Merger Control in Australia
ACCC v Metcash Trading: SLC v Legalism

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Competition and Consumer Act s 50 SLC test – *Metcash* case study

- *ACCC v Metcash Trading Ltd* [2011] FCAFC 151 has occasioned much debate in Australia about two issues:
  - what does “likely” mean in the s 50 SLC test?
  - when applying the SLC test, does a counterfactual need to be proven on the balance of probabilities?
- *Metcash* was litigated intensively but litigation has fermented these two issues without settling them
- No clarification on intractable further issue of meaning of “substantial” in SLC test
- Less than convincing on market definition – neglects previous decisions/commentaries
- Result in case commercially realistic but extensive legal analysis of SLC test by Federal Court of Australia failed to yield clear and convincing solutions

ACCC v Metcash

- Metcash agreement with Pick n Pay to acquire all issued shares in capital of Franklins independent grocery chain for $215 million
- ACCC advised Metcash that acquisition would have likely effect of substantially lessening competition in market for wholesale supply of packaged groceries in NSW & ACT
- ACCC sought injunction against breach of s 50:
- ACCC case:

Market definition

- market for wholesale supply of packaged goods to independent supermarket retailers in NSW and ACT

Counterfactual analysis – future with and without

- rival bidders would be in a position to acquire all or significant majority of relevant Franklins stores:
  - a consortium of retailers (known as KKKL) would have acquired Franklins stores and established an independent wholesale business which would compete with Metcash thus enhancing competition
  - ACCC had also argued that a number of other potential buyers existed but on cross examination it was clear that only KKKL presented “real chance”
- no likely SLC in that counterfactual scenario
- where multiple or alternative counterfactuals are pleaded, sufficient to prove that the pleaded counterfactual is "credible" in the sense of being a real chance but "more than a mere possibility”

SLC test under s 50

- “likely” SLC means a real chance of SLC
- removing Franklins and making Metcash the only source of wholesale supply of packaged groceries in NSW and the ACT was likely SLC in wholesale market pleaded

ACCC v Metcash

- Federal Court (Emmett J) denied injunction sought by ACCC:
  - ACCC market definition was incorrect – the product market included retail and well as wholesale groceries
  - ACCC failed to prove *it was more likely than not* that a third party or the consortium propounded by the ACCC was a credible alternative purchaser
  - if "real chance" test of counterfactual proof were adopted, ACCC failed to prove that there was real chance
  - no likely SLC in the market for retail and wholesale grocery supply
- Full Federal Court

  Finn & Yates JJ
  - upheld decision of Emmett J on market definition - market for retail and wholesale supply of packaged goods to independent supermarket retailers in NSW and ACT
  - unnecessary to decide whether or not counterfactual had to be proven on balance of probabilities but disagreed with Emmett J's approach
  - likely SLC = real chance SLC
  - acquisition was not likely SLC in market for retail and wholesale groceries supply

  Buchanan J
  - market for retail and wholesale supply of packaged goods to independent supermarket retailers in NSW and ACT
  - counterfactual had to be proven on balance of probabilities
  - likely SLC = SLC more likely than not
  - acquisition was not likely SLC in market for retail and wholesale groceries supply
- No appeal by ACCC to High Court of Australia

ACCC v Metcash – meaning of "likely" SLC in s 50

- Differing interpretations in *Metcash*:
  - "likely" = a real chance (Emmett J)
  - "likely" = more likely than not (Buchanan J)
- Difference may be significant although did not matter on evidence in *Metcash* case itself
- Not addressed in Competition Policy Review (Harper Report 2015)
- ACCC view after *Metcash*:
  - "Although not conclusively determined by the Full Court on this occasion, the ACCC considers that there is strong judicial support for the view that "likely" means a "real chance". The ACCC will continue to assess the likely competitive effect of an acquisition on the basis of a "real chance" test, Mr Sims said" (News Release NR 228/11)
- ACCC *Merger Guidelines* [3.15]:
  - Clearly a substantial lessening of competition must be more than speculation or a mere possibility for it to be likely, but it does not need to be a certainty. Importantly, a substantial lessening of competition need not be 'more probable than not', for the merger to contravene s. 50. Mergers are prohibited when there is a 'real chance' that a substantial lessening of competition will occur. However, a 'mere possibility' would be insufficient. Ultimately, the determination of whether a substantial lessening of competition is likely will depend on the facts of the particular matter.
- Decision of Full Court in *Metcash* does not settle the question

ACCC v Metcash – meaning of "likely" SLC

- Heerey's critique:
  - Standard dictionaries in use in Australia give meanings of "likely" consistent with "probable" or "more likely than not"; they 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.
  - 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.
  - 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.
  - 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%.
- Compare *Woolworths Ltd v Commerce Commission* (2008) 8 NZBLC 102 - real and substantial risk might be one that had at least a 30% prospect but may be as low as 10%

ACCC v Metcash – meaning of "likely" SLC

- Compare s 7 Clayton Act (US):
  - *E.I. du Pont de Nemours & Co*, 353 US586, at 589:

    Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a *reasonable probability, appear at the time of suit likely to result* from the acquisition by one corporation of all or any part of the stock of any other corporation") (emphasis added)
  - Little guidance from US case law on what "reasonable probability" means - opaque

