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WHAT IS THE APPROACH ADOPTED BY THE COURTS TO THE MEANING AND OPERATION OF "THE PURPOSE, EFFECT OR LIKELY EFFECT" THRESHOLDS IN THE CONTEXT OF SUBSTANTIALLY LESSENING COMPETITION IN A MARKET IN CASES UNDER SECTIONS 45, 47 AND 50 OF THE COMPETITION AND CONSUMER ACT 2010 (CTH)?

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What is the approach adopted by the Courts to the meaning and operation of "the purpose, effect or likely effect" thresholds in the context of substantially lessening competition in a market in cases under sections 45, 47 and 50 of the Competition and Consumer Act 2010 (Cth)?

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Introduction

The *Competition and Consumer Act 2010 (Cth)* is a statutory mechanism that prohibits anti-competitive conduct in the marketplace. It proscribes any conduct that would '*effect, or be likely to have the effect, of substantially lessening competition*' in the market. By design or otherwise the CCA does not, or has failed to, satisfactorily define essential terms and/or concepts that underpin its operation. That process has been left for the courts.

Defining a 'Market'

The *Competition and Consumer Act 2010 (Cth)* ("**CCA**") does not define 'market' although s. 4E of the CCA states that a market includes *inter alia* "*goods and services that are substitutable for, or otherwise competitive with*" other goods and services.[1] The term '*otherwise competitive*' is synonymous with '*substitutable*'[2] and is not to be narrowly construed in determining the breadth of a particular market.[3]

[1] Goods, supply and resupply are defined at s. 4(1) and s. 4C of the CCA
[2] Boral Besser Masonry Ltd v ACCC [2003] HCA 5; (2003) 215 CLR 374 per McHugh J at [247]; Seven Network Ltd v News Ltd [2009] FCAFC 166 per Dowsett and Lander JJ at [621]; Corones, S. G., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Sydney) at page 69
[3] News Ltd v Australian Rugby Football League Ltd (1996) 58 FCR 447 per Burchett J at 478; Regents Pty Ltd v Subaru (Aust) Pty Ltd (1998) 84 FCR 218 at 237

A 'market' has been referred to as a "*metaphor used to describe a range of competitive activities by reference to function, product and geography.*"[4] There are no universal criteria, other than broad principles,[5] because "[t]*he economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted.*"[6] Therefore, any market definition involves "*value judgments about which there is some room of legitimate differences of opinion.*"[7]

Nevertheless, a market is defined, as advanced in *Queensland Co-operative Milling Association Ltd*[8] ("QCMA"), as*:*

> *"... the area of close competition between firms or ... the field of rivalry between them... Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the 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 a sufficient price incentive.... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and costs 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... much of a reaction? And if so, from whom?"*[9]

Defining a market is consequential on the existence of anti-competitive conduct. For example, when anti-competitive conduct is identified, the market (using economic principles) is defined and this is then used to analyse the effect of that anti-competitive conduct on that identified market.[10]

There are four fundamental dimensions to a market: product, geographic, functional[11] and temporal.[12] The product and geographic dimensions of a market are defined by the demand and/or supply[13] side substitutability which identifies whether particular goods and/or services are substitutable with any other similar goods and/or services having regard to, for example, changes in price.[14] The substitutability between products and/or services must be comparable when defining the product and geographic dimensions of the market.[15]

Central to the concept of substitutability is the relative ease between suppliers or buyers substituting products and/or services with comparable alternatives when there is a small but significant non-transitory increase in price ("SSNIP").[16]

