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The Change from a Dominance to a Substantial Lessening of Competition Test in Australia's Merger Law

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1. Introduction

Australia's merger law originally prohibited mergers that substantially lessen competition; it then changed the law to prohibit only mergers that gave rise to or strengthened dominance; it then reverted to the original test. My paper will include a brief overview of the history of Australia's merger law, discussing why we made the change from dominance to SLC, focussing on the experience of the change, the lessons learned, and how it has affected merger regulation and market structures in Australia.

The paper also includes a discussion of the somewhat distinctive authorisation process under which anticompetitive mergers may not be blocked if they can be demonstrated to be of sufficient benefit to the public.

The paper also briefly discusses the review that is currently underway in Australia to examine Australia's competition law, including the merger provisions.

2. Australia's merger law

Merger regulation in Australia is administered under its general competition law – the *Trade Practices Act 1974* (TPA), by the competition regulator – the Australian Competition and Consumer Commission (ACCC). Mergers can be considered under the TPA in one of two ways.

2.1 Section 50 test

Section 50 of the TPA prohibits mergers or acquisitions which would have the effect or likely effect of *substantially lessening competition* in a *substantial market* for goods or services in Australia. If the ACCC considers that a merger is likely to contravene s.50 of the TPA, it must take action within the Federal Court of Australia to prevent the merger occurring, or to seek divestiture or other orders if the merger has already taken place.

The ACCC also has the option of negotiating a mutually acceptable outcome with the parties in order to avoid the costly and time consuming process of going to court. The ACCC can do this by accepting court enforceable undertakings, under s.87B of the TPA, from the parties that sufficiently allay the ACCC's concerns about the likely anticompetitive effects from a merger or acquisition.

However if the parties to a merger are not willing to offer such undertakings to the ACCC, or the terms of the undertaking cannot be agreed upon, the ACCC must then take action within the Federal Court to obtain an injunction to prevent the merger. It is therefore the Federal Court that is the final arbiter of merger matters that are considered under the s.50 merger review path.

In its analysis of the likely competitive outcome of a merger or acquisition the ACCC adopts a five step process, as follows:

- Definition of the market in its product, geographic and time dimensions; and ascertaining whether it is a substantial one.

- Gauge concentration levels: The ACCC has adopted twofold concentration thresholds below which it is unlikely to intervene in a merger. Generally speaking, if the merged entity would have a market share of more than 40%, that would suggest the possibility of unilateral market power. Alternatively, if it would have a share of more than 15% and the post-merger combined market share of the four largest firms would be greater than 75%, that would suggest the possibility of coordinated market power. In either of the above two concentration situations, the ACCC would want to give the proposed merger further consideration. Concentration below the twofold threshold has come to be known as the 'safe harbour' and the ACCC is normally unlikely to proceed further as the merger would usually be considered to be unlikely to substantially lessen competition.

- Where the merger crosses either of the concentration thresholds, the ACCC will seek to assess whether actual or potential imports would be likely to constrain the merged entity. If they are, the merger is unlikely to be considered to substantially lessen competition.

- If the merger crosses either of the concentration thresholds and imports are not seen to be an effective constraint, the ACCC will examine whether there are significant barriers to the entry of new competitors.

- In a concentrated market, unconstrained by imports and characterised by significant entry barriers, the ACCC will examine whether any other factor, such as:

  - countervailing bargaining power;

  - the availability of substitute product from spare, expandable or convertible capacity;

  - dynamic factors including growth, innovation or product differentiation in the market; or

  - the elimination or creation of a vigorous and effective competitor,

  suggests that a substantial lessening of competition is likely.

2.2 Authorisation process

A second option available to parties wishing to merge is that of 'authorisation'. Authorisation is a process of gaining immunity from legal proceedings if the ACCC is satisfied that, in all the circumstances, the merger would result, or be likely to result, in such a benefit to the public that it should be allowed to take place (s.90(9)). In other words, under the authorisation process, it is not necessary for the ACCC to show that the

merger substantially lessens competition; it need only be satisfied that it gives rise to public benefit and that such benefit outweighs the lessening of competition.

