Merger authorisation processes in Australia in the light of the Tabcorp decision

COMMENTS BY PHILIP WILLIAMS ON A PAPER BY DAVE PODDAR

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1 Introduction

1 Dave Poddar's paper reflects on the decisions of the Tribunal in *Tabcorp* and *AGL/Macquarie Generation*. He suggests that a straight slc test may be more predictable and more certain than our current authorisation test.

2 In both these cases, the Tribunal found that the proposed acquisitions were unlikely to cause a substantial lessening of competition. That is, the application of a net public benefit test produced the same result as if the Tribunal had been a court and asked for a declaration that the merger did not infringe s50.

3 In Tabcorp, the Tribunal identified four relevant markets:

a. supply of consumer wagering;

b. bidding for wagering licences;

c. supply of gaming services;

d. lottery and Keno services.

Consumer wagering

> Taking all the above matters into account, the Tribunal is of the view that the merger will not lead to any material lessening of competition in the wagering market, nor would any detriment be likely to arise in the provision of consumer wagering services.[1]

Bidding for wagering licences

> The Tribunal's assessment for the purpose of these Reasons is that conditions relating to bidding for State licences and the provision of pooling services are unnecessary, because no material detriment is likely with respect to either.[2]

Supply of gaming services

> The Tribunal had dealt with this concern in its earlier Reasons in the context of a lessening of competition in the market: Application by Tabcorp Holdings Limited [2017] ACompt 1 at [398]-[405]. No further evidence was placed before the Tribunal to support the existence of this or any other material detriment in

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1 Applications by Tabcorp Holdings Limited [2017] ACompT 5, para 177.

2 Applications by Tabcorp Holdings Limited [2017] ACompT 5, para 190.

> the provision of gaming services. The Tribunal has again considered this aspect. The Tribunal takes the view that neither this nor any other material detriment is likely to arise from the merger in the provision of gaming services.[3]

Lottery and Keno services

> The Tribunal is of the view that there are no detriments resulting from the merger in the provision of lottery and Keno services.[4]

4 The Tribunal also found no slc in the case of the AGL/Mac Gen merger. It found:

> In the light of the reasons of the Tribunal, it has reached the view that the Proposed Acquisition will have no adverse impact upon competition in the wholesale market for electricity in the NEM, and little or no adverse effect on competition in the retail market for electricity in NSW.[5]

5 Both mergers would have proceeded – whether the relevant test was slc or a wider notion of net public benefit. This raises the question of whether, at least in the context of mergers, authorisation is redundant.

6 My commentary addresses three questions:

a. What is the slc test as applied to mergers?

b. Should authorisation be available for mergers?

c. If we got rid of authorisation, would we need to add anything to the slc test?

2 What is the slc test?

7 The slc test when applied to a merger is, at least in principle, a very simple test. In its seminal decision *Re QCMA and Defiance Holdings*,[6] the Tribunal identified a lessening of competition with an increase of market power. It stated:

> As was said by the U.S. Attorney-General's National Committee to Study the Antitrust Laws in its Report of 1955 (at p. 320):
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> "The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements …".

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3 Applications by Tabcorp Holdings Limited [2017] ACompT 5, para 205.

4 Applications by Tabcorp Holdings Limited [2017] ACompT 5, para 207.

5 Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] ACompT 1, para 374.

6 *Re QCMA and Defiance Holdings* (1976) ATPR 40-012.

> Or again, as is often said in U.S. antitrust case, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry."[7]

8 If one accepts that a lessening of competition involves an increase in market power, it seems perfectly natural to approach the question of the effect of conduct on competition by asking whether the conduct is likely to cause prices to increase or to increase the ability of firms to engage in foreclosure strategies.

9 Some commentators have detracted from this simple approach by focusing on the Tribunal's remarks about market structure. *QCMA* contains the well-known statement that competition is a process rather than a situation; but, nevertheless, whether firms compete is very much a matter of the structure of the markets in which they operate.[8]

10 *QCMA's* reference to the link between structure and the effectiveness of competition was quickly adopted by the courts. However, even these early statements always maintained the distinction in *QCMA* between competition as a process and the static idea of the structure of the market. This is true even of the decision in the Full Federal Court in *Outboard Marine v Hecar*[9] which is sometimes construed as adopting a structural approach to analysing substantial lessening of competition.