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[4] Universal Music Australia Pty Ltd v ACCC (2003) 131 FCR 529 per Wilcox, French and Gyles JJ at [53]
[5] Queensland Co-operative Milling Association Ltd (1976) 8 ALR 481; (1976) 25 FLR 169; [1976] ATPR 40-012 ("QCMA")
[6] Queensland Wire Industries Pty Ltd v Broken Hill Co Ltd [1989] HCA 6 per Deane J at [7]; (1989) 167 CLR 177 at 196
[7] Queensland Wire Industries Pty Ltd ibid per Deane J at [7]; (1989) 167 CLR 177 at 196
[8] Queensland Co-operative Milling Association Ltd (1976) 8 ALR 481; (1976) 25 FLR 169; [1976] ATPR 40-012 ("QCMA")
[9] QCMA op. cit., [1976] ATPR 40-012 page 29-30; The High Court approved that definition in Queensland Wire Industries Pty Ltd op. cit.; also see TPC v Australia Meat Holdings Pty Ltd (1988) 83 ALR 299; ATPR 40-876 per Wilcox J at 49,480; ACCC v Baxter Healthcare Pty Ltd [2008] FCAFC 141 at [339]
[10] That approach is referred to as the '*purpose approach*' and is favoured by the tribunals and courts: Queensland Wire Industries Pty Ltd v Broken Hill Co Ltd (1987) 17 FCR 211 at 218-219; Seven Network Ltd v News Limited (2007) ATPR (Digest) at 46-274 per Sackville J at [1763]; Queensland Wire Industries Pty Ltd v Broken Hill Co Ltd [1989] HCA 6; (1989) 167 CLR 177 per Deane J at 195; Australian Competition & Consumer Commission Merger Guidelines (2008) amended at [4.9]; Norman and Wilson "*The analysis of Markets and Competition under the Trade Practices Act: Towards the Resolution of Some Hitherto Unresolved Issues*" (1983) 11 Australian Business Law Review 396 at 400-401.
[11] The '*functional dimension*' refers to a scenario that products may exist in different stages of production that may not be competing with the company/corporation under investigation: QIW Retail Ltd v David Holdings Pty Ltd (No 3) (1993) 42 FCR 255; ATPR 41-226; David Holdings v Attorney General (Cth) (1994) 49 FCR 211 at 229; Seven Network Ltd v News Ltd [2009] FCAFC 166 at [705] – [737]; Corones, S. G., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Sydney) at pages 91 – 98; Smith, R. L., et al "Functional Market Definition" (1996) 4 CCLJ 1
[12] The '*temporal dimension*' evaluates the changing nature of markets over time and imposes a time frame that considers the substitution possibilities with respect to identified competitors: Re AGL Cooper Basin Natural Gas Supply Arrangement (1997) ATPR 41-593; Duke Eastern Gas Pipeline (2001) 162 FLR 1; Corones, S. G., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Sydney) at pages 98 - 101
[13] Stirling Harbour Services Pty Ltd v Bunbury Port Authority (2000) ATPR 41-752; ACCC v Australian Medical Association (WA) (2003) 1999 ALR 423; Re New Zealand Ophthalmology (unreported, Gendall J, New Zealand Wellington Registry CIV-1997-485-34 CP 354/97, 1 March 2004);
[14] Corones, S. G., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Sydney) at page 64
[15] Re QCMA (1976) 25 FLR 169 at 190; Re Howard Smith Industries Pty Ltd (1977) 28 FLR 385 at 394-395; Rural Press Ltd v ACCC (2002) 118 FCR 236 per Whitlam, Sackville and Gyles JJ at 268 [111]; Also note that supply substitutability is equally as relevant as demand substitutability: Queensland Wire Industries Ltd v Broken Hill Pty Co Ltd [1989] HCA 6; (1989) 167 CLR 177 per Dawson J at 199; per Toohey J at 210
[16] Australian Rugby Union Ltd v Hospitality Group Pty Ltd [2000] FCA 823; Seven Network Ltd v News Ltd [2009] FCAFC 166

An economic model, referred to as the 'Hypothetic Monopolist Test' ("HMT")[17], was developed to determine whether product and/or service substitutability would occur and over what geographical area when a SSNIP was introduced. The HMT uses quantitive data (i.e. costs, prices, revenue and sales) collected over a sufficient period of time[18] and uses that data to determine how changes in prices by a firm effects the demand for its products or services.[19]

The HMT test focuses on determining what products, within a geographic area, are likely to be substituted for alternative products if there were a 5% to 10% SSNIP.[20] Consider for example, if the hypothetical monopolist supplier could profitably impose a 5-10% SSNIP, then the market is correctly defined. If, however, the supplier could not impose a 5-10% SSNIP then the breadth of the proposed market is reduced until the market tolerates that SSNIP. The market is, theoretically, defined as the smallest product, service or geographic area over which a hypothetical monopolist could profitably impose a 5-10% SSNIP.[21]