The ACCC is the primary body for adjudication of applications for authorisation of mergers (and certain types of anticompetitive conduct capable of authorisation). The Australian Competition Tribunal (the Tribunal) is a body established by the TPA to review various determinations of the ACCC. It is headed by a judge of the Federal Court but normally includes an economist and a person with business experience.

The Tribunal reviews authorisation determinations of the ACCC in relation to mergers, on the application of any interested party ie. by an aggrieved merger party (usually where the proposal has been denied authorisation); or by competitors, customers or consumers opposing a merger, (usually where authorisation has been granted).

Authorisation is not lightly, nor often granted, and the process is rigorous and transparent. The onus is on the applicant to satisfy the ACCC that there is sufficient public benefit; the process is transparent with the applicant's submission required to be public (other than in relation to confidential commercial data); interested parties such as customers, consumers, suppliers and competitors may make submissions and may participate in the process in various ways and may appeal against decisions of the ACCC, including decisions to authorise the merger; the ACCC must publish detailed reasons for decisions; the ACCC has 30 or 45 days to consider the matter depending upon its complexity, but appeals to the Tribunal take considerably longer, usually some months.

In fact merger authorisation is, in practice, rare. The ACCC each year seriously considers around two hundred or more mergers on the grounds of whether they might affect competition and of them about one authorisation every couple of years has been allowed.

Nevertheless, there has been interesting case law since 1974 concerning the concept of public benefit.

Public benefit is not defined in the TPA. The approach of the Tribunal, however, suggests that the authorisation process starts from the position that competition considerations are paramount; that the concept and approach to the assessment of public benefit begins with the assessment of competition and its impact on the efficient use of resources for the progress and benefit of society; and that the term should be given its widest possible meaning. It said:

> Public benefit has been, and is, given a wide ambit by the Tribunal as, in the language of QCMA[1] (at 17,242), 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'. Plainly, the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass 'progress' ; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.

In its merger guidelines, the ACCC says:

> 6.45 Furthermore, when comparing the situation that is likely to prevail with and without the proposed merger, it is critical to consider the likely durability of the claimed public benefits.

In *Howard Smith Industries Pty. Ltd.* the Tribunal said:

> If a merger is likely to result in the achievement of economies and a considerable cost saving in the cost of supplying a good or service this might well constitute a substantial benefit to the public, even though the cost saving is not passed on to the consumers in the form of lower prices. Nevertheless, if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the Tribunal, because the benefits are not being spread widely among the members of the community.[2]

The above extracts from some Tribunal determinations clearly show that competition is the overriding consideration, the starting point for analysis, and the backdrop against which claimed public benefit, including enhancement of the competitive process, is to be viewed in the assessment of an authorisation application. While cost savings from productive efficiencies are regarded as a benefit there is some bias to consumer surplus. The test itself is strict, with the goal of economic efficiency, through competition, clearly forming the overwhelming weight of consideration.

One important consequence of the authorisation process is that claims that mergers are justified are the grounds of their contribution to efficiency or public benefit are not considered under the s. 50 competition test, giving s. 50 a clarity it might not otherwise have.

Section 90 (9A) was included in the TPA in 1993 in recognition of the need to take international factors into account in assessing the benefit of mergers. It provides that in an application for authorisation of mergers:

> In determining what amounts to a benefit to the public for the purposes of sub-section (9):
>
> (a) the [ACCC] must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
>
> (i) a significant increase in the real value of exports;
>
> (ii) a significant substitution of domestic products for imported goods; and
>
> (b) without limiting the matters that may be taken into account, the [ACCC] must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Australia's experience in the consideration of merger authorisations shows that:

- Anticompetitive effects in some areas, outweighed by the benefits of efficiencies from rationalisation and increased competition generated by the merger, applying in wider areas, justifies the grant of authorisation in occasional cases.

