the state of COMPETITION

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In almost 40 years of the TPA/CCA, the ACCC has taken very few merger cases to Court. The decision of the Full Court in* Metcash *arguably raises the threshold for proving that a merger substantially lessens competition, so one has to wonder how many cases the ACCC will be prepared to bring in future. In this issue, we examine what the Full Court said, what it actually held and the implications of the* Metcash *decision for mergers and the CCA more generally.

Metcash and beyond... Likelihoods and the standard of proof

KEY POINTS

- The generally accepted meaning of "likely" has been "a real chance" – this was called into considerable doubt by the Full Court in *ACCC v Metcash*, but not actually overturned.
- The question was whether the ACCC only had to present a credible scenario showing there was a "real chance" the merger would lessen competition or whether it also had to prove this scenario was "more likely" than any competing scenario advanced by Metcash.
- The questions facing a Court in merger cases are unusually difficult, and the facts in *Metcash* were very complicated even as merger cases go.
- "Likely" is used throughout the *Competition and Consumer Act*, so the doubt arising from *Metcash* potentially has broad implications.

Warning! This issue of *The State of Competition* is a little technical, and perhaps best suited to the lawyers amongst us. Our resident economist says this aspect of *Metcash* makes her head hurt (it makes the lawyers' heads hurt too!). Later this year or early next year we will have another piece which focuses a bit more on the back story of the *Metcash* proceedings.

No-one would say that the ACCC's job is easy...

There's been a lot written about *ACCC v Metcash* and doubtless there's more to come, but the focus of this issue is some interesting comments by the Full Court about the meaning of "likely" and the applicable standard of proof. We place these comments in the broader context of the *Competition and Consumer Act* 2010 (the **CCA**), including the application of the *Brginshaw* test.

Section 50 of the CCA prohibits mergers which have the "effect or likely effect of substantially lessening competition" (the **SLC test**). This is similar – although not identical – to the SLC test as stated in sections 45 and 47: these sections also consider whether something has the *purpose* of lessening competition.

The *Metcash* decision: first instance

Last year the ACCC sought an injunction to stop Metcash buying certain assets associated with the Franklins chain of supermarkets. The case was heard by Emmett J at first instance, who rejected the ACCC's claim that Metcash's acquisition was likely to substantially lessen competition. In his decision, Emmett J considered the

How do you reconcile the "real chance" test with the balance of probabilities?

meaning of "likely" and the relevant standard of proof. He observed:

> *The phrase **would be likely to have** may be capable of bearing two meanings. One is that it is **more probable than not** that the acquisition will have the necessary effect. The other is that there is **a sufficiently high finite probability** that the acquisition will have the necessary effect. The latter meaning may be expressed by saying that there is a **real chance** of the relevant effect eventuating… [emphasis in the original]*

In accordance with generally accepted authority, he accepted that "**likely** signifies a real chance rather than a greater probability than not".

The "real chance" test is generally attributed to Deane J in *Tillman's Butcheries* (a case concerning a secondary boycott). Deane J drew the following analogy:

> *… if I fire a rifle through drawn curtains into a quiet lane in a country village, it is not likely, in the sense of more likely than not or an odds-on chance, that I will injure anyone. It would, however, be difficult to deny that there was a real chance or possibility (or likelihood in that sense) that an occasional passer-by would be wounded by the bullet…*

The specific facts of the *Metcash* case resulted in a focus on the "counterfactual" (ie the parallel universe that would exist if the merger did not occur). The ACCC argued it should succeed if it could present a credible counterfactual (one that was more than a mere possibility) that showed a real chance of a substantial lessening of competition.

While Emmett J accepted the real chance test, he was concerned about its application. Noting the possibility of very substantial penalties for contraventions of section 50,[1] he tried to work out how the real chance test intersected with the applicable standard of proof (ie the balance of probabilities).