The HMT test is used to ensure, if possible, that the market is not construed too narrowly or broadly as both will effect whether or not the conduct is interpreted as anti-competitive.[22]

Defining a market, however, is a subjective process. The products and/or services included or excluded in defining a market depends upon judicial penchant for a particular economic theory as espoused by competing economic experts. These theories are, however, constantly evolving as exemplified by the changes in economic thought from the Harvard School[23] to the post Chicago School[24] of economic rationalism. These imprecise and evolving economic tools are further used to forecast the composition of future markets with and/or without the alleged anti-competitive conduct. Having regard to the imprecision and subjectivity of defining a market it is foreseeable that markets could be, from time to time, incorrectly defined.

'Substantially Lessening Competition'

The phrase '*substantially lessening competition*'[25] is a core element in triggering the anti-competitive provisions of ss. 45, 47 and 50 of the CCA. However the term '*substantial*', which is not defined, has been described as "*imprecise and ambiguous...* [and could] *mean considerable or big...* [or] *not merely nominal, ephemeral or minimal.*"[26]

The courts have adopted a descriptive flexible test for 'substantial' that evaluates whether the anti-competitive conduct has a '*meaningful or relevant*' effect on the competitive process.[27] That is the impugned conduct must have

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[17] Also referred to as the SSNIP
[18] Sufficient period of time varies depending on the issue under investigation but ranges from 12 months upwards: Re AGL Cooper Basin Natural Gas Supply Arrangement (1997) ATPR 41-593; Duke Eastern Gas Pipeline (2001) 162 FLR 1; Re QCMA (1979) 25 FLR 169
[19] ACCC v Metcash Trading Ltd [2011] FCAFC 151 per Yates J at [248]
[20] ACCC v Liquorland (Australia) Pty Ltd (2006) ATPR 42-123 at [789] & [797]; Seven Network Ltd v News Ltd [2007] FCA 1062 per Sackville J at [1786] – [1787]; Seven Network Ltd v News Ltd [2009] FCAFC 166; Miller, R.V., "Miller's Australian Competition and Consumer Law Annotated" (34th Ed) (2012, Lawbook Co, Australia) at 311;; also see Australian Competition & Consumer Commission Merger Guidelines (2008) amended at [4.19]
[21] Miller op cit., at 311
[22] ACCC v Metcash Trading Ltd [2011] FCA 967 per Emmett J at [136]; Gardiner, J., "The continuing saga of market definition: QIW Retailers Ltd v Davids Holdings Pty Ltd (1995) 3 TPLJ 177 at 178;
[23] Mason, "The Current Status of the Monopoly Problem in the United States' (1949) 62 Harvard Review 1280; Bain in '*Barriers to New Competition*' (1959, Harvard University Press, Massachusetts)
[24] Hovenkamp, "Post Chicago Anti-Trust: A Review and Critique" (2001) Columbia Business Law Review 257; Salop, "Strategic Entry Deterrence" (1979) American Economic Review 335; Krattenmaker, "Per se Violations in Antitrust Law: Confusing Offences with Defences" (1988) 77 Georgetown Law Journal 165
[25] Fogarty, J. G., "Running the mischief rule over appellate decisions trans-Tasman (2011) 18 CCLJ 224; Vautier, K. M., "Theory vs Evidence? Or designer vs economic law? Comments on 'Running the mischief rule over appellate decisions trans-Tasman' by Fogarty J' (2011) 18 CCLJ 236
[26] Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd [1982] FCA 206 per Lockhart J at paragraph [26]; (1982) 62 FLR 437 at 444; Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 64 FLR 238 per Smithers J at 260
[27] Stirling Harbour Services Pty Ltd v Bunbury Port Authority [2000] FCA 38 per French J at [114]

a meaningful or relevant effect on lessening[28] competition which adversely effects marketplace competition.[29] The word 'substantially' in this regard does not, presumably, impose a high threshold test when considering whether competition has been lessened.[30]

