sup>204</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 7.42.

can indicate that a merger is unlikely to substantially lessen competition.<sup>205</sup>

In the *Metcash* case discussed above, the major supermarket chains were determined to be a significant constraint on the capacity of Metcash Limited to increase the price at which it supplied goods. A price increase of five to ten per cent could not be sustained without a Metcash losing business to its competitors, Coles or Woolworths.<sup>206</sup>

6 *The extent to which substitutes are available in the market or are likely to be available in the market*

The availability or potential availability of readily substitutable products in a market provides consumers with viable alternatives to switch to if the merged firm seeks to raise prices. The extent to which substitutability constrains the merged firm's market power depends on how substitutable the other products are, however a narrow assessment is not adopted. It is not necessary that the competitors product be identical, it is a sufficient constraint if the substitute be a workable alternative. For example, in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*<sup>207</sup> it was said that:

A wall is a wall, whether it is made of concrete blocks, tilt-up concrete bricks or clay bricks. The only need of the builder is to have a wall that will perform as a wall, and for the lowest cost possible. Within the market in which builders acquired materials for the use in the construction of walls there was not only the ever present threat of potential substitution but

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<sup>205</sup> Ibid, 743.

<sup>206</sup> *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 967 (25 August 2011); [2011] FCAFC 151 (30 November 2011), [340].

<sup>207</sup> (2003) 195 ALR 609.

actual substitution over the time.<sup>208</sup>

7 *The dynamic characteristics of the market, including growth, innovation and product differentiation*

When analysing the competitive effects of a merger the forward looking nature of merger analysis requires the ACCC, to take into account the changing nature of the market in the future.<sup>209</sup>

Markets that are growing rapidly are more likely to see competitive new entrants and the erosion of market shares of incumbents over time. Conversely, markets that are stagnant or reducing may see the opposite.

Other occurrences such as product innovation, improved distribution methodologies, brand loyalty or regulatory and technical changes must also be considered under s 50(3)(g).

The 2003 *Coca-Cola Amatil/Berri*<sup>210</sup> merger involved the unification of the market for the manufacture and wholesale supply of chilled and ambient fruit juice and fruit drink. The ACCC observed that although there was evidence of small or regional entry occurring to some extent and the erosion of market shares over time, very few new entrants had captured meaningful market shares in recent years. On these grounds the merger was opposed. The parties withdrew the application.

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<sup>208</sup> *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 130.

<sup>209</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 7.52.

<sup>210</sup> Australian Competition and Consumer Commission, Competition Assessment, 8 October 2003.

8 *The likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor*

The removal of a vigorous competitor from the market will have a significant impact on the level of competition in the market.

Vigorous and effective competitors drive significant aspects of competition, such as pricing, innovation or product development. A merger that removes a vigorous and effective competitor may therefore remove one of the most effective competitive constraints on market participants and thereby result in a substantial lessening of competition.<sup>211</sup>

For example, the proposed merger between *Healthe/Healthscope*<sup>212</sup> involved the acquisition of a private hospital in the Gosford (NSW) area, where Healthe already operated a private hospital. The ACCC considered post-acquisition competitive tensions between the two hospitals would cease, leading to a reduced incentive on the part of Healthe to provide quality of service.<sup>213</sup>

9 *The nature and extent of vertical integration in the market*

Some horizontal mergers can be affected by vertical integration in the market.

Vertically integrated mergers occur between two or more firms that operate within

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<sup>211</sup> Australian Competition and Consumer Commission, Parliament of Australia, above n 124, 7.57.

<sup>212</sup> Australian Competition and Consumer Commission, Competition Assessment, 22 January 2007.

<sup>213</sup> Miller, above n 200, 721. The 2015 edition of this text (Miller, above n 191, 639) refers to other examples – *Perpetual Ltd/The Trust Company Ltd* and *PMP/McPherson's*.

varying stages of production and distribution within the same industry. For example, where a retailer acquires a manufacturer or wholesaler in its supply chain.

Vertical integration does not reduce the total number of entities operating at one level in the market, but it may change patterns of industry behaviour. Vertically integrated firms may discriminate in favour of their own business to the detriment of the rest of the market. Suppliers may lose a market for their goods, retail outlets may be deprived of supplies and competitors may find that both supply and outlets are blocked. Vertical mergers may also substantially lessen competition by discouraging new businesses from entering the market.

*Trade Practices Commission v Rank Commercial Ltd*<sup>214</sup> provides an example of how the court interprets and applies the substantial lessening of competition test. Using the merger factors the court identified a number of characteristics of the market and the particular transaction that it determined would result in a substantial lessening of competition should the merger proceed.

In this case, the Trade Practices Commission (TPC) successfully obtained an interim injunction for the duration of two months preventing Rank from proceeding with a public offer to acquire Foodland (FAL).<sup>215</sup> To establish its case, the TPC relied primarily on the existence of a Deed of Operation between the Respondents that arranged a complex chain of transactions that would have ultimately seen Coles Myer Limited (CML) acquire the Australian assets of Foodland.

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<sup>214</sup> (1994)123 ALR 551.

<sup>215</sup> FAL had New Zealand assets and was also the independent West Australian grocery wholesaler.



The ACCC was successful in obtaining an interim injunction on the basis that the transaction was likely to substantially lessen competition in the wholesale grocery market in Western Australia. In applying the SLC test the TPC examined the current state of the market without the merger and the hypothetical state of the market with the merger. It was accepted that FAL had New Zealand assets and was also the independent West Australian grocery wholesaler where there were already 'substantial barriers to entry' into the wholesale retail market with FAL and CML being each other's main rival. If CML obtained control of FAL, or of FAL's WA operations, CML would 'control approximately 75%' of the WA retail grocery sales. There was likely to be a substantial lessening of competition in the retail market because CML would 'directly control the supplies and retail outlets of its most significant competitor'. There would be 'no alternative but to deal with CML' and 'little ability to influence the terms of trade'.

Rank withdrew its take-over offer of Foodland before proceeding to a final hearing in the Federal Court.

There are three significant commercial difficulties with this counterfactual analysis.

First, the counterfactual ignores the cumulative effect of mergers and acquisitions. Secondly, the counterfactual does not have the ability or scope to consider cross-market concentration. Thirdly, there is no express mention of the cumulative effect of mergers and acquisitions in the merger factors.

As s 50 refers only to a single acquisition there is no power in the assessment of mergers and acquisitions to consider the cumulative effect of multiple acquisitions that raise competitive concerns.<sup>216</sup> The application of the ‘with’ or ‘without’ formulation of the counterfactual nullifies the effects of any previous acquisitions on the market. It focuses less on capturing the ‘creeping’ effect of a series of acquisitions and more on preventing dominant firms from enhancing their market power.

In applying the counterfactual, the present state of the market at the time the merger or acquisition is proposed is used as the benchmark. The ‘without’ test hypothesises what the future state of the market will be should the *proposed* merger *not* occur versus what the future state of the market is likely to be *should* the *proposed* merger proceed. It deliberates on the potential changes in the market and compares the ‘hypothetical markets’ as well as the present state of the market.

Should the future market with the merger stifle competition, the transaction will likely not be permitted to proceed. However, should the future market with the merger or acquisition maintain or encourage competition that would otherwise not occur the transaction will likely be permitted to proceed.

In both cases, whether the merger or acquisition will advance or limit competition in the future market is a judgement call based on comparing the future market to the benchmark present market. Acquisitions occurring prior to the crystallisation of the benchmark present market do not form any part of the backdrop for assessing the competitive implications of a proposed transaction. The number, size, manner or

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<sup>216</sup> Clarke, above n 48, 6.

timeframe in which any previous mergers or acquisitions took place is ignored. All that is relevant is the current state of the market at the point in time immediately before the *proposed* merger or acquisition.

For example, a market in 2015 is comprised of 10 firms, each with 10% market share.

$$10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

Firm A undertakes five piecemeal acquisitions over a two year period. Each individual acquisition increases firm A's market share by 10%.

Acq 1

$$20\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

Acq 2

$$30\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

Acq 3

$$40\% + 10\% + 10\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

Acq 4

$$50\% + 10\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

Acq 5

$$60\% + 10\% + 10\% + 10\% + 10\% = 100\%$$

When considering the effects on competition, the counterfactual limits the analysis only to the acquisition immediately before the acquisition in question. The counterfactual does not have the scope to examine firm A's exponential increase in

market share from 10% to 60% between acquisition 1 and acquisition 5. The analysis is restricted to each individual proposed acquisition and the relevant benchmark market.

For acquisition 1, the benchmark state of the market comprises of firm A possessing 10% market share. The future hypothetical state of the market with the proposed acquisition sees firm A increase their market share by an unalarming 10% - to 20%.

For acquisition 2, the composition of the market after acquisition 1 (firm A with 20% market share) becomes the new benchmark state of the market. Again, the future hypothetical state of the market with the second proposed acquisition sees firm A increase their market share by an unalarming 10% - to 30%.

As this example highlights, the proposed hypothetical market for the counterfactual analysis of acquisition 1 has now become the present benchmark market for acquisition 2. The counterfactual analysis neutralises the increase to 10%, rather than for what it really is – a 20% increase in market share.

This cycle can continue until firm A achieves a market share of 60% yet the transactions are only ever analysed in 10% increases; despite the fact that firm A's increase is actually six fold.

From a theoretical point of view it is easy to understand that while a merger that gives a large firm an extra 5% market share is unlikely to lead to substantial anti-competitive effects (depending on the relevant market dynamics), four similar

transactions by the same large firm which increase its market share from 40% to 60% will almost certainly do so.<sup>217</sup> In this way creeping acquisitions circumvent s 50, with little to no recourse.<sup>218</sup>

While there is an argument for certainty, commercially, markets are not linear. Dealings permitted to proceed today can have an anti-competitive impact on the market in a year from now. Certainty must be balanced with fairness, sustainability and the correction of anti-competitive conduct. The advantage of a creeping acquisition provision or the like would allow the regulator to address and prevent industries from becoming incrementally concentrated as a result of creeping acquisition activity. To balance the need for certainty, the recommendations discussed later in this article suggest legislating a review period of two years that the ACCC and courts may look back to cumulate transactions. Where appropriate, any mergers or acquisitions during this two year period may be considered as one.

As currently defined, the counterfactual ‘with’ or ‘without’ test also does not provide power to the ACCC to consider the level of concentration an entity may possess across numerous unrelated markets. The narrowness of the counterfactual does not permit considerations of cross-market concentration as it is focused solely on competition in the defined market in which the merger or acquisition is proposed to occur.<sup>219</sup> That is, the existing rules do not currently require or allow the ACCC or the

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<sup>217</sup> Genna Robb, ‘Creeping Mergers – should we be concerned? A Case Study of Hospital Mergers in South Africa’ (Paper presented at the Seventh Annual Conference on Competition Law, Economics and Policy, 5 and 6 September 2013).