To achieve this, Emmett J drew a distinction between *identifying* counterfactuals, and considering their *consequences*. This two stage approach – combined with the applicable standard of proof – gave rise to the following options:

	Stage 1	*Stage 2*
Option A	*Real chance + real chance*	
	Was there a **real chance** that a given counterfactual would come to pass?	Was there **a real chance** that there would be an SLC when comparing the future with the merger and the future without (i.e. with the counterfactual identified at Stage 1)?
Option B	*Real chance + more probable than not*	
	Was there a **real chance** that a given counterfactual would come to pass?	Was it **more probable than not** that there would be an SLC when comparing the future with and without?
Option C	*More probable than not + real chance*	
	Was it **more probable than not** that a given counterfactual would come to pass?	Was there a **real chance** that there would be an SLC when comparing the future with and without?

Emmett J's assessment of the ways in which the "real chance" test could be applied to mergers

To cut a long judgment short, Emmett J opted for Option B:

> ***[T]he Commission must establish, on the balance of probabilities, what the future state of the market will be, both with and without the proposed acquisition.*** *That is, the Commission must satisfy the Court that its counterfactual is more probable than any competing hypothesis advanced to suggest that there is no real chance of competition being substantially lessened as a result of the acquisition [emphasis ours].*

In his view, the ACCC failed to do this. What's more, it failed even on the easiest standard, Option A (real chance + real chance).

Ultimately the ACCC lost on most, if not all, points at first instance. So it was difficult to imagine success before the Full Court. But the perceived erosion of the real chance test appears to have been an important factor in the ACCC's decision to appeal (see, eg, the ACCC press release announcing the appeal).

The Full Court's decision in *Metcash*

Before pouring over a lot of *obiter*, it's useful to confirm what was actually held by the Full Court on this issue. In short: nothing. A majority of the Court (Finn and Yates JJ) said that because Emmett J held the ACCC failed on even the easiest standard – Option A – it wasn't necessary to advance the debate. Finn J really meant it: his judgment is about as long as the last sentence! Yates J bought into the debate some more, but it was really Buchanan J who set the cat amongst the pigeons.

Buchanan J

As Buchanan J saw it, the ACCC's case theory rested on an economic proposition which was put forward as proof of a likely lessening of competition – something which raised the concern that economic theory might become a substitute for fact finding.

In this context, Buchanan J couldn't reconcile the real chance test with the applicable onus of proof, as expressed in section 140(1) of the *Evidence Act*. This provides that civil cases must be proved on the balance of probabilities. He considered that the real chance + real chance approach (Option A) could mean that "the Court would enforce the statutory prohibition in section 50 even if satisfied that it was more likely than not that the hypothesis advanced by the ACCC would not come to pass".

In his view, "[t]he 'real chance' test, if it applies, does not reach backwards to affect or reduce the discipline or level of proof required in establishing a proper factual foundation from which to argue for ultimate conclusions to sustain a cause of action". Any other approach would be an abandonment of the civil standard of proof for section 50 (and other provisions of the CCA), such that "the serious (and sometimes commercially damaging) restraints imposed by the *Competition Act*[2] may be activated… upon the basis of hypotheses and suppositions which reach only a level of respectability – i.e. respectable 'guesses' as opposed to the application of the ordinary judicial method".

Buchanan J noted that, while Emmett J followed an accepted line of authority (starting with *Tillmans Butcheries*), there was in fact an alternative line of authority that had never been rejected and which he preferred. In any case, he considered that the use of "likely" in section 50 could be distinguished. Whereas the relevant section in *Tillmans Butcheries* – section

1 This seems to be an allusion to the *Briginshaw* test (discussed below) but there is no express statement to this effect.

2 Another allusion to *Briginshaw*, again with no express acknowledgment.

45D – had purpose and likelihood as "conjoined elements" (as do sections 45 and 47), this was not so for section 50. In analysing Deane J's reasoning in *Tillmans Butcheries*, Buchanan J found the element of purpose was significant.

Buchanan J also questioned the notion that, in assessing mergers, the Court should be exercising a type of "competition risk management policy" (as French J - as he was then - said in *AGL v ACCC*). While accepting that may be a legitimate function for the ACCC, His Honour said that once matters reach Court "I see no real alternative to the Court attempting to deal with them on the basis of identifiable legal standards which are sufficiently certain and well established to yield predictable outcomes. Asking whether there is a 'real chance' of something occurring seems to me, with respect, to invite and endorse speculation and conjecture". Ultimately, his conclusion was unambiguous: "In my view, the 'real chance' test should not be applied to section 50 of the Act".