In *Rural Press Ltd v ACCC*[31] the High Court held that the term 'substantial' or 'meaningful or relevant' meant that the conduct had to be "*substantial in the sense of being meaningful or relevant to the competitive process,*"[32] that is "*the lessening of competition must be at least real or of substance... substantially in the sense of considerably.*"[33]

The term 'lessening' is effected by s. 4G which includes reference to '*preventing or hindering competition*.' In *Australian Wool Innovations Pty Ltd*[34] Hely J stated:

> "'*Prevents' suggests a total cessation of dealings between third persons and the target; 'hinders' suggests that they have been made more difficult... 'Hinder' in the context of s 45D has received a broad construction, as in any way affecting to an appreciable extent the ease of the usual way of supplying or acquiring goods or services*" [35]

'Competition' is not defined[36] but is referrable to commercial or economic principles.[37] Those economic principles, in essence, involve the notion of substitutability of products and/or services in response to changing prices or the quality of supplied products.[38] It is the process and/or conditions existing in the marketplace.[39] The USA's National Committee to Study the Antitrust Law noted that competition is essentially referrable to economic concepts and stated:

> *"The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers action in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements."*[40]

Sections 45, 47 & 50 of the CCA

Section 45(2) of the CCA, read with s. 4D, proscribes inserting provisions in contracts, arrangements or understandings[41] that restrict dealings and/or effect competition. These provisions are either prohibited *per se*[42] or subject to the competition test.

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[28] Lessening includes preventing or hindering; also see section 4G of the CCA
[29] Stirling Harbour Services Pty Ltd v Bunbury Port Authority [2000] FCA 38 per French J at [114]; Ergas, H., "Stirling Harbour Services v Bunbury Port Authority: A review of some economic issues." (2002) 10 CCLJ 27 Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193 per Wilcox, French and Gyles JJ at [242]; Rural Press Ltd v ACCC [2003] HCA 75 per Gummow, Hayne and Hayden JJ at [41] (2003) 216 CLR 53 at 71
[30] Rural Press Limited v ACCC [2003] HCA 75 per Gummow, Hayne and Hayden JJ at [41]; (2003) 126 CLR 53 per Gummow, Hayne and Hayden JJ at 71 [41]
[31] Rural Press Limited op. cit., at [41] and the discussion at footnote [26]
[32] Rural Press Limited op. cit. at [41]
[33] Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd (1982) 44 ALR 557 per Lockhart J at 564; Eastern Express Pty Ltd v General Newspapers Pty Ltd (1991) 30 FCR 385 per Wilson J at 420-422; Rural Press Limited op. cit., at [41] and the discussion at footnote [26]
[34] Australian Wool Innovations Pty Ltd v Newkirk (2005) ATPR 42-053
[35] Australian Wool Innovations op, cit., per Hely J at [34]; ACCC v Liquorland (Australian) Pty Ltd [2006] FCA 826 at [88]
[36] Section 4(1) states 'competition' includes competition from *inter alia* imported goods.
[37] Re QCMA (1976) 25 FLR 169 at 187-188; (1976) ATPR 40-012 at 17245-17246; Land, J., et al "The meaning of Competition" (2010) 24 NZULR 98
[38] Adamson v West Perth Football Club (1979) 39 FLR 199 at 224
[39] Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd (1982) 66 FLR 120 at 124; (1982) ATPR 40-327 at 43,983
[40] Miller, R. V., "Miller's Australian Competition and Consumer Law Annotated" (34th Ed) (2012, Lawbook Co. Riverwood) at page 582.
[41] Hereinafter 'contacts, arrangements and understandings' will be referred to collectively as 'contracts'
[42] "*Per se*: of, in, or by itself; standing alone, without reference to additional facts; As a matter of law" Black's law Dictionary (9th Ed) (2009, West, USA); Section 45(2)(a)(i) &/or 45(2)(b)(i) of the CCA

Section 47(1) of the CCA, read with s. 4G, proscribes the practice of exclusive dealings that restrict and/or refuse *inter alia* the supply[43] and/or acquisition of goods or services to other parties. Exclusive dealings, as exemplified in s. 47(10), are prohibited if the '*purpose, effect or likely effect*' substantially lessens competition.[44] It is worth noting that the simultaneous reliance on s. 45(2) and s. 47(1) cannot occur due to the disqualifying provision of s. 45(6) of the CCA.