11 The trial judge had found that Outboard Marine's (OMA's) refusal to supply Hecar with outboard engines had the effect of substantially lessening competition in a market because the likely effect of OMA's refusal would be to deprive customers of an opportunity to view two competing engines side by side. This decision was reversed by the Full Federal Court because the trial judge had failed to consider the market-wide impact of the conduct under consideration. The references by the Full Court to market structure are best read in this context. The key reasoning of Bowen J.J. and Fisher J was:

> The market in question is geographically wide. There seems to be no evidence that OMA's refusal to supply Hecar had or would be likely to have the result of altering the market structure so as to produce an anti-competitive effect, for example there is no evidence that the barriers to entry have been raised, nor that price competition has been reduced. Although the competitive position of Hecar as an individual retailer may be affected in the future, it is unlikely that this would have such a dramatic effect as to lessen substantially competition in the retail market which extends from Forster to Umina. …The evidence suggests that OMA wishes and intends to appoint a new Evinrude dealer in the immediate area served by Hecar, if it is successful in these proceedings. These

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7 *Re QCMA and Defiance Holdings* (1976) *ATPR* 40-012 at 17,245-6.

8 *Re QCMA*, p 17,246.

9 *Outboard Marine Australia Pty. Ltd. v. Hecar Investments (No. 6) Pty. Ltd.* (1982) ATPR 40-327.

> considerations do not support a conclusion that there will be a lessening of competition.[10]

12 Whether to focus on prices or market structure was a big issue in the 1970s and 1980s. Even well-informed commentators were concerned that the dual enforcement structure of our legislation might mean that in analysing competition the courts had to confine themselves to considerations of market structure and that effects on prices could be considered only by the Commission and the Tribunal in applications for authorisation.[11]

13 This view was inconsistent with the equation by Tribunal in QCMA of a lessening of competition with an increase in market power. That equation suggests that, when enquiring whether a merger is likely to lead to higher prices, it is important to look at the effect of the merger on the structure of the market. This view now seems to have become uncontroversial.

14 We now have section 50(3)(f) in our statute, stating that, when considering whether the an acquisition is likely to substantially lessen competition, the courts (and the ACCC) must consider whether the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins.

15 The ACCC merger guidelines also reflect the identification of a lessening of competition with an increase in market power by stating:

> Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.[12]

Conclusion

16 When considering whether an acquisition is likely to result in a substantial lessening of competition, the courts and the ACCC look to whether the acquisition is likely to result in an increase in market power of the merged entity. A natural way to think about this is to ask whether the acquisition is likely to enable the merged entity to increase prices or to engage in foreclosure strategies.

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10 *Hecar,* p 43,984.

11 Philip L Williams, "QCMA, Forty years on", 2016 Bannerman Lecture at https://www.accc.gov.au/system/files/Bannerman%20Competition%20Lecture%202016%20-%20Dr%20Philip%20Williams%20%20lecture%20paper.pdf

12 ACCC, Merger Guidelines, November 2008, para 3.5.

3 Should authorisation be available for mergers?[13]

17 In 1974, Bob Baxt and Maureen Brunt wrote a lengthy paper considering the Murphy Trade Practices Bill. They considered and supported in principle the Dual Enforcement structure of the Bill:

> Yet in the field of antitrust, all is not justiciable and 'compliable'. It seems to us that there is a proper scope of activity in this field for the administrative tribunal, complementary to the court of law – and it is an important ingredient of the Bill that it sets out to establish just this. Especially is this true for Australia where the attitude to justiciability and, indeed, the training of lawyers is narrower than in some countries, notably the U.S. – though elements of our argument are applicable even to that country. If the law can be stated with reasonable precision, with prospective liability established by per se rules or strong presumptions, such that the commission of an offence is knowable and avoidable, then the appropriate enforcement institution is a court and the appropriate remedy not only an injunction but also publishment. If, on the other hand, the law requires extended analysis of economic cause and effect, including complex evaluation by public interest criteria, in a way that makes the decision essentially more "open" and more uncertain, we believe the appropriate institution is an administrative tribunal and the appropriate remedy merely an order to cease. … Moreover, from a procedural point of view, the strength of the court lies in the use of adversary procedures and short lines of argument stemming from the evidence, in order to establish the actual conduct of the parties. But its traditional and formal procedures, the use of counsel, the rules of evidence, are ill-adapted to extended analysis of the competitive functioning of a whole industry.[14]

18 This passage seems to proffer three (somewhat related) reasons for a dual enforcement structure:

a. our courts are not suitable venues for extended economic analysis;

b. liability should not depend on complex evaluation by public interest criteria; and

c. the procedures of our courts are ill-adapted to extended analysis of the competitive functioning of a whole industry.

19 I shall consider these reasons in turn.

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13 The writing of this section has benefitted greatly from a conversation with Russell Miller.

14 Robert Baxt and Maureen Brunt, "The Murphy Trade Practices Bill: Admirable Objectives, Inadequate Means", *Australian Business Law Review*, Vol 2 (1974) pp 1–79 at 8.