<sup>218</sup> Australian Competition and Consumer Commission, Submission to Competition and Consumer Policy Division of the Commonwealth Treasury, *Creeping Acquisitions: Discussion Paper 1*, 23 October 2008, 5.

<sup>219</sup> This is to be differentiated from conglomerate mergers that involve firms that interact across several separate markets and supply products that are typically in some way related to each other. For example, products in neighbouring markets or products that are complementary in either demand or supply, such

Courts to analyse all past history when they determine whether the latest acquisition has substantially lessened competition.

Cross-market concentration refers to high levels of aggregate concentration in markets where a small group of economic entities controls large parts of the economic activity through holdings in many ‘unrelated’ markets. For example, where multiple subsidiaries or branches of the same parent entity operate and dominate different unrelated markets.

Cross-market concentration is a concern in Australia and in jurisdictions around the world.<sup>220</sup> In Australia, there are already examples of powerful corporates having extended their reach across a vast range of industries and markets. For example, the Woolworths group is made up of four main divisions: Supermarkets, General Merchandise (Big W and consumer electronics), Hotels (via its 75% shareholding in ALH) and Wholesale.<sup>221</sup> The Supermarkets Division alone comprises Australian Food and Liquor, Petrol and New Zealand Supermarkets.

For merger analysis, each of these divisions and subdivisions operate in separate and distinct markets with Woolworths being a dominant player in each of these markets. Woolworths’ grocery/supermarket business has ‘partnered’ with its petrol retailing business through the use of shopper docket incentives. In this arrangement, 4-cent

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as staples and staplers.<sup>219</sup> The issue of conglomerate markets was addressed by amendments to s 50 intended to clarify the ability of the ACCC or a court to consider multiple markets when assessing mergers. While this expanded the ACCC’s ability to consider the totality of the competitive effects resulting from an acquisition, it continues to fall short in assessing situations of unrelated cross-market concentration.

<sup>220</sup> Michael S Gal and Thomas K Cheng, ‘Aggregate Concentration: A Study of Competition Law Solutions’ (2016) 4 *Journal of Antitrust Enforcement* 2, 282-322.

<sup>221</sup> Woolworths Limited, *Woolworths Annual Report 2015*, 116.

discounts are offered on fuel purchases at Woolworths 516 petrol sites and 92 Caltex-operated sites<sup>222</sup> when a customer spends \$30 or more on groceries from Woolworths' supermarkets. These redemptions link money spent in one division to redemption discounts in another division in an unrelated market. Likewise, the shopper dockets customers receive when they purchase items from a Coles supermarket contain a discount that can be redeemed at participating Shell petrol retailers.

While the ACCC has confirmed this arrangement is not in itself anti-competitive, the concern for merger analysis is that this cross-market domination is not considered when determining the counterfactual. These cross-market benefits should be considered during merger analysis.

Looking at the 9 merger factors now, while the merger guidelines are a powerful tool they offer little assistance on the issue of creeping acquisitions, and what guidance they may offer has no legislative force.<sup>223</sup>

The 2008 Merger Guidelines are substantially more discretionary than the 1999 Merger Guidelines. This is the result of two particular aspects of the current guidelines. First, the use of uncertain and imprecise language; and second, the removal of the safe harbour.

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<sup>222</sup> Ibid, 25.

<sup>223</sup> Australian Competition and Consumer Commission, *Competition and Consumer Legislation Amendment Act 2011* (3 September 2014) <<https://www.accc.gov.au/system/files/Merger%20guidelines.pdf>>.

In the 1999 Merger Guidelines, the potential harm relating to creeping acquisitions was acknowledged, but not completely addressed. Paragraph 3.31 of the 1999 Merger Guidelines provided that:

The Commission may, under s 50, also consider the collective effect of shareholdings that are acquired incrementally over a period. In particular, the Corporations Law permits acquisitions beyond 20 per cent (the normal takeover threshold), of up to 3 per cent every six months without triggering the requirement for a full takeover offer. The initial acquisition may not raise substantial competition concerns, and each incremental acquisition may not give rise to a substantial lessening of competition in its own right. However, collectively the acquisitions may give rise to competition concerns and may eventually deliver control of the target company. The Commission considers that the Act may apply to such creeping acquisitions.

Paragraph 5.99 added:

A further relevant consideration is the extent of the increase in concentration. In many situations the acquisition of a small market player, resulting in a small increase in concentration, will have little effect on competition. However, in some instances a small increase in concentration may involve the removal of a market participant which played a significant role in maintaining a competitive market, e.g. by undermining attempts to coordinate market conduct. In other circumstances a small acquisition may form part of a pattern of creeping acquisitions, which have a significant cumulative effect on competition.

Paragraph 5.99 went on to acknowledge that vertical mergers, although they may involve no increase in concentration, may still enable the extension of market power



into a vertically related market – which is the preferred structure of the supermarket duopoly today.<sup>224</sup>

This express mention of creeping acquisitions or ‘small increases’ was omitted from the 2008 Merger Guidelines so they no longer refer in any way to the cumulative effect of previous acquisitions.<sup>225</sup> No explanation has been provided as to why this section was omitted.

There is an argument that the current merger factors and Merger Guidelines provide scope for the ACCC to consider creeping acquisitions. The view is that Parts 5 and 6 of the 2008 Merger Guidelines inexplicitly address the competition problems associated with creeping acquisitions<sup>226</sup> by requiring assessment of competitive effects based on the theories of competitive harm – namely, unilateral or coordinate effects that may arise as a result of the acquisition.<sup>227</sup> In cases where unilateral or coordinate effects amount to a significant and sustainable increase in the market power of the merged firm or other firms in a market, the merger is likely to substantially lessen competition in contravention of the CCA. Similarly, s 50(3)(g) – ‘the dynamic characteristics of the market including growth, innovation and product differentiation’ – is claimed to be sufficiently broad in scope to permit a court or the ACCC to consider issues such as creeping acquisitions.

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<sup>224</sup> Australian Competition and Consumer Commission, Parliament of Australia, above 108, 5.99. Vertical mergers may involve no increase in concentration, but may enable the extension of market power into a vertically related market.

<sup>225</sup> Australian Competition and Consumer Commission, Parliament of Australia, above 108, 5.99.

<sup>226</sup> Australian Competition and Consumer Commission, Parliament of Australia, above 124, 3.31 and 5.99.

<sup>227</sup> Australian Competition and Consumer Commission, Parliament of Australia, above 108, 11.

The uncertainty created by drawing inferences from the current Merger Guidelines to cover the issue of creeping acquisitions seems an unnecessary stretch. Furthermore, what implicit guidance can be extrapolated from the current merger guidelines is weak. A decision handed down by the ACCC that a merger or acquisition is anti-competitive as a result of the cumulative effects on competition rather than the isolated effect of the merger would be unlikely to survive legal challenge. That is, it would be beyond the power of the regulator under the existing legislation to prohibit a merger based on the effects of a series of mergers which are said to collectively offend the existing law.

Secondly, while providing a useful illustration of the application of the HHI, the Merger Guidelines have no statutory effect and are not binding on the ACCC or the Court. Thus, collective mergers with anti-competitive effects may be ignored in the decision making process. For example, the *Grocery Inquiry* reported the HHI for the retailing of packaged groceries market to be between 2750 and 3000.<sup>228</sup>

Given the Merger Guidelines state that the ACCC considers markets to be concentrated when the HHI is greater than 2000, clearly, according to the ACCC's own definition, the market for packaged groceries is concentrated to a level that requires action on the part of the regulator. Surprisingly, this level of concentration appears to be overlooked and given little weight. Mergers and acquisitions in this market continue to be permitted despite exceeding the concentration ratios used to identify commercial behaviour that is prima facie anti-competitive.

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<sup>228</sup> National Association of Retail Grocers of Australia Pty Ltd, above n 37, 5.

In 2011 it was noted that the Merger Guidelines have not been referred to by an Australian court considering a merger matter.<sup>229</sup> This is contrasted to the situation in the US. While the US Merger Guidelines<sup>230</sup> are also a statement of agency enforcement policy that is not binding on the courts,<sup>231</sup> in practice, the US courts have relied heavily on them.<sup>232</sup> In the US, the Merger Guidelines are given ‘precedent-like’ treatment by the courts, in some cases, the courts even seem to have given the Merger Guidelines more weight than their own precedent.<sup>233</sup>

While this more extreme treatment may be inappropriate for a statement of policy, this arguably points to the need for action to encourage Australian courts to place greater importance on the Merger Guidelines.

#### IV CONCLUSION

The need for specific provisions to be introduced that regulate creeping acquisitions and prevent any anti-competitive consequences is required to prevent firms ‘exploiting the ‘loophole’ in the legislation’.<sup>234</sup> The objectives of the

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<sup>229</sup> John Duns and Arlen Duke, *Competition Law: Cases & Materials* (LexisNexis Butterworths, 3rd ed, 2011) 110.

<sup>230</sup> Issued jointly by the DoJ and the FTC.

<sup>231</sup> *Chicago Bridge & Iron Co v FTC* 534 F 3d 410, 431 n 11(5th Cir 2), cited in *The Anti Trust Source, ‘The Revised Horizontal Merger Guidelines: Can the Courts be Persuaded* (October 2010) <[https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct10\\_Brannon10\\_21f.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Brannon10_21f.aut_hcheckdam.pdf)>.

<sup>232</sup> *The Anti Trust Source, ‘The Revised Horizontal Merger Guidelines: Can the Courts be Persuaded* (October 2010) 2 <[https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct10\\_Brannon10\\_21f.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Brannon10_21f.aut_hcheckdam.pdf)>.

<sup>233</sup> *United States v Baker Hughes* 731 F Supp 3 (DDC 1990) and *FTC v Cardinal Health Inc* 12 F Supp 2d 34, 53 (DDC 1998), cited in *The Anti Trust Source, ‘The Revised Horizontal Merger Guidelines: Can the Courts be Persuaded* (October 2010) <[https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Oct10\\_Brannon10\\_21f.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Brannon10_21f.aut_hcheckdam.pdf)>.