Yates J

Yates J, while not as loquacious as Buchanan J, was not as laconic as Finn J either. In fact, he teased us a little – offering some interesting insights without drawing conclusions. He acknowledged the ACCC's concerns about imposing too high a standard in cases where there could be multiple counterfactuals. (Here, the ACCC had originally pleaded five counterfactuals, although only one was properly developed.) "In those circumstances [the ACCC] asks: Does an applicant fail if it can demonstrate a real chance of its counterfactual occurring but a respondent can point to two or more alternative counterfactuals that also have a real chance of occurring?"

Yates J looked more closely at the language of section 50. If the "effect" of SLC must be shown on the balance of probabilities, then "likely effect" must require a lower degree of satisfaction. Thus, "it can be seen that s 50(1) itself imposes its own differential standards of proof, at least so far as the determination of competitive effect is concerned…". Significantly, however, he cast doubt on Emmett J's 2 stage approach:

> *[I]n the continuum of fact-finding, there may not be a bright line between those facts that determine the future state of a market and those facts that determine the future state of competition in that market. Indeed, one can envision examples where the facts that show the likely future state of the market will be the very facts that are determinative of a finding about the likely future state of competition in that market. In those cases, can fact-finding be regulated by two different standards of proof? To require, in those cases, the adoption, if that be conceptually possible, of a higher standard for one purpose (to determine the state of the market) would be to obliterate the threshold to which the second limb of s 50(1) [likely effect] has subjected the impugned conduct.*

Indeed, the distinction between Stage 1 and 2 seems rather artificial; likewise, the allocation of differing standards of proof between the two. One is tempted to wait for High Court guidance on this very tricky issue, but given no merger matter has ever made it that far in almost 40 years, we won't be holding our breath.

Yates J: "*Likely* effect" must require a lower degree of satisfaction than "effect"

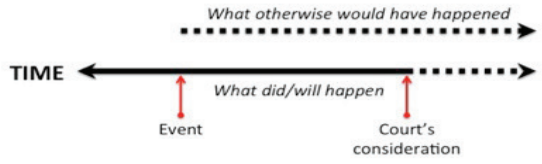
Analogies from other areas of law

The task before the ACCC and the Courts in applying section 50 is a difficult one: they have to assess the *future likelihood* of something occurring in entirely *hypothetical* circumstances. Considering these in turn:

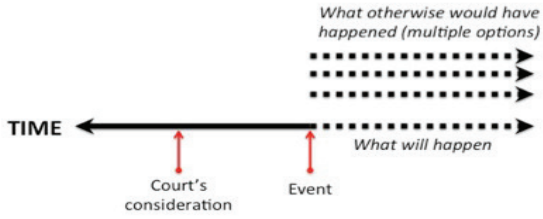
- effectively, Courts are constantly deciding whether something was *likely*, in the sense of *more likely than not* (ie the balance of probabilities). As Yates J observes, however, "likely effect" in section 50 has to mean something different because of the language used ("the effect or likely effect…");
- again, Courts regularly grapple with considering the *future*, for example when determining damages. Considerations of likelihood, however, are generally informed by events that have occurred following the "trigger" for litigation. Alternatively, predictions may be required in data-rich areas (giving rise to, eg, the bizarrely detailed actuarial estimates of lost future income upon the loss of a limb);
- finally, Courts can be asked to consider *hypothetical* outcomes. For example, an element of the implied terms test in contract law is explained by predicting the contracting parties' response to a question from a hypothetical bystander.

It's not uncommon for two of the above factors to come before a Court. For example, if one is seeking damages for a lost business opportunity (eg due to breach of contract), one may need to show that if A had not occurred, B would have, resulting in C profits. But one is hard-pressed to think of examples where a Court has to work through *all* of the above difficulties.

