COMPETITION POLICY REVIEW

SUBMISSION

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I wish to make submissions on the Panel's Draft Recommendation on misuse of market power (s 46).

While a judge of the Federal Court I sat on a number of competition cases, including *Melway* (Full Court) and *Boral* (trial). Both my judgments in those cases were subsequently upheld by the High Court.

The purpose test remains

The need to prove purpose, or intent, or some particular state of mind, has been a feature of many areas of the law, both civil and criminal, for hundreds of years. I am not sure such a requirement creates insuperable problems in the particular field of competition law.

In any case, I see that the recommendation does not suggest removing the purpose test; it simply adds an effects test. So presumably it is thought worthwhile putting up with the supposed difficulties.

The present s 46 requires the relevant corporation to have one or more of the proscribed purposes.

The recommended section would prohibit the corporation "engaging in conduct if the proposed conduct has the purpose ... of substantially lessening competition".

Two textual problems emerge. First, the section seems to be talking about both conduct which is actually happening ("engaging in conduct") and conduct which is not happening but may happen in the future ("proposed conduct").

Secondly, conduct itself is an objectively ascertainable series of actions or inaction. Conduct itself cannot have a purpose; the purpose is that of the persons who engage in the conduct, as the present section provides.

The effects test

Turning to the proposed additional alternative of "effect", while accepting that crude head-counting cannot be conclusive, it does seem worth noting that the clear majority of expert bodies who have examined this issue over the years do not favour an effects test.

Law operates not only as a kind of pathology, with lawyers and judges sifting through the detritus of past events, but also as a guide to future conduct.

Under the proposed section, a firm making a decision would have to agonise over the effects in the future on competition in a market. For a start, this would require working out just what was the market in which a substantial degree of power was held, and then what other possible markets might fall within the rubric of "any other market". This can lead to disagreement between learned economists and lawyers, and even judges. (*Mea culpa* moment. In *Boral*, I got the market definition issue wrong – according to the High Court – although upheld on other issues.)

Then there is the predictive speculation as to whether behaviour as a result of the proposed decision would "lessen" the abstract concept of competition, and, if so, whether "substantially".

While I agree with the principle of focussing on competition rather than competitors, the present section does have the practical advantage of specifying clearly identifiable conduct which is inherently likely to lessen competition. Of course competition usually involves competitors having the purpose of eliminating or substantially damaging each other. But the present section ties the prohibition into competition regulation by specifying that such purpose must accompany taking advantage of a substantial degree of power in the market.

Taking advantage of market power

While there may be subtle nuances in judicial discussions, and an unhelpful statement of the bleeding obvious in s 46(6A), the concept itself is simple and understandable. It embodies the notion that there is nothing wrong with

having market power – what should be prohibited is the abuse of that power in a way which harms competition.

The fact that at times it is difficult to ascertain whether there has been a "taking advantage" is not to the point. Very often clear and logical laws have to be applied in borderline fact situations where there is room for argument. That in itself is not a criticism of the law. Down the ages countless lawyers have infuriated clients by opining that the application of a law "depends on the facts and circumstances of each particular case".

The present law has developed a useful rule of thumb: if particular conduct could be followed by a firm without any, or any substantial, market power it is a good indication that a firm with substantial market power engaging in such conduct is not "taking advantage" of that power.

This has the great benefit that decision-makers can apply their practical knowledge of what goes on in their particular field of business: what is usual, what is done, or not done, by competitors. By contrast, requiring business decision-makers to speculate as to what economists and judges might think the "market" to be, or whether competition is "lessened", and if so "substantially", is to impose a new level of unpredictability in areas in which most decision-makers would have no particular expertise.

The recommended section would include a "rational business decision" exculpation, but adds a requirement that the effect will "benefit the long term interests of consumers". How long is "long"? One is reminded of John Maynard Keynes' aphorism "In the long run we are all dead".

And surely the worthy object of enhancing competition is something for the benefit of competitors as well as consumers. Firms will be encouraged to invest, to innovate, to take risk, if they know their prospect of profit will be enhanced by their market will have legal protection against abuse of market power.

"Likely to have"

The uncertainty facing a firm is compounded by the extension of the proposed conduct to that which "would be likely to have" the proscribed effect. The present s 46 contains no equivalent.