<sup>234</sup> Law Council of Australia, Submission to Australian Competition and Consumer Commission, *Consumer Amendment Bill 2010*, 5.

recommendations touched on in this Chapter and to be discussed in more detail in Chapter Five will empower the regulators to deal pro-actively with the competitive impacts created by creeping acquisitions. Competition is critical to the market economy and it is a critical role of Governments worldwide to keep the economy open for competition. The answer involves a balance of securing the efficiencies that may arise from mergers or acquisitions and ensuring that those efficiencies are passed on to consumers. While this will be discussed in more detail in Chapter Five, a mandatory notification regime inspired by comparable countries such as the US and UK would be preferred, with an expansion of the threshold test to require notification when the cumulative value of all entities over the previous two years exceeds reasonable thresholds.

## CHAPTER FOUR – HOW HAVE CREEPING ACQUISITIONS BEEN REGULATED

### ABROAD?

#### I INTRODUCTION

In 2002 the International Competition Network (ICN)<sup>235</sup> and the Organisation for Economic Co-operation and Development (OECD)<sup>236</sup> released a report entitled *Policy Roundtables: Substantive Criteria Used for Merger Assessment (OECD Report)*. The OECD Report assessed the criteria used for merger assessment in its member states. In this, the Secretariat posed a number of hypotheticals to the participating 19 member states.<sup>237</sup> One of those questions being:

Please explain why you do or do not believe that the choice of substantial lessening of competition or dominance test would make a difference in reviewing ... a series of small mergers which appear to be leading to the creation of a firm having significant market power.

The OECD Report reflected a high recognition from various international jurisdictions that creeping acquisitions are a serious issue in the competition space and are not easily addressed under current substantial lessening of competition

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<sup>235</sup> The ICN mission statement is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.

<sup>236</sup> The OECD Competition Committee has devoted substantial efforts to studying the merger review process and its work helped inform the development of the ICN Recommended Practices. The OECD and ICNs 'international best practices' are used as a guidepost and define a path to address many of the concerns identified with the merger review process. Australia is one of over 100 member countries of the ICN.

<sup>237</sup> Australia, Canada, Chile, Czech Republic, Denmark, the European Commission, Finland, Germany, Hungary, Ireland, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, South Africa, Spain, Switzerland, Chinese Taipei, Turkey, the United Kingdom, the United States.

tests.<sup>238</sup> It was widely acknowledged<sup>239</sup> that creeping acquisitions could be difficult to address under both the substantial lessening of competition test and the dominance test.<sup>240</sup> Of the 19 states providing submissions, only Germany and Mexico indicated unequivocally that their current merger regime, whether it be a dominance test or substantial lessening of competition test, would be sufficient to address creeping acquisitions.<sup>241</sup> A small number of states<sup>242</sup> with little comparability to Australia deemed the consideration irrelevant in the context of their anti-trust system.

The remainder of this Chapter will explain the approach various jurisdictions have taken to regulate creeping acquisitions.

## A *Europe*

The European Commission Merger Regulation (**ECMR**) is the main legislative text for merger decisions within the EU.<sup>243</sup> The ECMR regulates competition in the EU by prohibiting mergers that would significantly impede effective competition in a

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<sup>238</sup> Metcash Limited, Submission to Competition and Consumer Policy Division of the Commonwealth Treasury, *Creeping Acquisitions: Discussion Paper 1*, 10 August 2008, 5.6.

<sup>239</sup> By Australia, Brazil, Finland, Hungary, Ireland, Italy, Lithuania, Nederland, New Zealand and Norway.

<sup>240</sup> Under the dominance test, mergers resulting in the creation of a firm in a dominant position in a substantial market for goods and services in Australia, or a State or Territory of Australia, were prohibited.

<sup>241</sup> Organisation for Economic Co-operation and Development, 'Policy Roundtables: Substantive Criteria Used for Merger Assessment' (Report, 2002) 181, 235.  
<<http://www.oecd.org/competition/mergers/2500227.pdf>>.

<sup>242</sup> Chinese Taipei, Czech Republic, Korea and Spain.

<sup>243</sup> European Commission, *Merger Regulation* (25 November 2014)  
<<http://ec.europa.eu/competition/mergers/legislation/regulations.html>>.

primary market, or in a substantial part of a market.<sup>244</sup> The ECMR prohibits mergers resulting in the creation or strengthening of a dominant position.<sup>245</sup>

The ECMR does not expressly define creeping acquisitions however it does consider a series of previous transactions if they have taken place ‘within a reasonable period of time even if they fall below turnover thresholds.’<sup>246</sup> The ECMR explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these situations is not limited to the acquisitions of the ‘one and decisive’ share, but will cover all the acquisitions of securities. This approach also aggregates acquisitions carried out between different entities belonging to the same group. The provision applies to two or more transactions between the same persons or undertakings if they are carried out simultaneously. Such simultaneous transactions between the same parties are deemed to form a single concentration even if they are not connected with each other.

Although the term ‘within a reasonable period of time’ is not defined, Article 5(2) subparagraph 2 provides a specific rule which allows the Commission to consider two or more transactions taking place within a two-year period between the same persons or undertakings to be treated as one and the same concentration arising on the date of the last transaction. This is irrespective of whether or not those transactions relate to

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<sup>244</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (published in Official Journal L 395, 30 December 1989 as last amended Official Journal L40, 13 February 1998), Article 3.

<sup>245</sup> OECD, above n 241, 309.

<sup>246</sup> Australian Competition and Consumer Commission, *Creeping Acquisitions*, Discussion Paper 1, 2008, 73.

parts of the same business or concern the same sector.<sup>247</sup> The two-year rule does not apply where other persons or undertakings join the same persons or undertakings for only some of the transactions involved.<sup>248</sup> This two-year review period has been adopted across many European nations.<sup>249</sup>

The objective of this provision is to capture cases of attempted circumnavigation of the ECMR merger regulations.<sup>250</sup> The provision ensures that entities do not strategically breakdown an overall transaction into a series of smaller acquisitions over a period of time that individually do not exceed turnover thresholds but cumulatively do have that effect.

Within the EU region, Finland reported experiencing great difficulty in addressing creeping acquisitions. Finland currently adheres to the dominance regime explaining that a series of small mergers will only be covered by the dominance test when the required level of dominance is achieved. For example, a merger between the number two and number three firms in the market that does not result in the merged entity becoming the number one firm would not be covered by this dominance test.

Finnish merger controls implement an explicit merger provision to account for a series of small mergers in line with the ‘two-year rule’.<sup>251</sup> According to Articles

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<sup>247</sup> Article 5(2) of the European Commission Merger Regulation, European Council regulation No 139/2004 of 20 January 2004, OJ L 24. 29.1.2004.

<sup>248</sup> Kirsty Middleton (ed), *Blackstone's UK and EU Competition Documents* (Oxford University Press, 7<sup>th</sup> ed, 2011) 502.

<sup>249</sup> Council Regulation 139/2004 EC.

<sup>250</sup> T-282/02 *Cementbouw Handel & Industrie BV v Commission of the European Communities* [2006] ECR II-319, 118.

<sup>251</sup> OECD, above n 241, 171 and Articles 11b(4) and (5) of the Finnish merger control, the *Competition Act*. The Act was amended in 2004 and Article 11b(5) was repealed. Now, when the turnover of concentrations concluded after 1 May 2004 is calculated, transactions made in the same line of



11b(4) and (5) of the *Finnish Competition Act* (661/2012), where business operations are acquired through two or more successive transactions, the turnover of the target of the acquisition shall mean the combined turnover related to the business operations acquired from the same entity or foundation, and the turnovers of the entities or foundations acquired within the same industry in Finland during the two years preceding.<sup>252</sup> In any successive two-year period,<sup>253</sup> the turnovers of the business operations acquired are cumulated.

Similarly in Hungary, the Hungarian Office of Economic Competition can prohibit a transaction at any time within a two-year period where a series of mergers places the acquiring firm in an economic position of market power, allowing the firm to act independently of the market.<sup>254</sup>

Lithuania acknowledged that a problem could arise with the practical application of either the dominance or substantial lessening of competition test if any small merger were to be analysed in isolation and treated as neither being a substantial lessening of competition nor creating or strengthening of a dominant position.<sup>255</sup>

The UK, Spain, Norway and the Netherlands insist that in such a scenario of creeping acquisitions there seems to be little difference between the ultimate outcome of applying a substantial lessening of competition test or a dominance test given the

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business are no longer taken into account. However, the two-year rule on arrangements between the same buyer and seller under Article 11(4) is still in force.

<sup>252</sup> Metcash Limited, above n 238, 5.5(a).

<sup>253</sup> OECD, above n 241, 171.

<sup>254</sup> Ibid, 195.

<sup>255</sup> Ibid, 227.

similarities in these two competition assessments. Each nation had its own view on why this is so.

Spain commented:

These models include heterogeneous criteria with many common aspects which are ultimately based on economic analysis and which lead to the same results in the vast majority of cases.

Despite this indifference, the Spanish regard the substantial lessening of competition test to better fit with economic analysis and that it would allow more flexibility especially when dealing with small-scale mergers.<sup>256</sup>

The Dutch view other considerations, such as specific market structure, conditions of the market place, and freedom of interpretation of the antitrust authority, to be more influential than the question of which test is to be applied.<sup>257</sup>

Although Norway adheres to the substantial lessening of competition test, it also does not believe it to make any difference if the substantive test were dominance instead of substantial lessening of competition.<sup>258</sup> Under s 16 of the *Competition Act 2004* (Norway) merger control is based on a twofold test consisting of a substantial lessening of competition test and an efficiency test. The substantial lessening of competition test permits the Competition Authority to intervene in mergers that create or strengthen significant market power. An intervention under s 16 can only be directed against that merger in the series of mergers, which would create a situation of

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<sup>256</sup> Ibid, 269.

<sup>257</sup> Ibid, 249.

<sup>258</sup> Ibid, 262.

significant market power. Thus, if the firm does not already possess significant market power that authority cannot intervene until significant market power is created by that final transaction pushing the entity over the threshold. It is not possible under current competition law to stop a ‘wave of mergers’ in its incipiency. The New Zealand submission expressed similar confusion as to what point, if at all the threshold would be triggered in these cases.<sup>259</sup>

An example of this in practice could be seen in the Norwegian electricity market. The major producer in the market – Statkraft – announced an intention to acquire a significant portion of its competitors. Previous to this the Competition Authority had considered competition somewhat restricted but not substantially restricted. It was not until after the last acquisition of Agder Energi however that the Authority considered that Statkraft had reached the requisite level of significant market power in order to intervene. Therefore, only the last acquisition was prohibited.<sup>260</sup> A divestiture of the previous creeping acquisitions could not be ordered.