- However, it would be incorrect to conclude that the test of ‘benefit to the public’ allows scope for subjective, inconsistent or unpredictable decisions. When account is taken of the weight given to competition issues and to economic efficiency (even then, within a competition analysis framework), it is clear that the concept of public benefit has not opened up a Pandora’s box of arbitrary decision making. This is clear from the detailed decisions published by the ACCC and Tribunal.

2.3 Treatment of efficiencies

Efficiencies can be considered under both the s.50 process and the authorisation process. The ACCC specifically recognises efficiencies as one of the factors it will consider in a merger investigation, and its approach to the treatment of efficiency arguments is outlined in its Merger Guidelines.

Generally the ACCC believes that the efficiency enhancing aspects of a merger may be relevant in the context of s.50 to the extent they may increase the competitiveness of markets.

Where a merger enhances the efficiency of the merged firm, for example by achieving economies of scale or by effectively combining research and development facilities or yet by other means, it may in some cases have the effect of creating a new or enhanced competitive constraint on the unilateral conduct of other firms in the market, or it may undermine the conditions for coordinated conduct. Pecuniary benefits, such as lower input prices due to enhanced bargaining power, may also be relevant in a s.50 context.

If efficiencies are likely to result in more competition and lower (or not significantly higher) prices, increased output and/or quality of goods or services, the merger may not substantially lessen competition.

While recognising that precise quantification of such efficiencies is not generally possible, the ACCC will require strong and credible evidence that such efficiencies are likely to accrue and that the claimed benefits are likely to follow.

In addition, s.50 need not prove to be an absolute impediment to mergers that result in a substantial lessening of competition if it can be demonstrated under the authorisation process that they generate other public benefits such as increased efficiencies and/or international competitiveness which outweighs the anti-competitive detriment. Under the authorisation process the broader aspects of efficiencies, not only those relating to the competitiveness of markets, may be relevant. They may not be considered, however, under the s.50 process.

3. The Australian experience

3.1 History

The following is a brief time line of major events and changes in the history of merger regulation in Australia:

- 1965 – a limited form of antitrust law was introduced which led to the cessation of some anticompetitive behaviour, but there was no merger law. In some industries where anticompetitive horizontal restrictions were eradicated, mergers occurred between the firms that had previously engaged in the restriction.

- 1974 – merger control provisions first introduced in Australia in the TPA in 1974 to prohibit mergers which "… were likely to have the effect of substantially lessening competition in a market for goods or services".

- 1976 – merger provisions reviewed by the *Swanson Committee*[3], that supported the retention of the SLC test with a minor change to exclude insignificant mergers from consideration.

- 1977 – despite the recommendation of the Swanson Committee, the Government decided to change the test to prohibit mergers which would result, or be likely to result, in the merged entity being in a position to control or dominate a market, or where such an existing position was substantially strengthened as a result of the merger.

- 1983 – a green paper[4] issued by the Attorney General's Department resulted in removal of the word 'control' from the test, largely on the grounds that the term was redundant, given that dominance, a lesser standard, was included in the prohibition. However, one other change made to the TPA at that time involved the abuse of dominance test being changed to an abuse of market power test.

- 1989 – the Griffith Committee[5] recommended retention of the dominance test on the basis that it found insufficient evidence to justify a change.

- 1991 – following a vigorous campaign by the ACCC (then the Trade Practices Commission) the Cooney Committee[6] recommended a reversion to the SLC test, and the Government adopted the report.

- 1993 – the SLC test came into effect and was accompanied by a statutory, non-exhaustive, list of merger factors to be taken into consideration by the ACCC during its examination of a merger proposal under s.50 of the TPA (s.50(3)).

Australian courts saw dominance as unilateral market power and continued to do so throughout the period that test was extant. In the period 1977 – 1993 the Australian courts did not adopt concepts of collective dominance.