Both ss. 45(2) and 47(10) (and perhaps s. 50(1)-(3)) have similar thresholds allowing the analysis of one to be equally applicable to the other.[45]

Section 50(1) & (2)[46] applies to acquisitions[47] by a corporation[48] or person[49] of shares[50] and assets. The '*substantially lessening competition'* test in s. 50(1) & (2) may differ from that of s. 45(2) and 47(10) in that it concentrates on whether there is or is likely to be a reduction in competition if the merger or acquisition were to occur.

The test employed under s. 50 compares the factual effect of the merger/acquisition against the counterfactual (without) effect of the merger/acquisition having regard to its competitive impact[51] and/or the likely harm to the market[52] and/or consumers.[53] The ACCC adopts a quantitative and qualitative approach when evaluating possible anti-competitive mergers/acquisitions.[54]

The Thresholds

The meaning and operation of the principles underpinning the application of the '*purpose, effect or likely effect*' thresholds are similar under ss. 45 and 47 but the latter (i.e. 'likely effect') may be different under s. 50 of the CCA.

Sections 45(2)(a)(ii), 45(2)(b)(ii), 47(10)(a) & 50(3) prohibits three different types of conduct contained in provisions inserted into contracts that give rise to: a) the purpose, b) the effect or c) the likely effect of substantially lessening competition.

a) Purpose

The term '*purpose*' under ss. 45(2) and 47(10) is read with ss. 4D and 4F of the CCA. In general, the 'purpose' is nothing more than achieving the desired outcome for which the provision was inserted into the contract.[55]

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[43] Supply and resupply are defined at s. 4(1) but need to be read with s. 4C(b)-(e) of the CCA
[44] Visy Paper Pty Ltd v ACCC (2003) 216 CLR 1 at 20 [58]
[45] Corones, S. C., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Australia) at p 578
[46] Section 45(7) excludes for the operation of s. 45 with respect to a contract that provides 'directly or indirectly' of the acquisition of any shares in the capital of a body corporate or any assets of a person.
[47] Acquire in relation to acquisition is defined at s. 4(4)(a) & (b) of the CCA
[48] Corporation defined in s. 4(1) of the CCA
[49] The uniform Competition Policy Reform Acts apply the Competition Code (see Part XIA and Sch 1) to individuals. Schedule 1 contains a direct equivalent to s. 45 (and presumably the entire CCA) which applies to all 'persons': Miller, R. V., 'Miller's Australian Competition and Consumer Law Annotated' (34th Ed) (2012, Lawbook Co, Australia) at [1.45.15] page 572; Also see s. 2C of the *Acts Interpretation Act 1901 (Cth)* that states: "*In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "one", "another" and "whoever") include a body politic or corporate as well as an individual*".
[50] Granting of an option in shares is deemed to be an acquisition: TPC v Arnotts (1990) ATPR 41-062
[51] Section 50(3) of the CCA provides a list of criteria in determining whether mergers/acquisition under ss. 50(1) & (2) would substantially lessen competition.
[52] Market is specifically defined under s. 50(6)
[53] Corones, S. C., "Competition Law in Australia" (5th Ed) (2010, Lawbook Co, Australia) at p 308
[54] ACCC Merger Guidelines (November 2008) at [4.28]-[4.31]
[55] News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45; (2003) 215 CLR 563

The 'objective' test under s 45(2)(a)(i) and 45(2)(b)(i) and 4D focuses on the offending provision rather than the whole of the contract.[56] An exclusionary provision is *per se*[57] prohibited. It is, therefore, irrelevant whether the offending provision was inserted into a contract for a legitimate commercial reason.[58]

The 'subjective' test[59] under s. 45(2)(a)(ii) and 45(b)(ii), read with s. 4F, deems that if the provision inserted into a contract has the, direct or indirect, purpose of substantially lessening competition then it is proscribed. It is only necessary to demonstrate that the purpose was 'a' substantial purpose not 'the' substantial purpose that lessens competition.[60] Moreover, s. 4F contemplates an enquiry into a corporation's[61] purpose(s) for the inclusion of the provision in a contract.[62] That enquiry is not concerned with a corporation's motive[63] but rather its commercial objectives.