A further complication arises because, generally, the consideration of likelihood is binary – if X did not occur, then Y would have. Because of the forward-looking nature of section 50, however, multiple counterfactuals are possible. The following diagram shows some of the complexities involved:

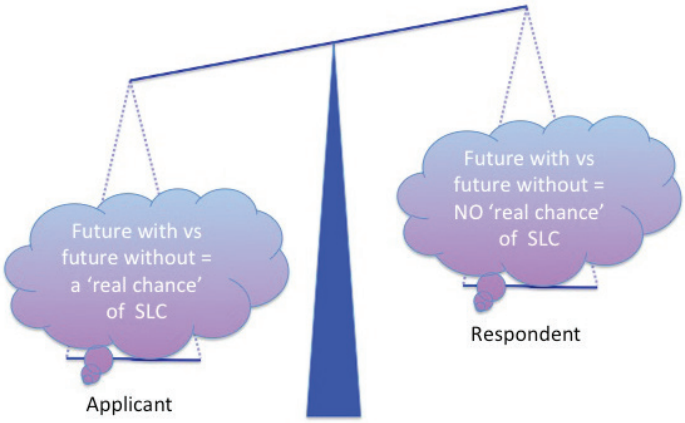


The usual task before the Court



The task in a merger case with multiple counterfactuals

One way to deal with these issues is French J's approach in *AGL v ACCC*. He effectively considered each party's future with and without scenario as a cohesive hypothesis. The following diagram is premised on an applicant (eg the ACCC) trying to establish that a given merger lessens competition. On the competing hypotheses approach, the Court would need to be satisfied that the ACCC's hypothesis was more likely than the respondent's hypothesis (ie satisfaction on the balance of probabilities).



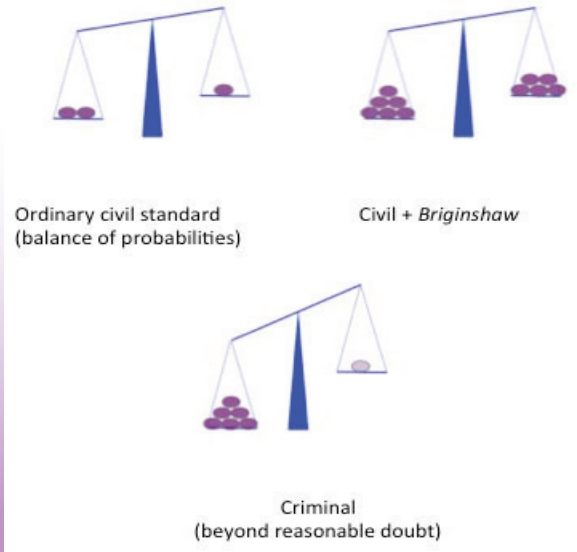
Weighing up competing hypotheses

As thought experiments go, there's no doubt it's a complex one, but perhaps it better reconciles the language of the section with the requisite standard of proof.

Likelihoods and *Briginshaw*

Reading their judgments, one senses that Emmett and Buchanan JJ felt uneasy that any "conviction" of Metcash would be premised on economic theory supported only by flimsy evidence. Although neither expressly referred to the *Briginshaw* principle, both alluded to it in their judgments.

The *Briginshaw* principle is sometimes mistakenly described as a higher standard of proof: something a little more than the balance of probabilities, but less than proof beyond reasonable doubt. In fact, *Briginshaw* goes to evidence – if the civil standard of proof and *Briginshaw* apply, then there needs to be an appropriate weight of evidence in light of the allegation. We show this in the following diagram – while the scales don't tip further when one is proving a case on this basis (civil + *Briginshaw*), more (or better) evidence may be required to satisfy the Court. Stated another way, when considering a serious allegation, a judge will not be convinced by minimal evidence, even if there is little evidence on the one hand as against no evidence on the other.



The relationship between standards of proof and the Briginshaw *test*

Briginshaw is triggered by the gravity of an allegation or the severity of the consequences if applicant succeeds. This is now effectively enshrined in section 140(2) of the *Evidence Act*:

> *Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
>
> *(a) the nature of the cause of action or defence; and*
>
> *(b) the nature of the subject-matter of the proceeding; and*
>
> *(c) the gravity of the matters alleged.*

Essentially, *Briginshaw* always applies when penalties are sought; likewise, it would apply if section 86E (disqualification) were invoked. So if the ACCC had waited until *after* Metcash acquired the Franklins assets and brought proceedings seeking a penalty (and presumably divestiture), then *Briginshaw* would clearly have applied.