The meaning of "likely" has provoked controversy in the context of the merger provision (s 50). Does it mean the ordinary standard of proof in civil litigation – ie the balance of probabilities, more likely than not? Or is it sufficient if there is a "real chance"?

There is a conflict in the authorities. The balance at the moment is probably in favour of the latter. I have argued, however, that this is wrong: see the attached article *Shootout at the Real Chance Café: Aiming s 50* (2011) 39 Australian Business Law Review 451.

In summary, I argue in relation to s 50:

- Standard dictionaries (Shorter Oxford, Macquarie) give meanings such as "probable", "liable", "expected".
- Those dictionaries do not give as a meaning "real chance" or anything like it.
- In ordinary speech, saying half a dozen horses had a "real chance" of winning the Melbourne Cup would not be taken as meaning that each horse is "likely" to win.
- The beguiling argument that we need to catch conduct which has a 49.9% chance of producing the prohibited result necessarily requires the same conclusion if the chance is only 30% or 20% - but none the less "real".
- The inclusion of "likely" may be due to the Commonwealth legislative philosophy of overdrafting to cover every conceivable eventuality: see dialogue in the attached article at pp 461-462. (I should make it clear that I do not suggest that this comes from some courageous whistleblower.)

Underlying this interesting linguistic debate is a vital policy issue, applying just as much to s 46 as to s 50.

Successful business and economic prosperity requires positive decisions, usually involving risk. To add another layer of uncertainty, as to what some economists or judges might regard as "substantially lessening competition in (this) or any other market" makes it just that much more likely (in my preferred sense), that the decision-makers will think "It's just too risky".

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SHOOTOUT AT THE REAL CHANCE CAFÉ: AIMING s 50

A merger will be unlawful if it "would have the effect, or be likely to have the effect, of substantially lessening competition in a market".[1]

In marked contrast to s 52,[2] disputes under s 50 reach the courts infrequently. The reason is obvious enough; the applicable commercial environment usually cannot be frozen for a year or two while litigation wends its way through the courts. In practice the Australian Competition and Consumer Commission (ACCC) will usually decide, via the authorisation or informal clearance processes, whether the merger can proceed.[3]

According to the recent decision of Emmett J in *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] ATPR 42-368; FCA 967 at [134]-[146], s 50 requires the following steps:

- The applicant must establish future scenarios as to the state of the relevant market with and without the proposed merger, that is to say the competing "counterfactuals";
  - Those counterfactuals must be established on the balance of probabilities;
  - The applicant must then establish that there is a "real chance" that the merger counterfactual, compared with the no-merger counterfactual, will result in a substantial lessening of competition in the relevant market.

Is this approach based on a misreading of the language of s 50, and in particular the word "likely"? Should the "real chance", rather than the ordinary civil standard of proof, have been adopted? What is the proper role, if any, for "counterfactuals"?

"LIKELY" IN THE CASES

The term "likely" appeared in s 50 and many other provisions of the *Trade Practices Act 1974* (Cth) when it was introduced in 1974. An early s 50 case was *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305; 20 ALR 31[4] which concerned Ansett's proposed takeover of the Avis car rental company. Northrop J did not in terms discuss the meaning of "likely" but in holding that the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 should apply his Honour said that "the civil standard of proof is to be applied", thus necessarily adopting the criterion of the balance of probabilities.[5]

Not long after *Ansett* the term "likely" became the subject of detailed attention in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331; 27 ALR 367 a case concerning the secondary boycott provisions of s 45D. Bowen CJ, with whom Evatt J agreed, said:

> The word "likely" is one which has various shades of meaning. It may mean "probable" in the sense of "more probable than not" – "more than a fifty per cent chance". It may mean "material risk" as seen by a reasonable man "such as might happen". It may mean "some possibility" – more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified.[6]

His Honour referred to *Australian Telecommunications Commission v Kreig Enterprises Pty Ltd* (1976) 14 SASR 303; 27 FLR 400 in which Bray CJ held that "likely", in the particular context of that

[1] *Competition and Consumer Act 2010* (Cth) s 50(1) and (2), previously *Trade Practices Act 1974* (Cth) s 50. The provisions are directed to the acquisition of shares or assets. It will be convenient to use the shorthand term "merger" hereafter.

[2] The author cannot quite bring himself to refer to "s 18 of Pt 2-1 of Ch 2 of Sch 2 of the *Australian Consumer Law*".