It is irrelevant whether the purpose was impossible to achieve. All that is required is whether the provision had an effect on anti-competitive conduct.[64] In *Universal Music Australia Pty Ltd v ACCC*[65] the court said:

> *"The paragraph is satisfied if the relevant corporation has the requisite purpose, regardless of whether or not that purpose has been, or was or is likely to be, achieved. It may conceivably be satisfied even in a case where the Court finds the purpose could never in fact have been achieved."* [66]

b) Effect

The terms '*effect*' or '*given effect to*" under ss. 45(2)(a)(ii), 45(2)(b)(ii), 47(10)(a) and 50(1) – (3) are read in conjunction with s. 4(1)[67] and s. 4D[68] of the CCA. The meaning of 'effect' is essentially the *prima facie* enforcement of the inserted provision in a contract. It is a "*relatively simple concept requiring examination of the results.*"[69]

It is an 'objective' test[70] that disregards a corporation's[71] subjective reason(s)[72] for inserting and/or enforcing the anti-competitive provision in the contract. The focus of the analysis is the effect (including a corporation's inaction[73]) of the anti-competitive provision in the contract.

c) Likely effect

The phrase '*likely effect'* or *'likely to have the effect'* under ss. 45(2)(a)(ii), 45(2)(b)(ii), 47(10)(a) and 50(1) – (3) is read in conjunction with s. 4(2) & 4(3) of the CCA.

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[56] South Sydney District Rugby League Club Ltd v News Ltd [2001] FCA 862; News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45 at [50]; (2003) 215 CLR 563 at [59]
[57] See footnote 41 above
[58] South Sydney District Rugby League Club Ltd v News Ltd [2001] FCA 862 at [158]; Rural Press Ltd v ACCC [2002] FCAFC 213; (2002) 118 FCR 236
[59] Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10 per Toohey J at 38; ASX Operations Pty Ltd v Pont Data Australia (No 1) (1990) 27 FCR 460 at 476-477; News Ltd v South Sydney District Rugby League Football Club Ltd (2003) 215 CLR 563 at 573 per Gleeson CJ at [18]
[60] ACCC v Liquorland (Australia) Pty Ltd (2006) FCA 826 at [810] & [831]; (2006) APTR 42–123
[61] See footnote 48 above
[62] Seven Network Ltd v News Ltd [2009] FCAFC 166 at [851]
[63] News Ltd v South Sydney District Rugby League Football Club Ltd [2003] HCA 45; (2003) 215 CLR 563 at [18]
[64] Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193 at [249]
[65] Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193
[66] Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193 at [249]
[67] Section 4(2) defines certain actions that '*give effect to*' anti–competitive conduct
[68] Section 4D defines "*exclusionary provisions*"
[69] Dowling v Dalgety Australia Ltd [1992] FCA 35 per Lockhart J at [107]; (1992) 34 FCR 109
[70] Rural Press Limited v ACCC (2003) 126 CLR 53; Gallagher v Pioneer Concrete (NSW) Pty Ltd (1993) 113 ALR 159; cf. Dowling v Dalgety Australia Ltd [1992] FCA 35; (1992) 34 FCR 109
[71] See footnote 48 above.
[72] Tradestock Pty Ltd v TNT (Management) Pty Ltd (No 2) (1978) 32 FLR 420
[73] Dowling v Dalgety Australia Ltd [1992] FCA 35 per Lockhart J at [102] – [107]; (1992) 34 FCR 109

The phrase '*likely effect*' has two possible meaning: a) '*more likely that not*' (i.e. on the balance of probabilities)[74] and/or b) '*real chance*' (i.e. somewhere less than probable).[75]