But the other limb for invoking *Briginshaw* – the gravity of the allegation – can considerably broaden its scope. For example, it has been applied in sexual harassment, fraud and discrimination cases. *Briginshaw* itself concerned allegations of adultery in the 1930s. Given the moral approbation attaching to price fixing (particularly since criminal sanctions were introduced), *Briginshaw* would almost certainly apply even in proceedings between private parties, as indeed has occurred (albeit infrequently) in private section 46 (misuse of market power) actions. Given the recent tendency for class actions to piggy-back on ACCC pricing fixing cases, *Briginshaw* is sure to be of increasing prominence in CCA matters.

That said, well before penalties were introduced for misleading or deceptive conduct,[3] *Briginshaw* was said to apply – notwithstanding the High Court's clear position that one could engage in misleading or deceptive conduct even when "act[ing] honestly and reasonably" (*Parkdale v Puxu*). *Briginshaw* has been applied even in private proceedings under the old section 52.

It should be remembered that *Briginshaw* is actually about an evidential continuum. The more serious the allegation/consequences, the more evidence required to satisfy the Court. Nonetheless, there is a tendency to lower one's voice when invoking it as if to say, "now we're *very* serious". Even the High Court's Justice McHugh has expressed a little impatience:

> *[T]here are only two standards of proof: balance of probabilities and proof beyond reasonable doubt. I know* Briginshaw *is cited like it was some ritual incantation. It has never impressed me too much. I mean, it really means no more than 'Oh, we had better look at this a bit more closely than we might otherwise', but it is still a balance of probabilities in the end.* [Transcript of Proceedings, *Witham v Holloway* (High Court of Australia, 10 February 1995)]

Nonetheless, there's no doubt it is significant and – given the ACCC's difficulties with section 50 as currently applied – one can only imagine how much harder life might be if *Briginshaw* were expressly invoked.

3 Strictly speaking, there are no penalties for the old section 52 (now section 18 of the Australian Consumer Law); nonetheless, penalties are available for contraventions of section 29 of the ACL (false or misleading representations - equivalent to the old section 53).

Implications of *Metcash* beyond mergers

"Likely" is a term used extensively throughout the CCA. It appears in practically every contravention in Part IV, the notification and authorisation tests and it is the fulcrum of section 18 of the Australian Consumer Law (previously section 52 of the Act). The idea of distinguishing between the meaning of likely throughout these sections is pretty confusing.

That said, there's already a little mind-bending required, as "likely" has a special definition for the cartel provisions, such that it "includes a possibility that is not remote" (section 44ZZRB). But this is actually a restatement of the real chance test – Deane J originally described it as "a real but not remote chance".

Section 18 of the ACL, of course, has no purpose element. Yet Courts do not appear concerned by the use of "likely" in this provision[4] and, as noted above, *Briginshaw* has been applied even as between private parties.

Final thoughts

The ACCC brings exceptionally few merger cases – if that's been so on the basis of "real chance + real chance", one can't imagine that there will be many cases if a stricter threshold is applied. Following the Full Court's decision, the "real chance" test still stands but now must be considered dubious. So one has to think that the ACCC is extremely grateful that *Briginshaw* hasn't been invoked in the cases to date. But if it looked through the history books, it really would thank its lucky stars – when the CCA (then the TPA) was debated in Parliament back in 1974, the Opposition called for the criminal standard of proof for all contraventions!

4 Again, where it's been considered (admittedly infrequently), "likely" has been held to mean a real but not remote chance.

About the authors

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FYI: Metcash presentation

If you're in Melbourne, Alexandra will be speaking about the *Metcash* decision at the Law Institute of Victoria on 26 July 2012 (*Metcash: Did it change anything?*). Go to http://www.liv.asn.au/Education---Events/whatsOn-Calendar for more information.

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