[3] Because of the delays involved there are remarkably few applications for authorisation of mergers. The public register on the Australian Competition and Consumer Commission (ACCC) website indicates that the Commission is not currently entertaining any applications for authorisation of a merger and has not dealt with any since 2007 when the public register started. Parties nearly always go down the informal clearance path – unless they wish to challenge the ACCC in the Federal Court.

[4] The *Trade Practices Act 1974* (Cth) at this time had been amended to make control or dominance, rather than SLC, the relevant criterion. However, this would not seem to be material to the present issue.

[5] *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305; 20 ALR 31 at 52.

[6] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331; 27 ALR 367 at 275.

case,[7] meant "more probable than not". After noting American cases which held that "may" in s 3 of the *Clayton Act* meant more than a mere possibility and varied from "potential" to a "probability", Bowen CJ concluded by declining to prefer one meaning over another; whatever meaning was adopted the applicant in the case presently before the court would succeed. At the very least, the majority in *Tillmanns* treated "more probable than not" as a meaning of "likely" that was respectably open and arguable.

Deane J, however, in a passage which has proved to be influential, expressed a firm preference for the "real chance" meaning of "likely".[8] His Honour accepted that "'likely' could in some contexts, mean 'probably' in the sense in which that word is commonly used by lawyers and laymen, that is to say, more likely than not or more than a 50 per cent chance". However, his Honour drew on the analogy of foreseeablity in the law of negligence to postulate "a real or not remote chance, regardless of whether it is less or more than 50 per cent". His Honour gave the example of firing a rifle through drawn curtains into a quiet lane in a country village: not more likely than not that a passerby would be injured, but "a real chance or possibility (or likelihood in that sense)" that such a result would eventuate.

His Honour rejected the view of Bray CJ in *Kreig* that "likely" should particularly be construed as meaning "probable" in a penal statute or one imposing an additional liability in tort. On the contrary, Deane J thought that where the statute proscribed conduct likely to cause loss or damage to another, the legislature should not be presumed to have intended "that conduct which has a 49.9 per cent chance of causing such damage was to be outside the proscription".

Deane J made a comment, echoed in later cases, to the effect that "[i] would have or [ii] be likely to have" in s 45D suggests a lower standard for [ii], otherwise [i] is redundant. Both limbs would mean the same thing.

His Honour concluded that it will suffice for the purposes of s 45D that there is a "real chance or possibility" that the conduct will, if pursued, cause loss or damage.

None of the judges in *Tillmanns* mentioned the earlier Trade Practices Tribunal decision in *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385; 15 ALR 645. In dealing with an authorisation application the Tribunal said that its task involved "a consideration of commercial likelihoods" which meant not that the like effects must be more probable than not but that "there must be a tendency or real possibility of a particular result following from the refusal of an authorisation".

Later cases dealing with "likely" in provisions of the Act other than s 50 adopted Deane J's *Tillmanns* statement, although, it is fair to say, without independent analysis: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 at 87 (s 52), *News Ltd v Australian Rugby League Football Ltd* (1996) 64 FCR 410 (s 4D), *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 at [111] (s 47(10)).[9]

Australian Gas Light Company v Australian Competition and Consumer Commission (No 3) (2003) 137 FCR 317 was a merger case. French J reviewed extensively the legislative history of s 50[10] and its construction,[11] including the meaning of "likely".[12] In his Honour's opinion, the statutory context provided by other sections of Pt IV indicated that "'likely' refers to a significant finite

[7] Section 139B of the *Post and Telegraph Act* (Cth) 1901-1973.

[8] *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331; 27 ALR 367 at 380-382.

[9] The astute reader will recognise the present piece as something of a Damascene conversion.

[10] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [320]-[336].

[11] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [337]-[356].

[12] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [342]-[348].

probability or a 'real chance' rather than 'more probable or not'".[13] His Honour made the same comment as Deane J had as to the redundancy of the first limb ("would have the effect") if it meant the same as the second limb ("would be likely to have the effect")[14] His Honour concluded:

> The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisitions s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the *Howard Smith case*, the Court is concerned with "commercial likelihoods relevant to the proposed merger". The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration – *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at [41].[15]

In *Metcash* Emmett J adopted the view of French J in *AGL*. His Honour also mentioned the redundancy point.[16]

"LIKELY" IN THE DICTIONARIES

Standard dictionaries in use in Australia give meanings of "likely" consistent with "probable" or "more likely than not":

- "probably" (*Shorter Oxford English Dictionary*);
- "probable, liable, expected" (*The Oxford Thesaurus*); or
- "probably or apparently going or destined (to do, be, etc)" (*Macquarie Dictionary*).