The Australian Government has recently instituted a Committee of Inquiry to review the competition provisions of the Trade Practices Act which has been empowered, among other things, to consider whether the TPA provides sufficient recognition for globalisation factors; the ability of Australian companies to compete globally; and whether it provides an appropriate balance of power between small and big business. This includes a consideration of the merger provisions. The Terms of Reference for the Committee of Review say, in part:

> In establishing a review, the Government is aware of concerns, among other things:
>
> - that Australian businesses increasingly face global competition and need to compete locally and internationally;
> - that excessive market concentration and power can be used by businesses to damage competitors; and
> - the need for businesses to have reasonable certainty about the requirements for compliance with, or authorisation under, the TPA.
>
> The Committee is to review the operation of the competition and authorisation provisions of the TPA, specifically Parts IV (and associated penalty provisions) and VII, to determine whether they:
>
> (a) inappropriately impede the ability of Australian industry to compete locally and internationally;
>
> (b) provide an appropriate balance of power between competing businesses, and in particular businesses competing with or dealing with businesses that have larger market concentration or power;
>
> (c) promote competitive trading which benefits consumers in terms of services and price;…

However, an interesting feature of the inquiry, which is due to report in late 2002, is that there has been virtually no support for the reintroduction of a dominance test, even from the big businesses and legal groups which opposed its repeal in 1993.

Of the major business group submissions, the Law Council of Australia rejected a return to dominance, whilst the Business Council of Australia, the Australian Chamber of Commerce and Industry and Australian Business Ltd made no reference at all to the dominance test. The Australian Industry Group floated the possibility of a return to the dominance test in their submission but stopped short of recommending it. The Institute of Public Affairs is the only organisation that has advocated for a return of the mergers dominance test in their submission to the TPA Review.

There has, however, been support by the Business Council of Australia for the inclusion of an efficiency defence in s. 50 of the TPA rather than leaving this defence as a matter to be considered in the authorisation process. The ACCC has opposed this, claiming it is best reserved for the authorisation process and it remains to be seen what the outcome of the inquiry is.

3.2 Reasons for change

Section 50 of the TPA originally prohibited any merger or acquisition likely to result in a substantial lessening of competition in a market for goods and services in Australia.

The 1976 amendments changed the mergers test from SLC to dominance, the rationale being that the amendments were necessary to enable and encourage mergers to proceed. The government of the day believed that it was necessary to allow more mergers to take place so that Australian firms could achieve economies of scale and improve international competitiveness.

The fundamental problem with this test was that it failed to prevent a significant category of mergers that were likely to substantially lessen competition. It only prohibited a subset of anticompetitive mergers, namely mergers that created or enhanced dominance. This seemed wrong in principle.

Throughout the 1980s and into the 1990s there was considerable debate as to the appropriateness of the dominance test. The Australian application of the dominance test was questioned after a number of significant mergers led to high levels of concentration in major industries (see examples in section 3.3).

There were also criticisms that the dominance test had failed to deliver the gains in efficiency and international competitiveness that would supposedly be achieved by allowing more mergers.

The SLC test allows the ACCC to deal explicitly with cases that raise issues regarding coordinated market power. In a concentrated market with only a few firms those firms will find it easier to lessen competition by colluding. It was recognised that this can be achieved without unlawful explicit agreement through subtle forms of tacit coordination, coordinated interaction or conscious parallelism.

Proponents of an SLC test also argued for change on the grounds of consistency. Substantial lessening of competition was the test underpinning much of the conduct provisions in the TPA and there was concern that a less rigorous merger test could lead to serious anomalies. For example, outcomes that may be in breach under other conduct provisions, such as the prohibition on anticompetitive agreements, may be achievable through a merger.

This important point of principle was strengthened even further in the Australian context because if some anticompetitive mergers are justified they can still be permitted under the authorisation test. Thus, given the authorisation process, to a degree, the change in Australian merger law could be seen as an adoption of the principle that any anticompetitive merger would be scrutinised by the regulator and indeed prohibited unless a serious case based on public interest considerations could be established.