The UK *Enterprise Act 2002* expressly addresses creeping acquisitions. Section 29, titled ‘Obtaining control by stages’ permits, where appropriate, the decision making authority to consider two or more transactions that have occurred within a two year period to be treated as having occurred simultaneously on the date on which the latest of them occurred. Where the last of a series of transaction is an anticipated merger and has not yet been completed, the Competition Markets Authority (**CMA**) may still

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<sup>259</sup> Ibid, 256.

<sup>260</sup> Ibid, 262.

take this anticipated merger into consideration even though it may not actually be completed in the two-year period.<sup>261</sup>

The CMA also possesses broad powers to investigate industries which are suspected to be showing anti-competitive effects associated with creeping acquisitions. If problems are found and a requisite degree of market disintegration is established, severe remedies can be imposed including requiring firms to divest assets or business units. For example in the recent market study into the airports sector the CMA found that the common ownership of airports in certain regions posed problems for competition and required British Airports Authority to divest several airports.<sup>262</sup>

The CMA's method to investigating the competitive effects of a series of creeping acquisitions involves a case-by-case examination rather than a law of general application.<sup>263</sup> The CMA investigates several facets of anti-competitive activity, including whether an acquisition in the UK will create certain market features to prevent, restrict or distort competition and particularly whether the acquisition will have any adverse effects on competition in a market.<sup>264</sup> While this is very much substantial lessening of competition terminology,<sup>265</sup> like Spain, Norway and the Netherlands, the UK is of the view that the two tests are likely to yield the same outcome in a situation of creeping acquisitions:

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<sup>261</sup> Jurisdictional and Procedural Guidance, para 4.33. Article 3, *Enterprise Act 2002 (Anticipated Mergers) Order 2003, SI 2003/1595*.

<sup>262</sup> Competition and Markets Authority, 'BAA Airports: Evaluation of the Competition Commission's 2009 Market Investigation Remedies (16 May 2016).

<sup>263</sup> Australian Competition and Consumer Commission, above n 246, 70.

<sup>264</sup> *Ibid*, 68.

<sup>265</sup> John Davies, *Getting The Deal Through – Merger Control 2010* (September 2014) <<https://gettingthedealthrough.com/area/20/merger-control/>>.

Where one of a series of mergers leads to an immaterial increase in market power then it is unlikely to be viewed as reinforcing or creating a dominant position or as a substantial lessening of competition. On the other hand, where such a small merger led to a material increase in market power, by definition, it is not a reinforcement or creation of a dominant position and substantial lessening of competition.<sup>266</sup>

The discussion will now be widened beyond the EU.

## B *The Americas*

US law and experience has had considerable influence on other jurisdictions. They have also published detailed Horizontal Merger Guidelines. These guidelines adopt the substantial lessening of competition test for merger analysis so that mergers are prohibited if they create a ‘substantial lessening of competition or tend to create a monopoly<sup>267</sup> in any market’.<sup>268</sup> Merger guidelines indicate that the FCT or DoJ will oppose a merger if it is ‘likely to create or enhance market power or facilitate its exercise.’ The statute has also been interpreted to prohibit mergers that worsen the competitive health of markets that already exhibit weak competition, and mergers, that while preserving the status quo, forestall future competition.<sup>269</sup>

When the FCT or DoJ review a merger that has come to their attention, they typically evaluate each individual transaction on its own merits. Each transaction is subject to

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<sup>266</sup> OECD, above n 241, 286.

<sup>267</sup> A monopoly describes a market structure in which a commodity for which there are no close substitutes is supplied by only a single firm. As with perfectly competitive markets, absolute monopolies are rare.

<sup>268</sup> Clayton Act 7, 15 USC 18, Sherman Act, 15 USC 1, Federal Trade Commission Act, 15 USC 45.

<sup>269</sup> Clayton Act 7, 15 USC 18.

the question of whether or not the transaction at issue will lead directly to anti-competitive effects.<sup>270</sup>

While the analytical framework is forward-looking and therefore does not specifically look back to previous acquisitions, it does explicitly entail considerations of ‘changing market conditions’ because ‘recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the likely future competitive significance.’<sup>271</sup> This widens the authority’s consideration beyond statutory concentration ratios and notification thresholds. It acknowledges that in some cases while these may not be triggered by the single transaction being reviewed, there may still be significant competitive effects. The US competition authorities opine that:

Concentration trends alone are irrelevant except insofar as they might suggest that somewhat more severe anti-merger rules be applied when an industry reaches or approaches a particular level of concentration ... In that event it is the present market structure that is critical.<sup>272</sup>

In the US in 1996, over 1000 mergers resulted from the liberalisation of previous statutory limitations on radio ownership. This catalysed a rapid consolidation of the industry in which the DoJ brought a number of cases. One such case was American Radio Systems Corp’s merger with EZ Communications. The DoJ’s action arose out of a series of proposed acquisitions by American Radio and EZ, culmination in the American Radio/EZ merger. In the Charlotte Metro Survey Area, these transactions would have resulted in American Radio having 55% of Charlotte’s radio advertising

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<sup>270</sup> OECD, above n 241, 295.

<sup>271</sup> The United States Department of Justice, *Concentration and Market Shares* (29 July 2015)

<<https://www.justice.gov/atr/herfindahl-hirschman-index>>-concentration-and-market-shares

<sup>272</sup> OECD, above n 241, 295.

revenue. In the Sacramento Metro Survey Area, the merger would have given American Radio 36% of Sacramento's radio advertising revenues.<sup>273</sup> The US authority had the ambit to consider the series of transactions in their totality rather than the effect of each individual transaction. This resulted in the divestiture of KSSJ-FM and another Sacramento FM station from American Radio Corp in order for the proposed transactions to proceed and the market to remain competitive.

In a press release by the DoJ concerning this case, the DoJ explicitly stated that when considering the effects on consumers, consumers encompassed small business that rely on competition to keep prices low.<sup>274</sup> This is contrasted to Australian competition law that does not offer protection to small business. A narrow perspective that requires change.

The competition issues raised by creeping acquisitions are relatively similar in both the Australian and US experience.<sup>275</sup> The US authorities in some cases appear to have considered the effect of a series of mergers despite not having explicit legislation. The US appears to acknowledge in some capacity that incrementally accruing concentration via creeping acquisitions should be considered during a merger review, and where required, action on behalf of the authority should be taken to preserve competition. In the case above, that action was a negotiated divestiture.

Mexican competition law can be regarded a mixture of substantial lessening of competition, dominance and the substantial market power model. Similar too many

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<sup>273</sup> Department of Justice, Justice Department Requires American Radio Systems Corp to Divest Radio Stations in California and North Carolina' (Press Release, 97-090, 27 February 1997).

<sup>274</sup> Ibid.

<sup>275</sup> Law Council of Australia, Submission to Competition and Consumer Policy Division of the Commonwealth Treasury, *Creeping Acquisitions: The Way Forward*, 12 June 2009, 13.

European states but unlike Australia, notifications of concentrations are compulsory when certain established thresholds are surpassed.<sup>276</sup> Compulsory notification empowers the Federal Competition Commission to investigate all concentrations that point to a probability of creating a firm with significant market power.

## C *New Zealand*

New Zealand and Australia's similarities and proximity create a close economic relationship. Both nations have very similar market structures. They are both geographically isolated, have small populations, relatively small markets and share very similar competition policy and statutes. In 2001 the *Commerce Act 1986* (NZ) was amended to align more closely with Australia's then *Trade Practices Act 1974* (Cth). The NZ regime does not regulate specifically for creeping acquisitions. Like Australia, the NZ substantial lessening of competition test prohibits the acquisition of shares or assets of a business if it would have, or be likely to have, the effect of substantial lessening of competition in a market.<sup>277</sup>

In its submission to the OECD, NZ indicated little difference between the substantial lessening of competition and dominance test. NZ conceded the substantial lessening of competition test did have a real effect at an earlier point than the dominance test. It relied on the fact the substantial lessening of competition sets a lower threshold than the dominance test, however difficulty remained in identifying the point where small acquisitions trigger the substantial lessening of competition test. The central difficulty remains knowing at what point to intervene – that is to say, at what point is the

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<sup>276</sup> Cf Article 20, FLEC.

<sup>277</sup> *Commerce Act 1986* (NZ) Pt III.



substantial lessening of competition threshold triggered?<sup>278</sup> These uncertainties compromise the efficient regulation of creeping acquisitions. In the New Zealand Commerce Commission's 2016 Consumer Issues Report, they described creeping acquisitions as harmful to market structures and were given a high risk of harm rating.<sup>279</sup> It has been listed by the Commission in the 5 'current issues and emerging risks to consumers from markets' for New Zealand.

The echo of Australia's concerns in the similar jurisdiction of New Zealand further suggests reform around creeping acquisitions needs to occur.

## II      WOULD REGULATION PUT AUSTRALIA OUT OF STEP WITH INTERNATIONAL BEST PRACTICE?

Creeping acquisitions are now a feature of most merger regimes around the world. There is a significant variation across jurisdictions in what form and how merger review tests are articulated. How a merger review test is applied is as important as how it is formulated. Application of even the same formulation varies considerably across jurisdictions. In this way, there is no 'consensus' on the approach to creeping acquisitions. No uniform resolutions have been made or adopted by the OECD or ICN that dictate best practice for addressing creeping acquisitions.

By legislating to deal explicitly with this issue, Australia would not be diverging from current international best practice, but pioneering the movement. Introducing a law to address creeping acquisitions, which does not throw out the current test but provides

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<sup>278</sup> OECD, above n 241, 256.

<sup>279</sup> Commerce Commission of New Zealand, *Consumer Issues Report 2016 (2016)* 44.

for the consideration of a new factor (that is, creeping acquisitions), is not ‘radical’ and is not moving Australia away from international merger standards. The options available to address the creeping acquisitions issue vary in scope. For example, one recommendation that will be explored later in this article is the adoption of mandatory notification and corporate unbundling orders which are widely used and proclaimed mechanisms in line with international best practice that Australia is currently out of step with.

### III CONCLUSION

A number of countries in the developed world have passed legislation in an attempt to deal with the issue. To an extent this has mitigated the risk; however it is widely acknowledged that creeping acquisitions continue to be a prevalent and concerning practice that requires further attention. The recommendations in Chapter Five will draw on the effective and ineffective features of these varying systems. The recommendations will apply and refine some of these approaches and encourage Australia to pioneer a more explicit response to the issue.