Extended economic analysis

20 Bob and Maureen argued that, at least in 1974, our courts were constrained to operate within a tightly constrained mode of reasoning which could not readily be adapted to extended economic analysis. Although this may have been true in 1974, the courts showed themselves more adaptable than they had forecast.

21 Certainly by the end of the 1980s the courts had proved the Baxt/Brunt forecast wrong. The decision of the High Court in Queensland Wire Industries Pty Ltd v. The Broken Hill Proprietary Company Ltd (1989) ATPR 40-925 was a decisive breakthrough in the willingness of our courts to embrace economic modes of analysis. As Maureen Brunt observed:

> However there is no longer any doubt that the Trade Practices Act is economic law, though the characterization was not fully affirmed until February 1989> That was the date the High Court brought down its judgment in QWI, a decision that is notable not so much for its detailed finding regarding BHP's refusal to supply QWI with Y-bars as for its policy content and overall approach. There is here no hint of narrow formalism but rather a willingness to get to the economic substance of the statutory terms. Note that it is not just that the terms of the statute are to be interpreted in light of the policy objective; the very statutory terms have mixed economic-legal content. That Mason CJ and Wilson J (p. 50,008):
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> "But the object of s 46 is to protect the interest of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. … In fact, the purpose provisions in s 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition – for example, s 46(1) prohibits a firm with a substantial degree of market power from using that power to deter or prevent a rival from competing in a market. The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition, and the addition of a hostile intent inquiry would be superfluous and confusing.[15]

22 Since *QWI*, the courts have treated us to extended economic analysis on many occasions; although, of course, there have been a few occasions when the economic analysis of a court has fallen short of being a treat. However, even when their economic analysis has been less than first class, it has been economic analysis; the courts are no longer confined to reasoning of a narrow legalistic kind. They have shown themselves quite willing to adopt economic modes of reasoning when the law requires them to do so.

23 The law makes this demand when the standard of liability is the substantial lessening of competition. This standard of liability may well mean that the commission of an infringement is not always 'knowable and avoidable'. However,

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15 Maureen Brunt, "The Australian Antitrust Law after 20 Years – A Stocktake", reprinted in Maureen Brunt, *Economic Essays on Australian and New Zealand Competition Law*, Kluwer Law International (2003), pp 297-351 at 311-312.

that is the standard the courts are required to apply to their assessment of mergers in Australia and in many other jurisdictions.

Consideration of the Public Interest

24 The second reason given by Bob and Maureen for favouring dual enforcement was that liability should not depend on complex evaluation by public interest criteria. This seems to refer to the words of the statute which require that the Commission and the Tribunal must not grant an authorisation unless satisfied that, in all of the circumstances, the proposed acquisition would result, or be likely to result, in "such a benefit to the public that the acquisition should be allowed to occur."[16]

25 It has been established since QCMA that the expression 'benefit to the public' should be interpreted broadly. It should include:

> …anything of value to the community generally, any contribution to the aims pursued by the 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.

26 As QCMA made clear, benefits to the public include, but are not limited to, economic goals; but there have been very few cases in which non-economic benefits have had a clear influence on the decisions of the Tribunal to grant an authorisation.[17]

27 Although the standard of benefit to the public may involve a broader range of considerations than substantial lessening of competition, both standards require normative and evaluative judgments. Bob French quotes Julius Stone to the effect that the rule of reason in United States antitrust law involves the application of a 'legal standard':

> When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy or hardship, then judgment cannot turn on logical formulation and deduction but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed as to many equitable standards, and also as to such notorious common law standards as "reasonableness". They are predicated on fact-value complexes not on mere facts.[18]

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16 Section 95AZH(1).

17 A notable exception is *Re Media Council of Australia (No. 2)* (1987) ATPR40-774.

18 Quoted by Robert S. French, "The role of the courts in the development of Australian Trade Practices Law", pp 98-116 of Frances Hanks and Philip L Williams, *Trade Practices Act, A Twenty-Five Year Stocktake*, The Federation Press (2001) at p 105.

28 In my opinion, there is no reason to suppose that the courts are ill-equipped to deal with considerations of the public interest. They deal well with the economic analysis required to decide whether conduct is likely to substantially lessen competition. There is no reason why they could not balance the harm caused by a lessening of competition against other considerations of the public interest.

Procedure

29 The final reason given by Bob and Maureen for favouring our dual enforcement structure was that the procedures of our courts are ill-adapted to extended analysis of the competitive functioning of a whole industry. As I pointed out above, our courts have undertaken some extended (and excellent) analyses of the competitive functioning of whole industries. In the years since 1974, they have also adapted existing procedures and adopted new procedures to facilitate the undertaking of such analyses.