In *Tillmanns Butcheries Pty Ltd*[76] the Full Court of Federal Court considered the meaning of the term 'likely' under s. 45D(1)(b) of the CCA and stated that it could mean: '*probable', 'more probable than not', 'more than 50 percent chance', 'material risk', 'some possibility', 'more than a remote or bare chance*"[77] or, as Deane J stated, '*a real or not remote chance or possibility regardless of whether it is less or more than 50 per cent*." [78]

In *Monroe Topple & Associates*[79] the meaning of 'likely' was considered with respect to s. 47(10) of the CCA. Heerey J stated: '"*Likely" does not mean "more likely than not". It is sufficient that there is a real chance or possibility that a substantial lessening of competition will occur…. Tillmanns was a case under s 45D of the Act, but the reasoning of Deane J is equally applicable to the concept of likely effect in s. 47(10)*'[80]

The '*real chance*' interpretation has been subsequently applied in cases involving breaches to s. 50[81] 45(2)(a)(ii), s. 45(2)(b)(ii)[82] and s. 47(10)[83] although the Full Court of the Federal Court in *Universal Music Australia*[84] was only prepared to assume "*for the purpose of argument*" that the 'real chance' test applied.[85]

It is suggested that the 'real chance' approach permits the tribunal or courts to infer from the established facts the likely consequences of the contract/merger or acquisition [86] when analysed from the point when the contract/merger or the impugned conduct occurred. [87] As explained by French CJ the 'real chance' approach involves judicial judgement. His Honour said:

> "*The word likely has been construed in terms of a 'real chance or possibility'. It does not require a finding that a substantial lessening of competition is more likely than not. It offers no quantitative guidance but requires a qualitative judgment about the level of anti-competitive risk associated with the proposed conduct. The judgement is necessarily evaluative and purposive. Set too high, it may have the result that conduct well within the policy of the Act is not prevented or penalised. Set too low, it may sweep up conduct well within the scope of ordinary competition.*[88]

The 'real chance' test is a subjective hypothetical judgment based on possibility rather than probability in ascertaining the likelihood that a contract/conduct/merger would substantially lessen competition. The 'real chance' approach is a "*kind of competition risk management policy*"[89] with the potential of nonfeasance. Using possibilities

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[74] TPC v Ansett Transport Industries (Operations) Pty Ltd (1978) 32 FLR 305
[75] Tillmanns Butcheries Pty Ltd v Australasian Meat Industries Employees' Union [1979] FCA 85; (1979) 42 FLR 331; Monroe Topple & Associates Pty Ltd v Institutes of Chartered Accountants In Australia [2002] FCAFC 197
[76] Tillmanns Butcheries Pty Ltd v Australasian Meat Industries Employees' Union [1979] FCA 85; (1979) 42 FLR 331 - this case involved anti-competitive conduct under s. 45D of the CCA.
[77] Tillmanns Butcheries Pty Ltd op. cit., per Bowden CJ at [34]
[78] Tillmanns Butcheries Pty Ltd op. cit., per Deane J at [10]
[79] Monroe Topple & Associates Pty Ltd v Institutes of Chartered Accountants In Australia [2002] FCAFC 197; (2002) 122 FCR 110
[80] Monroe Topple & Associates Pty Ltd op. cit. per Heerey J at [111]
[81] AGL v ACCC (No 3) [2003] FCA 1525 per French J at [343] states: ''*likely' refers to a 'significant finite probability or 'a real chance' rather then "more probable than not*"; (2003) 137 FCR 317 at [343]
[82] ACCC v Liquorland (Australia) Pty Ltd [2006] FCA 826; Seven Network Ltd v News Ltd [2009] FCAFC 166; (2009) 182 FCR 160
[83] Universal Music Australia Pty Ltd v ACCC [2003] FCAFC 193; (2003) 131 FCR 529; ACCC v Baxter Healthcare Pty Ltd [2008] FCAFC 141
[84] Universal Music Australia Pty Ltd op. cit.
[85] Universal Music Australia Pty Ltd op. cit., per Wilcox, French and Gyles JJ at [247]
[86] Hereinafter merger and acquisition will be commonly referred to a 'merger'
[87] TPC v TNT Management Pty Ltd [1985] FCA 23 per Franki J at [280]; (1985) 6 FCR 1 at 50; (1985) ATPR 40-138; Universal Music Australian Pty Ltd v ACCC 92003) 131 FCR 529 at [247]
[88] French, Chief Justice, "Dolores Umbridge and Policy as Legal Magic" (2008) 82 Australia Law Journal 322 at 329
[89] ACCC v Metcash Trading Ltd [2011] FCAFC 151 per Buchannan J at [88]

to determine the probability to predict future events contravenes the fabric of Australian civil law jurisprudence[90] and in particular s. 140(1) of the *Evidence Act 1995 (Cth).*[91]