True it is that these are not the only meanings given. For example, the *Shorter Oxford* gives meanings of "likely" as an adverb, in addition to "probably":

- Similarly;
- With close resemblance (in portraiture); and
- In a fit manner, suitably, reasonably.

But the dictionaries do not give any meaning which might suggest "likely" is used, as an ordinary English word, in the sense of "a real chance", or anything like it.

"LIKELY" IN EVERYDAY SPEECH

If one said that half a dozen named horses all had a "real chance" of winning the Melbourne Cup, it would not make sense to go on to say that each horse was "likely" to win. As Lord Hodson said in *C Czarnikow Ltd v Koufos* [1969] 1 AC 350 at 410, the common use of the word "probable" is that something is more likely to happen than not, that there is "an odds-on chance".

SECTION 50 AS A STATUTORY TORT

Section 82 of the Act confers a right of action for the recovery of loss or damage suffered by conduct of another done in contravention of a provision of, inter alia, Pt IV, which includes s 50. Further provision for compensation is made by s 87. As Gleeson CJ said in *Henville v Walker* (2001) 206 CLR 470, a s 52 case:

> Section 82 of the Act is the statutory source of the appellants' entitlement to damages. The only express guidance given as to the measure of those damages is to be found in the concept of causation in the

[13] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [343].

[14] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [347].

[15] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [348].

[16] *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] ATPR 42-368; FCA 967 at [135].

> word "by". The task is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case. The purpose of the statute, so far as presently relevant, is to establish a standard of behaviour in business by proscribing misleading and deceptive conduct, whether or not the misleading or deception is deliberate, and by providing a remedy in damages. The principles of common law, relevant to assessing damages in contract or tort, are not directly in point. But they may provide useful guidance, for the reason that they have had to respond to problems of the same nature as the problems which arise in the application of the Act. They are not controlling, but they represent an accumulation of valuable insight and experience which may well be useful in applying the Act.[17]

Someone seeking damages, an injunction, penalty or other relief must establish that the respondent has contravened a provision of the Act. It will be recalled that in *Tillmanns* Deane J said in effect that it was not to be presumed that, in proscribing conduct that is likely to cause loss or damage to another, the legislature intended that just because conduct had a less than 50% chance of causing such loss it would not be caught by the proscription.

But that is not how the common law, or statutes imposing civil liability, usually work. Courts do not say that because there was a real chance that the defendant drove through a red light, the plaintiff should recover damages. Legislators, in providing for civil liability for contravention of statutes, must be taken to recognise that most forms of relief, if granted, will be unpalatable and burdensome for the party against whom the relief is granted. It is a matter for those seeking such relief to a make out a case.

In the particular case of s 50 there is this further consideration. Mergers are not a per se offence. Unlike some other conduct, such as most forms of price-fixing, mergers are not by their nature inherently evil and anticompetitive. On the contrary, mergers can be highly beneficial for the community, as well as the parties. Mergers may bring about synergies which increase efficiencies and improve productivity, expand business and create jobs and wealth. Doubtless such considerations were behind the comments of the Attorney-General, the Hon Michael Duffy MP, when in the Second Reading speech for the 1992 amendments to the Act he said that mergers can lessen competition and on the other hand can be a valuable source of increased efficiency or other public benefits. He went on to say:

> Such possible benefits require that a line be drawn between those mergers which are likely to be beneficial and those which are likely to be detrimental to the community as a whole.

In citing this passage in *AGL*[18] French J said:

> Although it seems plausible that the word "likely" in that passage was being used in the sense of "more probable than not", such speculation is not a useful guide to construction.

The author disagrees. The *Acts Interpretation Act 1901* (Cth) provides that extrinsic materials may be used, inter alia, "to confirm that the meaning of the provision is the ordinary meaning conveyed by the text".[19] A Second Reading speech is specifically designated as one form of extrinsic material that may be so used.[20] Indeed, in any hierarchy of extrinsic material the Second Reading speech must rank highly. The responsible Minister, on behalf of the government, is telling legislators being asked to vote for a Bill what its purpose is. What Mr Duffy said is not a matter of "speculation" (like a "real chance" is speculation). He is simply making the factual point that many mergers are not harmful to society, or even just neutral, but positively beneficial.