## CHAPTER FIVE – PROPOSED MODELS FOR ADDRESSING CREEPING ACQUISITIONS

It is beyond the powers of the legislature and authorities to change the organic characteristics of the Australian market. However, the Government does have a responsibility to protect the Australian market place from anti-competitive behaviour and market disruption. The words of the late Honourable Sir Garfield Barwick are as pertinent to this contemporary debate as they were over 50 years ago:

I have formed myself the view that the maintenance of competition is, in the broad, indispensable to our economic growth. It seems to me that the pattern of trading in this community should be set on a competitive basis now, before the restrictive tendencies now present become entrenched to the point where their dislodgement would entail too great a business upheaval.<sup>280</sup>

Legislators must be vigilant about ensuring companies do not thwart the competition laws by acquiring dominance ‘under the radar’ of legislative prohibition.<sup>281</sup>

Implementing a regime that acknowledges this is vital. A strategy of incrementally acquiring smaller competitors to avoid the substantial lessening of competition threshold is repugnant to the competition model and is undoubtedly also repugnant to the objectives of competition policy and law.

Prevention is the best-case solution to avoiding anti-competitive dominance and consumer detriment. Australia ought to be proactive in implementing a framework that deals with creeping acquisitions so that detriment can be subdued and benefits

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<sup>280</sup> Ray Steinwall (ed), *25 Years of Australian Competition Law* (Butterworths, 2000) 25.

<sup>281</sup> Clarke, above n 48, 4.

unlocked. A reactive approach prolongs the adverse effects of creeping acquisitions and the damage to competition may be irreparable.

This Chapter will present and critically analyse a number of recommendations with the objective of introducing safeguards that empower administrators and decision makers to regulate those mergers and acquisitions likely to or currently displaying anti-competitive cumulative outcomes. The recommendations include the introduction of an additional merger factor (j) into s 50(3) of the CCA to enable the ACCC to assess the cumulative effect of the current and previous acquisitions; a contemporary interpretation that enlarges the objects of the CCA to explicitly permit prohibition based on anti-competitive intentions towards small enterprises; introducing a mandatory notification regime for mergers that breach high risk thresholds and Commissioner's declarations that bestow a watching brief and extra regulatory obligations on high risk entities or industries.

## I AMENDMENTS TO THE COMPETITION ACT

### A *Enlarging the Preamble*

The performance of competition agencies depends not only on the way agencies implement specific policies but also on their legal and institutional design.

Competition agencies need to not only define and implement their strategies and goals but also design the appropriate instruments to measure the degree of accomplished goals. To achieve this, competition policy needs to clearly define what it intends to do

and the competition agency needs to make sure it actually does that. The first step for understanding the intention of a piece of legislation is the objects clause.

The objects clause outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity. Objects clauses assist the courts and others in the interpretation of legislation.<sup>282</sup> Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The objects clause of the CCA is enshrined in section 2 of the CCA. It reads:

The object of this Act is to enhance the welfare of Australia through the promotion of competition and fair-trading and the provision of consumer protection.

The CCA is a complex piece of legal drafting and the distinction between promoting competition and protecting competitors is well worth the debate. Whilst regard must be had to the objects clause to resolve any uncertainty or ambiguity, it does not control clear statutory language, or command a particular outcome of exercise of discretionary power.<sup>283</sup> Moreover, the terms that appear in s 2 are not defined terms in the Act. They are open to an evolved and contemporary interpretation that preserves the effectiveness of the competitive process and should not be given a narrow interpretation that defeats the effectiveness of the Act.

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<sup>282</sup> *Tickner v Bropho* (1993) 114 ALR 409.

<sup>283</sup> *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78.

Competition law is an economic law and must evolve with our understanding of how the economy functions. So far as the language permits, it should receive the meaning that ensures the achievements of its objects.<sup>284</sup> It is instructive to reflect on Kirby J's statement in *Visy Paper Pty Ltd v Australian Competition and Consumer*

*Commission*:

It is in the context of such legislative opacity and unwieldiness that it is essential, in my view, to adopt a construction of the TPA that achieves the apparent purpose of that Act by furthering the objectives of Australian competition law. Keeping such purposes in mind helps to shine the light essential to finding one's way through the maze created by statutory language.<sup>285</sup>

This article argues that an interpretation of the objects clause that affords no consideration to the preservation of small enterprise is outdated, narrow and inflexible.<sup>286</sup> It calls for an interpretation that contemplates contemporary issues and aligns with commercial realities.

The current construction of the objects clause is a multifaceted policy objective and coordinated approach that can be used to protect both consumers and afford protection of business-to-business transactions. Analysing the elements of the objects clause reveals that embedded in the object of the CCA is scope for legislators to not just examine the effect of the action of dominant businesses but also the intent behind those actions.

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<sup>284</sup> *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, 100 (Kirby J).

<sup>285</sup> *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 201 ALR 414, 431.

<sup>286</sup> Harper Report, above n 52.

Determining legality by looking beyond merely the commercial facts and outcomes of a transaction, and into the intent of the controlling mind behind a transaction is a contemporary concept that has also become the focus of other areas of Australian corporate law. For example, under the General Anti-Avoidance Provisions in Part IVA of the *Income Tax Assessment Act 1977 (Cth)*, efficient schemes that are entered into for the dominant purpose of creating a tax advantage or benefit, that would otherwise be legal, but for the egregious intention behind the arrangement, are outlawed and the orchestrators of these offences can face serious penalties.

Applying this to competition law, competition policy is not about the pursuit of competition as an end in itself, but about promoting the competitive process where there are public benefits to be gained. The action is the protection of small enterprise, but the benefit is the preservation and promotion of competition for the long term.

The key terms in the objects clause will be examined now.

First, what is ‘welfare’ and how is it achieved? Welfare is a very broad term. In rare cases competition policy accounts for producer welfare. Producer welfare focuses on market participants other than those who consume goods or services in the Australian economy. Producer welfare is generally explored ancillary to a total welfare assessment that weighs up consumer welfare against producer welfare – that is, balancing anti-competitive effects with efficiency gains.<sup>287</sup> In practice, certain anti-competitive mergers that result in significant efficiency gains may be authorised to proceed on public benefit grounds.

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<sup>287</sup> Richard A Epstein and Michael S Greve (eds), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004) 167.

For the most part however, the objects of Australian competition law promote consumer welfare – competitive pricing, choice and quality in goods and services. Under this approach, conduct is assessed according to whether it is likely to lead to lower prices, greater choice and innovation on the one hand, or an increase in prices, reduction in choice or pause in innovation, on the other. These benefits, as examined are the product of competition and competitive rivalry. In this context, creeping acquisitions present a double-edged sword. They might initially give rise to economies of scale that reduce the costs of the merged entity and should result in lower prices for consumers. Consumers say, this is great and welfare is achieved. As these acquisitions gather inertia, more and more competitors are eliminated. The elimination of sufficient small business competitors has profound consequences for consumer welfare. This confers market power on the dominant entity allowing it to raise prices to the detriment of consumers. This reduces consumer welfare.

In this way, preserving small business is in the interests of enhancing consumer welfare. Small business creates jobs for Australians and its presence in the market place encourages new competition. The Senate Committee's *Milk Report* agreed with this proposition. It considered that the Act could best protect competition by maintaining a range of competitors (large and small), who should rise and fall in accordance with the results of competitive rather than anti-competitive conduct, such as creeping acquisitions.<sup>288</sup> At the end of the day, while small business may be the obvious victim of the misuse of market power, the real victim will be the consumer.

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<sup>288</sup> Milk Report, above n 83, xi.



The second element of the objects clause is the ‘promotion of competition’. The ACCC in interpreting competition borrows from the ‘effective competition’ and ‘workable competition’ models.<sup>289</sup> Finkelstein J describes both:

Effective competition requires internal and external conditions. The internal conditions are: (a) a reasonable degree of parity among the competitors; and (b) a high enough number of competitors to prevent effective collusion among them to rig the market. The external condition is easy entry. Effective competition denotes the idea that firms should be subject to a reasonable degree of competitive constraint from actual and potential competitors as well as from customers.

Workable competition is to envisage the market with a sufficient number of firms (at least four or more) where there is no significant concentration, where all firms are constrained by their rivals from exercising any market power, where pricing is flexible, where barriers to entry and expansion are low, where there is no collusion, and where profit rates reflect risk and efficiency.<sup>290</sup>

The strong theme of both models is the presence of rivalry from two sources. First, from many competitors in the market, and secondly from the presence of imminent entry of rivals to the market. This rivalry fosters diversity and choice by encouraging innovation and entrepreneurship in response to the competitive pressure of meeting changing customer tastes and demands. Diversity and choice require the presence of many competitors and the imminent threat of potential competitors. As to what ‘many’ means, Finkelstein J referenced four or more competitive players in the

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<sup>289</sup> Australian Competition and Consumer Commission, *Economics | Substantial Lessening of Competition* (10 November 2017) <<http://www.australiancompetitionlaw.org/law/economics/competition.html>>.

<sup>290</sup> Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 [37].

market with a spread of concentration. A situation that, as the case study in Chapter Two highlights, is not present in some Australian markets.

Therefore, where markets do not have conditions favourable to the smooth entry and exit of competitors, under the object of the promotion of competition, reasonable and lawfully justified intervention can be undertaken. This includes actions that preserve small business where it is needed to ensure sufficient rivalry remains in the market.

This protection does not go so far as to make small business infallible in such a way that incentives to remain competitive in terms of price, quality and innovation are diminished. It ensures competition remains. That means even small business will have rivals who will provide sufficient competitive restraint.

The last element, the ‘promotion of fair-trading’, was discussed in the Senate Committee’s report on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. After referring to s 2, the report stated:

The objects of the Act ... also refer to ‘fair-trading’ which suggests that traders, including small business, might expect protection under the Act from ‘unfair trading’. This, in turn, has led the Committee considering in this report the extent to which the Act ... Contribute[s] to fairness in the general, everyday common-sense use of the term.<sup>291</sup>

Fair-trading incorporates the prevention of companies from engaging in unfair trading practices towards both consumers and competitors.

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<sup>291</sup> Milk Report, above n 83, 8.

Further, it was affirmed in the Harper Review that ‘consumers’ in the context of the objects clause includes businesses transacting with other businesses.<sup>292</sup> In the US, the DoJ explicitly stated when dealing with consumers that ‘consumer’ encompasses small businesses that rely on competition to keep prices low.<sup>293</sup> The reality is small business faces the same vulnerability as consumers. They lack the resources and sophistication of big companies, making them susceptible to unconscionable and unfair conduct in the market place.

Creeping acquisitions threaten the competitive process and cannot be described as promoting ‘fair, vigorous and lawful competition’. Suppliers, small business competitors and, to an extent, consumers, are suffering serious detriment at the hands of agendas of creeping acquisitions.