The ACCC also expressed concern about markets that had either been recently disaggregated, de-regulated or were candidates for imminent deregulation where mergers short of dominance were likely to defeat the objectives of deregulation. This was likely to arise in sectors such as electricity, gas and telecommunications.

In small, open economies like Australia import competition is an important element in assessing competitive outcomes. However, it is in areas not subject to the discipline of imports, such as those in deregulating industries and the broader non-traded goods sector that significant harm can occur to the economy if the higher levels of concentration seen under dominance are allowed to develop.

Anticompetitive outcomes in oligopolistic markets (a characteristic of the Australian economy) where those market participants supply into competitive markets that are themselves subject to import competition, could seriously damage the competitiveness of those firms in industries subject to competitive discipline form imports.

The contention that the SLC test would prevent mergers desirable for Australia's competitiveness did not seem strong. The case for national champion mergers is often weak; it is strongest in sectors exposed to import competition, but in these sectors the ACCC does not oppose mergers and authorisation remains available.

A further argument advanced in favour of the SLC test is that in the absence of an appropriate merger law some mergers would give rise to increased market power which in turn would be likely to give rise to more regulation, whether of prices or of anticompetitive behaviour of one kind or another facilitated by the merger. The counter argument to this is that any potential harm from an anticompetitive merger would be avoided by the application of competition law. However, this counter argument is not fully convincing. Reduced competition can be generally harmful, even if there is no unlawful behaviour associated with it. Moreover, there are no laws to regulate some of the undesirable effects, eg generally there are no laws against high prices. Finally, there are weaknesses in such laws where they do exist, eg the difficulty of detecting and successfully litigating against anticompetitive collusion, as well as the administrative costs in doing so.

In 1993 the substantive test used to review mergers was changed back to a substantial lessening of competition test. According to the then Attorney-General:

> After much consideration the Government has decided to amend section 50 to prohibit mergers or acquisitions which are likely to substantially lessen competition and which have not been authorised by the [ACCC]. In an Act which seeks to preserve competition it is appropriate that the merger test should focus on the effect on competition in a market rather than on the dominance of a particular firm. The effect of the amendment will be to broaden the range of transactions which can be examined under section 50. This can only be procompetitive.

The Government, faced with big business opposition, gave some consideration to the possibility of replacing the dominance test with a collective or joint dominance test, but ultimately decided that it was best to adopt a conceptually clearer substantial lessening of competition test.

The ACCC believes that Australia's current merger law regime has served this country well since its reinstatement in 1993. It has played an important role in the maintenance of competitive market structures within the Australian economy and thus ensuring lower prices and higher quality goods and services for all Australians.

3.3 Actual experience

The key lesson from the Australian experience of the two tests is that the SLC test is a more stringent standard which prevents mergers giving rise to both single firm dominance as well as coordinated conduct. From this point of view, it is worthwhile to examine the operation of the SLC test in terms of mergers opposed that would probably have been allowed under a single firm dominance test and mergers that were allowed under the dominance test that may well have been blocked under an SLC test.

During the period of the dominance test a number of very prominent mergers were not opposed that many argue have caused significant competitive harm. Several examples of mergers that would have been likely to have been scrutinised and opposed under an SLC test, but were permitted to proceed under a dominance test are:

- *Coles-Myer*. This was a merger between two of the three largest competitors in the department store and discount department store retailing sectors of retailing. A merger in the supermarket sector, shortly thereafter, between *Woolworths* and *Safeways,* combined two of the four largest integrated supermarket chains. The overall impact of these two mergers appeared to be a substantial increase in concentration in the retailing sector. In these major areas of retailing, the ACCC did not oppose mergers of leading firms, under the dominance test, which led to substantial increases in concentration.

- In the newspaper market, two of the three national newspaper publishing groups, *News Ltd* and *Herald & Weekly Times* had merged, leaving *Fairfax* as the only remaining significant competitor. The ACCC submitted to the Cooney Committee that despite securing divestiture to overcome dominance in two State markets, the merger had substantially lessened competition in the market by the removal of the *Herald & Weekly Times* as a "major competitive force".