If the spectrum of mergers ranges from the anticompetitive to the positively beneficial, it seems counter-intuitive to outlaw a merger which has only a chance (albeit a "real" one) of being anticompetitive, even though it has a better chance of being community-benefiting or pro-competitive. Deane J's beguiling hypothesis of the 49.9% chance would not seem so attractive when the chance was only 30%, or even 20%, with a corresponding chance of a beneficial result being 70% or 80%.

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[17] *Henville v Walker* (2001) 206 CLR 470 at [18].

[18] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [342].

[19] Section 15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth).

[20] Section 15AB(2)(f) of the *Acts Interpretation Act 1901* (Cth).

By the same token, French J's "competition risk management policy"[21] does not fit with a setting in which these issues are resolved by litigation inter partes. Usually parties to a merger have reached an arms-length agreement for reasons which seem good to them. Such agreements are not inherently, or even prima facie, anticompetitive. It seems hardly unfair that those who seek to prevent such an agreement, or recover compensation for it, should have to persuade a court that it is more probable than not that the merger will substantially lessen competition, even if that probability is only 50.1%.

THE DAMAGES ANALOGY

In *Metcash*[22] Emmett J drew a distinction between proof of historical facts on the one hand and proof of future possibilities and past hypothetical situations on the other. The civil standard, his Honour said, applies to the former but not the latter. He treated as analogous the task of the court in assessing damages on the degree of probability that an event would have occurred, or might have occurred. He referred to *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 350. In *AGL*[23] French J also referred to *Sellars*; the real chance of a substantial lessening of competition was said by his Honour to be analogous to the assessment of damages for loss of a future commercial benefit or opportunity.

In *Sellars*, a s 52 case, the High Court applied the approach adopted in personal injury cases involving future possibilities and past hypothetical situations.[24] Had the plaintiff not been injured, what would have been the future possibilities for earning income? But s 50 poses a different question. A particular factual state of affairs must be established: that the merger would have, or be likely to have, an effect of a specified kind. Either the merger can be so characterised, or it cannot. That the relevant state of affairs lies (or does not lie) in the future is not a reason for treating s 50 differently from the rest of the universe of common law and statutory civil liability. The tort of defamation is committed by publishing a statement which is likely to have a particular effect, that of lowering the plaintiff in the estimation of right-thinking members of society.[25] The tort is committed on publication, the necessary tendency is something which must lie in the future. Recklessness in the criminal law requires awareness of a substantial risk,[26] that is awareness of what might happen in the future, yet that does not alter the standard of proof of recklessness, proof beyond a reasonable doubt.

THE REDUNDANCY POINT

It is said that if "would be likely to have the effect" is referring to a probability, then "would have the effect" also has the same meaning because the usual civil onus of the balance of probabilities would be taken as applying. So the two limbs would mean the same thing and the first limb would be unnecessary and redundant.

The short answer is that an awkwardness of drafting should not lead to a reading which commits the greater sin of ignoring the ordinary meaning of words.

An explanation may lie in the traditional culture of Commonwealth legislative drafting. To close every conceivable loophole and avoid the remotest possibility of misunderstanding, refinements and qualifications and explanations and subtle nuances are heaped on the text.

Speaking of the words "likely to mislead or deceive" in s 52, Gibbs CJ said in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 that the words, inserted by amendment in 1977,

> add little to the section; at most they make it clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone.

With s 50, perhaps its form followed a conference in the Office of Legislative Drafting something

[21] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [348].

[22] *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] ATPR 42-368; FCA 967 at [141].

[23] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [356].

[24] *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638.

[25] Gatley JCC, *Gatley on Libel and Slander* (8th ed, Sweet & Maxwell, 1981) pp 41.

[26] For example, the *Criminal Code* (Cth) s 5.4(2).

along the following lines:

> Drafter 1: We're going to need a section banning anticompetitive mergers.
>
> Drafter 2: All right. What about a section prohibiting a merger "which would have the effect of substantially lessening competition"?
>
> Drafter 1: That's fine for an obvious case, like a Coles-Woolworths merger, but what if it's not completely clear?
>
> Drafter 2: It's to be a civil liability, so in a case that's a bit borderline the court would have to be satisfied on the balance of probabilities that there would be a substantial lessening of competition.
>
> Drafter 1: That's probably right, but to be on the safe side, why don't we just stick in "or would be likely to have the effect of substantially lessening competition"?
>
> Drafter 2: OK then. Now what about morning tea?