There is no definitive High Court precedent as to the interpretation of the objects clause of the CCA. Therefore, a contemporary interpretation would support the ACCC putting forward a legislative agenda aimed at backing small business suffering at the hands of creeping acquisitions. This would be valuable in the minimisation of harm associated with creeping acquisitions.<sup>294</sup> Without a clear object, the intention and prohibition within s 50 is diluted.

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<sup>292</sup> Harper Report, above n 52, 16.

<sup>293</sup> The Department of Justice, above n 273.

<sup>294</sup> *Competition and Consumer Act 2010* (Cth) s 2.

## B *An Additional Merger Factor*

The second recommendation calls for the insertion of an additional merger factor (j) into s 50(3) that explicitly references incremental acquisitions as a relevant concern when determining whether a merger or acquisition would have the effect of substantially lessening competition.

Section 50(3)(j) is proposed in the following form:

[I]n determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

...

- (j) the previous acquisitions undertaken by the acquirer in the market in the previous two years.<sup>295</sup>

On a functional level, the amendment integrates a backward looking test, to what is currently only a forward-looking test.<sup>296</sup> This would permit acquisitions undertaken by a corporation within the previous two-year period to be considered as an aggregate when assessing whether or not an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.<sup>297</sup> It is important that previous mergers can be examined so that competition policy and any decision making aligns with commercial realities. To borrow the words of the Tribunal in *Re*

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<sup>295</sup> Business Council of Australia, Submission to Australian Competition and Consumer commission, (Media Release MR 178/08 25 June 2009) 8.

<sup>296</sup> The current formulation of the merger guidelines adopt a one to two year forward looking time frame when assessing whether competitive constraints are likely to substantially lessen competition in future markets. Australian Competition and Consumer Commission, above n 124, 3.6.

<sup>297</sup> Law Council of Australia, above n 275, 18.

*Howard Smith*,<sup>298</sup> the Court is concerned with ‘commercial likelihoods relevant to the proposed merger’. ‘The test has to be applied at a level that is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration.’<sup>299</sup>

Unlike other proposed regulatory models that called for a complete overhaul of the substantial lessening of competition test, this approach would provide the ACCC ‘with an express ability to deal with creeping acquisitions’ whilst retaining the well understood substantial lessening of competition test allowing the ACCC to make a better assessment of the merger’s true effect on competition.

Under the previously proposed aggregation model, an acquisition would be prohibited if the combined effect of the acquisition and any other acquisitions by the corporation within a six year period would substantially lessen competition.

The six year ‘specified period’ attracted much criticism at the time<sup>300</sup> and raised a number of conceptual difficulties.<sup>301</sup> Market boundaries and the structure and functioning of markets are likely to change over time.<sup>302</sup> This means an assessment of prior acquisitions to determine whether the current acquisition substantially lessens competition may necessitate an analysis of acquisitions on the basis of different market definitions and different dynamics of competition to when they occurred.

Other criticisms included that the six year retrospective analysis may impose

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<sup>298</sup> *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385.

<sup>299</sup> *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at [41].

<sup>300</sup> Clarke, above n 48, 1.

<sup>301</sup> The ACCC acknowledged that ‘the analytical framework underpinning the aggregation model is relatively complex, novel in part and presents significant conceptual difficulties.’ Australian Competition and Consumer Commission, above n 246, 30.

<sup>302</sup> Business Council of Australia, above n 295, 6.

significant uncertainty for business, may delay the merger clearance and investigation process by increasing pressure on businesses and the ACCC's resources and also introduce a large and unnecessary cost or risk impediment to expansion or investment. It is agreed that any discouragement of investment that has a detrimental effect on the growth and robustness of the Australian economy is not desirable<sup>303</sup> and the model proposed in this article has considered this.

Uncertainty is also an inescapable aspect of the operation of a section based upon speculative likelihoods. Even the current formulation of the test in s 50 gives effect to a kind of competition risk management policy. All antitrust actions require qualifying the difference between the actual and the counterfactual. Any effects based analysis, including the counterfactual, has challenges. It involves consideration of what the future world would look like and the past might have been absent of the conduct. It is inherently a speculative exercise that will often give rise to various competing interests.

It prohibits acquisition of shares or assets conditionally. The condition is that the effect or likely effect of the acquisition will be to substantially lessen competition in a market. That condition in itself imports uncertain judgments about the post-acquisition state of competition in the market where those judgments are required to be made before or after acquisition. Such judgments may require consideration of the likely responses of other rivals or potential rivals in the market. The uncertainty has not rendered the section non-justiciable.

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<sup>303</sup> Business Council of Australia, above n 295, 2.

Furthermore, companies of a size sufficient to risk being in breach of the merger provisions are already well acquainted in dealing with stringent regulatory requirements and some uncertainty. For example, the Australian Commissioner of Taxation has long been afforded the power to conduct audits and risk reviews on large corporates looking back four years, or, when serious cases of tax avoidance are suspected, the Commissioner has no limit on how far back the review period may be extended. Under other areas of taxation law companies are obligated to keep written evidence for five years and not doing so can result in significant penalties.<sup>304</sup> Cases of continued neglect to meet this obligation may be referred to the Department of Public Prosecutions for prosecution.<sup>305</sup> Likewise, the Corporations Act requires financial records be kept for up to seven years.<sup>306</sup> These records must correctly record and explain the company's transactions and financial position and performance.<sup>307</sup> As much of this information would overlap with the requirements of the ACCC under this provision, it is unlikely further risk or resourcing expense will need to be factored in.

To mitigate some of this uncertainty however, a more lenient two year specified period is proposed. This is considered a more reasonable and workable timeframe as it is unlikely competition and market dynamics would change drastically within this time period.

From an administrative perspective, the substantially lessening of competition test, supported by this additional merger factor will still require that the acquisition, on the

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<sup>304</sup> *Tax Administration Act 1953* (Cth), s 288-25.

<sup>305</sup> ATO Practice Statement Law Administration 2005/2.

<sup>306</sup> *Corporations Act 2001* (Cth), s 286(3).

<sup>307</sup> *Corporations Act 2001* (Cth), s 286(1).

balance of probabilities, have a meaningful or relevant impact on the competitive process over time, not merely a short-term effect, which was to be assessed by reference to commercial realities and not hypothetical theories.<sup>308</sup> As with all merger factors there will also be a high level of discretion in the hands of the ACCC in relation to the significance and apportionment of weight that will be placed on each merger factor. The ACCC may also exercise its discretion in such a manner as to minimise possible extra costs and burdens. This will be determined on a case-by-case basis and will depend on the actual matter under investigation and the governance and compliance history of the company under review. If costs stand to become a concern, the ACCC may examine whether in individual circumstances it is at all necessary or probative to consider previous acquisitions, and the extent that those acquisitions need to be examined. It may be the instance that only one merger in a chain of 10 mergers conducted over the two-year period is of concern, thus the ACCC may only require the target firm to retrieve information relating to that single case. Likewise, the ACCC may only be concerned with certain mergers conducted over an identified six-month period. In the same way, information of all transactions conducted over the full two-year limitation period may not always be necessary.

A two-year period is not a new or experimental concept amongst international merger regulation. As discussed in Chapter Four, Article 5(2) subparagraph 2 of the ECMR provides a specific rule that allows the Commission to consider successive transactions taking place within a two-year period between the same persons or undertakings to be treated as one and the same concentration arising on the date of the last transaction irrespective of whether or not those transactions relate to parts of the

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<sup>308</sup> *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317.



same business or concern the same sector.<sup>309</sup> Likewise, section 29 of the *Enterprise Act 2002* (UK) regulates the obtaining of control through successive acquisitions within a two-year period.

Thorough and clear guidelines provide unifying themes that increase certainty. Guidelines must explain the intent of the policy and provide necessary guidance to the ACCC and the courts on how to operate. If the regulation of anti-competitive creeping acquisitions were more readily interpreted the burden that arises from enforcement and compliance would be alleviated. Professor Allan Fels, commented: ‘It would be useful if the law more explicitly addressed creeping acquisitions.’

Introducing a merger factor with the theme of considering previous acquisitions will strengthen the analytical tool that is the counterfactual and go towards clearly informing business. In this context, the ACCC will continue to provide a range of opportunities for consultation, so that uncertainty can be reduced during the corporate planning process, which in turn reduces the risk that socially worthwhile projects will be abandoned.

The addition of a merger factor explicitly addressing creeping acquisitions into s 50(3) of the CCA is the strongest model for addressing creeping acquisitions. The proposed model widens the ACCC’s parameters, reducing ‘regulatory oversight of small acquisitions over time’.<sup>310</sup> Such a scheme facilitates a more holistic snapshot of the market, and the acquirer’s actions pre-merger to determine whether the mergers constitute creeping acquisitions that have the effect of substantially lessening

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<sup>309</sup> Article 5(2) of the European Commission Merger Regulation, European Council regulation No 139/2004 of 20 January 2004, OJ L 24. 29.1.2004.

<sup>310</sup> Law Council of Australia, above n 275, 21.

competition. However, the proposed model should not be viewed as a universal remedy to address the complex issue of creeping acquisitions as, with any regulation, there may still be associated practical problems. The remainder of this article will discuss ancillary safeguards aimed at mitigating, deterring and regulating this practice.

### III LEGISLATIVE AMENDMENTS BEYOND SECTION 50

Mandatory notification and Commissioner's declarations may provide further benefits.

#### A *Mandatory Notification*

The 2008 Merger Guidelines merely encourage merging parties to notify the ACCC if 'the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market'. As this is purely voluntary,<sup>311</sup> in practice, parties are actually permitted to proceed with a transaction that exceeds the merger control thresholds without seeking any regulatory consideration.

As early as 1992, the Cooney Committee recommended a mandatory pre-notification scheme be introduced in Australia.<sup>312</sup> Notification thresholds screen out transactions that are unlikely to result in appreciable competitive effects in a given jurisdiction, thus avoiding unnecessary transaction costs as well as the commitment of competition

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<sup>311</sup> Australian Competition and Consumer Commission, above n 108, 2.9.