- In the national domestic aviation market, a merger between *Ansett Airlines* and *East West Airlines* reduced the number of interstate competitors from three (*Qantas, Ansett* and *East-West)* to two. While *Qantas* and *Ansett* were substantially larger than *East West*, it was a vigorous and effective competitor on the trunk routes it competed on, with good prospects of growth.

With the benefit of nine years of experience of the operation of the SLC test since its re-instatement in 1993, it is also worthwhile to refer briefly to some mergers which have been examined under the SLC test where they would not have been under the previous dominance test:

- *Retail banking* – The four largest banks have individually sought to acquire the smaller, regional banks. The regionals made a distinctive contribution to competition by their efficient, customer-friendly approach and were vigorous and effective competitors. By contrast, the four majors had "look-alike" profiles, with poor customer appeal and broadly comparable market shares. An acquisition by a major bank of the largest regional in a State effectively reduced five significant competitors to four, and was considered likely to SLC. The ACCC closely examined, and generally opposed, such acquisition proposals.[7]

  On the other hand, under the dominance test, the acquisition of regional banks by any of the big four could not even have been examined as there was no possibility of single firm dominance resulting. Further, even mergers between the four majors, say from four to three or even from four to two, would not have been subject to examination under the dominance test unless the result was likely to be a single bank dominating the market.

- *Petroleum refining and marketing* – Under the SLC test, the ACCC initially opposed a proposed merger between *Caltex* and *Ampol*, the fourth and fifth largest competitors, which would have reduced the number of competitors from five to four. In the absence of import competition, the ACCC considered that the merger would be likely to SLC. However, the parties offered conditions in undertakings to sell certain port terminals to make independent imports possible. These were considered sufficient to allay the ACCC's concerns and the merger was allowed to proceed.

  Under a dominance test, the ACCC could not have opposed that merger. Indeed, it could not have opposed mergers between the remaining four major competitors unless they resulted in single firm dominance. In fact, under the SLC test, the ACCC subsequently indicated its concern about a joint refining venture between *Shell* and *Mobil* followed almost immediately by another similar proposal between *Caltex* and *BP*. Both were carefully scrutinised by the ACCC before they were abandoned by the parties for commercial reasons.

- *Grocery wholesaling and retailing* – A New Zealand entity, *Rank,* sought to acquire *Foodland Associated Ltd,* the largest grocery wholesaler in Western Australia which supplied various independent supermarkets, operating under banner groups, and also controlled a number of large supermarkets itself. The proposed acquirer had entered into collateral agreement with *Coles-Myer*, one of the two largest integrated wholesale/retail supermarket groups in the country, to subsequently transfer the entity to it. The ACCC successfully opposed it; and the merger did not proceed. Under a dominance test, the ACCC would not have been able to examine it because *Woolworths*, a national, integrated supermarket chain, was a significant, remaining competitor.

- *Telephony* – This involved a proposed merger between *Optus* and *AAPT*, the second and third largest players in fixed line telephony, where there would have been a

reduction in the number of competitors from three to two. The key point is that under a dominance test, it could not even have been examined.

- *Tobacco – British American Tobacco Pty Ltd (W.D. & H.O. Wills) / Rothmans*
  British American Tobacco (BAT) sought to acquire, through its Australian subsidiary, *W.D. & H. O. Wills,* the *Rothmans* businesses in Australia. Each of these two parties had approximately a third of the market as did *Philip Morris*. Import competition was negligible, because of the special way cigarettes were taxed at that time. Under the SLC test the proposed merger of *BAT* and *Rothmans* was opposed as it would have given rise to a structure where the merged firm had some 62% of the market, with *Philip Morris* having most of the remainder. Under the dominance test, it is unclear what the outcome would have been. The merged firm would have had a very large market share but it would have faced competition from a serious competitor, *Philip Morris*, and it might or might not have been concluded that single firm dominance resulted. In the event, *BAT* and *Rothmans* were able to proceed with the merger after selling some brands accounting for about 17% of the market to *Imperial Tobacco*, a major new entrant into the market which had both its own international brands as well as those representing 17% of the market sold to it by the merged entity.