30 Many of these changes in procedure have to do with the acceptance and consideration of expert economic testimony. The more-important changes can be listed:

a. requiring evidence in chief in written form,

b. allowing expert economic testimony to be treated as submissions;

c. requiring experts to meet to clarify the key issues on which they agree and disagree; and

d. allowing concurrent evidence by conflicting experts.

31 These changes have meant that expert economic testimony is now presented in a form which makes it more accessible to counsel and judges. The changes have also reduced the time taken by traditional cross-examination.

Conclusion

32 In my opinion, there were reasons for adopting a structure of dual enforcement in 1974; but these reasons no longer hold good. The danger with persisting with a structure of dual enforcement is that matters which are relevant to the public interest in a merger may fail to be considered if the matter comes before a court for adjudication. The time has come to consider whether we could do away with authorisation for mergers and, indeed, for other conduct.

4 If we got rid of authorisation, would we need to add anything to the slc test?

33 If we were to do away with the option of applying for authorisation of mergers, would there need to be any change in s 50 – or could we merely maintain a

proscription of mergers that are likely to substantially lessen competition, as do most jurisdictions?

34 Consideration of this question leads to issues of two kinds:

a. Do we trust the courts to deal with an slc test without any more guidance?

b. Are we concerned that some of the public interest considerations currently available with authorisation may no longer be available?

4.1 Trusting the courts

35 The debate of the Harper Committee's proposed changes to s 46 showed that commentators are divided over whether we can trust the courts to deal appropriately with an slc test. The Committee proposed a s 46(2) to read:

> Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:
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> (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and
>
> (b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.[19]

36 We all remember the debate these words provoked. Some argued that the words were a necessary safeguard against the courts engaging in poor economic analysis. Others, including the ACCC, argued that the extra words were redundant. As we know, the latter view prevailed.

37 As I concluded in section 2 of these remarks, when considering whether an acquisition is likely to result in a substantial lessening of competition, the courts and the ACCC look to whether the acquisition is likely to result in an increase in market power of the merged entity. A natural way to think about this is to ask whether the acquisition is likely to enable the merged entity to increase prices or to engage in foreclosure strategies. These seemed to be very much what the, now discarded, drafting proposed.

38 Although the slc test has been part of our law for many decades, the courts have only dealt with it on rare occasions. We have yet to see whether clear jurisprudence

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19 Competition Policy Review, Final Report, March 2015, Appendix A, Competition and Consumer Act 2010 – model legislative provisions.

develops. However, the (limited) experience since *QCMA* gives some cause for optimism.

4.2 Losing other public interest considerations

39 If we lost the avenue of authorisation parties lose their ability to argue non-economic considerations. This is the clear implication of the decision of the Tribunal in Media Council (No. 2). The Tribunal had to consider an application by the Media Council for authorisation of certain Codes as standards to which the rules of the Media Council governing the accreditation of advertising agencies would apply. The Tribunal gave a clear message that the rules would fail an slc test:

> Thus, the collective implementation of the Codes is, of its essence, anti-competitive. It places constraints upon the functioning of the market for advertising messages; it changes the quality of the products emanating from that market and the manner in which they are produced. Clearly, also, those different advertising messages change the perceptions and, hence, the demands of consumers and thereby influence the functioning of the markets for advertised products. In thus characterizing the Codes as anti-competitive, we adopt as out general concept of anti-competitive conduct any system (contract, arrangement or understanding) which gives its participants power to achieve market conduct and performance different from that which a competitive market would enforce, or which results in the achievement of such different market conduct and performance.[20]

40 Despite its finding that the collective implementation of the Codes was anticompetitive, the Tribunal granted the authorisation after considering various offsetting public benefits.

41 It would be possible to allow the courts to consider non-economic public benefits under the rubric of substantiality. We have very little jurisprudence on the meaning of substantial within the phrase 'substantial lessening of competition'. However, if its meaning is that the lessening of competition is of a kind the court is concerned about from the point of view of public policy, it would seem possible for a court to find that a merger was unlikely to cause an slc because the small expected increase in prices was not substantial in comparison with the benefits that the merger would confer on the public. In the light of Media Council (No. 2), such a consideration would seem to require an amendment to the law.

42 It is hard to think of a merger which substantially lessened competition but which, nevertheless, would be in the public interest. For that reason, I would be happy to eliminate the option of authorisation without any changes to s 50 – apart from removing the references to authorisation.

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20 *Re Media Council*, p 48,436.

Conclusion

43 Removing authorisation would remove the ability of parties to argue non-economic matters. However, these non-economic matters are unlikely to justify a merger which was likely to substantially lessen competition. For that reason, no substantive change in the law would need to be required if the option of authorisation for mergers were removed.

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