<sup>312</sup> Senate Standing Committee on Legal and Constitutional Affairs, 'Mergers, Monopolies and Acquisitions (1991) xviii, 48-51 ('*Cooney Report*').

agency resources without any corresponding enforcement benefit.<sup>313</sup> Currently, if the ACCC opposes a merger that is brought to it by voluntary notification, the merger parties are very unlikely to proceed given the prospect of injunctions being brought by the ACCC under section 80(1A) of the CCA, and possible litigation. Moreover, 'the fast commercial pace of mergers and acquisitions is not conducive to lengthy litigation.'<sup>314</sup> Parties' preference for the administrative process of the ACCC, the informal clearance and authorisation procedures, results in the ACCC applying the Guidelines largely free from costly and time consuming judicial supervision.<sup>315</sup> Notification is a very effective tool. However, its voluntary nature limits its effectiveness. Introducing a regime of mandatory notification for mergers would be beneficial in the successful regulation of large firms participating in the practice of creeping acquisitions with the intention of circumventing s 50 of the CCA.

Notification gives the regulator time to challenge a merger and seek modifications if necessary. The measure is not about punishment, but open and effective consultation. The benefit for the notifying entity being that it avoids the costly, potentially embarrassing and complicated process of seeking an order through the courts to unwind a merger after it has occurred.<sup>316</sup> This is a proactive regime that acknowledges that it is often impossible to restore competition fully once an anti-competitive merger takes place.

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<sup>313</sup> International Competition Network, 'Setting Notification Thresholds for Merger Review' (Report to the ICN Annual Conference, Kyoto, Japan, April 2008) 4.

<sup>314</sup> Dave Poddar and Kate Newman, 'Stormy Seas Make Skillful Sailors: Changes to the Australian Merger Control Regime' (2008) 16 *Trade Practices Law Journal* 191, 192.

<sup>315</sup> John Duns and Arlen Duke, above n 229, 110.

<sup>316</sup> Choe Chongwoo and Chander Shekher, 'Compulsory or Voluntary Pre-merger Notification? Theory and Some Evidence' (Working Paper No 13450, MPRA, 2009) 1.

The dominant pre-merger notification model follows the US *Hart-Scott-Rodino Antitrust Improvements Act*, 15 USC 18a (1976) (**HSR Act**), which requires certain types of transactions to be notified to the FTC and the DoJ. The DoJ and the FTC jointly administer a statutory notification procedure for proposed mergers over a US\$50 million threshold. The HSR Act requires certain types of transactions to be notified to the FTC and DoJ before they occur.<sup>317</sup> The FTC or DoJ may approve the merger – providing immunity from challenges – or seek a court order to veto it. The stated purpose of the HSR Act is to give the regulators 30 days’ notice of substantial mergers, which permits either agency to seek an injunction or pursue further investigation. They may also, and often do permit the merger to proceed in that time. Until those 30 days expire, parties may not complete the transaction unless the government has granted early termination of the waiting period. Whether a particular acquisition is subject to these requirements depends on the value of the acquisition and the size of the parties, as measured by their sales and assets. Fines are possible for failure to notify.

In the US, the program has been a success. Commentators have noted that ‘[i]t is not hyperbole that perhaps the greatest US export in the last decade has been the adoption of pre-merger review processes.’<sup>318</sup> The FTC reports that compliance with the Act’s notification requirements has been excellent and has minimised the number of post-merger challenges the enforcement agencies have had to pursue.<sup>319</sup> Although the agencies retain the power to challenge mergers post-consummation, and will do so

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<sup>317</sup> Federal Trade Commission, above n 137.

<sup>318</sup> Michael H Byowitz and Ilene Knable Gotts (Wachtell, Rosen, Lipton & Katz), Submission to ICPAC Hearings, *Rationalizing, International Pre-Merger Review* (4 November 1998), 3.

<sup>319</sup> Federal Trade Commission, The United States of America, ‘What is the Premerger Notification Program? – An Overview’ (Guide I, March 2009) 2.  
<<https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>>.

under appropriate circumstances, the fact that they rarely do has led many members of the private bar to view the program as a helpful tool in advising their clients about acquisitions proposed.<sup>320</sup> These same outcomes are likely to be reported in Australia. In the EU Community, the requirements have been similar since 1990. The differences between the various notification procedures are mostly in details of thresholds for notification.

Interestingly, Hungary for example, when calculating turnovers and undertakings, all acquisitions from the same group within two years preceding the acquisition of control by the acquirer group must be considered if the acquisitions were at that time not subject to notification.<sup>321</sup> In this circumstance, there is an incentive to notify from the outset or be exposed to more onerous thresholds later on.

In Australia, the relevant authority to be notified and to undertake examination will be the ACCC. It is logical to continue to use thresholds already in use by the ACCC – ‘when the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market’ or ‘in the case of concentrated markets any market where the HHI has exceeded 2000’ – to compel merging parties to notify.<sup>322</sup> Alternatively, a threshold similar to that implemented by the US regime that requires notification when a specified monetary value of assets is involved in the merger could be developed. What is important here is not so much the exact threshold, but that mergers susceptible to anti-competitive consequences are examined. For the most part, the majority of mergers will not be hindered or affected by the implementation

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<sup>320</sup> William J Gole and Paul J Hilger, *Due Diligence: An M&A Value Creation Approach* (Wiley Publishers, 2009) 259.

<sup>321</sup> *Competition Act* (Hungary) s 24.

<sup>322</sup> Australian Competition and Consumer Commission, above n 108, 2.9.

of this regime, but those few that are of concern will be brought to the attention of regulators.

There is concern that introducing mandatory pre-merger notification would overload the ACCC's resources resulting in significant delay. As such, a reasonable time frame – not necessarily 30 days – will need to be worked out. It is necessary for this timeframe to be codified in statute so as to afford protection to merging parties from undue delay. As a side note, one would argue if an economy on the scale of the US can adhere to a 30-day assessment period, there is no reason why Australia's significantly smaller economy cannot also adhere to that assessment period.

The current absence in the CCA of a notification requirement is a major failure.

## B *Commissioner's Declarations*

Somewhat similar to the pre-merger notification regime is the Commissioner's declaration process. This declaration process confers power upon the Commissioner to declare concern for potential or actual competitive harm at the hands of a specific corporation or entire industry. The declaration process would give the ACCC power to keep a specified 'watching brief' on declared companies or industries that exceed certain market share thresholds or have the very real potential to participate in unscrupulous business practices. Such thresholds do not constitute an automatic declaration of market dominance, nor are they an automatic signal as to the existence of anti-competitive practices or of an abuse of power. They act instead as a warning beacon to the regulator to maintain a watching brief on the company or industry

concerned.

Once triggered, the ACCC would notify the identified company that it must advise the ACCC of all market acquisition activity, with specific requirements to report to the ACCC annually. The ACCC could then, of its own volition, review the company or the industry concerned.<sup>323</sup> At the discretion of the Commissioner, additional prohibitions for a set period of time may be declared upon corporations or industries. In the most severe cases, these extra regulatory interventions could take the form of price ceilings or price floors.

A price floor stipulates a minimum price that can be charged for a good or service. In the past, governments have imposed price floors to help the suppliers of goods and services. The Australian Government, for example, operated the Wool Price Stabilisation Scheme until 1991 to prevent the price of wool falling below a certain level. Likewise, in the labour market, the government requires employers pay workers a wage no less than the regulated minimum.<sup>324</sup>

Applying this to the grocery sector, during the Milk Wars of 2010 the Commissioner could have temporarily established a watching brief of the industry. In response to the price of milk dropping to \$1, the Commissioner could have declared a floor minimum price that a producer may not sell to a wholesaler, and a wholesaler may not sell to a retailer. Then the major supermarkets could not demand that farmers and wholesalers, including their own private label providers, supply milk to them cheaper than the minimum price regulated by the Commissioner. This types of price control could

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<sup>323</sup> Senator Andrew Murray, 'Supplementary Remarks to the Report by the Joint Select Committee on the Retailing Sector' (1999).

<sup>324</sup> Andrew Schotter, *Microeconomics* (Harper Collins, 2009) 59.

constrain the major supermarket chains from demanding to be charged so little for supply and also charging consumers so little for these products in an attempt to squeeze out the competitors.

A price ceiling on the other hand, is a maximum price at which a good can be bought. Governments impose price ceilings in response to complaints that the market price is too high. The purpose is to help consumers who must pay the prices. For example, the US Government controlled oil prices in the early 1970s stipulating that US firms could not charge more than a stated maximum price of US\$5.25 per barrel of crude oil; the equilibrium price was well over US\$10 per barrel at that time.

Price ceilings have previously been utilised in the Australian National Electricity Market (**NEM**). The established specialised regulator is the Australian Energy Regulator (**AER**) – a body of the ACCC. The AER’s responsibilities include the economic regulation of the electricity transmission and distribution networks in the NEM.<sup>325</sup> Importantly for our analysis, the AER sets a ceiling on the revenues or prices that the owner or operator of a transmission or distribution network can earn or charge during a five year regulatory period.<sup>326</sup> In the NEM, the Transmission Network Service Provider must submit to the AER a revenue proposal and a proposed pricing methodology relating to its transmission services. The AER must assess whether the proposed pricing methodology is consistent with the pricing principles for prescribed transmission services outlined in rule 6A.23 of the National Electricity Rules (**NER**)

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<sup>325</sup> Australian Energy Regulator, *Our Role In Networks* <<http://www.aer.gov.au/networks-pipelines/our-role-in-networks>>.

<sup>326</sup> Australian Energy Regulator, ‘Framework and Approach Paper, Classification of Services and Control of Mechanisms, Energex and Ergon 2010-15’ (2008).



and the AER's pricing methodology guidelines.<sup>327</sup> Similar considerations will need to be taken into account when apportioning running costs and production costs to the final recommended price enforced by the grocery price regulator.

As an alternative, the Commissioner, using the Australian Bureau of Statistics (ABS) Consumer Price Index (CPI) or other industry relevant information, could set a recommended price percentile deviation within which suppliers are permitted to sell the same product to different retailers. This regulation would restrain the amount by which a price offered by a vertically integrated wholesaler to an independent retailer can deviate from that offered to a subsidiary retailer. By not fixing a price but rather a flexible median and deviation, the market is given room to fluctuate naturally whether from the effects of supply and demand or gradual inflation.

For the purpose of the above intervention, all levels of the supply chain – producer, wholesaler and retailer – within vertically integrated enterprises must be treated as separate entities. The object of this regulation would be to eliminate unfair price discrimination where vertically integrated firms supply their own downstream firms on more favourable terms than they do competitor independent firms. This would increase competition as the independent retailer will receive goods on similar terms or within a reasonable range of the same price as the vertically integrated networks.