3.4 Effect of change

In the nine years that the current SLC test has been in force, the law appears to have been clear – the non-exhaustive, but mandatory merger factors for assessment of competitive effects under s.50(3) of the TPA has possibly contributed to greater certainty; the inclusion of criteria relating to the enhancement of international competitiveness for authorisation, has ensured that globalisation issues are considered.

There was a slight rise in the rejection rate at the commencement of the SLC test, suggesting initial uncertainty from incomplete knowledge/poor risk assessment of likelihood of failure. It may also have been partially attributable to parties "pushing the envelope". Whatever the reason, the rejection rate soon began to return to its longer term rate – on average, only a small number of mergers are blocked. It is argued that 'self-selection' is a factor skewing the rejection rate down (ie. that clearly unacceptable mergers are not put forward). This itself suggests that certainty is a feature of the administration of the regime.

The ACCC has sought to give timely and clear guidance via informative and practical guidelines on its approach to merger assessment. The SLC merger guidelines were actually issued before the change to SLC was implemented.

The need for transparency and information dissemination has been addressed by a mergers register even though not statutorily required for the informal assessment of competitive effects.[8]

Business and community access to ongoing guidance about the ACCC's approach has been facilitated by public release of reasons and detailed analyses in complex informal assessments and in authorisation determinations.

The approach of the Court to the SLC test since its re-instatement has not really been tested. Only two pieces of litigation, neither involving detailed and substantive consideration of the SLC test, have occurred. Rank-Coles/Foodland[9] was an application by the ACCC for an interim injunction which, having been granted, led the parties to abandon the proposal. Adsteam-Howard Smith/Brambles[10] was an application for interim injunction by the ACCC which was refused because the Court concluded that divestiture was a viable remedy if the ACCC succeeded in the substantive case, rather than on the prospects of the parties succeeding in proving the merger was lawful. The ACCC decided it would not pursue the matter due to the practical difficulties of securing divestiture.

Similarly, the approach of the Tribunal has not been tested either. There has been no pronouncement on the difference between dominance and SLC from the Tribunal.

There are few challenges to ACCC decisions in the Court and Tribunal. This is most probably because parties do not believe that they are likely to successfully reverse them on the basis of their competition analysis or public benefit reasoning. Critics of the process argue that another factor is the length of time it takes for the Court or Tribunal to make decisions.

3.4.1 The significance of product differentiation

A further possible area of difference between the assessment of competitive effects under dominance and SLC occurs in markets characterised by differentiated products.

In some cases, mergers that involve low shares of some broader market may produce significant anticompetitive effects, where the parties supply the closest substitutes for each other's products.

In a market with, say, six or more competitors, three competitors may supply products that are, collectively, differentiated from the remaining products. While a merger between two of the three may or may not lead to coordinated conduct or collective dominance across the entire market, it could well strengthen the acquirer's brands, with substantial anticompetitive effects in the segment of the market occupied by them. In such a case, it would be important to assess the anticompetitive effects in that segment of the market and whether it has the net effect of SLC in the market as a whole.

Similar issues may arise in markets differentiated in their spatial and temporal dimensions.

The analysis of such product or geographically or temporally differentiated markets would take account of linkages or discontinuities in demand or supply under the SLC test

whereas they are unlikely to be considered under the dominance test.

3.4.2 A substantial lessening of competition or a substantial level of competition?

Some observers have expressed concern that the test may prohibit mergers that lessen competition even though competition is already sufficiently strong. This interpretation has never been accepted in Australia, as is clear from the “safe harbour” guidelines applied in the merger test. Broadly speaking, such mergers do not cause a substantial lessening of competition.