COUNTERFACTUALS

The term "counterfactual" is not found in the Act. It appears to have entered the discourse of merger regulation quite recently. In the 618 paragraph judgment in *AGL* in 2003 the term appears only once in passing, in a reference to the evidence of an economist witness.[27] The term was introduced in the Irish merger guidelines in 2004, though it was not picked up in the European Commission's horizontal merger guidelines of the same year.[28] The term is not used in the United States Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines 2010*.[29]

By the time of *Metcash*, however, the term has been elevated to a quasi-legislative status, with its very own standard of proof (balance of probabilities) which is different from that applicable to the ultimate question of substantial lessening of competition (real chance).

The term has probably been borrowed from the field of historiography. What if Napoleon had won at Waterloo? What if the Japanese had bombed Singapore instead of Pearl Harbour? Although dismissed by some historians – E H Carr regarded it as "a mere parlour game"[30] – others have been more understanding. Hugh Trevor-Roper said:

> At any given moment in history there are real alternatives ... How can we "*explain*" what happened and "*why*" if we only look at what happened and never consider the alternatives ... It is only if we place ourselves before the alternatives of the past ..., only if we live for a moment, as the men of the time lived, in its still fluid context and among its still unresolved problems, if we see those problems coming upon us, ... that we can draw useful lessons from history.[31] (original emphasis)

A fine example of the genre is the collection *Virtual History: Alternatives and Counterfactuals*, edited by Niall Ferguson.[32]

But the concept of counterfactual is an awkward fit in merger analysis. A counterfactual involves comparing an unarguably true fact (Napoleon loses at Waterloo) with an unarguably false fact (Napoleon wins at Waterloo) and speculating what might have followed from the latter. Section 50 requires a prediction of possible future scenarios, the market with and without the merger.

Introducing "counterfactuals" into the s 50 forensic process as if they were elements of a cause of action, with consequences for pleadings, particulars etc, is an unnecessary complication. It tends to encourage over-precise and restrictive particularisation of what must be proved. Clearly enough

[27] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [545].

[28] Comment by Karen Gibbons, a Partner at Freehills, Melbourne.

[29] Comment by Brent Fisse, Principal of Brent Fisse Lawyers, Sydney.

[30] Carr EH, *What is History* (2nd ed, Penguin Books, 1987) pp 44.

[31] Trevor-Roper H, *History and Imagination* (Clarendon Press, 1980) p 363.

[32] Ferguson N (ed), *Virtual History: Alternatives and Counterfactuals* (Basic Books, New York, 1997).

merger analysis requires prediction, looking at a world with and without the proposed merger.[33] It is just that the concept of the counterfactual seems to lead to a distortion of the forensic process. A detailed discussion of this question will be found in the paper of Peter R Taylor delivered to the Workshop of the Competition Law & Policy Institute of New Zealand in August 2010.[34] Mr Taylor argues against "the use of possible worlds and hypotheses rather than an evaluation of the facts and the exercise of judgment".

CONCLUSION

"Likely" is an ordinary, non-technical, English word. It does not mean "real chance". To give it that meaning in s 50 departs from the usual standard of proof applied in civil litigation and runs the risk that positively beneficial mergers will be prohibited.

As to "counterfactuals", perhaps the s 50 issues could be restated along the following lines:

1) What will be the state of the relevant market if the merger or acquisition proceeds?
2) What will be the state of the market if the merger or acquisition does not proceed?
3) Does 1 compared with 2 amount to a substantial lessening of competition?
4) (All questions to be on the balance of probabilities with the onus on the applicant.)

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Judge of the Federal Court of Australia 1990-2009

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Responsibility for views expressed is solely the author's.

[33] Although the merger may have already occurred, with the potential of orders for divestment. In *Australian Competition and Consumer Commission v Metcash Trading Ltd* [2011] FCA 1079, the court has refused an injunction pending the appeal and the merger has proceeded.

[34] Reference supplied by Brent Fisse. Taylor PR, *Keeping it Real – Escaping the Oppression of the Counterfactual and Return to Factual Analysis* (Paper presented to the Workshop of the Competition Law & Policy Institute of New Zealand, 6-7 August 2010).