In determining the revenues or prices that a supplier may charge, the regulator would be required to forecast the revenue requirement of a business to cover its efficient

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<sup>327</sup> Australian Energy Regulator, *Pricing Methodology – amendment to transmission guidelines* <<https://www.aer.gov.au/node/26637>>.

costs<sup>328</sup> and provide a commercial return on capital.<sup>329</sup> The difficulty in defining costs has always been in deciding how operating costs might be apportioned to individual products. It is clear that the cost to a supplier of any product sold is a product of invention. Not just of the purchase price paid for the product in question, but also of the operating costs associated in bringing the product to the market – costs such as wages, light, heating, rent, rates, transport, insurance and so on. When all costs have been paid, whatever is left over is the net margin or profit.<sup>330</sup>

To make this workable and ensure the forces of competition are still at work in the market, it is important to note that suppliers would not be compelled to trade at that minimum price; it would merely set a limit below which they cannot reasonably sell a product below. Standard terms and conditions in each individual supply contract would typically include supplier's price lists and credit terms for different classes of customers. This may include specific discounts and rebates that are available to reflect the quantity and value of goods purchased as well as economies and efficiencies in the production or distribution system. It may also include discounts for the promotion of individual products by the retailer, long-term agreements, and allowances for direct debit payments or for payment on time.<sup>331</sup> Therefore, it is still possible for a large or more efficient retailer, by virtue of the size of its operation, to retain greater negotiating power than an inefficient competitor. To avoid 'secretive' discounts being placed off invoice for favoured retailers such as vertically integrated downstream

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<sup>328</sup> These include operating and maintenance expenditure, capital expenditure, asset depreciation costs and taxation liabilities.

<sup>329</sup> Australian Energy Regulator, above n 326.

<sup>330</sup> Department of Jobs, Enterprise and Innovation, *Off Invoice Discounting and the Prohibition of Sale Below Net Invoice Price*

<<http://www.djei.ie/publications/commerce/2005/groceriesorder/chapter6.pdf>>.

<sup>331</sup> *Restrictive Practices (Groceries) Order 1987* (Ireland), Article 2(1)(c).

firms, it would be a requirement that retailers are not permitted to sell at a price less than the price on the invoice provided by the supplier.

At the satisfaction of the Commissioner, a declared entity or industry may be ‘undeclared’ and alleviated of any additional compliance obligations conferred upon it by declaration. To ensure transparency and fairness, the legislation could include a maximum consecutive time period that an entity or industry may remain declared without review. This will prevent entities or industries from becoming stagnant or unappealing to potential future investment.

The declaration process is another proactive measure to prevent the market from ever reaching the point where concentration through creeping acquisitions is occurring. The threat of such regulatory intervention alone may address many of the flow-on issues associated with creeping acquisitions.

Importantly, the Commissioner’s declaration is not a laying of guilt, but merely a focus of extra attention upon those entities or industries displaying the conditions susceptible to this type of anti-competitive acquisition. A declaration does not prevent declared firms or industries from continuing to grow and expand. The primary objective of the declaration program is to shine light on problematic and potentially detrimental industries and firms. This extra attention is an incredibly persuasive deterrent should those with declared status have in contemplation anti-competitive conduct. Regardless of whether that be organic or through merger and acquisition, as long as it is within the bounds of Australia’s competition law policy it will be permitted to proceed. This policy only becomes restrictive where the growth is

occurring by anti-competitive means.

#### IV CONCLUSION

Economic growth and prosperity involves a continuing process of structural change. Robust and effective competition law is an important element of business regulation in Australia and careful market design and management can deliver market systems that maximise benefits of those reforms while minimising costs and disruptions to consumers. It is vitally important that competition authorities have a means by which to regulate creeping acquisitions in order to protect consumers and promote competition without discouraging economic development and growth. Failing to deal with creeping acquisitions undermines competition and without such a law Australia cannot have the world's best competition framework.<sup>332</sup>

This article has suggested a number of reforms that support introducing an additional merger factor (j) into s 50(3) of the CCA to enable the ACCC to assess the cumulative effect of current and previous acquisitions. In such a situation, an acquisition notified to the ACCC would be judged, not only on the basis of its effect on competition, but on the cumulative effect of it and prior acquisitions. Ancillary recommendations have also been proposed. These include a contemporary interpretation that enlarges the objects of the CCA to explicitly permit prohibition based on anti-competitive intentions towards small enterprise, introducing a mandatory notification regime for mergers that breach high risk thresholds and Commissioner's declarations that bestow a watching brief and extra regulatory obligations on high risk entities or entire

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<sup>332</sup> Zumbo, above n 5, 31.

industries. The article encourages the adoption of multiple models in parallel. For example, in such a situation, an acquisition notified to the ACCC under the mandatory notification provisions or as the result of a declaration would be assessed, not only on the basis of its effect on competition, but on the cumulative effect of it and prior acquisitions.

Competition law is an economic law that must evolve with our understanding of how the economy functions. Adapting merger analysis to this purpose in the manner suggested above is a task which the ACCC and legislature must undertake.

## CHAPTER SIX – CONCLUSION

Creeping acquisitions find their livelihood in a loophole in Australia's current merger regime. In certain industries, firms with significant market power are able to use this practice to continue to grow in dominance often at the detriment of incumbents or, ultimately, consumers. Implementing a practice of creeping acquisitions conceals the true intention of the acquiring firm such that if the same dominance and detriment were to occur in a more rudimentary fashion of merger and acquisition, it would likely be contested and prohibited by the ACCC through the CCA.

In competition law theory, there seems no logical reason why a series of small mergers by a single entity that have the combined effect of substantially lessening competition should escape prohibition when a single merger having the same impact on the market does not.

Australia's competition authority, the ACCC, has repeatedly confirmed that creeping acquisitions are a concerning issue and they are not equipped with sufficient power under the CCA to address this practice. The ACCC affirmed that action would need to be taken in this regard to protect future markets and consumers.<sup>333</sup>

In the previous Chapter, a number of recommendations to counteract this anti-competitive corporate behaviour have been presented. These revolved around the introduction of an additional merger factor (j) into s 50(3) of the CCA. This would enable the ACCC to assess the cumulative effect of the current and previous

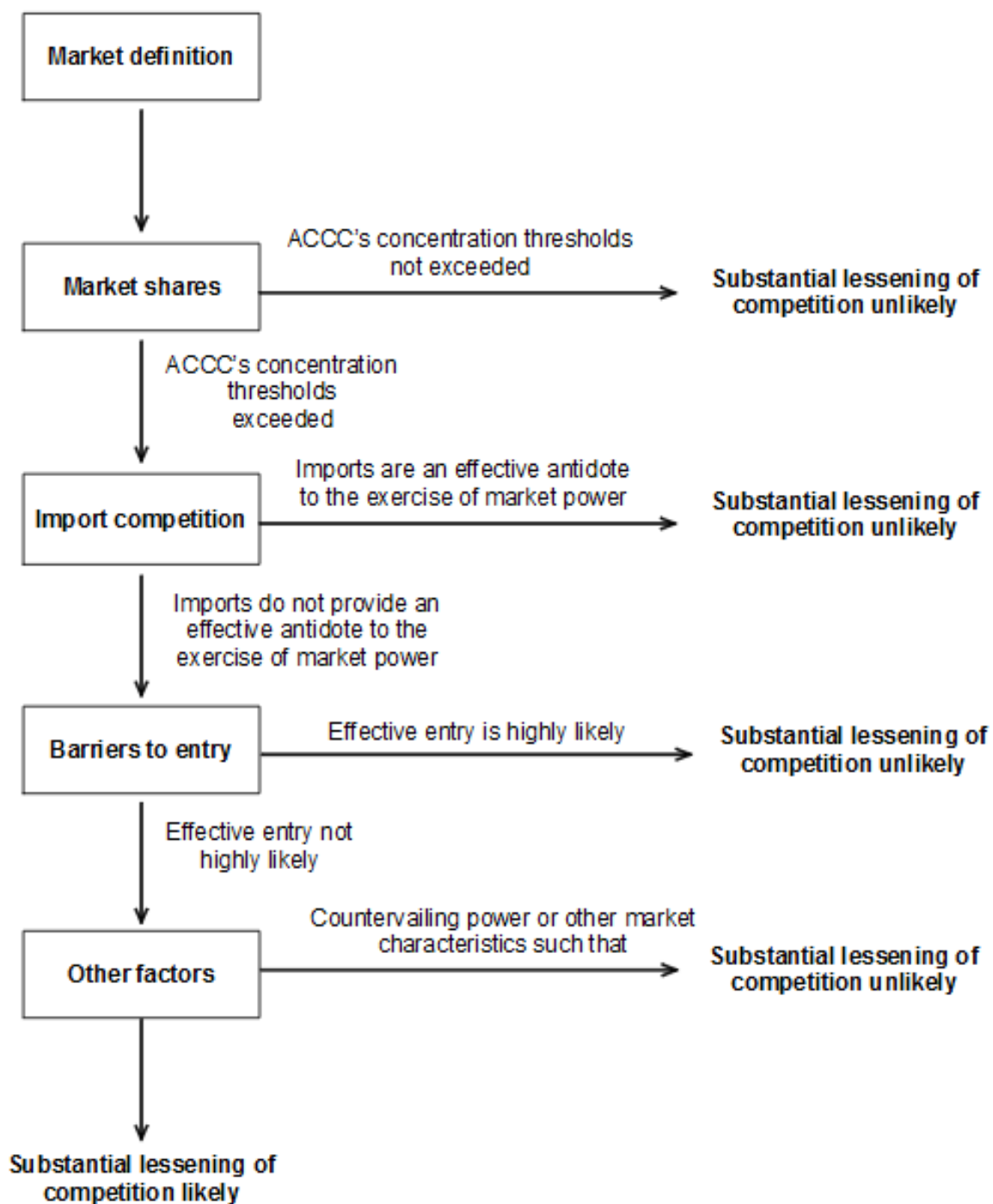
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<sup>333</sup> Grocery Inquiry, above n 78, 427.

acquisitions. In such a situation, an acquisition notified to the ACCC would be judged, not only on the basis of its effect on competition, but on the cumulative effect of it and prior acquisitions. Ancillary recommendations have also been proposed. These include a contemporary interpretation that enlarges the objects of the CCA to explicitly permit prohibition based on anti-competitive intentions towards small enterprise, introducing a mandatory notification regime for mergers that breach high risk thresholds and Commissioner's declarations that bestow a watching brief and extra regulatory obligations on high risk entities or entire industries.

The overarching theme is that Australia must have a competition and consumer law framework that adequately protects against the dangers inherent in creeping acquisitions. Appropriate regulation of creeping acquisitions is essential to ensure a practice that has been largely unregulated in Australia for over 30 years does not continue to interfere with the efficient functioning of markets.

APPENDIX ONE





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