ACCC v Metcash – counterfactual proof

- Where a counterfactual is pleaded what degree of proof is required?
- ACCC argument in *Metcash*:
  - where the counterfactual scenario is not the *status quo,* but multiple or alternative counterfactuals are pleaded, it is enough to prove that the pleaded counterfactual is "credible" in the sense of being a real chance but "more than a mere possibility“
- That argument was rejected by Emmett J:
  - the ACCC had to prove that the counterfactual (an alternative bidder for the Franklins assets) was more probable than not (the ACCC failed to prove that there was a credible alternative purchaser)

ACCC v Metcash – counterfactual proof

- On appeal to Full Court:
  - Buchanan J took a similar position to Emmett J
  - Yates and Finn JJ implicitly rejected Emmett J's position ([228]-[229]:
    - if "likely" means "real chance" then it should apply to establishing all facts, matters and circumstances that define the future state of affairs
    - different legal standards should not apply to inseparable elements of the analysis used to determine whether there is a lessening of competition
    - the counterfactual is merely a tool of analysis – it does not have a separate existence to which a different standard of proof could be applied
    - the facts that determine the future state of the market may not be clearly distinct from the facts that determine the future state of competition in the market (that would mean that, in some cases, two different standards of proof would apply to the same fact, effectively meaning that the higher standard would apply and displace the "real chance" standard)
- Issue not settled by Full Court decision in *Metcash* – views expressed by Finn & Yates JJ and Buchanan J are obiter dicta
- *ACCC v Australian Competition Tribunal* [2017] FCAFC 150 at [56]:
  - with or without test, while useful when applying public benefit test, not a substitute for the statutory wording ("would result, or be likely to result, in")

After *ACCC v Metcash*

- After *Metcash*, there are several possibilities, including these three:
  1. the ACCC must show that there is a real chance that the counterfactual will come to pass, and that there is a real chance of a substantial lessening of competition comparing the merger to that counterfactual
  2. the ACCC must show that it is more probable than not that the counterfactual will come to pass, and that there is a real chance of a substantial lessening of competition comparing the merger to that counterfactual
  3. the ACCC must show that it is more probable than not that the counterfactual will come to pass, and that it is more probable than not that there will be a substantial lessening of competition comparing the merger to that counterfactual

  (Chubb & Cadd)

ACCC v Metcash – counterfactual proof

- Heerey's critique:
  - by the time of *Metcash*, the term "counterfactual" 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)
  - 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
  - merger analysis clearly requires prediction, looking at a world with and without the proposed merger – but the concept of the counterfactual seems to lead to a distortion of the forensic process
  - suggested alternative approach:
    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
- Heerey's proposed approach is commendable but:
  - has yet to be adopted in law by court
  - does not resolve uncertainty about what "substantial" in SLC test means, eg:
    - what is a significant increase in prices post-merger?
    - what is a sustained period during which prices will be increased significantly?

Conclusions

- Significant SLC issues have not been settled by the *Metcash* litigation but ACCC was given a reality check:

  "The case exposed deficiencies in the way the ACCC evaluated the available evidence. Both at first instance and on appeal, the Federal Court criticised the ACCC's counterfactual analysis for relying on speculation, rather than a rigorous assessment of the merger based on commercial realities. …" (Chubb & Cadd)
- Legalism won the SLC v Legalism battle in *Metcash* by a spectacular margin
- The legalism, although copious, did not settle the law on key SLC issues
- Competition Policy Review (Harper Report) (2015) failed to address key issues of "likely", counterfactual proof, or "substantial" in s 50 SLC test – known problems, no solutions
- *Metcash,* and its hangover in Australia ever since the litigation in 2011, exemplifies *w*orld worst practice in merger review
- Questions?

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Sources

1. *ACCC v Metcash Trading Ltd* [2011] FCAFC 151
2. *ACCC v Australian Competition Tribunal* [2017] FCAFC 150
3. ACCC *Merger Guidelines* @ https://www.accc.gov.au/publications/merger-guidelines
4. S Corones, *Competition Law in Australia* (6th ed, 2014) 431-436
5. P Heerey, "Shootout at the Real Chance Café: Aiming s 50" (2011) 39 ABLR 457
6. S Chubb S & C Cadd, *Why the Metcash Case Will Continue to Trouble the ACCC* (2011) @ https://www.lexology.com/library/detail.aspx?g=30157ce6-4d20-4de5-83bd-1dc89caa58de
7. R Baxt, "Will There be a Change in the Review of Mergers by the ACCC after the Metcash Decision?" (2012) 40 ABLR 55
8. I Wylie, "What is 'Likely' in the Competition and Consumer Act 2010?" (1012) 20 CCLJ 28
9. C Veljanovski, "Mergers, Counterfactuals and Proof after *Metcash*" (2012) 40 ABLR 263
10. D McCracken-Hewson, "How likely is 'likely'? Metcash, counterfactuals and proof under s 50"(2012) 40 ABLR 363
11. M Terceiro, "Messcash: A Comedy of Errors" (2011) 636 CCH Australian Competition & Consumer law Reporter 1
12. M Bull and D Wood, "The Fairest of Them All? Rival Bidder Counterfactuals in Australian Merger Clearance" (2012) 19 CCLJ 231
13. B Fisse, "The Australian Competition Policy Review Final Report 2015" (NZ Competition Law & Policy Institute, 26th Annual Workshop, Auckland, 16 Oct 2015), 29-32 @ https://www.brentfisse.com/images/Fisse_Harper_Report_Critique_(Oct_2015).pdf