Recently in *ACCC v Metcash Trading Ltd*[92] Emmett J reintroduced the probability test at least for determining counterfactual issues in alleged anti-competitive conduct under s. 50.[93] On appeal the Full Court of the Federal Court[94] had an opportunity to resolve whether the test for 'likely' under s. 50, and perhaps ss. 45(2) and 47(10), was 'on the balance of probabilities', 'real chance' or a combination of both. Finn J declined to express a view on the "*proper construction of, and standard of proof*" that was required.[95] Yates J noted there would be difficulties of utilizing both tests but was not required to determine whether the '*real chance*' test applied to the issues raised by the primary judge.[96] Buchannan J, on the other hand, stated that the relevant test should be, at least in s. 50 applications, on the balance of probabilities.[97]

His Honour Justice French once said that in assessing the likelihood or 'real chance' of anti-competitive conduct the substantially lessening competition test "*cannot rest upon speculation or theory.*"[98] Yet the judicial endorsement of the 'real chance' test appears counterintuitive in achieving that desired outcome.

Conclusion

Economic principles/theories provide broad predictive tools in defining and forecasting markets. The interpretation of a 'market' is a subjective exercise based on judicial penchant. The nature, composition and breadth of the defined market materially effects whether anti-competitive conduct exists.

The threshold tests, in the main, are determined as *per se* prohibition or subject to the competition test which employs a balance of probabilities thresholds.

The exception is the meaning ascribed to the term '*likely effect*" which embodies a 'real chance' test. That test uses possibilities to determine probabilities. Not only is the use of the 'real chance' test counterintuitive to the courts' desire to avoid decisions based on '*speculation or theory'* it is alien to Australian jurisprudence.

The concepts beneath the CCA are complex and evolving. The courts have grappled with defining and applying those concepts to ss. 45, 47 and 50 in an increasing intricate and complex marketplace.
However, the subjective interpretation of a market juxtaposed with the 'real chance' test

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[90] Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66 per Mason CJ, Brennan, Deane & Gaudron JJ at [2]; (1992) 110 ALR 449 at 170-171; Pedler v Richardson (unreported NSW SC, Young J, October 1997)
[91] The same provision exists at s. 140 of the *Evidence Act 1995 (NSW);* Also see ALRC 1985 Interim report (ALRC 26) vol 1 para 998
[92] ACCC v Metcash Trading Ltd [2011] FCA 967
[93] ACCC v Metcash Trading Ltd [2011] FCA 967 per Emmett J at [145] – [146]
[94] ACCC v Metcash Trading Ltd [2011] FCAFC 151

[96] ACCC v Metcash Trading Ltd op. cit., per Yates J at [226] – [237] particularly at [230]
[97] ACCC v Metcash Trading Ltd op. cit., per Buchannan J at [23] – [90] particularly at [88] – [89]
[98] AGL v ACCC (No 3) [2003] FCA 1525 at [348]; Rural Press Ltd v ACCC [2003] HCA 75 per Gummow, Haynes and Heydon JJ at [45]; (2003) 216 CLR 53 at [45]

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WHAT IS THE APPROACH ADOPTED BY THE COURTS TO THE MEANING AND OPERATION OF "THE PURPOSE, EFFECT OR LIKELY EFFECT" THRESHOLDS IN THE CONTEXT OF SUBSTANTIALLY LESSENING COMPETITION IN A MARKET IN CASES UNDER SECTIONS 45, 47 AND 50 OF THE COMPETITION AND CONSUMER ACT 2010 (CTH)?

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