3.5 Changeover issues / problems

Changeover issues particularly relate to promoting understanding by business and consumers about the effect of the change in the law. Where the law is not proscriptive in many regards and relies upon case law to develop a history of jurisprudence, it is not clear immediately following implementation of a new law, exactly what its effect will be.

The competition authority therefore has an important role to play in educating and informing the public about the substance and effect of the change and providing as much guidance as it can about how the new test will be implemented. This includes publishing transparent and clear guidelines about processes, criteria for the examination of mergers, time frames for merger reviews and appeal processes etc. All efforts made in this regard serve to minimise the impact and difficulties that businesses may face in transferring from one test to another.

4. Globalisation

The debate about globalisation is not static, just as globalisation itself is dynamic and has competition consequences. Markets change and a merger rejected at one time may be acceptable at another eg. because of a rise in the share of imports.

An example is the *Southcorp/Email* merger. It involved whitegoods (refrigerators, washing machines, freezers, dishwashers, cooking appliances etc). It would have been rejected, under any test, if import competition was not an effective constraint at that time. Yet, under SLC, it was allowed because of import competition. However, dominance does not resolve competition problems – where there is no import competition eg. in the non-traded sector, as discussed earlier.

Another example is that of sugar refining. The original proposal was rejected, both under the informal competition assessment procedure, as well as under the authorisation procedure, as discussed earlier in this paper. By 1997, however, circumstances had changed. The tariff had been removed; freight costs had reduced, thus reducing the import parity price. There was a significant increase in world and regional refining capacity, particularly in Asia and the Middle East, thus increasing the import constraint on domestic prices. Under the informal competitive effects assessment process, a s. 87B undertaking to make import facilities in Western Australia available to potential independent importers ensured that anticompetitive effects in that State would be avoided

and it was concluded that the joint venture was unlikely to substantially lessen competition.

4.1 Globalisation and domestic factors

It is customary for business critics of merger law to try to focus debate on whether or not merger law is relevant in an environment of globalisation. In fact, this is not the principal framework in which to view merger law. Most mergers in the traded goods and services sector in most countries are not blocked. The area of the economy in which merger law is most relevant is the nontraded goods and services sector. Thus, as noted above, in domestic sectors experiencing deregulation, the benefits of increased competition can be annulled by anticompetitive mergers.

5. Conclusion

Australia's unique history in relation to merger regulation enables it to discuss the issues surrounding the advantages, disadvantages and implications of changing a country's merger test. This experience, for better or worse, has provided evidence of the preference for a merger test based on 'substantial lessening of competition' as a result of the emergence of anticompetitive market structures in a number of industries in Australia during the period that the dominance test was in place and as a result of *a priori* arguments that "substantial lessening of competition" is a more correct economic criterion for evaluating the desirability of mergers.

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[1] *Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40-012.
[2] *Re: Howard Smith Industries Pty. Ltd.* (1977), ATPR 40-023, the Tribunal said, at p. 17,334.
[3] The *Trade Practices Act Review Committee* (the Swanson Committee), 1976.
[4] Attorney-General the Hon. Gareth Evans, *The Trade Practices Act – Proposal for Change*, 1983.
[5] *House of Representatives Standing Committee on Legal and Constitutional Affairs* (the Griffith Committee), 1989.
[6] *Senate Standing Committee on Legal and Constitutional Affairs* (the Cooney Committee), 1991.
[7] See *Westpac Banking Corporation/Challenge Bank Ltd; Westpac Banking Corporation/Bank of Melbourne Ltd*.
[8] The merger register entry is made public after the decision has been made on a proposal and contains relevant information including the parties involved; the market; analysis in terms of the statutory merger factors; date of commencement of matter and decision; the outcome and reasons for opposing or allowing the merger. Of course, no details are made available while a merger is still confidential, nor is confidential business information included. The register can be accessed electronically as well as in physical form.
[9] *TPC v Rank Commercial Limited & Ors* (1994) ATPR 41-331.
[10] *Australian Competition and Consumer Commission v The Adelaide Steamship Company Limited & Others* (1996) ATPR 41-462.